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Foreign Restrictions on U. S. Investment

HENRY T. KING, JR.*

THE CHANGED CURRENT INTERNATIONAL CONTEXT FOR THE U.S. INVESTOR**

The past year has witnessed significant and far-reaching changes in legal restrictions encountered by the U.S. corporate investor in his overseas investment activities. New patterns of control and decontrol appear to be emerging in key areas of the world, and the U.S. corporate investor must be fully prepared to anticipate and deal with them. In some areas completely new styles of participation for the U.S. investor have evolved while in others existing patterns have been modified.

To date, U.S. and other foreign investors have not had, for the most part, an opportunity to influence these new patterns of control and decontrol as they have evolved in host countries. This is because the overseas investor has historically lacked a constituency outside his own country. For the future, it seems increasingly important that a definable local constituency be developed so that the

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** Without wanting to appear to be a male chauvinist, I shall use the masculine gender when referring to the U.S. corporate investor in pronominal forms.
foreign investor’s views are considered when new control patterns emerge or are developed. This, of course, does not mean direct political intervention by foreign corporate investors in the affairs of other nations, but it does mean a group of host country nationals who fully understand the foreign investor’s objectives and how these objectives may be related to host country objectives. Unfortunately, in the charged political climate of many countries, economic issues are too frequently presented as confrontations between foreign investors and local interests whereas, in my view, there is a greater commonality of interest than of conflict. Certainly, if we can assume that overseas investment can be mutually beneficial to the foreign investor and the country involved, it would seem desirable that these host nations should have the benefit of the foreign investor’s views in developing policy, if only to complete or complement the information on which a considered judgment or course of action can be based.

In traditionally free investment areas, such as the Federal Republic of Germany, the past year has seen the development of tight exchange controls affecting the financing of foreign-owned operations in Germany and the amendment of Germany’s Cartel Law to require government acquiescence either tacit or explicit to most mergers or acquisitions by U.S. firms where the acquired firm has over DM 50 million in sales. Moreover, after the decision of the Court of Justice of the European Communities in Continental Can,¹ the Commission of the European Communities (as expanded to include the United Kingdom, Ireland and Denmark) is currently considering a draft regulation of the Council which would not only set up a new standard of illegality for mergers and acquisitions having sufficiently adverse effects on competition but would also require prior notice to the E.C. Commission of mergers or acquisitions involving companies having sales above a certain amount—notice which could result in Commission intervention.²

In Australia, where the U.S. investor heretofore has had a relatively free hand, a new Takeovers Law was enacted in late 1972 which has, in practice, meant Australian government review, and approval or disapproval, of all mergers or acquisitions involving the acquisition by foreign firms of the stock of Australian firms.

² The current draft of the regulation as it relates to prior notice, specifies total annual sales of one billion units of account (a unit of account being equal to a 1971 U.S. dollar), the only exception being in the case of acquisitions of a company with sales under twenty million units of account.
Canada is also considering a similar law and may act on it this year.

Mexico has codified and tightened by legislation its traditional administrative controls over foreign investment. Mexicanization (defined as over 50% Mexican ownership of an enterprise) is the order of the day in Mexico. Venezuela has joined the Andean Group which favors local majority ownership of local industry and is committed to limiting profit transfers annually to 14% of invested capital. In Argentina the government has placed a premium on Argentinization (51% Argentine ownership) in key industries, such as the auto parts industry, by severely limiting the financing in Argentina of foreign-controlled firms, and by limiting their right to introduce new products into their existing operations without Argentinian participation.

In areas traditionally restrictive towards foreign investment, such as Japan, the winds of change seem to be blowing the other way. In 1973, Japan announced a liberalization program, the avowed purpose of which is to open up to foreign participation most industrial sectors in the Japanese economy. It is too early to judge the effects of this liberalization, but at least on its face, it represents a fundamental departure from prior Japanese policies. In Spain liberalization has recently been under way, and a foreign firm may currently acquire 50% of a Spanish company in most industrial sectors merely by giving the Spanish government notice to such effect.

In some communist countries which previously had been closed to U.S. equity participation, joint ventures between foreign investors and host government entities are now permitted, although the foreign investor's participation must be on a minority basis. Since 1967, Yugoslavia has permitted joint ventures between Yugoslav entities and foreign firms, and over 85 are now in existence. In late 1972, Romania enacted a decree which allowed joint ventures between Romanian entities and foreign firms, and already at least one joint venture between an American firm (Control Data Corporation) and a Romanian firm is in effect. There are clear indications that other areas of Eastern Europe, such as Poland and Hungary, will open up to the joint venture style of participation, albeit on a modified basis, in the reasonably near future.
In evaluating the changes which have been occurring in the area of foreign restrictions on U.S. investment, the U.S. investor must attempt to put himself in the position of the host governments and try to understand the policy and underlying economic reasons for the changes. Also, the U.S. investor will want to examine the change in a particular country to determine whether it is a relatively isolated restriction or part of a larger emerging pattern. In this sense, he may wish to determine its relationship to restrictions in other countries in the region. He will want to make an assessment of where he thinks the country involved is ultimately headed in its restrictions on foreign investment.

The U.S. investor can, in many areas, assume the existence of differences between his political or economic philosophy and that of the countries with which he is dealing. He must also be aware of the nationalism which is rampant in certain areas of the world today. But more and more we are seeing that differences in ideology or philosophy do not foreclose business accommodation, and this should be healthy in the long run. Suffice it to say that if the investor is a guest in the host country, he must appreciate and attune himself to differences between his ideology and those of the country with which he deals, and he must be aware of the host country's national interests as it interprets them.

Perhaps it is premature to assess the full effect of the recent and dramatic changes in foreign restrictions on U.S. investment, and to determine how to adequately accommodate to them. But if nationalism continues to be as prevalent in Latin America as it currently is, perhaps the joint venture may be the best long-term instrument for operating within this region. In the Iron Curtain countries and Yugoslavia, the foreign investor can only go the joint venture route. While the utilization of the joint venture device may mean that the U.S. investor does not play quite as significant a role in the running of the overseas operations, frequently he can retain negative control over critical actions of the joint venture through the exercise of the right of veto. From a strictly business point of view, the "forced" joint venture may not be without some benefits, since an astute, knowledgeable local partner may be helpful in a positive sense in averting for the foreign investor needless host country pitfalls and possible disasters. In Europe, the dimensions of the U.S. investor's acquisition activities may have to be scaled down in terms of the size of the companies he can acquire, and he may find himself restricted in certain European countries to smaller scale "seed"-type acquisitions. In Japan, the U.S. investor will want to determine
whether, in a culturally different area, a joint venture is still not the most desirable means of market penetration in many industries. “Going it alone” in this area may just not be practicable.

In assessing the effects of changes, the U.S. investor will want to consider the use of additional means of market penetration such as the license device. Where accompanied by a joint venture, this may be a means of increasing the return on his investment, although it may also be a factor considered by host countries such as France in evaluating whether permission is required for acquisition of a small equity interest in a domestic company. Furthermore, there may be instances where the remittance of royalties and technical assistance fees is permitted, and the remittance of dividends is not permitted, or is restricted. It may also be a means of strengthening his relationship with his foreign partners and his influence over joint venture activities.

The license device can be used in the patent, know-how, technical assistance or trademark areas, depending on the technical resources of the U.S. partner and the legal structure in the host country.

In developing his new styles of participation in response to the changing international context, the U.S. investor must also keep in mind the variable U.S. context in which he is operating. U.S. regulations control the flow of his funds from the U.S. to overseas investments, and govern the flow of funds from his overseas investments to the U.S. U.S. tax laws affect his overseas operations and will do so, in all probability, to a greater extent in the future. U.S. antitrust laws can affect the market sphere of his acquisition, licensing and joint venture activities. U.S. export and transaction control laws may impinge on his transfers of technology overseas and in the sales he may make from his overseas manufacturing operations.

With the foregoing backdrop covering the changed international context in which the U.S. investor finds himself currently operating, it seems appropriate to proceed to an analysis of restrictions which may impinge on the investor in any proposed transaction. The purpose of such an analysis is to isolate those factors which may be germane to legal or de facto restrictions on a proposed
investment in a given country. However, while this analysis may be developed in terms of a *pro forma* checklist, caution demands the checklist be used with discretion. This is because such a checklist usually does not include the input of disciplines other than the legal or financial disciplines which would be relevant to a proposed transaction in a given country. These nonlegal and nonfinancial disciplines could embrace the cultural, political, economic, and religious factors which would have to be weighed in making a given investment in a specific country. Let it suffice to say that a transaction analysis cannot be completely mechanical or stereotyped but must deal with the total current context of the country in which the proposed investment is being made; and it is perhaps, in a deeper sense, more of an art than an exact science.

**A TRANSACTION ANALYSIS OF FOREIGN LEGAL AND DE FACTO RESTRICTIONS AFFECTING U.S. INVESTMENT OVERSEAS**

An analysis such as this requires the development of a precise list of particulars, and the quality of the analysis will depend upon the precision and comprehensiveness of the questions asked.

