Readings in comparative sociology of law

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CHAPTER VI

AN EXERCISE IN DIFFERENT METHODOLOGIES: THE CASE OF FOREIGN INVESTMENT LAWS

In the preceding chapter we examined three different methodologies: Ends-means, creeping incrementalism, and problem-solving. In this Chapter, we examine two articles about foreign private investment in Third World countries, and ask what methodologies their authors use. We take advantage of the occasion briefly to examine China's foreign private investment laws.

A. CONTRASTING METHODOLOGIES FOR JUSTIFYING PROPOSALS FOR NEW LEGISLATION

In this section, we present two articles, each discussing the appropriate laws concerning foreign private legislation. We ask the student to consider, first, not the merits of the two articles, but only their methodologies. What methodology does each use? Which seems to you more persuasive? In the succeeding section we take the occasion to address some aspects of the substantive issues raised by the articles.

ALICE GALENSON, "INVESTMENT INCENTIVES FOR INDUSTRY; SOME GUIDELINES FOR DEVELOPING COUNTRIES"
(World Bank Staff Working Papers No. 669, 1984, pp. 1-17, 40-47)
I. INTRODUCTION

The general economic health and degree of political stability in a country, along with the presence of resources and markets, are probably the primary determinants of the climate for industrial investment. Given the satisfaction of these basic conditions, investors may still have a wide choice of locations to choose from. In order to influence this choice, governments provide a wide variety of incentives aimed at promoting both investment in general and investment in selected sectors or locations or with certain characteristics. Accelerated investment in industry is usually one of the primary goals of incentive policies.

Many African countries package their incentives in investment codes or laws which specify the criteria for awarding benefits, the nature of the benefits, and the obligations of the beneficiaries. Other, sometimes more powerful, incentives may arise from the countries' policies in the areas of trade and tariffs; credit allocation and interest rates; price, wage and labor regulations; and government investment in infrastructure or productive projects. These factors can influence the price of an activity's inputs or outputs and can thereby influence the investment decision in a positive or negative way. Taken as a whole, this set of factors, including the negative ones, will be referred to as a country's incentive system. This paper will discuss the objectives of investment incentive systems, the types of incentives offered, their administration and the impact that they are likely to have on the level and nature of investment and on the economy.

In many cases, the incentives offered by a country, when taken together, are inconsistent, contradictory or redundant. This paper will describe such situations, as well as those where appropriate incentives have been used. Most of the examples will be drawn from the African experience, but evidence from other regions will be presented as well. A broad range of commonly used incentives will be discussed, but trade policies, which may be the most important, have been covered extensively in the literature and will be included here only in so far as they form part of the incentive package offered to investors. Section II will
discuss the reasons and justification for offering incentives. Section III will review a number of incentives and their likely impact. Section IV will present some typical African incentive systems, and Section V will review the evidence on the impact of such systems. Finally, Section VI will draw some lessons from the experience with incentives and reiterate some general principles for incentive packages. This final section can be read on its own for a broad summary of the paper's main conclusions.

II. OBJECTIVES OF INVESTMENT INCENTIVES

Some incentives are directed simply at raising the general level of investment in the country. While these may be aimed in part at increasing the rate of domestic savings and investment, they are in large part intended to attract foreign investment. In addition, most incentives try to some extent to direct resources into certain priority areas.

Many investment codes specify their objectives, either explicitly or implicitly through the criteria for admission. These objectives may be as broad as consistency with the country's development plan, or more specific, for example to increase domestic value added and employment, improve the balance of payments, or promote the development of particular regions. Sometimes the government chooses desired sectors or subsectors for investment. Industrialization is usually a priority, under the implicit assumption that it will speed the country's economic development, both through its direct effects on output and employment and through the externalities associated with it. In addition, diversification out of primary production is expected to lessen the disruptive impact of price fluctuations and adverse trends in the terms of trade.

A national industrialization strategy often serves social and political, as well as economic, ends. For example, the location of some key projects in a particular region might demonstrate the government's commitment to improving the status of a certain ethnic group or to improving income distribution. Strategic considerations might require the development of a few basic industries or the attainment of self-sufficiency in some key consumer goods.
Although the objectives cited above have merit, they do not always justify the use of special incentives. In freely functioning markets, prices play a key role in allocating resources efficiently, ensuring that the structure of production in a country will be consistent with the resources available to it. If an investment is profitable, then it will be undertaken without further incentives; if not, then it should not be undertaken. If capital is scarce relative to labor, for example, it should earn high returns, which alone should suffice to attract capital. In the real world, however, the market is already distorted by numerous forces (e.g. minimum wages, administered prices, or tariffs). The most direct way to deal with distortions is to eliminate them, but this is not always feasible nor desirable, particularly in the short run, and compensating measures in the form of incentives may be justified.

Externalities, or spillover benefits from an investment, may also justify the use of incentives. For example, the creation of a skilled labor force may benefit the country as a whole beyond the profits to the firm providing the training, so society should bear some of the costs. A product used for national defense serves the general public as well as the firm that produces it. Finally, economies of scale and the need for a significant learning period in an industry create the case of an infant industry which becomes profitable only in the long run, but which would not be undertaken at all in the short run by a private investor. If the investor could foresee the long term gains and obtain finance for the interim period, incentives would not be necessary, but imperfections in the capital market are likely to preclude such a solution. Although infant industries may be difficult to identify, they do represent a valid case for intervention. For all of these reasons - existing distortions, externalities and market failures - an investment that is economically profitable for the country as a whole might appear unprofitable to an individual entrepreneur. Appropriately designed incentives can narrow the gap between public and private returns and induce the entrepreneur to undertake the investment.

The use of incentives may entail losses as well as gains. They impose both financial and administrative burdens on the government and they can lead to a distortion of the country's productive structure,
rendering it less efficient. For example, the promotion of investment in industry (i.e. by maintaining high prices) may result in disincentives to agricultural production, thus reducing agricultural incomes, increasing rural-urban migration, and exacerbating the unemployment problem. Policies to promote regionalization, to improve income distribution or to ensure national defense may impose similar costs, which must be balanced against the expected benefits.

III. TYPES OF INCENTIVES

Once the decision is made to use incentives, a wide choice of instruments is available. The more direct the instrument, the less likely it is to create costly side effects, and conversely. For example, tariffs used to encourage local production by restricting imports raise the price of the protected product, thus discouraging consumption and creating a perhaps unnecessary welfare loss for society. A more direct production subsidy (financed by a neutral tax) would cause fewer distortions in the economy. If the goal is employment creation, a direct subsidy to labor use could be used. Instead, one of the incentives most frequently used to attract capital (tariff exemption) tends to encourage its use in relatively capital-intensive activities. Similarly, some methods used to promote import substitution, save foreign exchange and improve the balance of payments tend to promote an industrial structure heavily dependent on imports and unable to export. This section will discuss the probable impact of the benefits found in most investment codes, as well as a much broader range of interventions that affect investment decisions. These include the provision of subsidies or services (e.g. training, infrastructure, or direct subsidies to production, employment or capital) and factors such as price controls or minimum wages. More important than any of these factors, however, are the assurances and guarantees offered to reduce the risks faced by investors.

A. Measures to Enhance Investor Confidence

Surveys show that among the most influential factors in the location decision for foreign investors are political stability, favorable
terms for the transfer of profits and the repatriation of capital, absence of discrimination against foreign ownership and control, and freedom from burdensome regulations (Diamond and Diamond, 1983, 1/ Vol. 1, pp. 6-7; Robinson, 1961, pp. 4-5). Predictability of conditions and lack of arbitrariness may be the most important assurance that can be offered to investors, who seem able to adapt to practically any conditions as long as the rules are clearly established in advance and followed subsequently (Frank, 1980, pp. 11-12). Provision for compensation in the event of nationalization of a business also falls into the category of necessary assurances, without which all the economic incentives together may have no impact at all. The presence of such factors reduces the risk and uncertainty associated with investing abroad, thereby reducing the rate of return required by the investor. 2/

B. Trade Policies

In many developing countries trade and exchange rate policies are among the most important determinants of industrial investment. An open trade policy can enhance a country's development in line with its comparative advantage, and substantial evidence exists of more rapid growth among outward oriented countries than among inwardly oriented ones. 3/ On the other hand, high levels of protection encourage production for the domestic market, even though it may be inefficient and ill suited to conditions in the country. Protection can lead to the establishment of inappropriate industries. For example, high tariffs or quantitative restrictions instituted to discourage the consumption of luxury goods may also have the unwanted result of encouraging production of these goods. Resources attracted to protected industries might otherwise be directed into more efficient uses, such as export industries,

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1/ This two-volume work provides country-by-country information on legal requirements and incentives for investors.

2/ Section V. B. below will present additional evidence from surveys of investors.

3/ The evidence for this assertion can be found elsewhere.
which, in the absence of subsidies, would be forced to be efficient to remain competitive. Wide differentials in the level of protection to different industries, and the systematic bias against export industries, can create a structure of industrial production that is inefficient and inconsistent with a country's comparative advantage. Trade policies and their impact have been well covered in the literature; this paper will refer to them only insofar as they form part of the incentive package offered to investors.

C. Administered Prices

Protection of domestic production may reduce the pressures that would otherwise keep prices at competitive levels. If only one domestic firm produces a good, the absence of competition from imports may enable it to charge monopoly prices. As a result, many countries that restrict trade in order to encourage domestic industry have found it necessary to establish price controls. Reasons often cited for their use are to moderate inflation, to keep prices of basic consumer goods low, and to allow firms to achieve "reasonable," but not monopolistic, profits.

Cost-plus pricing is one way of administering prices. In Cameroon cost-plus pricing of a wide range of products permits an ex-factory price that incorporates a margin of 12% on top of the cost of all current inputs, services, wages, indirect taxes, depreciation and finance charges. Prices need to be certified before they can become effective, and the claimed expenses must be documented. This method has several drawbacks. It reduces the incentive to lower costs and improve efficiency, provides an incentive for firms to bias their cost estimates upwards, and ignores the principle of comparative advantage by allowing identical profit margins for all activities, regardless of efficiency. To the extent that controls keep prices below their free market level, they encourage increased consumption while discouraging production; this has happened particularly in the case of agriculture.

Administration of a price system presents additional problems. If done carefully, with independent price checks, it requires substantial manpower. It also allows ad hoc and inconsistent decisions. If margins are not fixed, but rules simply call for "fair" prices, this danger is even greater; as a result, foreign investors will come in to some...
countries only with the government as a partner so as to ensure the enterprise reasonable treatment. Long delays in getting changes approved can cause serious problems for firms, especially in a situation of rapid inflation. In Cameroon, manufacturing industries must apply individually for an authorized price for each product, and a slight change in design requires a new official price. The same is true of an increase in the price of raw materials or any other input that the manufacturer wishes to pass on to consumers. In practice, delays of six months or longer can occur.

D. Investment Codes

Investment codes are a common feature of African incentive systems. They describe the benefits offered, the eligibility criteria and the obligations of the government and the investors. Investment codes generally provide tariff and fiscal concessions to firms that meet certain conditions, often related to size, choice of sector, employment creation, location, and use of domestic raw materials. Although investment codes usually apply equally to domestic and foreign investment, they are aimed primarily at the latter. In addition to the benefits they offer, investment codes can be an important element of the investment climate. They signal the government's interest and desire for a stable environment for investors, and many of them spell out guarantees to investors in areas such as repatriation of profits and equality of treatment for foreign firms, thus enhancing investor confidence. At the same time, investment codes, by establishing fixed rules, can relieve pressures on the government for ad hoc granting of concessions.

Tariff concessions are an integral part of many investment incentive packages. Material and equipment inputs to production, and sometimes raw materials, are frequently exempt from import duties for a period usually lasting 5 to 10 years, but sometimes as long as 15 to 25 years for major projects (e.g. in Togo and Guinea). Mauritania extends an exemption on raw materials and spare parts for 12 years to firms located outside of the main cities, and Niger gives exemptions of up to 15 years to small enterprises. The exemptions often apply only to goods not produced domestically.
This benefit may be costly not only in terms of government revenue foregone, but also in terms of productive efficiency, through distortions in the allocation of resources. Exemption of duties on capital equipment favors the use of capital over labor, since labor not only is usually taxed, but is also often subject to a minimum wage greater than its opportunity cost. Thus the exemption will tend at the margin to increase the capital intensity of the production process over what might have been the case without intervention. Highly sophisticated imported technology could also increase dependence on expensive expatriate technical staff, due to the nature of some capital intensive processes. Furthermore, the duty exemption increases the rate of effective protection, sheltering inefficient firms from competition, and tends to discourage domestic production of the exempted goods. Thus while the system of protection fosters import substitution in final goods, it could actually increase the country's dependence on imports.

Export incentives are sometimes also offered. Exemption from export taxes is frequently offered to priority industries under investment codes. Other export incentive measures include export development funds, tax credits for duties paid on imported materials or supplies, preferential tax treatment of income from exports, export subsidies, free trade or export processing zones, concessions on domestic sales in return for export performance, foreign exchange credits from export earnings (in countries where foreign exchange is constrained), and export insurance. These measures are, however, usually outweighed by those favoring production for domestic markets.

Tax concessions are one of the most widely used incentives for industrial investment and growth. 1/ Tax policy can be used to create a favorable climate for investment or it can be used to promote particular industries, regions, or types of investment. The following discussion takes the existing tax system as given; a more comprehensive treatment would analyze the impact of the entire system (in both host and home

1/ More material on tax incentives for industrial investment can be found in Heller and Kauffman. 1963: IMF 1981: Tect 1967:
countries), which might already be biased. Furthermore, investors may prefer moderate taxes coupled with fair enforcement to highly concessional short term rates followed by high taxes imposed in a discriminatory or arbitrary manner. Indonesia recognized this fact when it eliminated special tax incentives in favor of lower tax rates.

The tax holiday offers full or partial exemption from income and other taxes for a period generally ranging from 5 to 10 years. Most African countries fall into this range, with some exceptions, such as the Ivory Coast, which grants up to 25 years of holiday and Niger, up to 15 years. In some cases, the length of the period of exemption varies directly with the size of the investment, while in others, mainly outside of Africa (e.g. Malaysia and the Philippines), it varies with the number of jobs created. Other criteria may also be used, including location, production of "priority" goods, and use of local raw materials (e.g. in Ecuador, Malaysia and Morocco).

Tax holidays allow firms to recover their capital more quickly and maintain greater liquidity in their early years, thus reducing the risk. However, they have limitations. A tax exemption is worthless if there is no tax liability, and many firms, particularly in infant industries, earn little profit in their early years. Some countries solve this problem by letting the period of exemption begin not in the first year of operation, but in the first year that profits are earned. Others, including Nigeria and Malawi, allow losses incurred during the holiday period to be written off against profits earned later.

As with tariff exemptions, the most obvious cost of a tax holiday is the revenue foregone by the government, although this is not a cost if the investment would not have been undertaken without the tax incentive. Such causation is difficult to determine, making this cost hard to measure. Another possible cost is through the impact on resource allocation. Depending upon the existing tax system and on how the tax holiday is applied, it could influence the capital intensity of investment.
and might encourage short term investments, designed to earn profits quickly, closing at the end of the holiday period. 1/

A lengthy period of exemption from taxes can be very costly to the treasury, while it is likely to be less important to the enterprise concerned. Given the uncertainties attached to investing in a developing country, and the resulting short time horizon over which he will seek profits, the private entrepreneur's discount rate (the rate of interest at which he discounts future earnings) is likely to be high compared to that of the government. The benefits offered and profits expected in the early years of a project are likely to have the greatest impact, and the more extended the period for which incentives are offered, the greater their cost will be to the government relative to their value to the firm.