Some of the questions which seem appropriate in developing and evaluating the restrictions which may affect a given host country investment would include the following:

1. What is the nature of the industry involved? Is it specially regulated? Special rules may apply in natural resource industries as, for example, in Brazil where the foreign investor must take a minority position in mining, and in Mexico where foreign equity participation in the petroleum industry is prohibited (except in the marketing area). In many countries, special prohibitions will be applicable to foreign investments in shipping, banking, insurance, communications media, and public utilities industries which will not be applicable to investments in other industries. In Japan, the nuclear, aircraft manufacturing and armaments industries, as well as certain other industries, will be closed to foreigners. It must be kept in mind that in some industries there will be outright prohibitions on foreign ownership, while in other industries there will be merely restrictions on the percentage of foreign equity ownership.

2. Will the method of investment be a buyout of an existing company, or the establishment of a new plant, as in an investment incentive area? The method of investment employed may trigger the application of special regulations or differing policies. Until now, France and Japan have been more restrictive, in many in-
stances, in their approach towards foreign buyouts, in part or whole, of existing companies owned indigenously, than towards the establishment of a new company and/or new facilities on a startup basis.

(3) What is the percentage of ownership sought? (Portfolio investment involving the purchase of an interest of less than 10% is not within the scope of this article.) In India, Mexico, Romania and Yugoslavia, an equity interest of only 49% or less can generally be obtained by the foreign investor; this has also been true for most industries in Japan, at least up to the 1973 liberalization program. In some cases the foreign owner's equity investment may have to be less than 49%, and in Yugoslavia he will not obtain any intrinsic equity rights himself in the joint venture as a 49% owner, but, as a practical matter, will have a claim against his Yugoslav partners, with statutory support.

If there are to be partners, will they be local or foreign? In Argentina, there are special advantages to having local rather than foreign partners. In Brazil there are special advantages to being an open company with a substantial number of Brazilian stockholders.

It is important, when considering taking a minority ownership, to make certain of at least a 20% ownership since foreign earnings cannot be consolidated for U.S. accounting purposes if the investment is less than 20%. For U.S. tax purposes, a 10% or greater voting interest is required to claim a foreign tax credit; the indirect interest must be at least 5% where second and third tiers are involved.

(4) What is the relative size of the investment, and what is the extent of competition? In Belgium, prior notice of acquisition of substantial interests in Belgian companies is required only when the net assets are worth at least BFR 100 million. In the United Kingdom (hereinafter referred to as U.K.), investments of over five million pounds and investments in industries where the market shares of buyer and seller exceed 33-1/3% are subject to review by the Department of Trade and Industry and possible referral to the Monopolies Commission. The Department of Trade and Industry may check with customers in the industry involved to get their reaction to the acquisition. In France, a domestic competitor may try to intervene against a buyout of a French company by a foreign
investor, but the intervention would not be on antitrust or monopoly grounds. The French Government might then proceed to determine whether there was a possible French solution in the matter, whereby French interests would undertake the purchase.

(5) What form will the investment take? Will it be an investment of cash, of used or new machinery, or of patents and technology? Will it be an investment in exchange for stock of the U.S. company? If it is a contribution of assets, there may be de facto restrictions connected with its valuation. For example, in Japan and Brazil there are certain procedures which must be undertaken in valuing an assets' contribution for investment purposes, and strict compliance with these procedures is required. In addition, in some countries, such as Spain or India, there are restrictions on the compensation which a foreign investor can get from his local subsidiary for an investment of technology. There may, in fact, be restrictions on the investment itself, such as in Germany where reinvested earnings are subject to a 25% tax while cash dividends are subject to only a 15% withholding tax. In the U.K., there are also de facto restrictions in the form of penalties on the use of U.S. company stock to make the acquisition, since the seller will be subject to a "switch and surrender" operation involving the acquisition and surrender of investment currency.

(6) If the investor is buying out an existing company, are stocks or assets being purchased? And who are the sellers? The acquisition of stock in an Australian company by a foreign investor is subject to clearance by the Exchange Control authorities who, in turn, refer the acquisition as proposed to the Committee on Takeovers. Purchases of assets are not yet covered by the "Takeover" legislation, although this situation may be changed in the near future.

In addition, if the sellers of the stock in the company being purchased are foreign sellers not indigenous to the country involved, the host government may be inclined to view the purchase with comparative indifference, although this is by no means uniformly the case.

(7) If the investment is for purposes of establishing a new business enterprise rather than a buyout of an existing company, what legal form will the new investment take? Will it be a branch of the U.S. company, a foreign subsidiary of the U.S. parent company, or a foreign branch of a U.S. domestic subsidiary of the U.S. parent company? In each case, the ground rules will be different. For example, a branch of a U.S. company will be
permitted to deduct startup losses for U.S. tax purposes, but would create a "permanent establishment" in the foreign country giving rise to adverse tax and jurisdictional effects. The answer may be to establish the new operation as a branch of a U.S. subsidiary if a consolidated U.S. tax return is filed. On the other hand, in developing a final answer to this question one cannot ignore the investment laws of the country involved.

(8) What will be the proposed market area of the investment? Will it be primarily in the country in which the investment is located, or will it be primarily for exports? In Romania, the ability of the foreign investor's local partner to obtain government approvals of the investment in a 49% foreign-owned joint venture will depend on his ability to show its relation to the country's exports. In Yugoslavia, the export earnings of a joint venture will be the primary source of the foreign partner's return on his investment.

(9) Will the foreign investment be a reinvestment of earnings in an existing company? If so, while in most cases this may be favored, there may be other instances where tax penalties will be applied by the foreign government to such reinvestments, as in Germany.

(10) Is the Company a listed company? Sometimes restrictions on new investments and takeover bids, in particular, apply only when the company to be acquired is listed, or at least publicly held. Such is the case when local variants of the Securities and Exchange Commission exist.

SOME GENERAL HURDLES FOR THE U.S. INVESTOR TO KEEP IN MIND

Let us assume that foreign equity ownership is permitted in the industry involved, although perhaps only on a restricted basis. What are some of the hurdles which the U.S. investor may face at the time he makes his investment or when he wishes to remit to the U.S. his earnings on the investment from his equity contribution itself or from royalties derived from his technical service or patent contribution to the investment?

Foreign Government Registration Approval Process

It may be necessary for the investment to be properly registered
with and/or approved by the local governmental authorities, and this normally means a review of the investment by such governmental authorities. In Brazil, an investment contribution in dollars to a new or existing company must be registered to ensure the investor's ability to remit profits from the investment in dollars at some later date after the investment is profitable. The level at which such profits may be remitted is prescribed by law and administrative regulation and varies with the industry involved and balance of payments difficulties existing during a given period.

In buyouts of domestic companies by foreign companies, or in the case of the establishment of totally new facilities, many governments have made it clear that there must be appropriate review and clearance by designated government authorities. In France, for example, the foreign investor must notify the Ministry of Finance of his intention to make a foreign direct investment (buyout or new facility) and the Ministry of Finance must approve the investment.

In Italy, which is one of the freest areas of the world for investment purposes, there are no controls which apply, but there is a procedure whereby the investment can be registered and qualified, subject to appropriate approval, as an "Article I investment" (Productive Enterprise), under the Investment Law of 1956. This insures the investor's unlimited right to remit earnings and profits to his office outside the country, even in troubled times for Italy.

In Belgium, it is possible to obtain a repatriation guarantee for profits but the right to repatriate dividends and interest will always depend on the rules in effect at the time the transfer is requested.

One point to be kept in mind is that the host government registration and/or review and approval of an investment can have an affirmative value to the foreign investor as evidence of the government's knowledge of, and acquiescence in, the investment, possibly important for future reference purposes. Here the essential element to bear in mind is that the subsequent ability to remit dividends and fees and to repatriate the original investment in dollars should be faced at the time of the making of the investment rather than at some later date when such transfers are needed.

In some countries, such as Romania and Yugoslavia, where joint ventures are involved, there are further requirements relating to the registration of the joint venture company with, and the submission of its bylaws to, the appropriate governmental agency as a prerequisite to the operation of the company.

In some situations the concept of registration is met by mere filing requirements. This was the case, for example, with filings
relating to acquisitions of a specified size and market impact by foreign investors with the German Cartel Authority (as required by the German Cartel Law until its amendment in 1973). However, in other instances the registration of the investment is a control point and no foreign investment carries with it full rights (and obligations) until it has, in fact, been registered by the foreign government.

Restrictions on Financing

The U.S. investor's foreign venture will require financing, and there are, in a number of countries, restrictions relating to the manner of such financing. British authorities do not normally allow a foreign equity investment in the U.K. to be financed from within the U.K. So, in handling the financing of his investment in the U.K., the U.S. investor will be confronted with the U.S. Department of Commerce's Foreign Direct Investment Regulations and also with the British restrictions. In Germany, the U.S. investor's financing problems will have a reverse twist. Because of Germany's special financial situation and her surplus of foreign exchange, new equity investment cannot currently be financed by having a German subsidiary borrow outside Germany for an acquisition in Germany without incurring a severe penalty. The German subsidiary may, for local tax purposes (including the "pooling" of profits and losses for tax purposes of all German operations), be the chosen instrument to carry out the acquisition, but it will have to borrow money within Germany at high interest rates if it is to finance the acquisition with a loan. An alternative route for achieving investment objectives is to make an additional equity investment in the German subsidiary which is to be the vehicle to carry out the acquisition; however this involves extra tax costs. Additional financing costs or additional tax costs can at times hinder the investment.