One way to ensure against excessive revenue loss from firms that become profitable quickly would be to set a ceiling on their benefits, e.g. by allowing a tax credit only up to a specified amount. Senegal restricts exempt earnings to 100% of the original investment, and Liberia, to 150%. Other solutions have been found by Guatemala, which suspends the exemption if annual earnings exceed 20% of the invested capital, or the Philippines, which does so if annual earnings exceed 30% of the costs of production. Such rules can be difficult to enforce, however, particularly given the poor accounting practices followed in many cases, and the required monitoring could prove costly.

The attractiveness of tax concessions to foreign investors depends heavily on the tax systems in their home countries. France has signed agreements with its former colonies in Africa that allow tax credits for taxes paid in the host country at the corporate level to be deducted from individual income taxes at home. Japan, the United States, Great Britain and Germany permit foreign income taxes paid to be credited against income taxes on income from foreign sources. However, this simply eliminates double taxation; it does not prevent the home country from taxing the income that is exempt from tax in the host country. If the tax rate is at least as high in the home as in the host country, then tax

1/ Such a case is described in Section V. A. 8.
holidays will have no effect on a firm's tax liability, and will in fact merely transfer revenue from the host to the home country. For this reason, some countries have "tax-sparing" agreements, whereby the investor's home country gives credit for taxes that would have been paid in the host country if no tax exemption had been given. Such treaties are negotiated on a bilateral basis and are obviously of key importance in determining the usefulness of tax holidays to investors. Tax sparing agreements were implemented widely during the 1970's, but some countries, notably the United States, have not adopted them. (Robert Antoine, Chapter 2 in Hellawell, 1980, pp. 69-71). Tax holidays should not be offered in the absence of such agreements.

Many of the francophone countries in Africa **stabilize the fiscal regime** applying to important projects at its existing level for extended periods. The members of UDEAC (Cameroon, Central African Republic, Congo and Gabon) offer a stable fiscal regime for 25 years for large projects, as do Chad, Guinea, Mali and Togo. Mauritania, Niger and Upper Volta permit stabilization for 15 to 20 years, and many other countries offer 10 year stabilization conventions. As with lengthy tax exemptions, the cost of this benefit to the Government in the later years may far outweigh its value to the entrepreneur, and it also greatly reduces the government's flexibility in responding to new economic conditions.

Another commonly used type of tax incentive is **accelerated depreciation**, which allows a firm to write off the cost of its capital equipment against its gross revenue in a short period. Like tax holidays, this benefit increases liquidity and reduces risk. However, it also reduces the cost of capital and rewards firms in proportion to the size of their investment, rather than their profitability, thereby tending to encourage larger and more capital intensive industries or methods of production.

An incentive frequently used to encourage expansion of firms is the **reinvestment allowance**, which exempts reinvested income from the corporate income tax. Another way to encourage reinvestment is to tax the portion of tax-exempt corporate profits that is distributed as dividends; Sierra Leone has such a provision. However, this could reduce the supply of equity funds.
E. Infrastructure and Services

Inadequate infrastructure can prevent the establishment of new firms, particularly in the more remote areas of a country. Roads, railroads, and ports are necessary both for obtaining inputs and for selling the output. In some countries, enterprises are forced to provide their own power, or at least a back-up generator to fill in during frequent power interruptions, to avoid the costs associated with loss of production or shutting down and restarting machinery. Inadequate telecommunications systems can slow work, also reducing returns to investment. Finally, adequate water supply and disposal are indispensable for some industries. For these reasons, except for those activities attracted to sources of raw materials or specific markets, modern industries tend to concentrate in major urban and port centers.

Infrastructure in many developing countries has deteriorated in recent years. As public funds have been channeled increasingly into direct investment in industrial and commercial enterprises, many of which have become a steady drain on the budget, and into prestigious new projects, the funds allocated for maintenance of existing networks have been inadequate. Many governments offer incentives to firms that will locate outside of the major centers, in order to improve the distribution of income, slow the rate of rural-urban migration, and avoid the negative externalities associated with large urban agglomerations. Tax incentives may be ineffective, however, in the face of inadequate infrastructure, and import duty exemptions might simply encourage greater use of imports, increasing the advantage of locating near a port. Building and maintaining infrastructure could remove much of the disincentive attached to more distant locations, while at the same time meeting various social or equity objectives, such as improved access to schools and hospitals, wider availability of consumer goods, or rural electrification and sanitation. The costs and benefits of such investments should, of course, be analyzed like any other. Non-economic goals may be taken into consideration, but the costs should be recognized explicitly, since government resources can be used in alternative ways to promote social objectives.
Many countries create industrial estates where firms can buy or lease land furnished with access to some or all of the following: transportation, water, power, sewerage, telecommunications, common service facilities, and factory buildings. However, industrial estates often incur high costs and experience low occupancy rates. As an added incentive, sites are sometimes provided at subsidized prices. For example, the Industrial Parks Authority of Cameroon (MAGZI) develops and rents land granted to it by the government at rates well below the market, thus artificially stimulating the demand for land. Industrialists ask for and get more land than they need, sometimes then subleasing it at higher rates. Adequate infrastructure is necessary to attract factories, but they should be required to pay commercial rates.

Industrial estates have also been used to promote regional dispersion of industry. In order to correct regional imbalances and reduce urban congestion, Japan provided factory sites with water, transportation, communications and electric power supplies, as well as housing, water supply, sewerage, educational and entertainment facilities for the workers. In addition, local governments offered tax incentives to enterprises locating in the new towns. Despite all of these incentives, entrepreneurs still preferred to invest in the larger, more congested urban areas. The experience in India has been similar; estates near the metropolitan centers have been relatively successful, while those in less developed areas have low occupancy rates (Datta-Chaudhuri, Chapter 8 in Cody, Hughes and Wall, 1980 pp. 253-4). Kenya, on the other hand, has had some success in developing local industry in small rural towns through the use of mini-estates, smaller and less costly, and with fewer services than the larger models that have so often proved unsuccessful.

Another service frequently provided by governments is assistance in identifying, financing, implementing, and managing projects. A government or other institution might carry out pre-investment studies of promising projects, so as to provide information on markets, availability of raw materials and supply of infrastructure to interested investors. The Caribbean Project Development Facility, for example, is a regional organization that identifies projects, arranges market studies, assists with feasibility studies and locates interested investors and donors.
fund could be established to finance studies, to be paid back out of the projects that materialize. Funds or development banks are often established to lend, guarantee, subsidize or invest funds in promising projects; these methods are often geared particularly to promoting small enterprises. Once an enterprise is in place, the government or other organization might provide advice on production processes and marketing techniques, or assistance with training. These services should be paid for, at least in part, by the beneficiaries. The imposition of a fee helps to ensure that they will be used efficiently.

F. Employment Incentives

Employment creation is an underlying, if not always explicit, objective of most industrialization programs. The instruments used to seek this goal vary widely, ranging from general incentives for increased investment to subsidies specifically aimed at the use of labor. Many incentives seek to attract capital, which is scarce, in order to employ more labor. However, since many manufacturing processes can be carried out using a range of combinations of capital and labor, an incentive that reduces the price of capital may increase the capital-labor ratio. The range of activities undertaken in a country could also be influenced by distortions in relative factor prices.

In a labor surplus economy, wage rates should be low enough to encourage labor-intensive industries with no further incentives. Neutral incentives to promote investment and growth generally, while leaving the relative costs of capital and labor unchanged, would be preferable from the point of view of productive efficiency. Several arguments might be offered, however, for targeting the incentives directly at labor use. First is the presence of distortions in the market, frequently caused, for example, by minimum wages that fix the cost of labor above its opportunity cost, thereby discouraging its use, or by guaranteed employment or high severance pay, which have the same effect. Many African countries have minimum wages that make wages high relative to those in other regions, and some have restrictions on retrenching workers. In a recent survey of

For a fuller discussion of this topic, see ILO, 1972.
multinational investors, several companies asserted that restrictions on their right to dismiss employees had encouraged them to use more capital-intensive methods of production than would otherwise have been the case (Frank, 1980 p. 87). Removal of the distortions would be the most efficient solution. In Mauritius, for example, firms specialized in export are exempt from the indemnification of laid-off workers. However, such measures might not be politically palatable. A wage subsidy or tax incentive related to labor use could reduce the distortions, although monitoring of payrolls might prove difficult.

A second argument for employment incentives is the presence of externalities. For example, if high wages result from a lack of trained workers, rather than minimum wages, the use of labor in an enterprise could benefit the economy as a whole by helping to create a trained labor force. If workers are free to change jobs, the firm that bears the cost may not capture all of the benefits, and training subsidies would be appropriate.

Another reason sometimes offered for employment promotion is a social one, that employment creation is necessary to improve income distribution, raise incomes and reduce urban unemployment. While income distribution might initially be improved by employment incentives, the promotion of labor use beyond its economically efficient level could well reduce the growth rate of income, thereby worsening conditions in the longer run. Furthermore, creation of more jobs in urban areas might increase the rate of rural-urban migration and lead to even higher unemployment. Finally, it must be recognized that the cost of creating jobs in industry is higher than in other sectors and that given the size of the industrial sector in most African countries, it will be many years before it can have a significant impact on the severe unemployment that exists today. Far more important in the short and medium terms are policies toward agriculture, particularly the maintenance of producer prices at a level adequate to retain the existing agricultural labor force.

In an effort to promote employment, incentives are sometimes awarded on the basis of the number of jobs created or the ratio of labor to capital. In Senegal, for example, enterprises can qualify for
investment code benefits by investing 200 million CFA Francs and creating at least 50 jobs for Senegalese, or simply by creating 100 jobs, and in Benin a minimum of 15 jobs is required to qualify even for the regime for small and medium scale enterprises. Niger allows the creation of 500 jobs to substitute for other criteria relating to size of investment and value added in awarding the convention regime to large enterprises. However, if the concessions themselves reduce the cost of capital relative to labor (e.g. exemption from import duties on equipment), this can dilute the impact of the incentive on employment. Alternatively, a firm might temporarily employ more labor than it really needs, without changing its production process, or use part time employment in order to qualify for the concessions; monitoring would be difficult.

Employment subsidies are the most direct way to promote the use of labor. The difficulty in subsidizing employment for many countries lies in the fact that, unlike tax concessions, subsidies must be explicitly accounted for and financed in the budget. Tax measures adopted to finance the subsidies might have offsetting effects on employment. For example, in some countries, the combined burden of payroll taxes on wages, apprenticeship and social security can be as high as one-quarter of the payroll (Lent, 1967, pp.159-60). The effect of these taxes on the allocation of capital and labor depends on their incidence. If the tax can be shifted to the employees, it will not affect the demand for labor (it may, however, affect the supply of labor, as well as the distribution of income). The use of general tax revenues would eliminate this problem, but might be politically unpopular. Finally, subsidization of labor in qualifying firms ignores the employment created

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1/ In Canada, for example, the Regional Development Incentives Act of 1969 included grants which could reach Can$30,000 per job for new investment or expansion of an existing business.

2/ This could actually be seen as an advantage, since it requires explicit recognition of the cost of the program.

3/ Lent found combined ratios of these taxes to the payroll in 1969 of over 25% in Algeria and Guinea, 15-20% in the CAR, Congo, Ivory Coast, Mali, Togo and Upper Volta, and around 10% in Burundi, Chad, Gabon, and Senegal. Payroll taxes alone ranged from 7% to 8%.
indirectly by the activity through its purchases of raw materials and intermediate goods. Estimating and subsidizing indirect employment would probably be administratively impossible (and expensive), and yet the indirect effects might be at least as important as the direct ones (Usher, 1977, p.135).

Alternatives to a subsidy could be to reduce the level of payroll taxes or to allow an extra tax deduction or credit based on wages or on training costs. In the Philippines, for example, the total cost of direct labor and half of training expenses (up to a limit) are tax deductible.

A final way to promote employment might be to eliminate the bias against small and medium scale enterprises (SMEs) created by the fact that they are often excluded from the full range of investment code benefits. Smaller enterprises are often more labor intensive than larger ones, and equal treatment could reduce the capital-labor ratio of the industrial sector as a whole. Although SMEs are often eligible for some benefits, these are usually less favorable than those awarded to larger enterprises, and the administrative requirements alone might discourage SMEs from applying.

G. Interest Rates 1/

Interest rate subsidies are frequently used to promote certain sectors or types of investment. For example, many central banks set lower discount rates for investment in agriculture or small scale enterprises. However, low interest rates reduce the price of capital relative to labor and might encourage more capital-intensive investment than would otherwise be the case. Furthermore, low rates make lending less attractive to banks and may lead to an excess demand for and rationing of credit.

More broadly, low or negative real interest rates in some countries may have reduced the level of savings or prompted savers to place their money abroad. Higher interest rates might have as much effect on increasing the availability of capital for investment as many of the other incentives presently being employed.

1/ Interest rates are of key importance in many countries. They are, however, beyond the scope of this paper and are therefore mentioned only.
VI. SUMMARY AND CONCLUSIONS: SOME PRINCIPLES FOR INCENTIVE SYSTEMS

Developing countries have used a wide variety of incentives to attract industrial investment. One of the most important incentives is protection from competition, or guaranteed markets, generally accomplished with tariffs and quantitative restrictions that prohibit or limit competing imports. Trade policy is not covered in this paper, but it must be noted that its influence on both the level and the structure of investment is probably greater than all other economic incentives combined. While protection of infant industries may be justified for a limited period, protection can perpetuate industries whose true cost to the country is greater than their benefits. It also permits costs to rise and reduces the level of efficiency. Administered prices, which have been adopted in many countries to restore the control over prices that would normally be exerted by competition, lead to further inefficiencies and distortions in the structure of production.

A number of incentives have been adopted over the years in an effort to compensate for the inefficiencies and distortions stemming from
shortcomings in various policies (such as those dealing with trade and exchange rates) and institutions. Although the best way to deal with the distortions would be to remove them, this might not always be possible, and an argument can be made for using incentives to compensate, for example, for high labor costs resulting from minimum wages and social legislation. In addition, incentives can be used to increase the rate of return to investors in cases where some of the returns from the investment would flow to the country as a whole and to compensate for market failures (e.g. to support infant industries). However, the incentives commonly used in many countries, and the criteria by which they are awarded, often lead to more, rather than fewer, distortions.

The criteria used by different countries to award incentives fall into four categories (Usher, 1977, pp.128-30). The broadest possible method is to grant concessions to all new investment. This method might increase total investment in the country, since it would raise the rate of return to all projects, pushing some marginal ones over the minimum required without discouraging others. The drawback to this method is its high cost to the government, unless taxes raised from the induced investment after the concessions end make up the difference. Experience indicates, however, that the typical incentive packages offered to investors have had little or no effect on the level of investment, implying that the lost tax revenues are in fact a real cost to the economy.

A second selection method is to restrict the concessions to a limited number of industries believed to be of particular importance to the country. However, promotion of particular sectors or industries implies the relative discouragement of others (usually agriculture). In making such a choice, a government implicitly assumes that it can identify the areas of a country's comparative advantage. This is not an easy task, particularly in an economy where previous interventions have so distorted prices that they cannot be used as an indication of value, and there is a risk that areas with significant potential may be omitted from the list to be promoted. Even in a country like Japan there is no agreement on the extent to which the government has been successful in picking winners.
The third method used to award investment incentives is that of the committee with only vague guidelines, such as the "good of the country," or consistency with the national development plan. This method might be the least costly in terms of foregone revenue, in that it might be able to restrict concessions to those investments that would not be made otherwise, but the information and skill requirements for such a committee to succeed, and the possibilities for abuse, would be enormous.