Antitrust Considerations

There will be foreign antitrust considerations which may restrict the U.S. investor's foreign investments. Their impact will depend on (i) the size of the investment, (ii) sales of the acquiree and the combined market position of the acquiror and acquiree, and (iii) in certain areas, the total economic clout of the U.S. investor in
terms of financial and technical resources. Here the question of the appropriate relevant market by which to judge the proposed investment may be a problem. There may be regional restrictions, such as those applied by the EEC, or the restrictions might be at the national level, such as those in effect in Germany. In the case within the EEC’s jurisdiction, if a merger violated either national rules or Article 86 of the Rome Treaty, it would be prohibited. If a German merger violated both, it could be pursued by both EEC and German enforcement agencies. It is also possible that there may be U.S. antitrust implications in a foreign acquisition where the acquiring party has significant investments in, or sales to, the U.S. In addition, antitrust regulations may affect the operation of the group once the local company is acquired, particularly if a dominant market position is involved.

**Personnel Requirements**

The U.S. investment overseas probably will require U.S. or third-country personnel for different types of jobs in the course of operation, particularly during the takeover or start-up period. Restrictions on non-nationals which the U.S. investor may employ in attempting to make the investment a success may, in fact, constitute a restriction on the investment itself. Switzerland has extremely tight restrictions on the numbers and type of foreign personnel who can be utilized there. In Yugoslavia, by a statutory provision, only a Yugoslav national may direct a joint venture enterprise. In the province of Ontario, Canada, there is a legislative requirement, effective in 1973, providing that a majority of the directors and the executive committee (if any) of a corporation incorporated in Ontario must be “resident Canadians.” Mexico is an area where U.S. personnel, working on U.S.-owned or joint venture investments, have encountered trouble if they did not have work permits, which, at times, have not been easy to obtain. Mexico has, in addition, pursued a policy calling for the reduction or elimination of foreign personnel in Mexican companies. It is true that within the EEC some relief from local employment restrictions has come about, since, in general, nationals of a Member State of the EEC must be allowed to work in other Member States.

**Imports of Equipment**

The U.S. investor may need to import either new or used machinery into the host country. In South America normal duties, or other import charges, on such equipment may be considerable, even as much as 100% of the value of the machinery and equipment.
In addition, there are special requirements applicable to used equipment shipments such as the approval of its value by an Argentine Consul. Let it suffice to say that this is a point which should be checked early, particularly to determine whether an exemption from the duty can be obtained for imports destined for the specific investment and project. If no waiver can be secured and the full duty and related charges are to be applied, will the project still be economically feasible? It is also worth noting that the waiver of import duties (and perhaps approval of the investment itself) may be subject to other conditions such as a projected level of export sales. Is it reasonable to presume the new venture could produce the required level of export sales?

**Investment Insurance**

If the investment is in a developing nation, an Overseas Private Investment Corporation (OPIC) insurance policy covering the risk of war and internal strife, expropriation and currency inconvertibility will usually be in order. However, this will require the approval of a designated agency or agencies in the host country, and this approval has not been easy to obtain in Argentina and Brazil. To be eligible for such insurance, the U.S. investor must inform OPIC prior to the making of a definite commitment regarding the investment. It may well be that if host country approval of OPIC insurance cannot be secured or if the host country will not permit coverage on all the risks insured by OPIC, then the investment probably should not be undertaken since the uninsured risks may realistically be too great.

**Foreign Investment Incentives**

In a number of areas of the world, tax or financial concessions may be available to investors who put up new plants in these areas. Here the chances are that the German or Italian competitors of the U.S. investor may have obtained such concessions, and, to be competitive, the U.S. investor may need such offers. His inability to obtain them may constitute a practical restriction. In Italy, tax concessions covering direct taxes are available for investments in certain areas of Northern Italy, and exemptions for both direct and indirect taxes are available for investment in certain Southern Italian areas beginning just south of Rome. The granting of such
exemptions may be limited to investments of specified size which may present problems for the U.S. investor. A prerequisite to the finalization of exemptions in both areas is, of course, the granting of specified approvals and clearances by the Italian government.

In connection with tax or financial concessions, the local government may impose new restrictions. It may, in effect, enter into a contract with the investor that includes obligations as to the use of local labor and obligations to inform workers on business matters and the like.

Tax treaties serve a vital commercial function in establishing certainty and moderation, and rules for resolving disputes, with respect to taxation of income earned in one country by citizens, residents, or entities of another. The nonexistence or inadequacy of tax treaties between the U.S. and host countries, which is directed at the avoidance of double taxation may, in fact, constitute a restriction on U.S. investment activity in the area concerned. Our tax treaty cooperation is weak or nonexistent with certain countries of Latin America and Eastern Europe. Recently a treaty was signed with the Union of the Soviet Socialist Republics (which is subject to ratification), which could become a model for the other countries; it is an encouraging sign.

Very high taxes, such as India's at the 70% level, may constitute a de facto restriction or deterrent on U.S. investment in the area concerned unless a U.S. tax credit for the higher taxes can be made available by averaging these taxes with lower taxes in other countries. The ability to average credits could be adversely affected by legislation currently being considered by Congress.

Labor Situation

An investor must study the labor market. In Yugoslavia, the Workers' Council for an industrial unit must approve a joint venture project involving the unit and a foreign investor. In addition, in several countries there are statutory provisions on "co-determination" by workers or their representatives in the running of a business. Furthermore, if the U.S. investor wishes to take over an existing facility, his freedom of action with regard to laying off of workers may, as in the case of the U.K., be restricted by statutory ("redundancy") requirements which, when met, will certainly be costly. In the case of France or Belgium and a number of other countries (particularly in Latin America), the investor's freedom of action with regard to the elimination of agents or distributors is restricted by statutory requirements calling for substantial in-
demnities in the case of terminations.

**Regional Rules on Investment**

The country in which the investment is being considered may belong to a regional grouping of countries such as the Andean Group in South America or the European Economic Community in Europe, and that regional organization’s policies may affect the investment. As indicated previously, the EEC is now discussing a proposed regulation which would require a notification to the EEC covering certain buyouts or mergers involving EEC firms. In addition, in theory at least, EEC firms can establish in other member countries of the EEC without prior host country clearance—a privilege that has not been extended to non-EEC investors. However, France has limited this right of establishment on exchange control grounds, particularly where the EEC subsidiaries of non-EEC firms were involved, and has insisted on prior government approval in such cases.

In the case of the Andean regional restrictions on foreign investment, the implementation is not uniform from country to country in the Andean Group, and this warrants the foreign investor’s scrutiny of the particular country’s legislation and practices as well as the Andean Investment Code. The Andean restrictions cover, among other things, requirements for registration with, and approval by, the host governments of new and existing foreign investments in the Andean countries, and the registration with, and scrutiny by, host governments of transfers of technology from the foreign investor to his subsidiary or affiliate in the Andean Group. In this latter situation payment for his technology may be severely circumscribed at times.

**Local Content Requirements**

Local content requirements may be a problem, particularly in certain areas of South America where a high percentage of the value of the end product—e.g., the car—must be of local content within a specified period of time. Specifically, in the automotive industries of Mexico, Argentina, and Brazil, a high percentage of the value of the parts used in the production of automobiles must be produced locally.
Other Considerations in Planning an Investment

As previously indicated, frequently the greater concern of the investor is not with putting money in the host country, but in arranging for repatriating dividends and royalties at a future date. This is vital when dealing in a country where the currency has not been freely convertible. In addition, it is also important for the U.S. investor to determine what foreign taxes or other charges will be applicable to the remittance of funds. In Brazil, profits can only be remitted after income taxes have been paid, and the remittance of profits above a specified level may bring about the imposition of a supplementary tax. If such charges were sufficiently heavy, they would constitute a de facto restriction on the investor's ability to invest successfully in a specific country.

An early checkpoint will be the host country's government agencies to which the foreign investor must disclose the details of his investment. Here the emphasis should be on the fullest possible disclosure to the agencies involved. If this is not done, the investor may never be able to regain the confidence so vital to his investment goals.

There may be unpublished restrictions on foreign investment in addition to the published restrictions. Mexico was, until recently, a country where certain restrictions existed in practice and were generally known, but which had not been published in codified form. The investor should check with his local attorney and other sources in the locality to determine whether there are any unpublished government practices, policies or attitudes which restrict foreign investors and which might affect the planned investment.

The investor must keep in mind that foreign restrictions on U.S. investment are continually subject to change by law, decree, or simply by administrative practice, and that as public pressures and foreign governments change, so do government policies on foreign investment. Thus, the investor must have access to information which will keep him posted on proposed and operative changes in host government rules and regulations affecting investments.

If the investor is in a minority position in a joint venture, he should determine what controls he can legally exercise under the laws of the host country over the actions of the majority partner and those controls which he thinks are necessary to ensure effective participation in basic joint venture decisions. At the same time, he must be mindful to not hamstring the joint venture to such an extent that it cannot function. Ideally, and to the extent possible,
the controls he thinks are necessary should be recognized in the Article of Incorporation. However, in some cases where the Articles of Incorporation are reviewed by a government agency as part of the approval process, some investors have felt it desirable to place some of the more detailed aspects of these controls in collateral agreements, realizing that there is always the question of how enforceable such agreements are when they are not recognized in the Articles of Incorporation or supported by statutory provisions. In any case, an inability on the part of the U.S. investor in a foreign country to secure enforceable agreements which would give him the controls he needs over the operation of the investment is a serious consideration to be weighed by him in determining whether he wishes to go ahead with the investment.

In addition to ensuring himself an effective voice in key decisions with respect to the operation of the investment, the investor will want to ensure that in the event of the dissolution of the joint venture there are no restrictions on his ability to secure the return of his technology, his capital or his name. He does not want to be restricted in his recourse only to a forced sale or disposition of his investment at fire sale prices.

**AN ILLUSTRATIVE LIST OF COUNTRY AND REGIONAL RESTRICTIONS ON U.S. INVESTMENT**

In a global review of this problem, it seems appropriate to illustrate some of the restrictions which the U.S. investor may encounter in specific geographical areas. Here we are primarily concerned with general restrictions and not those applicable only to certain sensitive national industries. This list is not all-inclusive; rather it is intended only to be illustrative of the types of restrictions the U.S. investor will encounter in these areas.

**Europe**

**France.** A U.S. investor who wants to acquire 20% more of a French company, establish a new operation in France, or expand a company he already controls, must declare this investment to the

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3. In France, however, one gets involved in the approval process automatically upon obtaining 20% or more.
Ministry of Finance and obtain the Ministry’s approval. The French government has also indicated that clearance from the Minister of Finance should be sought in cases of purchases of less than 20% where other factors such as license agreements or debt financing might give the U.S. investor the possibility of effective control, whether or not such control is intended or is, in fact, exercised.

At the present time acquisitions of French companies by U.S. investors can be financed in France. Generally loans from foreign parents to French subsidiaries are considered direct investments and require the approval of the French government, while interest rates which are too high in the government’s view may be disallowed for tax purposes. Repatriation of capital must be carried out through an authorized intermediary, generally a bank, and remittances of less than one million francs are permitted without prior approval. The required formal approval by the French government for remittances of greater amounts is usually granted routinely. License agreements between a foreign parent and a French subsidiary must be notified to the Ministry of Industrial Development and Scientific Research within one month after execution of the agreement.

As indicated by the foregoing, the problem areas for the foreign investor in France may be in determining just what constitutes a foreign direct investment in France, and thus, what requires prior government approval, and the French government’s disposition of proposed foreign buyouts of French companies, which is handled on a case-by-case basis. In the future, acquisitions or mergers in France will be subject to the proposed EEC directive covering this matter.

Italy. For the U.S. investor who wishes to invest in Italy, there are no restrictions on buy-ins into Italian companies, or on the


6. Loans from foreign affiliates to French subsidiary are considered direct investment; Circular of the Ministry of Economy and Finance of March 21, 1969, concerning loans.

7. When authorization is needed for repatriation of capital; Circular of the Ministry of Economy and Finance March 21, 1969 concerning repatriation of capital as modified by Circular of September 8, 1970.


9. See p. 28 supra.
establishment of new enterprises. If the investor wishes to be assured of guaranteed, unlimited remittance of earnings and repatriation of capital at the official exchange rate prevailing at whatever time payment is being made, he may try to qualify his company as an Article I company (Productive Enterprise) under Law No. 43 of 1956. To do so he must, for notification and prequalification purposes, submit an application to the Italian Treasury. However, authorization of Article I status will not be extended until there has been verification of the implementation of the investment determined by the Technical Offices of the Ministry of Finance through visits to the plant, review of accounts, etc. The foreign investor's status as an Article I company subjects him to some restrictions on his ability to borrow in Italy on a medium or long-term basis.

Borrowings by Italian subsidiaries and affiliates from a U.S. parent and/or affiliate require Treasury and Foreign Trade Ministry approval if the loans are for five years or less. While payments of license fees and royalties are not subject to prior clearance, the bank handling the transaction, acting as an agent of the Exchange Control Authority, and under its own responsibility, must be satisfied that the amounts remitted are consistent with the provisions of the contract evidencing the transaction.

Italy is currently the least restrictive major country in the world from the standpoint of the national regulations which affect the non-Italian investor, and there are no indications that this will change. However, acquisitions and mergers in Italy will, for the first time, be subject to control when the planned EEC regulation covering prior notification of mergers and acquisitions goes into effect.

Germany. Until 1973 foreign investment in Germany was relatively free of control, and only a report on an acquisition or merger had to be filed with the German Cartel Authority if certain size and market share standards were met or exceeded. Effective June 7, 1973, under the amended Cartel Law, notification to the German Cartel Authority of an acquisition or merger is required if two companies are involved whose total turnover, including affiliates, would exceed a certain amount. 

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is DM 500 million or more, or whose employees total 10,000 or more, or where the enterprises involved have 20% of that market or of any other German market. The notification requirement is applicable if 25% or 50% or a majority of the shares or substantially all of the assets of the company are acquired. In addition, where a dominant position is created or increased, acquisitions or mergers are prohibited in the absence of special justifying circumstances. A dominant position is presumed if (A) an enterprise has a market share of more than 33-1/3% and did not have less than DM 250 million turnover, or (B) the acquisition or merger is in an oligopolistic industry where three or less enterprises have more than 50%, or five or less enterprises have more than 66-2/3% of the market, and the enterprises involved did not individually have less than DM 100 million turnover. A possible justification for acquisitions or mergers in cases where dominant positions are involved might be that the acquisitions or mergers improve competitive conditions, and this improvement outweighs disadvantages for competition, or that the merger was in the public interest. There is an exemption from possible Federal Cartel Authority intervention for mergers or acquisitions where the acquiree had less than DM 50 million in turnover. All mergers involving two companies with more than DM 1 billion each require prior Federal Cartel Authority approval.

For exchange control purposes, prior approval is required for acquisitions of stock corporations (AGs), although no prior approval is required in the case of acquisition of KGs or GmbHs. With regard to financing acquisitions or operations in Germany, the government is attempting to dampen the flow of money into Germany, and currently it is not possible, without penalty, for the German subsidiary of a U.S. company to borrow money outside Germany to finance an acquisition in Germany. Where such borrowing is done, the German subsidiary must make a cash deposit of a percentage (currently 50%) of the borrowing in an interest-free account with the German Federal Bank. Although there is this pressure for financing acquisitions within Germany with German funds and at an increased interest cost, it should be noted that acquisitions can still be financed from outside Germany without a cash deposit as, for example, when a U.S. company purchases the shares of a GmbH, and borrows the money outside Germany to finance the acquisition.

There is no German requirement that license agreements be-

tween U.S. parents and German subsidiaries and affiliates be registered for German purposes, and royalties may be remitted freely.

As indicated above, Germany has been tightening exchange controls (admittedly for domestic and international monetary reasons) and has enacted a tough anti-merger law. Germany will also be subject to the planned EEC Regulation covering mergers and acquisitions. If a proposed merger or acquisition in Germany violates either the German rules or the EEC rules, it would be prohibited, and if it violated both, the infraction could be pursued under either.

United Kingdom. The organization of a new company and an offer for the stock of an existing company by a U.S. firm both require the consent of the Exchange Control Office at the Bank of England. In reviewing the transaction, the Bank of England will normally require that the necessary financing comes from outside the U.K., and there are de facto penalties for the use of U.S. company stock for a U.K. acquisition. An exception to the requirement of outside financing is the establishment of a new plant in a “development area”, which can normally be financed within the U.K. Acquisition of British companies by U.S. firms above the five million pounds level, or where 33-1/3% or more of the relevant U.K. market is involved, is subject to review by the Department of Trade and Industry and may be referred to the Monopolies Commission. There are rules of conduct established by the Governor of the Bank of England laid down by the City Working Party in a document entitled “The City Code on Takeovers and Mergers,” which are applicable to U.K. takeovers and mergers. These rules apply primarily to firms whose stock is registered on the London Stock Exchange, and are administered by the Panel on Takeovers and Mergers.

Loans from U.S. firms to their U.K. subsidiaries or affiliates all

12. Reference is made to the so-called “switch and surrender operation” involving the acquisition and surrender of investment currency. Specifically a United Kingdom resident acquires U.S. stock has to pay a dollar premium. When he disposes of this stock he receives the benefit of whatever the dollar premium is at that date but he has to surrender a percentage thereof to the Government.
13. There is currently legislation before Parliament which proposed to reduce this percentage figure to 25%.
require U.K. Exchange Control approval. Profit transfers from U.K. subsidiaries and affiliates to the U.S. parent require Bank of England consent. Seldom are great difficulties encountered in such transfers. Capital may be repatriated without difficulty from the U.K. to the U.S. provided its entrance into the U.K. was properly approved. Finally, payment of license fees and royalties requires Bank of England approval which, in the absence of special circumstances, should not present a problem.