The fourth method is to screen projects by certain characteristics, such as size, job creation, increased domestic value added, or improvement in the balance of payments. In fact, these criteria really all represent the desire for economic growth in a way that uses the country's resources (including human resources) as efficiently as possible. Many incentive packages, however, fail to list efficiency as a criterion for awarding concessions. Even in promoting non-economic, i.e. social or political, goals, it is still in the country's interest to achieve these goals as efficiently as possible.

The easiest way to identify economically efficient investments would be to use the economic rate of return as the main criterion for selecting projects that are to receive special incentives. Entrepreneurs base their decisions on the financial rate of return to their investment, but the Government is more interested in the project's economic rate of return, or its impact on the economy. The economic rate of return might differ markedly from the financial rate of return due, for example, to minimum wages, training, administered prices, or tariffs, and incentives could be used to bring the signals to investors more closely in line with the interests of the country, i.e. to reduce the disparity between the financial and economic rates of return. Most other criteria are simply a way of guessing what the economic rate of return of an investment would be. Thus the employment criterion implicitly tries to compensate firms for wages that are higher than their opportunity cost (although the instruments used often subsidize capital rather than labor). Instead, shadow wages could be used to calculate the rate of return, and appropriate compensation awarded. The size criterion assumes that the largest investments will have the greatest positive impact on the economy, but this will not be the case if they do not...
Small enterprises, often ignored by the incentive system, are probably the most efficient resource users in many developing countries. The value added criterion implicitly assumes that domestic value added is the best way to measure economic growth, but it is rarely specified that value added should be calculated at world prices. If domestic prices are used, a high value added might simply reflect high levels of effective protection and could mask a low or even negative economic value to the country. Concessions might in this case be awarded to the very firms that already have the greatest incentive and that are least suited to the country's resource endowment. Use of an economic rate of return criterion would reveal such cases, and it would also make explicit the economic trade-offs involved when using other criteria, including social or political ones, for project selection.

Given the decision to promote investment, the choice of instruments is critically important to a country's welfare. In many countries the concessions offered to investors have encouraged a type of investment that is ill suited to the country's comparative advantage and sometimes inconsistent with the government's objectives. In countries endowed with abundant unskilled labor and scarce capital resources, investment codes often offer exemptions from import duties on capital inputs, accelerated depreciation and other concessions that lower the price of capital relative to that of labor. They favor large projects, relatively intensive in the use of capital and imported inputs, and thus in relative terms discourage the use of labor and the production of intermediate goods. On the labor side, interventions by the government, in the form of minimum wages or labor legislation, increase, rather than reduce, labor costs. Many of the industries that have evolved in response to these distorted price signals can survive only as long as the concessions continue. Governments thus find themselves supporting on a permanent basis industries that are economically inefficient and that may even represent a net drain on the economy. More broadly, the policies that encourage investment in industry often do so at the expense of investment in agriculture, creating further distortions in the structure of production. This is a high price to pay for industrialization in countries where the very scarcity of resources argues forcefully for their use in the most productive manner possible.
A second cost of incentive packages is the revenue foregone by the government when it awards tariff and tax reductions, exemptions and holidays. This cost is not always recognized, since it does not appear in the budget, and it is difficult to measure, since to the extent that the incentives induce investment that would otherwise not have taken place, there is no loss. However, it is nonetheless important, since it represents government expenditures foregone.

If the government's objective is to stimulate investment in general, this can best be done not through the investment codes typically found today, but by broad fiscal, monetary and exchange rate policies that will improve the climate for savings and investment, while remaining neutral among sectors or types of investment (e.g. industry vs. agriculture, export vs. import-replacing, intermediate vs. final goods, capital vs. labor intensive). Failing broad policy improvements, investment codes should offer neutral incentives, such as value added subsidies or tax credits. More specialized incentives can be geared to overcoming existing distortions or market failures or to account for externalities, i.e. to ensure that economically viable projects have financial rates of return high enough to attract investors. Creation of new distortions as side effects of the incentives can be minimized by targeting the incentives as directly as possible. Thus, measures to promote employment should do so directly (e.g. by a training subsidy or tax credit for employment to correct for wages above the market level), not by promoting the use of capital in labor-intensive industries (e.g. by allowing accelerated depreciation or duty-free equipment imports as a function of the number of jobs created). At least one African country is revising its investment code to eliminate the most distortionary incentives, such as import duty exemptions for intermediate inputs, and substitute a value added subsidy based on the wage bill for local labor. Similarly, incentives for investment in less developed areas could include provision of infrastructure or training subsidies, which attack the constraints directly, rather than duty free imports, which may actually encourage location near a port.

Incentive systems should be as simple as possible. Most investment codes allow some discretion, both in the approval of
applications and in the size of the benefits awarded. The lack of
automaticity implies a good deal of time spent in decision-making and may
cause confusion, rather than interest, among investors. Furthermore, a
substantial amount of monitoring would be required to ensure that
enterprises fulfill the conditions imposed on them. The amount of trained
manpower necessary to carry out these tasks adequately is a severe burden
in countries where this type of expertise is scarce and could be used far
more productively in other capacities. One single concession, whose value
to the investor could be easily calculated, might prove the most effective
means of attracting investment. A subsidy or tax credit based on criteria
that reflect the government's objectives would serve this purpose.

The final and most important point to bear in mind is that
perhaps the main determinants of investment are those beyond the direct
and immediate control of the government. These include political and
economic stability, adequate markets, and availability of inputs. Other
important incentives, over which the government has greater control, are
non-discriminatory treatment for private, including foreign, investment,
favorable terms for the repatriation of profits, and freedom from
burdensome controls. These factors depend upon broad economic and
legislative policies, not on special inducements offered to selected
investors. They establish the basic investment climate, and without them
all other incentives are likely to prove fruitless.
NOTES AND QUESTIONS

1. What methodology does Galenson use to justify her recommendations? Does it persuade you that China ought to adopt them? Why or why not?

2. No doubt if one asked Galenson about her paper she would respond that hers concerned only technical matters: If a country desires to attract foreign private investment, these constitute useful incentives. That is, she would argue that she only discusses means, not ends. Is that the message that the reader gets from her paper -- no matter how often it repeats that statement?

3. To test the applicability of Galenson's proposals for China, what research do you believe it necessary to undertake?
Foreign Private Investors and the Host Country

ROBERT B. SEIDMAN

THE THIRD WORLD HAS a gaggle of laws purporting to regulate the relationship between the host country and the foreign private investor. This article aims to provide a framework for assessing these codes from the perspective of a developing country.

"Investment code" has three different meanings. Originally, it meant a code that, by placing constraints on the action of the host country, aimed to protect the foreign private investor (nowadays, read "transnational corporation"). These I denote here as investor protection codes. Second, in its most common meaning, "investment code" meant a law offering both protection and inducements to prospective foreign investors. I continue to use that term to denote those laws. Finally, some developing countries enacted statutes designed to place restraints on most foreign private investment, while at the same time offering inducements to limited, selected sorts. These I denote investor control codes.

Each of these three sorts of codes purported to help alleviate poverty in the less developed world. We can assess proposed laws in two ways. First, solutions rest upon explanations for the difficulty they aim to solve. A bridge's design rests upon theories of mechanics and engineering. A law, too, must rest upon an explanation of the difficulty the law purports to ameliorate. We can test our three different sorts of codes by examining and testing the explanations for poverty upon which they purport to rest.

Second, every law has certain costs and benefits. We can assess the relative worth of these laws in terms of their anticipated and (where known) their actual consequences.

In this article we examine these different codes from these two perspectives. With respect to each, we discuss its theoretical underpinnings, its content and its probable and (where evidence exists) its actual, consequences.

Theoretical justification

During the imperialist night, the nominally independent countries of Africa, South America and Asia maintained "open door" policies towards foreign enterprise. So did the several colonies, although there the doors usually stood open only to capital from the imperialist power. Its proponents justified the open door policy by arguing that only the exploitation of colonial natural and human resources could solve the problems, not of the colonies, but the metropole. Following Joseph Chamberlain, Lord Lugard said that Britain had a dual mandate: to exploit the colonies for the benefit of the home country, and to act as trustee for colonial peoples. Following world war II, the winds of change blew away that frankly exploitative ideology. A new one replaced it.

Capitalist theory explained less developed country (LDC) poverty by the relative lack of natural resources, trained manpower, modern technology, and capital. The LDCs could not do much about changing their natural resource endowment. At a blow, however, foreign private investment seemed to fill the three remaining gaps. Foreign entrepreneurial capital came accompanied by high technology and managerial resources—not to speak of marketing and procurement know-how and credit sources. Capitalist economic theory therefore perceived in foreign private investment the principal engine for development. During the imperialist era, it seems the open door benefitted the metropole. Now capitalist theories suddenly discovered that it benefitted the former colonies and client states.

The nationalist politicians in the new nations spoke with radical

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FOREIGN PRIVATE INVESTMENT

tongues. Some less developed countries had nationalised foreign private investment—the Soviet Union, Mexico during the 1930s, after 1951 in Iran, Egypt, Indonesia, Guatemala and Cuba. Many of these countries enacted exchange controls, import licensing provisions, immigration controls and other measures they believed necessary to control their economies. Everywhere in the poor countries, the open door seemed about to slam shut.

Faced with that rhetoric and those controls, the great corporations, their lawyers and governments looked worriedly at the future. They mounted a major campaign for guarantees against state interference with investment. “Many economists”, they said, blamed the slowness of private capital to invest in the LDCs on “the feeling, backed by incontrovertible historical fact, that sound, long term investment in emerging, highly nationalistic, sensitively sovereign nations is subject to unusual political risks of discrimination or taking without prompt, adequate and effective compensation. This evokes an almost omniverous desire for protection on the part of the foreign investor.” To obtain the guarantees they demanded, they followed a four-pronged strategy: investor protection conventions, for US investors, the post-world war II Friendship, Commerce and Navigation treaties, constitutional guarantees against expropriation, and investor protection codes.

Forms of investor protection

Investor protection conventions: In the 1950s, capitalist groups stumbled over each other proposing multilateral investment protection codes. In general, these only laid down norms for the behaviour of host countries, to prevent them from interfering with the “rights” of foreign investors. Most of them required the host country to guarantee non-discrimination between foreign and local enterprises, to promise not to expropriate foreign investment without prompt, adequate and effective compensation, and to agree that the host government would not unilaterally breach a contract between it and a private investor. Lord Shawcross excused their one-sided thrust:

The quid pro quo for the borrowing State’s undertaking is, in fact, in the English vernacular, the provision of the ‘quids’, that the capital importing countries in return for agreeing to abide by the generally recognized procedures of international law, will receive more private

investment and with the capital, the benefits of the technical and commercial skills which go with them than would otherwise be the case. 10

None of these proposed multilateral conventions ever came into force. The U.S. Friendship, Commerce and Navigation Treaties. 11 The United States emerged from world war II as the new industrial colossus, astride the world in aid of its entrepreneurs' search for new investment opportunities. Its foreign policy responded to their demands for protection. The vehicle lay at hand in Friendship, Commerce and Navigation treaties (FCN treaties).

FCN treaties constitute the traditional framework for consensual international relationships. Their content has varied from time to time, depending on contemporary needs, the usages of countries, and policy objectives. 12 After world war II, they became the centrepiece of U.S. foreign economic policy, taking the form of bilateral investment agreements. 13

As their preambles sometimes so proclaimed, 14 these treaties emphasized mutuality. A Nicaraguan company investing in the United States had the same rights and privileges as a U.S. company investing in Nicaragua. In Anatole France's celebrated bon mot, both rich and poor may sleep under the bridges of Paris.

The new FCN treaties protected foreign private investment in a variety of ways. Unlike pre-world war II FCN treaties, modern ones used half the treaty to describe the protections afforded to foreign investment. Early FCN treaties did not protect corporations; now they did so specifically. 15 They contained guarantees against expropriation and discrimination. 16 The treaties required "national" treatment of investment — i.e. Nicaragua agreed to treat U.S. investment in Nicaragua as it treated domestic investment.

The FCN programme achieved only marginally better acceptance than the multilateral conventions. By 1981 the United States had entered into only 23 FCN treaties since 1948. 17 Of these 23 countries, only fourteen

10 Quoted in Snyder, supra, n. 6 at 482.
16 Supra, n. 14, Art. VI (4).
17 Department of State, "Friendship, Commerce and Navigation and Similar Treaties or other International Agreements in Force in Whole or in Major Part", revised December, 1910, 20 In't Leg. (Amsterdam) 683 (1911). One of the 23 FCN treaties in force, with Surinam, the State Department claimed only as derivative form and FCN treaty with its Dutch colonial masters.
FOREIGN PRIVATE INVESTMENT

were LDCs. The United States signed its last FCN treaties in 1966 (with Thailand and with Togo). In both of these cases the guarantees to U.S. investors had become significantly weaker. Their preambles no longer proclaimed them treaties aiming mainly at investment. Instead of the stringent measures of payment specified in the Nicaraguan treaty, for expropriated property these treaties only guaranteed the payment of "just" compensation in accordance with the principles of international law.

With her former colonies, however, Britain used an alternative and seemingly more successful device, the constitutional guarantees against expropriation without compensation.

Constitutional provisions: During the independent process for the former British colonies of Africa and elsewhere, the Colonial Office developed what amounted to a standard-form constitution. That included a set of so-called fundamental human rights—freedom of speech, religion, association, and so forth. They included also—as a fundamental "human" right—a guarantee against the expropriation of property without compensation.

Investment protection codes: Finally, some of the more subservient U.S. client states did not need the spur of multilateral convention or constitution to meet TNC demands for an open door. Liberia, for example, introduced its Investment Incentive Code, 1966, with a preamble that summarised the capitalist theory of development:

(a) Recognising the great benefits which have come to the Nation from the Open Door Policy which has provided freedom of movement of capital, including the repatriation of dividends, profit and capital; and

(b) taking into account the great incentive to saving and investment which a reasonable tax structure provides in the absence of hampering restrictions; and

(c) convinced that a sound currency and monetary system free convertibility and the absence of artificial regulatory pressures are necessary and conducive to the maintenance of confidence in the economic progress of Liberia; and

\[\text{[References omitted for brevity]}\]
(d) as further evidence of a desire on the part of the Government of Liberia to co-operate to the fullest extent with foreign and domestic investors in Liberia to the mutual advantage of Government, people and the participants;

(e) and in further testimony of a deliberate desire to encourage the maintenance of an atmosphere of mutual confidence and common interest . . . [It is enacted etc].

Consequences

By urging a minimal role for state action, classical laissez-faire theory permits the market’s Invisible Hand to dictate the economy’s shape. Even that theory holds, however, that a market will do that only if competition exists. In no LDC did competition exist in any sector in which a foreign private investor might sink capital. (If competition did exist, no need for the foreign investor would arise). To determine the shape of the economies of the developing countries, in lieu of a very theoretical Invisible Hand, the open door policy substituted the far from theoretical decisions of foreign capitalists. The investor protection codes and treaties tended to ensure continued domination of the LDCs by foreign capital. They constituted a legal expression of naked neo-colonialism and dependence. Most developing countries rejected them in favour of an investment code.

II. INVESTMENT CODES

In most developing countries the governing elites wanted to share in the delights of power and privilege. To do that, they had to reject the open door policy. Their governors did not, however, usually reject the notion that foreign private investment stoked the fires of development. The investment codes reflected this theoretical stew.

Theoretical justifications

Investment Codes ranged from ones nearly as permissive as Liberia’s, or the few other countries that continued to adhere to the open door policy, to codes that seemed to embody most of the provisions of an investor control code. That broad range came out of the theoretical confusion of most third world governments. Given that theoretical confusion, the precise shape of a country’s code reflected the relative power of foreign capitalists, local “radicals” or “socialists”, local entrepreneurs and the local governing elite. / 

Theoretical “Mishmash.” The governments of most developing countries had one foot in vague intimations of neo-classical theory, and the other in equally vague notions of socialism. Most of those governments had no well-articulated theory; some never sounded so incoherent as when they
FOREIGN PRIVATE INVESTMENT

tried to put forward a theory of development. ?? Having no theory, as J. K. Galbraith said, they remained in thrall to long dead economic theorists. At heart, most subscribed to the capitalist theory they learned while young. Some even repeated it in the preambles to their investment codes. ??

To these vague intimations of time past, authoritative institutions added their voices, none more so than the World Bank. In the late 1950s and early 1960s, at or just before the moment of independence for many countries, a Bank mission prepared a book-length report, “The Economic Development of ______.” 28 These consistently preached the necessity for foreign private investment. 26

Opposed to these neo-classical notions of the pervasive importance of foreign private investment stood remembered fears of imperialism. So long ago as 1919, on behalf of “the Negroes of the world”, the Paris Pan-African Conference demanded that governments should regulate investments and concessions in Africa in order to “prevent the exploitation of the members and exhaustion of the natural wealth of the country”. 27 Many African perceived foreign capital as a drain on local resources, not a cure for poverty.

This strain of economic thought took nourishment from the congeries of economic theory that Ann Seidman labelled “transforming institutionalism”. 28 Those theories generally perceived foreign private investment not as the cure but the cause of third world poverty. In every African country some transforming institutionalists offered an alternative to neo-classical theory.

Those claims did not fall entirely unheeded upon elite ears. Just as they cleaved to vague neo-classical economic theories, most third world elites cleaved to vague “socialist” theories. In Africa, socialism rarely had a definition. It subsumed welfare state notions of increased benefits to the

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24 See, e.g. Afghanistan: The Foreign and Domestic Private Investment Law, Official Gazette N. 12 of 20 Feb. 1967, [NW LAWS, supra, n. 22, sec. 16: 2A–1] (Purpose of law “to encourage new private investments by both foreign and Afghan nationals so as to promote economic development and to advance the standard of living in Afghanistan”); see also Pakistan: Ministry of Industries and Dept of Investment, Foreign Investment Guide, sec. 2.1, quoted in Dempsey, infra, n. 6 at 595.


26 See, e.g. Uganda, supra, n. 25 at 40-41; Uganda, supra, n. 42 at 39-40, 56, 234, 267.

27 Quoted in G. Levitt, Pan-Africanism (Lumton, 1992), 131.

28 See A. Seidman, Inaugural Lecture, The University of Zimbabwe [1982, forthcoming in Zambesi (Harare)], Transforming Institutionalism from Gunnar Myrdal through Andre Gunder Frank to Samir Amin.
poor. It also subsumed notions of economic planning and state intervention in the economy.

From this theoretical mishmash of neo-classical and "socialist" notions, there emerged the state capitalist structures, "pragmatic socialism" and "mixed economies" that today characterise most developing countries. Without the rudder of a clear, warranted explanation for poverty (that is, a genuine theory), the third world countries mainly lurched from one pragmatic, hastily drawn programme to the next, and justified themselves either by announcing the glories of the end to ideology, or by giving a label to their confusion and calling it a theory— "Nkrumahism" or "Conscientism" in Ghana, "Humanism" in Zambia, "Ujamaa" in Tanzania. Having no clear explanation for poverty, and therefore without a definable strategy to deal with it, the third world governments instead trimmed their sails to the conflicting winds of power.

The partnership defined by the investment codes. Foreign capitalists, foreign governments, international aid agencies, third world "socialists" of varying sorts, and local ruling class and elite interests competed for the benefits the state could offer. They justified their claims by diverse economic theories. With respect to the issue, whether to admit foreign private capital indiscriminately, elite interest found comfort in transforming institutionalist theory. With respect to meeting local claims for a share of the action, however, the interests of foreign capitalists and local ruling classes and elites sang close harmony in a neo-classical key.

Transforming institutionalist theory would admit foreign private capital into a developing country only where it would demonstrably advance development. Governing elites tended to agree, for practical considerations. The governments of the new countries scratched for revenue. They had to satisfy their own elite's demands for high incomes. They had to satisfy their masses' demands for a share in the welfare cake. At a measure that reduced public revenues, government looked cross-eyed.

The investment codes gave special inducements to approved investments. Every inducement constituted an open or disguised subsidy. If to do business in Ruritania a business ordinarily must pay an income tax, to exempt a particular business from tax constituted as much a subsidy as if the state had paid that business the same amount in cash. Non-financial inducements had the same effect. To exempt a particular enterprise from foreign exchange control amounted to a decision to expend always scarce...
foreign exchange for the benefit of that enterprise. Capitalist theorists therefore faced pragmatic questions: why grant a subsidy to a foreign investor unless we have some assurance that this investment will indeed further economic development? For governments short of revenue and foreign exchange that question seemed unanswerable. Most investment codes therefore extended their benefits not to all foreign investment, but only to those that met specified criteria.

Those limits did not go unchallenged. The 1951 Pioneer Industries Ordinance (Nigeria) extended its benefits to pioneer industries, with a residual catch-all, permitting granting benefits in addition, where to do so seemed "expedient in the public interest". In 1953, the World Bank urged Nigeria to use these powers "in the most liberal manner".

So far as foreign private capital enters a country unhindered it commands the local economy. Governing elites and local ruling classes alike demanded a share in the action. The partners would not, however, share power equally; for "the foreign investor will be acting... as... managing agent." Inevitably, the transnational corporations held the reins of power.

The stew of ideology that nourished most third world governments produced laws relating to foreign private investment that reflected not theory so much as power. Practically every country hastened to provide a "hospital investment climate". Their investment codes, however, ranged from some that seemed hardly different from investor protection codes like Liberia's, to a few that came close to investor control codes.

Provision a "hospital investment climate"

In the early independence period, the poor countries and their advisers thought that their first task lay in creating a "hospital investment climate". Early post-war capitalist theory explained why foreign private investment did not flood into the developing world. In classical capitalist theory, given a free market, capital would seek out profitable investment opportunities wherever they arose. If only the developing countries would remove artificial clogs on their economies, capital would flow to them and they would instantly enjoy the benefits of development. As its main

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32 Meier, supra, n. 6 at 463.
34 Nigeria, supra, n. 25, at 359; see also Mummery, supra, n. 6.
35 See generally—K. Benner, R. S. Seidman.
36 Nigeria, supra, n. 25 at 29. See also Megwa, supra, n. 2; A. Akinsaya, "Host Government Responses to Foreign Economic Control: The Experience of Selected African Countries", 30 ICLO 769 (1981).
37 Ibid., at 353.
38 The World Bank urged the LDCs to take the lead in establishing these unequal partnerships. Id. at 354.
39 Fatourou, supra, n. 13.
developmental function the state must provide a hospitable investment climate, that is, an institutional structure in which capitalists could make free choices about investment.

Investors, like others, act by making choices within a range of constraints and resources thrown up by the milieu in which they act. The resources and constraints of the legal order make up part of that milieu. No single law alone ever induces behaviour. A law against speeding will induce conforming behaviour only if other laws and institutions, physical environment and ideologies support it—the laws concerning police, court activity, and the condition of the roads for example. So also in conditions of development. A lawyer advising a client about the legal atmosphere for investment in Ruritania must examine a wide range of matters: international agreements, commercial law, tax law, industrial property rights (patent, trademarks, copyrights), exchange control regulations, antitrust law, securities regulations, industrial relations law, maritime and shipping law, conflicts of laws, the law of arbitration and commercial dispute settlement, land tenure law, mining law, pollution control law, the law concerning the expropriation of private property, and so on and on—not to speak of institutions like stock exchanges and corruption, physical factors like industrial estates, and the ideologies that influence politics. Of these, governments could do most about the legal surroundings. A hospitable investment climate requires that the various laws all respond to investor needs. To amend colonial statutes to meet those needs became a legal priority. So popular became this programme, that in 1954 the General Assembly appealed to member states to amend their legislation and administrative codes to provide a more hospitable investment climate.

In the late colonial and the early independence periods of the 1950s and the 1960s, many African countries hastened to conform to the United Nations' prescription. They reformed their laws in accordance with the advice of experts from the developed world. Most poor countries went further. They enacted investment codes to induce foreign private investment.

Investment codes: content

Responding to the particular power vectors in each country, the codes varied in three dimensions: the criteria by which they determined which foreign investments qualified for admission to benefits, the processes by which the host country determined which investments would receive benefits, and the benefits granted.

Criteria for receiving benefits. The investment codes varied in the sorts of investments they sought to attract. Some virtually adopted an open door
FOREIGN PRIVATE INVESTMENT

policy. Others imposed a variety of criteria. Some of those responded to claims by local moral entrepreneurs that foreign private investment should only receive benefits where demonstrably of help in the development process. Others responded mainly to the claims of local capital and governing elites for their share of the boodle.

a. Codes without criteria for foreign private investment

So broad did some investment codes cast their net for foreign private investment, that one might as easily subsume them under investor protection codes. Greece's Investment and Protection of Foreign Capital Decree, for example, applied to all foreign capital imported into the country for "productive investment". Some codes that specified criteria also included a catch-all permitting the deciding authority to admit to benefits any enterprise. In Kenya, the minister might do so if he was satisfied that the enterprise "would further the economic development of, or would be of benefit to, Kenya," even if the proposed investment did not meet the other criteria specified in the Act. Before granting their offered goodies, however, most codes required that an investment conform to some criteria.

b. Criteria related to development

Usually the criteria used in investment codes related to perceived difficulties in the local economy: foreign exchange deficits, unemployment, the lack of linkages within the local economy, low technology, high geographical concentrations of "modern" investments, and local dependence upon very few kinds of exports.

44 Ibid., INV LAWS, supra, n. 22, at 22: 2A-1.5.
45 Infra, n. 73.
47 The list of criteria mentioned in the text does not purport to be exhaustive. Mexico, for example, included the following criteria: supplement national investment; may not displace national companies nor enter fields adequately covered by them; the effect on balance of payment; employment generation, considering level of employment and compensation; training Mexican technicians and administrative personnel; backward linkages; extent of financing from foreign resources; diversification of sources of investment and need to promote regional and sub-regional integration; contribution to less economically developed zones; investments not to occupy a monopolistic position; capital structure; supply of technology and contribution to research and development in Mexico; effects on price levels and quality of production; preservation of social and cultural values; importance of the activity involved for the national economy; the identity of the foreign investor with the interests of the country and his ties with economic decision-making centers abroad; and finally, in general, the extent to which the enterprise contributes to the attainment of, and conforms with, the national development policy objectives. Foreign Investment Law, 1973, Art. 13, described in E. E. Bleuel, "The Latin American Development Process and the New Legislative Trends", 10 Georgia Int'l and Comp. L. 323 (1980).
(i) **Foreign exchange.** Except for the oil-rich, the poor countries ached from foreign exchange shortfalls. Without foreign exchange they could purchase neither the capital machinery and equipment required for development, nor the luxury goods their elites demanded, nor in starving times, even the food required to feed their populations. Every investment code admitted to benefits an enterprise that would help the foreign exchange position. It might do this by producing goods for export, by producing import substitutions, or by using few imports as inputs in the manufacturing process.

(ii) **Improving employment opportunities.** Poor countries all suffer severe unemployment. Most codes promised inducements if the new enterprise would provide jobs. The employment opportunities offered by a particular investment depends upon the technology used. As worded, most investment codes did little to push investors into using more labour-intensive technology. A few went the other way.

(iii) **Forward and backward linkages.** A modern, developed economy depends upon specialisation and exchange. In an under-developed economy, in one sector of the economy, a high proportion of economic enterprises tend towards subsistence and self-sufficiency. In the other sector, enterprise tends towards production for export. To reduce this dualism, in a variety of ways investment codes sought to encourage forward and backward linkages between the new enterprise and the rest of the economy. Some gave credit for using locally produced raw materials, for example, for “maximum utilisation of domestic raw materials” and “production of intermediate goods which are used by other industries.”

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21 Pakistan gave favourable consideration to investment using a labour-intensive technology, supra, n. 48. Thailand gave favourable consideration to an investment that had neither a capital- nor labour-intensive technology. supra, n. 49.

22 Kenya: supra, n. 46, INV LAWS, supra, n. 22, sec. 12: 2A–4.6 (investment must contribute to development of key industries or public enterprises); Mexico, supra, n. 47.

23 Afghanistan, supra, n. 30, INV LAWS, supra, n. 22, sec. 16: 2A–1.4; Ghana, supra, n. 49, INV LAWS, supra, n. 22, sec. 4: 2A–1.3; Thailand, supra, n. 49.

FOREIGN PRIVATE INVESTMENT

(iv) Technology transfer. Zambia's Code, as did others, favoured investments "fostering the development of domestic technology". Other codes held out inducements for training local workers in new skills.

(v) Geographical diversification. A number of codes gave credit for locating in rural areas, so as to provide a pole-of-growth in an otherwise neglected spot.

(vi) Economic diversification. The earlier codes provided inducements mainly or even only for so-called "pioneer" industries, justified on the ground that that would diversify the economy. Most later codes made that only one of several criteria.

c. Linking benefits to performance

At one end of the spectrum, some codes showered their benefits upon any foreign investment admitted to benefits. At the other end, some codes sought to link particular benefits with particular criteria. In Zambia, for example, to qualify for relief from customs duty or tariffs, an enterprise had to export a "substantial amount" of its products. An industry investing in a rural area had special facilities available to it from RUCOM, a Zambian parastatal formed to encourage rural industry. Whether the incentives actually induced investment, or merely showered the investor with a gift of tax and other benefits after, for other reasons, he had decided to invest, nobody could know.

d. Criteria aimed at helping the local middle classes

Investment codes served a dual purpose: to aid the economy generally by attracting private foreign investment and channelling it into enterprises helpful to the development of the economy as a whole, and to aid the local

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55 Id. sec. 18(2)(a): Republic of Korea, supra, n. 49; Egypt: Law Concerning the Investment of Arab and Foreign Funds and Free Zones, Law No. 43 of 1974, as amended: (Projects "in need of international expertise"); Pakistan: see Dempsey, supra, n. 6.

56 See, e.g. Zambia, supra, n. 54; Ghana, supra, n. 49; INV LAWS, supra, n. 22, sec. 4: 2A-1.3; Jamaica, supra, n. 49, INV LAWS, supra, n. 22, sec. 8: 2A-3.1; Pakistan, supra, n. 48; Republic of China (Taiwan), in Dempsey, supra, n. 6; Mexico, supra, n. 47.

57 See, e.g. Ghana, supra, n. 49; Zambia, supra, n. 54; Egypt, in Dempsey, supra, n. 6; Greece, supra, n. 48.


59 See, e.g. Pakistan, supra, n. 48, cited in Dempsey, supra, n. 6, at 595.

60 Zambia: supra, n. 54, sec. 21.

61 Id. sec. 23; Mummery, supra, n. 6 at 7.

62 Infra, text following n. 110.
elite by ensuring them a share of the action. They protected middle class interests in two ways, by requiring local equity participation, and by ensuring that foreign codes did not compete with local capital.