While Exchange controls in the U.K. are posing less and less of a problem with the recent strength of the pound, there is currently government-proposed legislation before Parliament, which would require that any acquisition or merger involving at least 25% of the relevant market be submitted to the Department of Trade and Industry for review and possible referral to the Monopolies Commission. In addition, the planned EEC Directive on acquisitions and mergers will affect acquisitions and mergers by U.S. firms in the U.K.¹⁵

Spain. In most industries, a foreign investor who acquires, either directly or indirectly, 50% or less of the capital of a Spanish company need merely file notice of such acquisition with the Spanish government. Specific approval is required for investments of more than 50% in key industries, and such approval is not easy to obtain in the absence of special circumstances.¹⁶ Loans to Spanish affiliates and subsidiaries from outside Spain by foreign investors must be registered and authorized by IEME (The Foreign Exchange Institute), not only to insure repatriation of the loan principal and interest, but mainly to prevent the Spanish affiliates and subsidiaries from being held criminally responsible as a matter of penal law.¹⁷ The Spanish government prohibits or restricts (depending on the percentage of ownership) license fee payments by Spanish subsidiaries or affiliates to foreign firms owning an interest in the Spanish firms. Conceptually, the Spanish government maintains that there is a “oneness” between parent and subsidiary as the percentage of ownership grows larger, and does not recognize the logic of compensating transfers of technology within a corporate group whose ownership is all the same. Thus, the current

¹⁵. See p. 28 supra, for a discussion of this Directive which is still in the drafting stage.
¹⁶. For general comments re Foreign Investment in Spain see Law of July 27, 1959, Order of March 15, 1962, Decree of May 17, 1962, and Decree of April 18, 1963, all of which are concerning Foreign Investment in Spain.
¹⁷. For comments re Loans to Spanish Subsidiaries and Affiliates see Monetary Crimes Act (1938) and IEME's Circular No. 249 (August 10, 1968).
problem areas for the foreign investor in Spain are those of obtaining (1) more than a 50% equity participation, and (2) adequate compensation for technology transfers where he has a substantial equity participation.

Switzerland. The establishment of a new business or the buy-in by a foreign investor of a Swiss company is comparatively easy, although very little of this type of investment has taken place because of the comparatively small Swiss market, Switzerland's non-alignment with trading blocs, and because of problems in obtaining work permits for non-Swiss personnel. The establishment of a new business or the buy-in requires the authorization of the Swiss National Bank. Transfers of profits and repatriation of capital from Switzerland are relatively free. Switzerland currently has severe exchange control measures covering the entrance of funds into Switzerland, but these measures apply primarily to portfolio-type investments and investments in real estate.

In Switzerland, the entrance of foreign personnel is severely restricted. A foreign investor in Switzerland may find himself severely circumscribed, and faced with an investment that he cannot adequately operate with personnel from outside Switzerland, because he just cannot obtain Swiss work permits. This has, in fact, deterred many prospective investors in Switzerland. Furthermore, there are currently no indications that the work permit situation for foreign personnel in Switzerland will ease.

Latin America

Mexico. Mexico enacted a new law for the promotion of Mexican investment and the regulation of foreign investment, which became effective May 8, 1973. It defines foreign investment essentially as that of any foreign individual, company or enterprise, or of a Mexican company having majority foreign capital, or where

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20. The legal basis is the Federal Law of March 26, 1931 concerning the Residence and Establishment of Foreigners; and the Decree of the Federal government of April 21, 1972, limiting the number of foreigners who exercise a lucrative activity.
foreigners have control over management of the company. Previous legislative and administrative requirements regarding specific percentages of foreign capital permitted in various Mexican industries continue in effect. Further, the new law sets forth a general rule limiting foreign investment to a maximum of 49% ownership, and prohibits foreign control of management unless a special ruling from the National Commission on Foreign Investment, established by the new law, is obtained, allowing a greater percentage. Criteria for such an exception are included in the law.

A Registry of Foreign Investment is created requiring registration within 180 days of foreign investments as defined above (i.e., of Mexican companies in which foreign capital participates), of trusts relating to real estate in prohibited zones where foreigners are beneficiaries, of shares owned by foreigners or given in guarantee to foreigners. Dividends cannot be paid if the investment is not registered. Bearer shares must be changed to registered shares for such registration purposes.

While existing companies are not affected by the new statutory limits on foreign investment, the new law gives the Commission the power inter alia to resolve questions relating to the investment of foreign capital in established companies, in companies to be established, or in new establishments, and the participation of foreign investment in new fields of economic activity or new products. No specific regulations, interpretations or definitions are yet available, nor is it clear to what extent capital increases are included within these powers of the Commission. A permit is required for any foreign investor to acquire, in one or a series of acts, 25% or more of the capital or 49% of the fixed assets of any company. Rental of an establishment, or of assets essential to the operation of a company, is considered as an acquisition of assets.

Penalties are provided for actions which may be taken to give the appearance of compliance, and for noncompliance with provisions of the law applicable to directors and officers. Any act contrary to provisions of the law is null and void.

On December 30, 1972, the Law on Transfers of Technology and the Use and Exploitation of Patents and Trademarks was published in the Federal Official Daily Gazette, to become effective January 30, 1973. This law requires the registration with the Technology Registry of the Ministry of Industry and Commerce of all agreements of the genre indicated, as well as agreements for serv-

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ices relating to the administration and operation of companies in Mexico within 60 days of execution. Certain exclusions are established, such as emergency situations, initial operational arrangements for machinery and equipment, and border program operations. No distinction is made between contracts involving only Mexicans and those involving foreigners. Certain types of consultation agreements also could be subject to registration.

To be registrable, an agreement must satisfy certain requirements of which the following are the most important: 1) the agreement cannot involve technology already available in the country; 2) payments under the agreement should not create an unreasonable and unjustified burden on the economy; 3) the agreement must not contain a restriction on exports contrary to the interests of Mexico; an obligatory grantback clause, a provision requiring the exclusive sale of the licensed product to the grantor of the technology, a provision requiring the grantor of the technology to be the exclusive sales agent in Mexico for such products, a provision fixing limits on production, a provision fixing sale or resale prices of the licensed products for domestic consumption or exportation, or clauses making foreign law applicable or requiring submission of disputes under the agreements to foreign courts.

An existing agreement could be simply presented to the Technology Registry of the Ministry of Industry and Commerce as executed before June 25, 1973. However, the agreement must be registered within two years after January 30, 1973, the effective date of law, and at that time it must comply with the requirements described above. Existing contracts not presented and new contracts not registered shall be considered "nonexistent," and any payments thereunder will not be deductible for tax purposes.

There have always been restrictions in Mexico by way of import permit requirements and customs duties on imports of equipment, parts and materials which, in the past (especially when local opposition in an industry sector existed), have made implementation of investment projects by foreigners difficult. Foreign investors generally have found that these problems are easier to overcome when they have joint ventures with Mexican interests and especially when the local joint venture partner holds a substantial or a majority interest.
The statutory codification of policies covering foreign investment is good in part because it clarifies matters. However, the new Foreign Investment Law and the new Law covering transfers of technology to Mexico almost inevitably mean that an administrative rigidity will be created which did not exist before, and that additional time and expense will be incurred by the foreign investor in meeting these new requirements.

Brazil. Foreign investment and reinvestment in Brazil must be registered with the Central Bank within 30 days of entering Brazil or incorporation into capital. Remittance of profits is governed by the Remittance of Profits Law of 1962, as amended. A prerequisite to the remittance of profits is registration of the capital investment with the Central Bank and payment of income tax on such profits. Remittance in excess of 12% per year of invested capital, based on a three-year average, entails a higher withholding tax than the normal 25%. In addition, remittance of profits on registered investment may be limited during times of emergency to 10% annually where production of normal non-luxury items is involved.

Remittance of principal and interest payments on foreign loans is subject to prior registration of the loan with the Central Bank, which may disallow interest rates in excess of those prevailing in the lending country. At this time foreign loans are acceptable for a minimum eight-year period, without need for any blocked deposit.

Royalty payments from a Brazilian subsidiary to its U.S. parent are not a deductible item, and patent and trademark royalty remittance is prohibited. Technical assistance fees are allowed, but may not exceed 5% of net sales, and the rendering of the assistance must be documented. Registration of Technical Assistance Agreements is subject to prior review by the National Institute for Technical Property as to technical aspects. Technical Assistance Agreements also must be registered with the Central Bank as a prerequisite for remittances, and such registration is normally valid for only five years.

There has been considerable speculation in Brazil recently concerning a possible decree which would require prior government approval of mergers and acquisitions involving Brazilian and for-

eign firms. As this article is written, prior government approval is required only in the case of the purchase of Brazilian companies which have received tax incentives under the condition that no change in equity control would occur without securing prior governmental approval. In view of the rapid growth of foreign investment in Brazil, its advancing industrial capabilities, and developments elsewhere on the continent it seems likely that Brazilian government intervention in such matters will grow rather than recede. Additionally, controls over payments by Brazilian firms to their foreign parents probably will remain a difficult area both from a remittance and a tax standpoint.

Andean Common Market. The Andean Common Market\textsuperscript{28} is a group of Latin American countries largely in the Andean Mountain area and includes Bolivia, Peru, Chile, Colombia, Ecuador and Venezuela. These countries have agreed on certain principles, the Andean Investment Code, which severely restrict the scope of new foreign investment.

Enterprises are classified as National Enterprises (more than 80% owned or controlled by local investors); Mixed Enterprises (51-80% owned or controlled by local investors); and Foreign Enterprises (less than 51% owned or controlled by local investors). Certain key industries are barred to Foreign Enterprises and foreign investors.

All new and existing foreign investment and reinvestment must be registered with and approved by the host governments.\textsuperscript{26} Enterprises which do not reduce foreign investment to minority participation within a fixed period of time are to be denied the reduced tariffs offered to imports from other members of the Andean Common Market. There are also restrictions with respect to the acquisition by foreigners of equity interests from local investors, the acquisition of newly issued capital of National and Mixed Enterprises, particularly when the character of the Enterprise is changed, and the sale by a foreign investor of an equity interest. Such a sale must be made to a local investor if the foreign investor is to have remittance rights. In addition, profits remitted annu-

\textsuperscript{25} Decision 24 of the Cartagena Agreement (Andean Common Market).
\textsuperscript{26} Under the Andean Code, the host governments may waive the requirement for host government authorization and registration of reinvestments of up to 5% of annual net profits.
ally cannot exceed 14% of invested capital (including reinvestments) without special approval. Finally, transfers of technology to licensees within the Andean Group by foreign investor licensors are to be registered and will be closely scrutinized from the standpoint of the royalty level involved, and other provisions, such as export restrictions. There is a complete prohibition on the payment of royalties by an Andean “Foreign Enterprise” to its U.S. parent.