(i) Local equity participation. To qualify for benefits—in some investment codes, even for entry into the country—most investment codes viewed favourably the foreign investor having a local partner or other local equity participation. Capitalist economists justified the requirement as reducing the amount of foreign exchange outflow in profits, interest and dividends. At the end of that road lay a denial of a need for any private foreign investment. To require local participation may act as a severe disincentive to investment. Why should a foreign investor share his profits? Moreover, local savings invested in an enterprise dominated by foreign capital meant that much less locally mobilised savings for other investments, and that the foreign investor brought in that much less new capital. Politicians more frequently justified requiring local participation by appeals to economic nationalism. That identified the national interest with a profitable investment made by a few wealthy nationals, an identification not self-evident. Whatever their other consequences, local participation rules cemented the alliance between local entrepreneurs and foreign investors.

(ii) Protection of local enterprise from competition. The investment codes frequently excluded from benefits of even entry into the country foreign investments that threatened domestic industry. Some identified specific areas of industry that they reserved entirely for local entrepreneurs. Others extended benefits only to “pioneer” industries—i.e. enterprises that by definition did not

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63 Mexico: A. A. Vizzaino, "[Mexico's] Law on Foreign Investment", 1 Ga. J. Int'l and Comp. L. 33 (1977) (Mexican Code had the purpose of "increasing Mexican enterprise without cutting off the flow of technology and capital from abroad").

64 See, e.g. Republic of Korea, supra, n. 49 (investments with 50 per cent local equity participation given preference); Egypt: A. Abdel-Meguid, "Egypt's Policy Towards Foreign Investments", 10 Vanderbilt J. Transnat'l L. 97 (1977) (no strict percentage of local equity required, except in construction industry); G. G. Bushell, Note, "The Development of Foreign Investment Law in Egypt and Its Effect on Private Foreign Investment", 10 Ga. J. Int'l and Comp. L. 301 (1980); J. Salaceus, "Egypt's New Law on Foreign Investment: The Framework of Openness", 9 Int'l Law 647 (1975); Republic of China (Taiwan), cited in Wam, supra, n. 8 (no specified minimum percentage of local equity required save in specified sectors—e.g. basic metals manufacturing (60%), pork processing (50%); the Investment Screening Committee may grant a waiver). Mexico, supra, n. 47; Megwa, supra, n. 2 (Nigeria).

65 Id., supra, n. 6.

66 Id. at 485.

67 Id. at 487.

68 Frequently retail and wholesale trade and real estate-favoured areas for investment by local entrepreneurs. Megwa, supra, n. 2 (Nigeria).
FOREIGN PRIVATE INVESTMENT

threaten local ones. Still others denied benefits to investments that would compete with domestic industry in local or overseas markets, or compete for materials or even for credit. Neo-classical economists argued that the provisions could only serve to dry up foreign private investment.

Decision-making: discretion versus rule

Whatever the criteria, in the end all the investment codes left to some decision-making body discretion whether or not to admit to the benefits of the code a particular foreign private investment. They did not grant an entitlement to foreign investors, but only a discretionary privilege. By seeking to reduce the role of discretion, the rule of law responded to entrepreneurial interests in reducing risks of unforeseen state action. To the extent that the codes reflected entrepreneurial interests, one would have thought that the codes would have determined benefits not by discretion but rule. Why this paradox?

As we have seen, many codes imposed no more precise criterion than that the proposed investment would further the economic development of the country. Some codes which specified more precise criteria nevertheless included a catch-all general category. Most codes tried to specify the criteria with greater precision. Few succeeded. Practically every investment code left decisions about eligibility for benefits to official discretion.

That every investment code in the end lodged the decision about eligibility in administrative discretion did not result from legislative perversity. The question of articulating a rule for development investment arose in several ways. For example, the development corporations that existed in many countries had the task of investing in projects that would aid economic development. At best, the development corporations acted under a set of criteria analogous (indeed, sometimes identical) with those

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70 supra, n. 58; see also Egypt, supra, n. 63 (foreign investment allowed only in specified sectors); Afghanistan, supra, n. 50 (incentives available only for investments in specified sectors); Ghana, supra, n. 49, INV LAWS, supra, n. 22, sec. 4: 2A-8.1; Mexico, supra, n. 47 (some sectors reserved for State investment, others for local private investment).

71 See, e.g. Republic of Korea, supra, n. 49; Zambia, supra, n. 54, sec. 7 (established industry in Zambia may object to admission of a potential competitor); Ghana, supra, n. 49, INV LAWS, supra, n. 22, sec. 4: 2A-7.3; Nigeria, supra, n. 38 (1971), INV LAWS, supra, n. 22, sec. 17: 28-4.1; Mexico, supra, n. 47.

72 Meier, supra, n. 6 at 485.


74 See, e.g. Kenya, supra, n. 46, INV LAWS, supra, n. 22, sec. 11: 2A-4.1 (Minister may grant priority status if satisfied that enterprise would "further the economic development of, or would be of benefit to, Kenya"); Zambia, supra, n. 54, sec. 11 (Minister to grant manufacturing licence if satisfied "the proposed enterprise is in the best interest of Zambia").

75 See, e.g. Mexico, supra, n. 47, Nigeria. Text at n. 34 (benefits granted if "expedient in the public interest").

76 Zambia: supra, n. 54, sec. 18 (relating to availability of incentives).
stated in the investment codes, that is, a shopping-list of desirable attributes of investment to which the decision-makers should attend.\(^7^7\)

The failure to articulate a clear rule arose because investment decisions had many possible alternative solutions. Suppose a rule said, "The Board shall approve as eligible for benefits an investment whose feasibility study indicates that it will likely produce net foreign exchange earnings." In deciding whether to grant eligibility, the Board needed to answer only a single question, Yes or No. If, however, the rule identified a number of factors that the Board must balance against each other, the answer to no single question would determine the outcome. The question had multiple possible outcomes. Whatever the formal criteria, the authorities had to assign a priority to the proposed investment. Nobody could do so by staring myopically at the single proposed investment. Priorities rested upon balancing this proposal against others, to determine how this fitted into the entire pattern of economic development. In short, assigning a priority to a proposed investment became impossible without an economic development plan.

Economic development planning rested upon a gaggle of discretionary decisions, each of which required consideration of all the others. Properly to state the criteria planners should use in deciding upon an investment programme required volumes. So did a statement of the balancing processes by which planners ultimately decided which investments to approve. As a result, most planners advocated long-term, medium-term and short-term plans. These would show concretely the results of the balancing of criteria for investment by indicating in physical terms what investments the planners deemed desirable, and in what order of priority. Only in the planning process could the planners see the whole problem. That could not happen if the planners considered projects one by one. Only with a long-term investment strategy worked out in physical terms and articulated in a plan, could anybody decide whether a particular proposed enterprise ought to receive priority rating.

Few developing countries had the sorts of economic plans that would help make that sort of a decision. Some neo-classical economists argued that poor country incapacity to plan required resort to "market" mechanisms.\(^7^8\) Most LDCs had what they called development plans. The capitalist ideology that most of them espoused, however, taught that the market allocated resources more efficiently than could any plan. In most developing countries, the plan amounted to little more than a shopping-list of public sector projects. No poor country following neo-classical precepts

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\(^7^7\) See Seidman, supra, n. 1 at 263.
FOREIGN PRIVATE INVESTMENT

had a stated industrial strategy, nor a long-term perspective plan expressing it. Without such a plan, nothing existed against which a foreign investment board might assess the priority of a proposed investment. Forced to proceed case by case, incapable of balancing the desirability of the proposed investment against other possibilities, inevitably the deciding authorities had to assign priorities by discretion, not rule.

Unlike constrained, officials use discretion to maximise benefits and minimise strains upon themselves and their bureaucracy.79 The greater the benefits a potential investor could receive from approval, the greater the incentive to offer bribes to the decision-maker. In every country, corruption festered most at those points at which decision-makers had discretionary power to distribute public favours to private entrepreneurs,80 and none more so than where the subsidies did not appear in any public accounting. A tax holiday constituted a subsidy paid in public monies that appeared in no book of accounts.

Various devices existed that might have helped constrain discretion. Specifying criteria more precisely at least directs decision-makers to attend to the sorts of data specified. Institutional devices can also lower the probabilities of corruption and encourage: accountability by the decision-making body, openness, written decisions, collegial decisions, rights of appeal, and so forth. Very few of the codes tipped their hat towards accountability—an Economic Planning Board,81 a specially created board,82 in Lesotho, the Pioneer Industries Board,83 in Ghana, the Industrial Investments Board. Others used the highest governing body.84 By permitting an appeal to some higher body or official, a few investment codes increased the number of decision-makers and thus reduced the chances of corruption.85

Some investment codes, however, seemed written to ensure non-accountability. Even when a code specified criteria, a catch-all frequently negated it. Lesotho’s code added a catch-all clause that ensured discretionary control.86 Zambia’s Industrial Development Act, 1977,

79 Chambliss and Seidman, supra, n. 72.
80 R. B. Seidman, "Why People Obey the Law: The Case of Corruption in Developing Countries", 5 Brit. J. Law and Society 45 (1978); Negeva, supra, n. 2 (Nigeria).
81 Kim and Rogers, supra, n. 49.
83 Lesotho; supra, n. 43, sec. 3; supra, n. 63 (General Authority for Investments); Thailand, in Dempsey, supra, n. 6 (Board of Investment).
84 Jamaica, supra, n. 49, INF-L.\h, supra, n. 22, sec. 8: 2A-4.1 (Governor-in-Council); Nigeria, supra, n. 81 (Federal Executive Council).
85 Afghanistan, supra, n. 30; INF-L.\h, supra, n. 22, see: 2A-4.1. Zambia permitted an appeal to the Minister to reconsider his decision. Supra, n. 34, sec. 9 Botswana permitted an appeal to the President from a denial of an application. Industrial Development Act, 1969, No. 22 of 1968, INF-L.\h, supra, n. 22, see: 2A-4.1.
86 Supra, n. 43, sec. 7(1)(c); see text, supra, at n. 73.
enumerate specific criteria, as though to ensure against public accountability however, the Act specifically provided for secrecy concerning applications. 87 (By contrast, Afghanistan required publication of agreements between investors and government). 88 None required the authority to state reasons for its decision.

All the investment codes endowed deciding authorities with discretion to grant benefits to selected individuals. That constitutes a classic device by which the legal order places state power at the service of those who already have power and privilege. 89 On paper, the benefits they had to distribute seemed substantial.

**Benefits**

Investment codes rested on neo-classical economics' great simplifying assumptions: people act in response to economic motivations alone. To explain behaviour, we need only to examine the costs and benefits of alternative potential courses of action. Provide adequate economic incentive for foreign private investment, and potential investors will queue up. Obedient to that assumption, investment codes provided incentives of three sorts: to reduce non-business risks, to reduce costs and business risks, and to increase net profits. Each is discussed in turn.

(a) Reducing non-business risks. Some countries had in place guarantees against a spectrum of non-business risks—for example, a constitutional provision against expropriation, or an FCN treaty. Others included analogous provisions in their investment codes.

These protections ranged broadly in both scope and rigour. Investors wanted assurances that the state would not interfere with their power to make decisions about the enterprise, to enjoy profits, and ultimately to repatriate the capital. The codes accordingly frequently contained provisions: against expropriation without compensation, 90 against discrimination vis-à-vis national or other foreign capital, 91 permitting selection of high-level staff without regard for immigration laws and facilitating obtaining work permits, requiring government bodies to purchase locally-produced goods, 92 providing for the remission home of salaries of expatriate staff, 93 and assuring the enterprise that foreign

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87 Zambia, supra, n. 54, sec. 10.
88 Afghanistan, supra, n. 50, INV LAWS, supra, n. 22, sec. 16: 2A-4.1.
89 Chambis and Sennman, supra, n. 73.
90 See, e.g. Egypt, supra, n. 63; Republic of China (Taiwan), in Dempsey, supra, n. 6 (no expropriation for twenty years); Akinitama, supra, n. 2 at 770.
91 See, e.g. Afghanistan, supra, n. 50, INV LAWS, supra, n. 22, sec. 16: 2A-4.1.
92 Fatouros, supra, n. 13.
93 See, e.g. Thailand; Dempsey, supra, n. 6.
94 See, e.g. Afghanistan, supra, n. 50, INV LAWS, supra, n. 22, sec. 16: 2A-4.1; Chan, supra, n.
95 INV LAWS, supra, n. 22, sec. 4: 2A-3.1.
FOREIGN PRIVATE INVESTMENT

exchange and import controls would not cripple bringing in necessary inputs. All permitted some repatriation of profits and capital.

These codes varied, however, in the extent of these guarantees. The amount of compensation guaranteed in the event of expropriation varied from "adequate" compensation in the Guiana code to Papua New Guinea's milk-and-water assurance of "payment of compensation as defined by law". Some codes permitted unlimited repatriation of profits, interest and capital, even if the enterprise earned no foreign exchange. Others permitted repatriation of capital only after a stated period of years or only a stated portion of profits.

(b) Cost and business risk-reducing measures. The various codes offered a range of devices aimed at reducing the cost and risk undertaken: unlimited import quotas, remission of import duties, infrastructure and sites in industrial estates, credit or equity participation usually through a Development Corporation. Kenya outlawed strikes against approved foreign enterprise. Botswana authorized the President to grant monopoly status for up to four years. These cost-reducing measures usually required the host country to make out-of-pocket "up front" payments—that is, payments made before the foreign private investment began to earn any benefits for the host. By contrast, tax credits (the principal form of profit-increasing measures) amount to a subsidy paid to the enterprise, but they do not come out-of-pocket for the host country. Countries varied widely concerning how much they could or would pay to induce foreign private investment.

c) Profit-increasing measures. The principal profit-increasing measures con-

95 Fatiuros, supra, n. 13.
96 Ghana, supra, n. 49, INV LAWS, supra, n. 22, sec. 4: 2A–5.
98 See e.g. Afghanistan, supra, n. 30, INV LAWS, supra, n. 22, sec. 4: 2A–5.1; Egypt, see Abdel Meguid, supra, n. 63; Dempsey, supra, n. 6.
99 Fatiuros, supra, n. 13.
100 See e.g. Republic of Korea, see Kim and Rogers, supra, n. 49.
101 Thailand, see Dempsey, supra, n. 6.
102 See e.g. Ghana, supra, n. 49, INV LAWS, supra, n. 22, sec. 4: 2A–5.1.
103 Kenya: Trade Disputes Act, 1965: Egypt, supra, n. 63 (foreign investors need not distribute a fixed portion of earnings to employees, or place employees on Board of Directors, or hire employees in order of registration, as law requires of other industries).
sisted of various forms of income tax remissions. These have received wide scholarly attention and do not require independent analysis here.101

Consequences

By almost any criterion, in most countries, the investment codes failed in their purposes. They neither increased the amount of foreign private investment, nor did they succeed in channelling it into desired sectors.

Measuring the success or failure of an investment code poses serious difficulties. Had no investment code existed, how much investment would have occurred? Establishing a causal nexus between code and investment seems almost impossible.

In very few places however did foreign private investment match expectations.106 Every economic development plan in the poor countries specified the amount of foreign private investment expected. Not one came within whistling distance of the planned amount. Between 1970 and 1974 Kenya realised only five per cent of its planned foreign investment,107 despite the Foreign Investments Protection Act. 1964, the Treaty between the Federal Republic of Germany and Kenya Concerning the Encouragement of Investments, and the provisions of the Kenya Trade Dispute Act, 1965 (outlawing strikes against protected industries). Between 1971 and 1975, Tanzania’s private investment hit only 13.5 per cent of anticipated amounts.108

Nor does it appear that the codes served their purpose of channelling foreign investment into the desired sectors. Zambia had an investment code since 1977. What small foreign private investment had come to Zambia continued to invest along the line of rail. In Africa as a whole, four-fifths of U.S. private foreign investment went to South Africa.109 No evidence exists that the investment codes produced more jobs than might otherwise have come about, or more export-oriented industry.

Why the failure of the investment codes? No research has given a dispositive answer. Part of the answer probably lies in the overall insufficiency of foreign investment funds. Not all the transnational corporations in the world combined could meet the demands of the less developed world for capital.110

101 The literature on tax benefits is large. See, e.g. H. Heller, Tax Incentives for Industry in Less Developed Countries; Nwogugu, supra, n. 8; Barlow, Foreign Investment and Taxation.
106 A very few countries claimed successes for their investment codes: Republic of China (Taiwan, e.g. Wan, supra, n. 6; Republic of Korea; Puerto Rico.
110 In 1951, a UN group of experts estimated that US$19 billion in foreign investment would produce only a 1% annual net increase in the national income of the less developed countries. Cited in Nwogugu, supra, n. 8 at 2.
FOREIGN PRIVATE INVESTMENT

Another part of the answer lay in the ways that transnational corporations make investment decisions, the motivations that affect those decisions and how the investment codes affected them. The investment decision consists of a number of discrete steps. First, the potential investor must decide to look abroad for investment opportunities. Second, the firm makes an investigation, that has as its outcome an investment proposal for discussion within the firm. Third, various bodies within the firm review the proposal, accompanied by intra-firm negotiations, to meet objections raised. The final decision to invest comes only at the end of this trail.

Different considerations obtain at each stage. In the first stage, none of the incentives offered by investment codes will likely influence decisions. Most often, for their profits investors look to the local, not the export market. The OECD reported that about 90 per cent of all foreign-owned manufacturing firms produced mainly for internal sale to the local market. Inducements aimed at creating export manufactures will not likely work. Investors consider matters not easily affected by an investment code—general political stability, for example, or amenities for managerial living.

Third world countries had two attributes that sometimes excited the original decision to invest. Neither, however, advanced the development process very much. Many countries had opportunities for extractive industry—minerals, oil, timber. Foreign private investment moved into those industries. These do not, however, help much in the process of training a labour force. Second, a few third world countries attracted some light industry by their excessively low wage rates—Puerto Rico, Singapore, Taiwan, South Korea, Thailand. Neo-classical economists told the third world that there lay their comparative advantage. If development proposes to raise living standards however, investment that comes because of low wages will not likely help.

In the event, investment codes did little to attract that first look for investment opportunities abroad. At the review and negotiation stage, however, investment codes may have some impact, but not their most important inducement, tax concessions. Ahorani concluded:

The most widely used government concessions are income tax exemption, accelerated depreciation for tax purposes, tariff protections, and government-sponsored low interest loans. These are not sufficient in themselves to create a decision to look abroad, although they do act as catalysts, strengthening an initial force or supplementing its impact.

The main effect of these stimulants is felt during the investigation process: given a decision to look abroad, different types of aid are important in countering the impact of forces that in the absence of such aid would have led to rejection of the proposal. The main reason for the small impact of the widely used government concessions as an initiating force seems to be the general prejudice prevailing against investment abroad, particularly in less developed countries and against government intervention.

In general, the concessions that reduce risk and uncertainty seem the most effective. All investigators agree that income tax concessions have almost no effect upon the decision to invest. Income tax concessions become important only after profits. As one of Aharoni’s respondents said, “Tax exemption is like dessert. It is good to have, but no more. It does not help if the meal is not there.”

Viewing the matter from a theoretical perspective, investors like other actors make choices within an arena of constraints and resources as they perceive them. Governments seek to channel choice by using the legal order to change the constraints and resources of the environment. Law, however, does not consist of a free product in unlimited supply. It has sharp constraints. Except at considerable cost, governments cannot do very much to attract foreign private investment.

They did not fail in their second objective, to ensure that local elites and entrepreneurial classes entered into a partnership with foreign capital. In Nigeria, Kenya and elsewhere, wealthy local citizens became shareholders in the local branches of transnational corporations. Decision-makers received lucrative goodies for making decisions favourable to particular investors. Everybody seemed to have gained, except the nation.

III. TOWARDS AN INVESTOR CONTROL CODE

Theoretical justification

Both investor protection codes and investment codes rested upon an explanation of third world poverty: it flowed from their lack of capital, natural resources, manpower and technology. The strategy that flowed from that theory required these countries to try to snare foreign private investment. A contrary set of theories, transforming institutionalism, however, explained third world poverty by its systematic underdevelop-
FOREIGN PRIVATE INVESTMENT

ment by foreign private capital. Instead of re-investing surpluses earned in the third world, foreign private capital exported the surpluses to the metropolis. Shaped by decades of colonial exploitation, the institutions of the poor countries succeeded only in ensuring that their people worked at very low rates of pay to generate high profits for transnational corporations. The transnationals dominated the economies of the poor countries. Rather than starving because they lack foreign capital, the poor countries die of indigestion from a glut of it.

Neo-classical economics and transforming institutionalism's principal disagreement lay in their explanation for poverty. Neo-classical economics tells us that the poor countries do not have sufficient capital to invest. Transforming institutionalists say that they generate huge surpluses, only to have them channelled out of the country or to unproductive uses.

On that, the data plainly confounded the neo-classical economists. This appeared in at least three ways. First, where economists studied it, they have discovered that every country generated some surpluses. Second, the foreign-dominated economies of most third world countries themselves proved the existence of surpluses. In most third world countries, transnational corporations controlled finance, foreign trade, industry and commercial agriculture. They entered and remained there because they made profits, frequently much larger profits than they made in their metropolitan bases.

The institutions of most third world countries, however, permitted most of these surpluses to seep out of the country, and in any event failed to direct investment into sectors and areas useful for development. The seeming lack of surplus for investment arose because domestic institutions failed to mobilise savings and direct investment, not because of a failure to generate surpluses. In general, the third world needed institutional transformation, not new foreign private capital.

Finally, one intriguing case pointed in the same direction—what was then called Rhodesia's unique experience during the period of its Unilateral Declaration of Independence. During that period, international sanctions effectively sealed its borders to new foreign private investment. Nevertheless, its economy grew apace until at Independence it had, proportionately, the largest industrial sector in Africa north of the Limpopo River. That unexpected result warranted not neo-classical but transforming institutionalist theory. Faced by the exigencies of suppressing the independence revolution, Rhodesia's masters imposed stringent controls

118 A. Seidman, supra, n. 28; see A. Giard-Frank; W. Rodney, How Europe Under-Developed Africa.

over capital-exports. Rhodesia's laws and institutions coerced the transnational corporations within Rhodesia to reinvest their surpluses domestically (and added to them other locally-generated surpluses). The economy boomed. Rhodesia, it seems, generated ample surpluses. Once it channelled surpluses towards investment, the manufacturing sector took a great leap forward.\textsuperscript{120}

With respect to foreign capital, the strategy that emerged from the transforming institutionalist analysis contradicted that which flowed from capitalist explanations. In the transforming institutionalists' view, rather than offering incentives unboundedly to induce foreign private investment, the poor countries must impose limits upon it. Rather than relying upon transnational corporations for technology and management, they should buy technology and management directly.\textsuperscript{121} Rather than freeing the surpluses earned by that foreign capital for export overseas, laws should ensure against its export, and its redirection into new, productive investment within the poor country. Rather than granting freedom from import licensing, the poor country should ensure that foreign exchange goes to purchase only truly necessary imports. Rather than conceding transnational corporation claims for secrecy and protection, the poor country must insist upon openness and disclosure. Rather than tax breaks to induce foreign investors to come to the poor country, the country should tighten its tax administration to ensure against leaks by way of transfer pricing and other fiddles. Rather than angling indiscriminately for foreign investors, a poor country should admit into the country only the very few foreign investors who can uniquely contribute to country development. Rather than laws that encourage a dependent alliance between the great corporations and the host bureaucracies and middle classes, laws should ensure the subservience of foreign capital to local governors, and provide devices (primarily by institutionalising inputs from peasants and workers) to ensure that officials use their power and discretion in the country's interests, rather than to line their own pockets. Rather than an indiscriminate offering of goodies, specific subsidies should go only for investments with the characteristics appropriate to earn that subsidy (for example, easy export of foreign exchange only for an enterprise that earns foreign exchange).

\textit{Towards an investor control code}

The legislation that emerges from the law-making process reflects the state

\textsuperscript{120} In Latin America, at least, most investment by the subsidiaries of U.S. corporations originate outside the United States, i.e. that comes from surpluses generated in the Third World. Vaitso, supra, n. 111. See also Meier, supra, n. 6 at 187-188.

\textsuperscript{121} Vaitso, supra, n. 119.
FOREIGN PRIVATE INVESTMENT

of the forces concerned with the legislation. Change did not always go from investment code to investor control. In Egypt, from Nasser to Sadat, it went the other way.\(^{122}\) Some of the more restrictive provisions of investment codes arose in response to claims by radicals for an investor control code.\(^{123}\) Some of these investment codes therefore contain provisions useful in structuring a true investor control code. An examination of investor control codes in those countries that have adopted a transforming institutionalist strategy will also help. A complete examination would study a variety of matters that might each become the subject of a separate paper, for example, transferring technology, preventing transfer pricing, and ensuring local investment of surpluses in development-linked industry. Here only five issues are addressed: ascertaining which foreign private investment to admit to the country, obtaining information about the foreign private investor, alternative methods of obtaining capital, technology and management expertise, the forms of joint venture, and ensuring that the inducements given produce the desired results.

Which foreign private investment to admit?

Transforming institutionalists tend to see much, probably most foreign private investment as immiserating. As a result, investor control codes typically prohibited foreign investment unless the investment and the investor received approval of a government body.\(^{124}\) To do that required, first, adequate criteria, and second, a rational decision-making process. The various criteria that the different investment codes contained have already been discussed. Whatever the detail of the criteria, without an adequate economic development plan, and institutions to implement it, all those criteria had little meaning. Without a development plan a country could not determine which foreign private investments would immiserate, and which would aid the country. Without a development plan, transforming institutionalism stubbed its toe.

Information about corporate structure and activities

One source of transnational corporate power over the governments of the poorer nations lay in the control by the corporations of information about their own corporate structure and accounts. An investor control code would require a prospective foreign investor to divulge this information to

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\(^{122}\) Bushell, supra, n. 93

\(^{123}\) That apparently happened in Papua-New Guinea. Fitzpatrick, supra, n. 96

\(^{124}\) See Vialov, supra, n. 119; The Cartagena Agreement Commission, Resolution 23, Zambia, supra, n. 34, sec. 3 (manufacturing); Biskin, supra, n. 84; INWALIS, supra, n. 22 at sec. 32.

the host country. Without information about the internal structures and processes of the transnational and its subsidiaries, the host country cannot control transfer pricing or other intra-company transactions. As a minimum, a country should require a foreign investor to file with the host company copies of all reports filed by the parent or its subsidiaries to governments in any place in the world. Too frequently, it turns out that information that a company claims it cannot divulge to, say, Zimbabwe, it routinely files with the Securities and Exchange Commission in Washington.

The question of information has a regional thrust. In the Southern African Development Co-ordinating Committee (SADCC), for example, all the nine countries face the same transnationals: Lonrho, Anglo-American, Rio Tinto Zinc, Tate and Lyle, BAT, Standard Bank, and Barclays Bank. The SADCC countries cannot co-ordinate strategy in dealing with these corporate giants unless they have information about transnational corporate subsidiaries and activities in the other SADCC countries. A regional information network would help.

Alternative methods of obtaining foreign capital, technology and management expertise

Whatever their disagreements with neo-classical economists, transforming institutionalists conceded that in some instances the poor countries must import capital, technology and management expertise. Transforming institutionalists, however, argue that alternatives to foreign private investment frequently exist. Capital can come from loans or aid to government, which can then use it for productive investment. An international market in technology exists. Government can buy technology free of ties to particular foreign investors. A licensing agreement from a transnational corporation to an enterprise built by a poor country’s government, for example, may solve the problem. So might a turn-key contract for the construction of a plant. Managerial expertise, too, has a world market. It comes expensive, but less so than the overall costs of foreign private capital.

The forms of joint venture

Investor control codes differed from the most stringent investment codes in

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125 See Vaitsos, supra, n. 119 (host country should require information about capital, foreign exchange earnings, effective profitability, development of human capital and productive know-how); Zambia, supra, n. 34, sec. 29 (Minister may require a broad range of information about the enterprise and the investor); Mexico, supra, n. 47. The Caragena Agreement Commission, Resolution 24, forbade bearer shares, thus requiring investors to reveal their shareholders.

126 Zambia, Malawi, Tanzania, Angola, Zimbabwe, Mozambique, Botswana, Lesotho and Swaziland.

127 Supra, n. 121.
FOREGN PRIVATE INVESTMENT

two ways. First, like investment codes, they required the foreign private investor to share ownership, not with local private investors, but with a state enterprise. Second, they required that the state enterprise have at least formal control of the undertaking. For most countries that followed some form of transforming institutionalism, the investor control code took as its title something like the Joint Venture Code. 128

These codes sought local control over the joint venture in different ways. Most frequently, they required 51 per cent equity ownership by the government agency representing the host country. (Yugoslavia, Romania, Hungary, Poland, Vietnam). In the People's Republic of China, the Chinese partner must appoint the Chairman of the Board, and the foreign participant might appoint one or two vice-chairmen. 129

Joint ventures in socialist countries raised difficult problems of the status of the enterprise and of the foreign investor's actual ownership and control. In some countries in the socialist bloc, the constitution provided that ownership of the means of production belonged to the people. In what sense could a joint venture in these countries constitutionally provide for protection to the foreign partner against expropriation? 130

Given the formal relationships—usually, a minority equity position, and at least formal control lying in the hands of the host country, and constitutional provisions that call into question the legal status of the enterprise—joint ventures of these sorts in effect converted the foreign partner into a preferred shareholder who also supplied technology, markets and other services. 131

The effectiveness of control, however, varied. Many African countries attempted joint ventures with foreign capital. Almost invariably, they took a majority position in common stock, and therefore nominally had control over the board of directors. Ordinarily, however, the foreign partner supplied the day-to-day management under a management contract. In the event, management—the foreign partner—had all the expertise. Whatever the forms of the agreement, its control over information and technology gave it de facto control over the enterprise. 132

That did not necessarily obtain when the host country had better control over its own economy, invariably demonstrated by an economic development plan that specified planned investment. Jansen concluded that the Joint Venture legislation of the Eastern European countries.