In assessing the effect of the foreign investment principles adopted by the Andean Group, it should be kept in mind that their detailed implementation varies among the member countries. It also should be noted that the principles must be implemented through the legislature of the individual member country—and it goes without saying that this implementation can and has varied.

The U.S. Overseas Private Investment Corporation (OPIC) has suspended its financial and political risk investment insurance program in some Andean countries pending receipt of certain interpretations of the Andean Investment Code. Certainly the trend in this region is toward greater restrictions on foreign investment. The means of enforcement are exchange controls in most Andean countries, an operating license requirement in others, and the nonavailability to Foreign Enterprises of tariff concessions on their exports to other Andean Group members.

*Argentina.* In late 1971, the Argentine government enacted a new Foreign Investment Law under which new investments must be registered and approved in order to receive the benefits of the law—principally the guarantee of remittability of profits and the right to repatriate capital and reinvested profits.\(^2\)

Law 18,875, known as the “Promotion of Local Industry Law,” distinguishes between local companies of internal capital and local companies of external capital. Local companies of internal capital must have the following qualifications:

1. The company must be organized in accordance with Argentine law, and the domicile and place of business must be Argentina;

2. At least 80% of the members of the Board of Directors and key personnel must be domiciled in Argentina;

3. The company must have a Board of Directors and Management not having any direct or indirect dependency upon private or public foreign entities;

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(4) At least 51% of the company’s capital and votes must belong to persons whose real “domicile” is in Argentina.

Companies not meeting the above qualifications are considered companies of external capital or “foreign” companies. Local companies of internal capital are eligible for special financial assistance and preference in government purchasing. Companies with a majority of foreign capital are restricted to short-term or evolution credit up to a maximum of 50% of registered capital plus accumulated reserves (but this restriction does not apply to exports). There are also restrictions on the introduction of new products. In the automotive parts industry, for example, foreign companies are allowed to produce new parts only if there are no local producers who can do so.28

There are currently no restrictions regarding takeovers of Argentine firms by foreign firms, however, the Argentine government has announced that it is contemplating such legislation. In addition, there are indications that Argentina may completely revise its current legislation regarding foreign investments, along the lines of the Andean Investment Code.

Argentina has not approved OPIC investment insurance against expropriation. Thus the U.S. investor in Argentina cannot currently insure his new investments in Argentina with OPIC against the risk of expropriation.

Profit remittance in the form of dividends from an Argentine subsidiary to a U.S. parent, may presently be done only by purchasing Argentine government bonds, which then may be sold by the parent in the U.S. at a discount.

Under a 1971 law, new and existing license agreements between a U.S. parent and its subsidiary or affiliate in Argentina must be registered with the government. Registration is a prerequisite to the payment of royalties which may be denied if the agreement does not meet Argentine government requirements.29

In summary, Argentina has had a policy of encouraging local participation with foreign investors. This policy is reflected in matters such as restrictions on local borrowings and restrictions

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with regard to production in certain key industries. It may be assumed that this policy will be carried further under the current administration.

Far East

Japan. The foreign investment authorities must review and approve all foreign equity investment, whether on a buy-in basis or upon the establishment of a new company. Depending on the industry and the percentage of foreign ownership sought, equity investment will either be validated “automatically,” or be subjected to further review.

Where there is a buy-in of an existing company in a fully liberalized industry, if the consent of the company has been obtained, the acquiring foreign investor may receive automatic validation without limitation on the amount of ownership. This consent must be given by the management of the company being acquired. In the absence of such consent, automatic validation will be accorded only if a single foreign investor’s shareholding is less than 10% and the aggregate number of shares held by all foreign investors is less than 25%. In certain specified industries, such as banking and public utilities, the acceptable percentage is reduced to 15% of the total outstanding shares of the company. In 17 industries, such as computers, integrated circuits and real estate, majority foreign ownership will be validated automatically only after specified dates which have been fixed for each of these 17 industries, ranging from August 4, 1974 to April 30, 1976.

In five natural resource and other industries, majority foreign ownership will not be validated automatically in the foreseeable future. In these industries, foreign equity participation, whether by formation of a new company or on a buy-in basis, will be validated automatically only up to 10% for a single foreign investor and, in one case only up to an aggregate of 15%; in other cases, foreign investors may hold up to an aggregate of 25%.

All license agreements between a foreign investor and his Japanese licensee affiliate or subsidiary must be submitted to the gov-

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30. Law of May 10, 1950, Concerning Foreign Investment, No. 163, Art. 11.
33. Id.
34. Id.
ernment, and formal validation by the foreign investment authorities is required if the term of the license agreement is to exceed one year.\textsuperscript{35} In the area of electronic computers, technological assistance is subject to close scrutiny by the foreign investment authorities.\textsuperscript{36}

Loans between Japanese firms and foreign parents and/or affiliates must receive a foreign exchange license.\textsuperscript{37} Dividends may be remitted and invested capital may be repatriated freely if validation of investment is obtained.\textsuperscript{38}

Japan has indicated that, with the 1973 liberalization of foreign investment in Japan, it is complying with the OECD (Organization for Economic Cooperation and Development) Code.\textsuperscript{39} Thus it would appear that Japan's approach with respect to foreign investment will be more liberal. However, it will only be as actual cases are handled that we can judge what the practical outcome of the new policy will be.

Taiwan. At the time an investment is made, the foreign investor must obtain approval from the Ministry of Economic Affairs so that he can later freely remit earnings and/or repatriate capital.\textsuperscript{40} When this is done, repatriation of capital on approved investments can be made at the rate of 15% annually of the investment approved, starting the third year after the project begins operations.

In the event that the foreign investor wishes to transfer his shares to another foreign national, the Ministry of Economic Af-

\textsuperscript{35} Law of May 10, 1950, Concerning Foreign Investment, No. 163, Art. 10.
\textsuperscript{37} Foreign Exchange and Foreign Trade Control Law (1963) Art. 30: Ministerial Ordinance Concerning Control of Invisible Transactions—MOF Ordinance No. 58, November 2, 1963.
\textsuperscript{38} Law of May 10, 1950, Concerning Foreign Investment, Arts. 15-2 and 15-3, Table 22 to MOF Ordinance Concerning Control of Invisible Transactions.
\textsuperscript{39} See p. 63 infra.
\textsuperscript{40} See Chinese Statute for Investment by Foreign Nationals, as amended December 14, 1969.
fairs must, in practice, approve such a transfer. Loans from foreign parents to Taiwan subsidiaries or affiliates are subject to prior approval by the Central Bank of Taiwan and, with this approval, remittance of principal and interest may be made freely. Local content requirements have been established for production in many industries, and imports of capital equipment are tightly controlled. License agreements calling for remittance of royalties from Taiwan firms to U.S. parents or affiliates are subject to prior governmental approval.41

Taiwan is becoming more selective with respect to new foreign investment and is accepting such investment in certain types of industry while not accepting it in others. Taiwan’s current restrictions on such investment are, however, moderate.

Korea. All foreign investment, whether by subscription to new shares of a company to be established or to the shares of an existing company, requires authorization from the Minister of the Economic Planning Board under Article 6 of the Foreign Capital Inducement Law (hereinafter called FCIL).42 However, investment through buying already issued and outstanding shares of a company is not permitted under FCIL. Within the Korean government, requests for the authorization provided for in Article 6 are reviewed by the Foreign Capital Inducement Deliberation Committee. Article 4 of FCIL provides that the Minister of the Economic Planning Board shall, in granting such authorization or approvals, give priority to those projects which will “greatly” contribute to the improvement of the nation’s balance of payments position and to joint ventures with local capital participation, and Article 6 of FCIL also provides that the authorization referred to above can be issued with certain conditions, such as adjustment of the proportion of shares of stock between Korean nationals and foreign nationals. An investment ratio of 50-to-50 between the foreign investor and the Korean partner is strongly recommended by the government. If an investment is wholly foreign-owned, it is government policy to require this company to export its total production abroad.

All license agreements must be approved by the Minister of the Economic Planning Board under Article 19 of FCIL. Once a license is approved, remittance of royalties and fees is guaranteed under Article 20 of FCIL. Remittance of profits is guaranteed by Article 11 of FCIL, but approval therefor must be obtained from

42. Law No. 1802, as amended.
the Ministry of Finance before each remittance, as required by Article 7 of the Enforcement Decree of FCIL. Reinvestment of profits up to the amount of the original investment is permitted without approval, but such investment must be reported for acceptance to the Minister of the Economic Planning Board under Article 7 of FCIL. Repatriation of capital after two years of operation at the rate of 20% per annum is guaranteed by Article 12 of FCIL.

To sum up, joint ventures are the order of the day in Korea and will continue to be for most U.S. investors in the foreseeable future. They provide a means of leveraging the investment and limiting risks and, as indicated above, the Korean government strongly favors them as a vehicle for foreign investment.