129 Peoples' Republic of China: Law on Joint Ventures, 1979, Art. 5; see Wan, supra, n. 8.  
130 See supra.  
131 See id. at 243.  
132 See supra, n. 1, Chap. 11
... has not only a protective effect but also a regulatory function. As compared with market economies, the more centralised political and economic systems of these socialist countries permit greater supervision and control of foreign investment. Thus, the Eastern European governments are able to enforce the detailed requirements set out in their respective laws and decrees much more effectively than countries operating under a market system.\footnote{Jansen, supra, n. 128. See also J. G. Scriven, "Joint Ventures in Poland: A Socialist Approach to Foreign Investment Legislation", 14 J. W. \& L. (1980), 124.}

**CONCLUSIONS**

Investor control codes rested on a different explanation for third world poverty than investor protection or investment codes. Transforming institutionalism maintained that rather than arising from the lack of foreign private investment, poverty arose from its abundance. Far from poverty arising because the poor countries did not generate sufficient surpluses to reinvest, it arose because the abundant surpluses these countries generated did not result in productive investment. As a result, the investor production codes aimed at preventing foreign private investment except where the country had a need for a particular investment. That decision they made on the basis of an economic plan, not generalised criteria alone. They required adequate information about the foreign investor, in a few places on a regional basis; they required joint ventures with state enterprises, not equity purchases by the local rich; they sought to ensure local control over the enterprise, not foreign control. (Other rules concerning transfer pricing, technology transfer, taxation and measures to ensure reinvestment of surpluses are beyond this article's scope). The problem lay in mobilising the surplus for reinvestment within the country, and channeling investment to uses that would lead to development. Private foreign investment seemed resistant to helping solve these problems, for it had as its chief concern funnelling the surpluses out of the country as profits, interest and dividends. If a country produced a surplus then the neo-classical explanation for poverty, that poverty arises because no investable surplus exists, must fail.

Second, as the old saw says, the proof of the pudding is in the eating. If a bridge fails, it may fail because of bad construction, bad engineering, or even mistaken notions of mechanics underlying the design. So it is with law; a statute that fails to resolve the problem at which it aims may demonstrate an erroneous use of the legal order to induce behaviour, or an erroneous explanation for the difficulty to resolve which the law-makers enacted the statute. The widespread failures of the investment codes the world around either to attract much foreign capital or to alleviate poverty suggests they built upon sandy theoretical foundations.
FOREIGN PRIVATE INVESTMENT

Scholars dealing with third world problems have frequently focussed on the relationship between foreign capital and local capital. The various investor protection codes, investment codes and investor control codes spelled out what third world lawmakers perceived as a desirable form of that relationship. That so many opted for investment codes rather than investor control codes demonstrated not only the hegemony of neoclassical economic theory over their minds; it demonstrated, as well, how that theory ineluctably induced third world governments to accept a junior partnership with transnational corporate capital.

An alternative existed, based upon transforming institutionalism. Investor control codes ensured that foreign private capital entered the country only when specially permitted, and not in the superior position. Only by an investor control code could a third world country maximise the benefits to it of a presence of transnational capital.
NOTES AND QUESTIONS

1. What methodology does Seidman use to justify his proposals? Does it persuade you?

2. To test the applicability of Seidman's theses to China, what research would you undertake?

B. CHINA'S FOREIGN INVESTMENT LEGISLATION

China has three national laws relating the foreign private investment: The law on joint enterprise, the law on foreign investment, and the law on economic contracts with foreign enterprise. In addition, China has created several Economic Development Zones. These zones have the power to admit foreign enterprise on even more liberal terms than those set forth in the national legislation. We include here only a brief summary of this legislation.
Law of the People’s Republic of China on Chinese-Foreign Equity Joint Ventures

(Adopted at the Second Session of the Fifth National People’s Congress on July 1, 1979, promulgated by Order No. 7 of the Chairman of the Standing Committee of the National People’s Congress and effective as of July 8, 1979)

Article 1 With a view to expanding international economic cooperation and technological exchange, the People’s Republic of China shall permit foreign companies, enterprises, other economic organizations or individuals (hereinafter referred to as “foreign joint venturers”) to establish equity joint ventures together with Chinese companies, enterprises or other economic organizations (hereinafter referred to as “Chinese joint venturers”) within the territory of the People’s Republic of China, on the principle of equality and mutual benefit and subject to approval by the Chinese Government.

Article 2 The Chinese Government shall protect, in accordance with the law, the investment of foreign joint venturers, the profits due them and their other lawful rights and interests in an equity joint venture, pursuant to the agreement, contract and articles of association approved by the Chinese Government.

All activities of an equity joint venture shall comply with the provisions of the laws, decrees and pertinent regulations of the People’s Republic of China.

Article 3 The equity joint venture agreement, contract and articles of association signed by the parties to the venture shall be submitted to the Foreign Investment Commission of the People’s Republic of China, which shall then decide to approve or disapprove the venture within three months. When approved, the equity joint venture shall register with the General Administration for Industry and Commerce of the People’s Republic of China, acquire a business licence and start operations.

Article 4 An equity joint venture shall take the form of a limited liability company.

The proportion of the foreign joint venturer’s investment in an equity joint venture shall be, in general, not less than 25 percent of its registered capital.

The parties to the venture shall share the profits, risks and losses in proportion to their contributions to the registered capital.

If any of the joint venturers wishes to assign its registered capital, it must obtain the consent of the other parties to the venture.

Article 5 The parties to an equity joint venture may make their investment in cash, in kind or in industrial property rights, etc.

The technology and equipment contributed by a foreign joint venturer as its investment in kind must be advanced technology and equipment that really suit China’s needs. In case of losses caused by a foreign joint venturer practising deception through the intentional provision of outdated technology and equipment, it shall compensate for the losses.

A Chinese joint venturer’s investment may include the right to the use of a site provided for the equity joint venture during the period of its operation. If the right to the use of the site is not taken as a part of the Chinese joint venturer’s investment, the equity joint venture shall pay the Chinese Government for its use.

The above-mentioned investments shall be specified in the contract and articles of association approved by the Chinese Government.
Article 6  An equity joint venture shall have a board of directors, the size and composition of which shall be stipulated in the contract and articles of association, after consultation between the parties to the venture; the directors shall be appointed and replaced by the relevant parties. The board of directors shall have a chairman, whose office shall be assumed by the Chinese side, one or two vice-chairmen, whose office(s) shall be assumed by the foreign joint venturer(s). In handling important problems, the board of directors shall make decisions through consultation by the parties to the venture on the principle of equality and mutual benefit.

The functions and powers of the board of directors are, as stipulated in the articles of association of the equity joint venture, to discuss and decide all major issues concerning the venture, namely, the venture's development plans, proposals for production and business operations, the budget for revenues and expenditures, the distribution of profits, the plans concerning manpower and wages, the termination of business, and the appointment or employment of the general manager, the vice-general manager(s), the chief engineer, the treasurer and the auditors, as well as the determination of their functions, powers and terms of employment, etc.

The offices of general manager and vice-general manager(s) (or factory manager and deputy manager(s)) shall be assumed by the respective parties to the venture.

The employment and discharge of the workers and staff members of an equity joint venture shall be stipulated in accordance with the law in the agreement and contract concluded by the parties to the venture.

Article 7 The net profit of an equity joint venture shall be distributed among the parties to the venture in proportion to their respective contributions to the registered capital, after payment out of its gross profit of the equity joint venture income tax, pursuant to the provisions of the tax laws of the People's Republic of China, and after deductions from the gross profit of a reserve fund, a bonus and welfare fund for workers and staff members and a venture expansion fund, as stipulated in the venture's articles of association.

An equity joint venture equipped with advanced technology by world standards may apply for a reduction of or exemption from income tax for the first two to three profit-making years.

A foreign joint venturer that reinvests its share of the net profit within Chinese territory may apply for a partial refund of the income tax already paid.

Article 9 The production and business operating plans of an equity joint venture shall be submitted to the competent authorities for the record and shall be implemented through economic contracts.

In its purchase of required raw and semi-processed materials, fuels, auxiliary equipment, etc., an equity joint venture should give first priority to purchases in China. It may also make such purchases directly on the world market with foreign exchange raised by itself.

An equity joint venture shall be encouraged to market its products outside China. It may sell its export products on foreign markets directly or through associated agencies or China's foreign trade agencies. Its products may also be sold on the Chinese market.

When necessary, an equity joint venture may set up branches and subbranches outside China.

Article 10 The net profit which a foreign joint venturer receives as its share after performing its obligations under the laws, the agreements and the contract, the funds it receives upon the expiration of the venture's term of operation or its early termination, and its other funds may be remitted
abroad through the Bank of China in accordance with the foreign exchange regulations and in the currency or currencies specified in the contract concerning the equity joint venture.

A foreign joint venturer shall be encouraged to deposit in the Bank of China the foreign exchange which it is entitled to remit abroad.

Article 11 The wages, salaries or other legitimate income earned by foreign worker or staff member of an equity joint venture, after payment of the individual income tax under the tax laws of the People's Republic of China, may be remitted abroad through the Bank of China in accordance with foreign exchange regulations.

Article 14 Disputes arising between the parties to an equity joint venture which the board of directors has failed to settle through consultation may be settled through mediation or arbitration by an arbitration agency of China or through arbitration by another arbitration agency agreed upon by the parties.
NOTES AND QUESTIONS

1. What reasons does the PRC Joint Venture law give for enacting the law?

2. Consider the criteria for granting permission to a joint venture for doing business in China. Does that statute state those criteria specifically? Does it state it by implication? (Consider Articles 3 and 5).

3. What provisions does the statute make that protect China's interests in having foreign private capital invest in China? Do they seem adequate?

REGULATIONS FOR THE IMPLEMENTATION OF THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON CHINESE-FOREIGN JOINT VENTURES

(Issued by the State Council on September 20, 1983)

CHAPTER I GENERAL PROVISIONS

Article 1 These Regulations are formulated for the purpose of facilitating the smooth implementation of the Law of the People's Republic of China on Chinese-Foreign Joint Ventures (hereafter referred to as the "Chinese-Foreign Joint Venture Law").

Article 2 Chinese-foreign joint ventures (hereafter referred to as "joint ventures") established in China with approval granted in accordance with the Chinese-Foreign Joint Venture Law are Chinese legal persons subject to the jurisdiction and entitled to the protection of Chinese law.

Article 3 Joint ventures established in China shall be capable of promoting China's economic development and raising its scientific and technological standards, and shall be beneficial to socialist modernization. The principal lines of business in which the establishment of joint ventures is permitted are:

(1) Energy resources development, and the construction materials, chemical and metallurgical industries;

(2) The machine-building, instrument and meter industries, and offshore oil-mining equipment manufacturing:
(3) Electronic industry, computer industry and communications equipment manufacturing;

(4) Light industries, and the textile, food, pharmaceutical, medical apparatus and instruments and packaging industries;

(5) Agriculture, animal husbandry and aquaculture; and

(6) Tourism and service trades.

Article 4 A joint venture that applies for establishment shall emphasize economic results and satisfy one or more of the following requirements:

(1) It will adopt advanced technology and equipment and scientific managerial techniques, enabling it to increase the variety of its products, improve their quality and raise output, and conserve energy and materials;

(2) It will benefit the technical renovation of the venture and achieve quick results and large profits with a small investment;

(3) It will be able to expand the export of its products and increase foreign exchange earnings; and

(4) It will be able to train technical and managerial personnel.

Article 5 Application for the establishment of a joint venture shall not be approved if the proposed joint venture would involve any of the following circumstances:

(1) Injury to China's sovereignty;

(2) Violation of China's laws;

(3) Incompatibility with the requirements of China's national economic development;

(4) Creation of environmental pollution; or

(5) Obvious inequity, infringing the rights and interests of one of the parties to the venture, in the signed agreement, contract or articles of association that they have concluded.

Article 6 Except as otherwise provided, the government department in charge of the Chinese venturer shall be the department in charge of the joint venture (hereafter referred to as the "department in charge of the venture"). In the event that the joint venture involves two or more Chinese venturers under the jurisdiction of different departments or different areas, the relevant departments and areas shall, through consultation, designate a single department to be the department in charge of the venture.

The department in charge of the venture shall be responsible for guiding, assisting and supervising the joint venture.

Article 7 A joint venture has the right to conduct its business independently within the scope prescribed by China's laws and regulations and the joint venture agreement, contract and articles of association. All relevant departments shall provide support and assistance to the joint venture.
NOTES AND QUESTIONS

1. The Regulations, of course, arise under the main statute that we have just considered. With respect of the conditions with which a prospective Joint Venture must comply, do the Regulations conform to the principal statute? Consider particularly Articles 3 and 4.

2. How much discretion do the Statute and the Regulations give to the authorities granting licenses to joint ventures? What protection is there against the possibility of bribery in making these decisions?

3. Does the statute give existing Chinese businesses or industries any opportunity to complain about granting a license to a possible foreign competitor? Should they?
Law of the People's Republic of China on Foreign-Capital Enterprises

(Adopted at the Fourth Session of the Sixth National People's Congress, promulgated by Order No. 39 of the President of the People's Republic of China and effective as of April 12, 1986)

Article 1 With a view to expanding economic cooperation and technical exchange with foreign countries and promoting the development of China's national economy, the People's Republic of China permits foreign enterprises, other foreign economic organizations and individuals (hereinafter collectively referred to as "foreign investors") to set up enterprises with foreign capital in China and protects the lawful rights and interests of such enterprises.

Article 2 As mentioned in this Law, "enterprises with foreign capital" refers to those enterprises established in China by foreign investors, exclusively with their own capital, in accordance with relevant Chinese laws. The term does not include branches set up in China by foreign enterprises and other foreign economic organizations.

Article 3 Enterprises with foreign capital shall be established in such a manner as to help the development of China's national economy; they shall use advanced technology and equipment or market all or most of their products outside China.

Provisions shall be made by the State Council regarding the lines of business which the state forbids enterprises with foreign capital to engage in or on which it places certain restrictions.

Article 4 The investments of a foreign investor in China, the profits it earns and its other lawful rights and interests are protected by Chinese law.

Enterprises with foreign capital must abide by Chinese laws and regulations and must not engage in any activities detrimental to China's public interest.

Article 5 The state shall not nationalize or requisition any enterprise with foreign capital. Under special circumstances, when public interest requires, enterprises with foreign capital may be requisitioned by legal procedures and appropriate compensation shall be made.

Article 6 The application to establish an enterprise with foreign capi-
Article 6 An application for the establishment of a foreign-invested enterprise shall be submitted for examination and approval to the department under the State Council which is in charge of foreign economic relations and trade, or to another agency authorized by the State Council. The authorities in charge of examination and approval shall, within 90 days from the date they receive such application, decide whether or not to grant approval.

Article 7 After an application for the establishment of an enterprise with foreign capital has been approved, the foreign investor shall, within 30 days from the date of receiving a certificate of approval, apply to the industry and commerce administration authorities for registration and obtain a business licence. The date of issue of the business licence shall be the date of the establishment of the enterprise.

Article 8 An enterprise with foreign capital which meets the conditions for being considered a legal person under Chinese law shall acquire the status of a Chinese legal person, in accordance with the law.

Article 9 An enterprise with foreign capital shall make investments in China within the period approved by the authorities in charge of examination and approval. If it fails to do so, the industry and commerce administration authorities may cancel its business licence.

The industry and commerce administration authorities shall inspect and supervise the investment situation of an enterprise with foreign capital.

Article 10 In the event of a separation, merger or other major change, an enterprise with foreign capital shall report to and seek approval from the authorities in charge of examination and approval, and register the change with the industry and commerce administration authorities.

Article 11 The production and operating plans of enterprises with foreign capital shall be reported to the competent authorities for the record.

Enterprises with foreign capital shall conduct their operations and management in accordance with the approved articles of association, and shall be free from any interference.

Article 12 When employing Chinese workers and staff, an enterprise with foreign capital shall conclude contracts with them according to law, in which matters concerning employment, dismissal, remuneration, welfare benefits, labour protection and labour insurance shall be clearly prescribed.

Article 13 Workers and staff of enterprises with foreign capital may organize trade unions in accordance with the law, in order to conduct trade union activities and protect their lawful rights and interests.

The enterprises shall provide the necessary conditions for the activities of the trade unions in their respective enterprises.