**Australia.** Any direct acquisition of stock in an Australian company by a foreign investor is subject to Reserve Bank approval under Australian foreign exchange regulations. The practice of the Reserve Bank is to make the approval subject to the consent of the Committee on Foreign Takeovers established pursuant to the Companies (Foreign Takeovers) Act of 1972. While the provisions of this Act do not specifically require the parties to obtain approval, they do appear to give the government the authority to seek a divesting order if an acquisition is made which could be considered contrary to the national interest. The Act does not define what is meant by “national interest.”

The purchase of assets as distinct from the purchase of shares is not covered by the Companies (Foreign Takeovers) Act of 1972, although there have been indications that the law will be amended to cover purchases of assets and other areas of interest. Presently, some leeway is permitted on sales of interests in Australian companies from one foreign owner to another, and also where the assets taken over amount to less than $1 million and no important national interest considerations are raised.

Any borrowings from overseas to finance Australian acquisi-

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43. Banking (Foreign Exchange) Regulations Act (Aust.).
44. Companies (Foreign Takeovers) Act of 1972 (Aust.). This will probably be rewritten in 1973 to broaden its application.
45. See former Prime Minister's Statement on Overseas Investment, dated September 26, 1972, for criteria which Committee on Foreign Takeovers is following.
tions require Reserve Bank approval and are subject to a compulsory interest-free deposit requirement if the loans are in excess of $100,000 within a 12-month period. There are also restrictions on the length of such loans.

Australia is becoming more restrictive toward U.S. corporate investors. The new takeovers legislation, which requires prior review by the Australian government of most takeovers and acquisitions of Australian firms by foreign firms, may be a prelude to further restrictions.

**Eastern Europe**

**Yugoslavia.** Yugoslavia now permits joint ventures between Yugoslav entities and foreign firms in which the foreign investor has up to a 49% interest. Foreign participation requires the establishment of a joint stock company whose Articles must be approved by the Workers' Council of the entity involved and by the Yugoslav government (Federal Secretariat for Economics). The Yugoslav partner must take the lead in obtaining these approvals, since the foreign partner cannot. Essentially, the foreign partner has no right to form a new enterprise in Yugoslavia and joint ventures to date have involved existing entities or new entities formed by the Yugoslav partner.

In the Yugoslav joint venture, the foreign equity investor's remedies are limited to recourse against his Yugoslav partner and, conceptually, he has no direct equity rights in the investment itself.

The U.S. investor's investment may not be less than 1-1/2 million dinars nor for less than five years, and, to date, joint venture contracts registered have not been for more than 15 years. If the joint venture contract so provides, the foreign partner is permitted to withdraw part of his investment during the term of the contract. Upon termination of the contract, he may repatriate the full amount of his original investment. A foreign partner may sell his participation in the joint venture to another company but he must offer it first to his Yugoslav partner. Remittance of profits to the

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46. Statements to Prime Minister Whitlam and Reserve Bank of Australia, dated December 23, 1972, related to compulsory deposit procedure on foreign borrowings.

47. See Foreign Investments in Yugoslavia—legal problems; Yugoslavia Chamber of Economy Institute of Comparative Law, Belgrade 1972; see also pamphlet describing International Investment Corporation for Yugoslavia (IICY) whose function is to help foreign investors desiring to do business in Yugoslavia.
foreign partner is dependent upon foreign exchange availabilities of the joint venture and of the Yugoslav partner.

The management of the joint venture must be through a business board on which the Workers’ Council and foreign investor have equal representation. A unanimous vote can be required on all important decisions. The managing director must be a Yugoslav.

License agreements between foreign investor licensors and their Yugoslav affiliate licensees are subject to prior Yugoslav government approval.

Yugoslavia continues its cautious moves toward liberalization, particularly for export-oriented joint ventures. It is interesting to note that in 1973 OPIC insurance was made available for investments in Yugoslavia.

Romania. In late 1972, Romania enacted legislation which permits joint ventures between Romanian firms and foreign investors provided, however, that a majority of the ownership (at least 51%) is Romanian.48 Prior governmental approval of the Council of Ministers of State is a prerequisite to the establishment of joint ventures, and the Romanian partner is charged with informing the appropriate government ministries regarding the establishment of such ventures.

It may be agreed between the parties that the foreign partner will have veto rights over actions to be taken by the partnership and foreign personnel may hold management positions in the joint venture.

Remittance of profits from the joint venture to the foreign partner is to be primarily from the joint venture’s holdings of foreign currency which presumably will be generated by export sales.

Prior Romanian government approval is a prerequisite to the establishment and implementation of license agreements between foreign investor licensors and Romanian affiliate licensees.

Romania’s joint venture program, put into effect in November, 1972, would appear to be a good start in the right direction, but we

do not yet have enough working experience with it to adequately judge what its impact will be. It is noteworthy in this connection that Communist Party planning directives indicate a firm national commitment to the program.

**SOME GENERAL OBSERVATIONS**

For the most part, it can be said that legal restrictions applicable to foreign investment in most countries affect equally both U.S. investors and investors from other countries. Currently there are comparatively few foreign investment restrictions which discriminate against U.S. investment, but this may change in the future in countries within certain regional groupings such as the EEC and the Andean Group. Theoretically, under EEC rules a firm incorporated in one Member State can establish itself without difficulty in any other Member State, although the French have insisted that they wish to limit this right of establishment in France, particularly as asserted by companies incorporated in other EEC countries that are controlled by non-EEC groups.

In the nature of things, the proposed E.C. regulation instituting a prior notice requirement for mergers and acquisitions involving companies above a certain sales volume will affect more American companies than others, because of their size, except when they are acquiring relatively small companies. This would certainly be a *de facto* restriction on U.S. investment in the EEC if put into effect as currently contemplated. This will also be true of the new German legislation on mergers where the applicability of the legislation will depend on the size of the firms involved. What this means, of course, is that merger activities by U.S. firms will be closely scrutinized because the worldwide sales of the U.S. firms will bring them within the sales volume levels set forth in the statute where scrutiny and/or approval of the German government authorities is required as a condition to a merger going into effect.

In the Andean area, preference is given to investors located in the Andean countries, but it is too early to judge the full impact of this policy at this time. Certainly, locally-owned firms have the advantage of reduced tariffs vis-à-vis foreign-controlled firms when they trade within the Andean bloc. Other Andean Group practices may pose problems for the U.S. investor who wishes to enter this growing market of 66 million people.

Limitations on the right of recourse by foreign investors to the courts of the country where an investment has been made may constitute another *de facto* restriction on the investment. Thus, at
the outset, it may be desirable for the foreign investor to deter-
mine what his legal remedies may be in the event of the breach of
an agreement by his joint venture partner, if he has one, and how
he can enforce his remedies. In some cases disputes are handled
by resort to arbitration by virtue of prior agreement or as diffi-
culties arise, but if a foreign government is involved, will it subject
itself to arbitration in a neutral forum and, if so, under what con-
ditions? Recently there has been an increasing willingness on the
part of the Eastern European governments to submit disputes with
foreign investors and other foreign businessmen to arbitration un-
der the Arbitration Rules of the Economic Commission for Europe
or at least in one instance to the rules of the International Cham-
ber of Commerce. This development is certainly promising.

As regards country restrictions on inflows of investment and
other capital, what about the application of the OECD Code to the
situation in which the U.S. investor finds himself in many coun-
tries? A number of the nations whose laws are discussed above
are members of the OECD (Organization for Economic Coopera-
tion and Development). The OECD Code of Liberalization of Cap-
ital Movements (June 1965) calls upon members to progressively
abolish restrictions on international capital movements, but there
are no legal teeth in the Code. While all members, including the
U.S., have entered some reservations to the Code of Liberalization
of Capital Movements, Japan, when it joined the OECD, entered a
large number of reservations particularly for an industrial nation.
The Japanese government cited the Code when announcing the
1973 liberalization of restrictions on incoming foreign investment,
but it cannot be assumed that this was actually the dominant reason
for Japan's new approach towards foreign investment. The OECD
Code represents, at minimum, a "moral" obligation to members
to liberalize movements of capital internationally, while recognizing
that sovereign states must reserve to themselves some leeway to
act unilaterally in meeting the requirements of sensitive industries.
Here it should be kept in mind that the Codes are not treaties, but
they prescribe a standard on which practices could be attacked.
While perhaps these Codes have not afforded significant protection
to the U.S. investor in OECD countries against investment restric-
tions per se, their existence, and the periodic reviews of members' restrictions contrary to the Codes, probably has acted as a deterrent
to some national actions which might have been harmful to the international economic order.

Theoretically, the U.S. investor who wishes to take advantage of the United States' Treaties of Friendship, Commerce, and Navigation with foreign governments in order to protest restrictions on the right of establishment, should be free to do so through his government. This would mean, for example, that under the 1960 U.S.-France Convention of Establishment 49 (which follows the Friendship, Commerce, and Navigation bilateral Treaty between these countries), he could protest to the U.S. government against the French government's restrictions on his right to establish a business in France by buying, in part or in whole, a French company or starting a business de novo. The Convention provides that nationals of either party are to be accorded "national" treatment in the other's territory. In Treaty terminology this means that U.S. companies desiring to establish and conduct businesses in France are to have the same rights and standing as French companies in France, and the same equal standing is to be accorded to French-owned firms which are established in the U.S. vis-à-vis U.S. firms. However, while this "right" may exist, the investor probably will not want to force the issue through his government for fear of host government reprisals 50 and possible loss of public esteem in the host country. It also may be noted that our government may not wish to raise the matter too forcefully, depending on political and economic relationships with the host country. Let it suffice to say that the concept of national treatment as set forth in most of these bilateral treaties has not been a fully effective device for the protection of investors.

Another difficulty faced by U.S. investors is the fact that many governments adopt the tactic of simply delaying action indefinitely on an investment application when they do not favor the application, or it is politically unpalatable, and it is the government's wish to avoid an affront to the investor or seemingly to break a treaty or other understandings to which it is a party. Thus, in this instance, the U.S. investor's residual treaty rights have not proved an effective instrument in assisting him in foreign investments. It is interesting to note that in Mexico when foreign persons set up a company, the permit they must obtain will include a condition that a "Calvo Clause" be inserted in the

49. TIAS 4625, 11 UST 2398.
50. See also 1965 Proceedings of Section on International Law of the American Bar Association (Report of Committee on Commercial Treaties) at 215.
bylaws and stock certificates, through which the foreign investor waives the right to foreign diplomatic intervention.

It is worth repeating that in making a foreign investment, one of the considerations the U.S. investor will wish to keep in mind at the outset is whether there are any restrictions of the investment in the event that he wishes to dispose of it at a future date. Specifically, may he dispose of his investment only to prospective indigenous buyers, or may he sell to any buyer, including a fellow U.S. investor? If there are restrictions, will he be able to repatriate the payment? And if so, can it be in dollars or other hard currency? If he has a partner in a foreign joint venture, can he only sell to his partner? And if so, on what basis?

This article has dealt primarily with national government restrictions on foreign investment by U.S. firms, but mention should also be made of the existence of state or local restrictions. Some well-known restrictions exist, for example, in the Province of Ontario, Canada, and in the Canton of Geneva, Switzerland, and as practices of local governments may constitute a hurdle to the potential U.S. investor, he needs to be mindful of them.

**Conclusions**

As has been the case for the last decade or more, foreign restrictions on U.S. investment are in a state of flux, and the direction of specific countries is hard to predict. Ironically, the most restrictive countries in the past, such as those in Eastern Europe and Japan, are becoming less restrictive. On the other hand, the countries in which the U.S. investor has traditionally been able to invest rather freely, such as Canada, Australia, and Germany, are for varying reasons becoming more restrictive. Given this changing situation, the U.S. investor must continually check the legislative and regulatory structure applicable to his investment on a local, national and country grouping level. He should keep in mind that these restrictions may apply in varying degrees to both new investment in its different forms and reinvestment. Ideally—and this can have important practical results—his knowledge should be such that he can anticipate policy shifts rather than be forced to react defensively to new situations as they arise.

While foreign government restrictions frequently are time-consuming and difficult, they are not, in all instances, an unmitigated
evil. They may serve to ensure host government recognition of, and hence some degree of responsibility for, an investment as well as to define the terms of an investment. In this sense, the restrictions, provided they are not too onerous, have positive effects by removing some uncertainties at the outset.

In evaluating foreign investment restrictions, the U.S. investor should try to take the long view with respect to (1) his plans to return earnings and profits in dollars or to repatriate the investment itself; (2) alternatives in the event he wishes to dissolve a joint venture with a foreign partner; and (3) in the event a joint venture is terminated, his freedom of action to control the further use of his technology and/or to secure its return to him.

Frequently restrictions are not clearly visible, and the U.S. investor must obtain all the information he can from his overseas lawyers and others, including U.S. government officials, on the important nuances of government and private attitudes. This is particularly appropriate in the developing world where governments frequently are less self-confident and national sensitivities are greater, but it is equally important for other areas such as France and Japan.

The U.S. investor should address foreign restrictions not only in terms of the penalties they carry for violations but also for the effect that a violation might have on the foreign government's overall attitude toward his project, his investment objectives, and the effect it might have on local public opinion. Crossing the policies of a foreign government by violating its rules in a sensitive area may, in fact, mean that the U.S. investor is blacklisted in a practical sense and his future may be severely circumscribed. For example, a questionable importation of machinery and equipment may result in distrust of the foreign investor and foster continuing audits in the tax and customs areas.

The foreign investor should remember that he is a "guest." This means that he should try to understand and comply with the rules. It is also prudent to keep the host government officials informed as to what he is trying to accomplish and how it is beneficial to the host country. However, he should be wary at all times about making promises (with respect to employment, exports, etc.) which he may not be able to keep.

The U.S. investor also needs to be sensitive to objectives and trends which appear to be developing in the host country. For example, to what degree does the host country need or want the
foreign investment he is currently proposing? Have its policies on such investments become more or less restrictive over a period of years? Furthermore, apart from national restrictions, what is the possibility that regional restrictions, such as those in the EEC or in the Andean Group, may impinge on his investment?

The investor will need to evaluate the effect of the restrictions in terms of both cost and executive time to determine the effect on the overall profitability of his investment. Will the restrictions so hamper the operation of the investment that its profitability is adversely affected? Will there be available sufficient key personnel to ensure compliance with the restrictions, and can such a time allocation be justified in terms of the profit potential of the investment?

The U.S. investor will probably have to be more flexible than in the past in accommodating foreign investment restrictions and hostile attitudes towards foreign investment. In view of the international furor over the activities of “multinational corporations,” more questions are being asked, both here and abroad, concerning the desirability of the foreign investor’s presence, and this has resulted in a more restrictive context for such an investor. As restrictions increase, he may have to use different approaches in meeting them. The joint venture with local participation may be an international middle ground and a means of accommodating both the host country’s and the foreign investor’s interests. It provides a means of broadening the foreign investor’s overseas constituency (an important goal as noted at the beginning of this article) and enables him to limit his financial exposure in investment areas where the risk is high. Even in those situations where the U.S. investor has a minority equity position, he may be able, through careful negotiation and draftsmanship, to ensure himself an adequate voice in the key decisions concerning the venture.

Frequently, unarticulated but de facto restrictions on the U.S. investor’s freedom of action in host country areas exist in the form of national differences in cultural, political, economic, and religious theories. While there may not be legal restrictions associated with these attitudes, the investor must be more sensitive to these local differences to ensure the success of his investment.

51. In some countries, formal five-year plans may help the investor situate his investment in the country’s overall program of priorities.
To reduce uncertainties and to define risk parameters, a strong, enforceable international investment code or treaty may be in order. Such a code or treaty need not be an international straight jacket, but could at least define the investor's rights and his possible recourse in the event that certain national actions were taken which adversely affected his interests. From the standpoint of the host country, such an understanding could define its right to participation and consultation with respect to the taking by the foreign investor of certain critical decisions which affected its interest, such as the handling of plant closings. Hopefully, in most cases, a mutually satisfactory course of action could be developed after common consultation, but in the event of failure to agree, there could be recourse to a body akin to the Conciliation Commission provided for in the draft Vienna Convention on the Law of Treaties. Failure to agree at this point could then mean recourse to arbitration before a neutral arbitration forum. If time pressures were great, the conciliation stage might be eliminated, and the parties could proceed immediately to the arbitration of their differences. A mandatory conciliation/arbitration procedure would tend to force the parties to resolve their differences between themselves. The International Centre for the Settlement of Investment Disputes (ICSID), a currently viable international institution which was created under the aegis of the World Bank, provides facilities for conciliation/arbitration of disputes involving contracts between States and nationals of other States when both parties consent to the jurisdiction of the Centre. An arbitration tribunal constituted under the auspices of the Centre is now arbitrating a dispute between the government of Morocco, and Holiday Inns and Occidental Petroleum Corporation.

While it is generally agreed that foreign investment which introduces new capital and technology into developing host countries is an important means of increasing national living standards, it is also apparent that it is not always viewed in a positive manner in the host countries. Nevertheless, there is a broad commonality of interests between the host country and the U.S. investor which should be fostered by both and, perhaps more importantly, needs to be better articulated than has been the case in the past. The challenge, then, is for both parties to keep these common interests in focus. From the U.S. investor's standpoint, he must try to avoid actions which provoke, or provide an excuse for, such restrictions and, the host country must avoid punitive-type actions which serve no salutary economic or social purpose and work in the long run against its best interests. Specifically, both should
have due regard for the sensitivities and legitimate needs of the other. When this is done on a consistent basis, constructive compromises can be achieved.

With respect to the countries of the developed world, the situation has a different tone. The U.S. itself has, during the past year, become subject to keen foreign investor interest. Currently foreign investors may invest in the U.S. on a relatively unrestricted basis. From the standpoint of the U.S., this can, in certain areas, be a positive influence, particularly when it concerns communities in economic distress. In my view, it behooves the U.S. and other developed countries to push for the avoidance and elimination of artificial restrictions on investment in the developed world. And it is especially important that the U.S. be militant about pressing for the elimination of restrictions which may be discriminatory with respect to U.S. investors.

The signs are becoming increasingly clear that we are going to see a marked increase in foreign direct investment in the U.S., and this may well provoke such a reaction from domestic competitors that it will force a very real test of our commitment to a truly international economic order. When this comes, U.S. investors with an international constituency may need to articulate their commonality of interest with these foreign investors in order to dissuade our own government from taking actions which may be unwise and unfair to such investors and which, in all likelihood, could lead to retaliatory action in other countries.