Article 14 An enterprise with foreign capital must set up account books in China, conduct independent accounting, submit the fiscal reports and statements as required and accept supervision by the financial and tax authorities.
If an enterprise with foreign capital refuses to maintain account books in China, the financial and tax authorities may impose a fine on it, and the industry and commerce administration authorities may order it to suspend operations or may revoke its business licence.

Article 15 Within the scope of the operations approved, enterprises with foreign capital may purchase, either in China or from the world market, raw and semi-processed materials, fuels and other materials they need. When these materials are available from both sources on similar terms, first priority should be given to purchases in China.

Article 16 Enterprises with foreign capital shall apply to insurance companies in China for such kinds of insurance coverage as are needed.

Article 17 Enterprises with foreign capital shall pay taxes in accordance with relevant state provisions for tax payment, and may enjoy preferential treatment for reduction of or exemption from taxes.

An enterprise that reinvests its profits in China after paying the income tax, may, in accordance with relevant state provisions, apply for refund of a part of the income tax already paid on the reinvested amount.

Article 18 Enterprises with foreign capital shall handle their foreign exchange transactions in accordance with the state provisions for foreign exchange control.

Enterprises with foreign capital shall open an account with the Bank of China or with a bank designated by the state agency exercising foreign exchange control.

Enterprises with foreign capital shall manage to balance their own foreign exchange receipts and payments. If, with the approval of the competent authorities, the enterprises market their products in China and consequently experience an imbalance in foreign exchange, the said authorities shall help them correct the imbalance.

Article 19 The foreign investor may remit abroad profits that are lawfully earned from an enterprise with foreign capital, as well as other lawful earnings and any funds remaining after the enterprise is liquidated.

Wages, salaries and other legitimate income earned by foreign employees in an enterprise with foreign capital may be remitted abroad after the payment of individual income tax in accordance with the law.

Article 20 With respect to the period of operations of an enterprise with foreign capital, the foreign investor shall report to and secure approval from the authorities in charge of examination and approval. For an extension of the period of operations, an application shall be submitted to the said authorities 180 days before the expiration of the period. The authorities in charge of examination and approval shall, within 30 days from the date such application is received, decide whether or not to grant the extension.

Article 21 When terminating its operations, an enterprise with foreign capital shall promptly issue a public notice and proceed with liquidation.
in accordance with legal procedure.

Pending the completion of liquidation, a foreign investor may not dispose of the assets of the enterprise except for the purpose of liquidation.

**Article 22** At the termination of operations, the enterprise with foreign capital shall nullify its registration with the industry and commerce administration authorities and hand in its business licence for cancellation.

**Article 23** The department under the State Council which is in charge of foreign economic relations and trade shall, in accordance with this Law, formulate rules for its implementation, which shall go into effect after being submitted to and approved by the State Council.

**Article 24** This Law shall go into effect on the day of its promulgation.
NOTES AND QUESTIONS

1. What purposes does this statute have? Do they differ from the Joint Venture statute?

2. What criteria does the statute establish for the granting of a license for foreign-capital investments in China? (Consider Article 3). Compare and contrast the statute's specifications in this regard with those of the Joint Venture statute and regulations. Which seems more likely to result in maximizing Chinese benefits from foreign investment?

3. Technology by itself has little use for a developing country. A company may be said to import technology when it imports a black box with complicated machinery and wiring inside it. If the worker in the Third World country only hooks up two wires to terminals on the box, the technology is not much use for the developing country. It only ensures that the Third World country will remain dependent upon the First World country for the manufacture and import of those little black boxed. Only if the technology is unpacked, so that the Third World country's technicians learn to service, repair and ultimately to use the technology in new designs can one say that the foreign firm has imported a new technology of use to the Third World country. Critique the Chinese statutes in light of these considerations.

3. The essence of dependency and neo-colonialism as described in Chapter III consists of the export of profits, dividends and interest to the First World Country, so that the Third World country lacks capital for new investment; and its dependency
upon world capitalist markets for its survival. Critique China's legislation in this regard.

4. Kentucky Fried Chicken, an American firm that specializes in franchising restaurants to serve fried chicken, has formed a joint venture in China (and has been fabulously profitable -- it will recoup its entire $20,000,000 investment in eighteen months. For the succeeding thirty years it will take out of China some $13,000,000 a year at present rates of profit. That means that for the use of $20,000,000 for nine months -- that is, one-half of eighteen months, on the theory that the American firm will receive its profits evenly over the eighteen-month period), China must pay $13,000,000 in hard currency for thirty years). Under what provision of the Regulations do you think that the authorities granted that Joint Venture a license? In order to analyze their decision to grant the license, what research would you want to undertake?
CHAPTER 47

An Act to make better provision for the encouragement of enterprises contributing to the economic development of The Gambia for relief from the payment of income tax, import duty and purchase tax by such enterprises and for various matters connected therewith and relating thereto.

[15TH JULY, 1964.]

PART I.—PRELIMINARY

1. This Act may be cited as the Development Act.

2. In this Act except where the context otherwise requires—

“capital allowances” mean initial, annual and balancing allowances as calculated in accordance with the provisions of the Income Tax Act;

“company” means any company incorporated or registered under any law in force in The Gambia and any company which, although incorporated or registered outside The Gambia, carries on business or has an office or place of business therein;

“construction date” means the date when the construction, development, alteration or extension of any factory or place of business of any proposed development project is to begin;

“development certificate” means a certificate granted under section 5 of this Act;

“factory” includes any buildings, structures and stores together with any machinery, plant or apparatus used for the purposes of a development project which are necessary to the proper functioning of such project, as approved by the Minister in that behalf;

“factory scale” means such scale as the Minister deems to be a factory scale for the purposes of this Act;

“Minister” means the Minister responsible for the administration of this Act;

“place of business” means any agricultural, horticultural, fishing, mining or servicing premises occupied and used solely for a development project, together with any buildings, structures, stores or other ancillary erections, plant, machinery, and apparatus on such premises used for the purpose of the development project;

“production date” means the date specified in any development certificate as such, being the date on or before which it is anticipated that the manufacture of a product in marketable quantities or activity on a commercial scale will begin, or, in any case where such project has begun to produce the product or to carry on the activity before the date of the application for a development certificate, such date as may be specified as the production date by the Minister;

“tax holiday period” means in respect of any development project the period specified in the development certificate not exceeding five years after the production date of that undertaking.

PART II.—DEVELOPMENT INDUSTRIES AND DEVELOPMENT CERTIFICATES

3. (1) Any industry concerned on a factory scale with the manufacture of any of the products or with any of the activities specified in Parts 1 and 2 respectively of the First Schedule to this Act shall be a development industry.
(2) The Minister may by order published in the Gazette add any item to or delete any item from the First Schedule to this Act if he is satisfied that it is in the interests of the development of the Gambia so to do:

Provided that before making any such order the Minister shall have regard to the following considerations—

(a) the effect which the order, if made, would have on existing industries;

(b) whether the new development industry would utilise raw materials or skills available in The Gambia;

(c) whether any existing capacity in The Gambia for the manufacture of the product or for the activity concerned is sufficient to meet the probable demand; and

(d) the element of risk involved in establishing the new development industry.

(3) An order made under the provisions of subsection (2) of this section may provide that any additional industry shall be a development industry only if it is located within an area specified in the order.

(4) An order made under the provisions of subsection (2) of this section in respect of any industry which is being carried on in The Gambia at the date of the order may contain provisions limiting the period or amount of the relief to be granted under the provisions of this Act to any person engaged in such industry, whether by reference to the amount of capital invested by such undertaking or in such other way as the Minister may think fit.

(5) No order made under the provisions of subsection (2) of this section shall affect the operation of any development certificate.

4. (1) Any person desiring to engage in any development industry and to obtain any benefits conferred by this Act may apply in writing to the Minister for a development certificate.

(2) An application made under this section shall be in such form and of such content as the Minister may decide and shall—

(a) give particulars of the products to be produced or the activities to be carried on;

(b) estimate in detail the type, cost, size and production capacity of any capital works to be undertaken;

(c) estimate in detail the production date and the proposed rate of production or volume of business of the products or activities concerned; and

(d) estimate in detail the construction date.

(3) The Minister may at any time call for such further particulars in connection with an application under this section as he considers necessary from the applicant.

5. (1) Subject to the provisions of section 6 of this Act, the Minister may if he is satisfied that it is in the interests of the development of The Gambia so to do, grant a development certificate to any person making application in that behalf under section 4 of this Act, certifying that such person is proposing to engage in a development project in the development industry specified in the certificate.

(2) Before granting any development certificate the Minister shall satisfy himself that the applicant—

(a) is adequately financed;

(b) has adequate trained personnel in his employ or is able to obtain the services of such personnel;

(c) has access to the necessary technical information;

(d) is able to obtain adequate raw materials; and

(e) possesses, or will possess, the necessary factory or place of business.

(3) The Minister may impose such conditions as he considers fit on the grant of a development certificate, including in the case of an applicant other than a company a requirement that the applicant shall, by such date as the Minister may specify, incorporate or
register a company for the purpose of engaging in the development industry concerned, and shall cause such conditions to be endorsed upon the certificate.

(4) The Minister may grant a development certificate taking effect from such date as may be specified in the certificate which date may be a date before the date of the application made under subsection (1) of section 4 of this Act.

(5) In every development certificate the Minister shall specify—
(a) if appropriate, the construction date, which shall not necessarily be the date on which the construction of the factory began;
(b) the production date, which shall not be later than eighteen months after the construction date unless the Minister shall, upon being satisfied by the applicant that a later production date is in the public interest, specify otherwise;
(c) the development industry;
(d) the tax holiday period;
(e) the limitation, if any, of the amount of the relief to be granted.

6. (1) Before any order is made under section 3 of this Act or any development certificate is granted, the Minister shall cause the fact that he is about to consider the making of such an order or the granting of such certificate to be notified in the Gazette.

(2) The notification referred to in subsection (1) of this section shall contain such particulars as to the product, activity or project concerned as the Minister may think necessary in order that any person interested in the development industry concerned may object to the proposed order or certificate.

(3) The notification shall state a period, not being less than thirty days, within which any objection to the proposed order or certificate shall be made.

(4) Every objection received by the Minister within the time stated in the notification or within such extended time as the Minister may allow shall be notified to the original applicant for a development certificate and such objection together with any further representations submitted by the original applicant shall be considered by the Minister before any order is made or any certificate is granted.

(5) This section shall also apply in the case of an application to amend a development certificate under the provisions of section 7 of this Act.

8. The Minister shall cause to be published in the Gazette—
(a) the name of any person to whom a development certificate or an amendment to a development certificate has been granted;
(b) the development industry in relation to which such certificate has been granted or amended;
(c) where the production date has been ordered to be later than eighteen months after the construction date, the grounds on which such order has been made; and
(d) the name of any person whose development certificate has been cancelled.

9. The holder of a development certificate shall provide the Minister with such information as to the progress of his development project as the Minister shall from time to time require.
12. (1) Every person shall, upon the issue to him of a development certificate and subject to such terms and conditions as may be imposed by such certificate, be entitled at any time prior to the expiration of his tax holiday period to import into The Gambia free of customs duty, or to purchase in The Gambia subject to refund of customs duty as provided in subsection (2) of this section, any of the articles specified in the Second Schedule to this Act if the person satisfies the Comptroller of Customs and Excise that such articles are or were required for the capital works and equipment necessary to the development project concerned, other than for repairs.

(2) Every person who satisfies the Comptroller of Customs and Excise—

(a) that any article which if imported by him would have been exempt from import duty under the provisions of subsection (1) of this section has been purchased by him in The Gambia and that customs duty were paid upon the importation of such articles; and

(b) as to the amount of the customs duty so paid;

shall be entitled to be refunded by the Comptroller ninety per cent of the amount of the customs duty so paid:

Provided that—

(a) where the person satisfies the Comptroller that he is unable to ascertain the amount of the customs duty paid, he shall be entitled to be paid by the Comptroller such sum by way of refund as is in the opinion of the Comptroller reasonable; and

(b) no refund shall be made under this subsection when the amount of customs duty so paid, or the sum which the Comptroller assesses as a reasonable sum to be paid by way of refund, as the case may be, is less than twenty-five pounds.

(3) The Minister may by order published in the Gazette amend or replace the Second Schedule:

Provided that no benefits already enjoyed by a person by virtue of his development certificate shall be decreased during his tax holiday period.

13. (1) Every person who is granted any relief under provisions of section 12 of this Act shall—

(a) keep such records and submit such returns at such times as may be determined by the Comptroller of Customs and Excise in such form and containing such particulars as may be required by the Comptroller of the articles imported or purchased by him; and

(b) cause such articles to be marked with such mark and in such manner as may be required by the Comptroller; and

(c) permit the Comptroller or any person authorised by him at all reasonable times to inspect such records and to have access to any premises under the control of such person for the purpose of examining any such articles which the Comptroller may believe to be therein and of satisfying himself of the accuracy of the particulars in relation to such articles contained in such records.

(2) Any person who contravenes any of the provisions of this section or any requirement of the Comptroller of Customs and Excise made under this section shall be guilty of an offence and on conviction therefor shall be liable to a fine not exceeding five hundred pounds.

14. (1) No article in respect of which any relief has been granted under the provisions of section 12 of this Act shall be sold, given away or otherwise disposed of except—

(a) in the case of an assignment of the development project for the purpose of which such article was acquired, to the assignee of such project; or

(b) upon the holder of the development certificate paying to the Comptroller of Customs and Excise an amount equivalent to the relief granted, or such lesser amount as the Comptroller shall consider reasonable; or

(c) after the expiry of five years from the date of acquisition of such article.

(2) Any person who contravenes the provisions of this section shall be guilty of an offence and on conviction therefor shall be liable to a fine, and the article concerned shall be forfeited to the Crown:

Provided that such fine shall not be less than one hundred pounds.
15. (1) The Minister may direct that the customs duty and purchase tax on any raw or semi-processed materials required for the manufacture of articles by any development project may be reduced by a specified amount or waived altogether when imported by the holder of a development certificate.

(2) The provisions of sections 13 and 14 of this Act shall apply mutatis mutandis in respect of any importation made under the provisions of this section.

PART IV.—INCOME TAX

16. Subject to the provisions of this Act, a holder of a development certificate shall be entitled to relief from income tax during his tax holiday period equal to the tax chargeable on the income in respect of his development project, or to such lesser relief as may be provided for in any order made under the provisions of subsection (2) of section 3 of this Act, or in his development certificate.

17. Notwithstanding any other provisions of this Act in the case of persons other than companies—

(a) the relief from income tax to be given in any year of assessment under the provisions of section 16 of this Act shall not exceed the amount which would otherwise have been payable by such person on the first one thousand pounds of profits arising out of the development project; and

(b) the rate of such relief shall not exceed the rate of income tax on companies in force in such year of assessment.

19. (1) After the expiration of his tax holiday period the holder of a development certificate may, for the purpose of the assessment of income tax, carry forward in respect of the next succeeding six years of assessment any net loss incurred during or prior to his tax holiday period.

(2) For the purposes of this section the term net loss means the amount by which the total of any losses incurred during the six years prior to the commencement of the tax holiday period together with any losses incurred during the tax holiday period exceeds the total of any profits made during that period.

23. (1) A company to which a development certificate has been granted shall place in a separate account all profits or gains which have been relieved of income tax in accordance with the provisions of this Act and, if it intends to pay a dividend to its shareholders out of such profits or gains, such dividends shall be paid out of such account.

(2) A shareholder to whom a dividend is paid pursuant to subsection (1) of this section shall be relieved from income tax in respect thereof if he is—

(a) a resident in The Gambia; or

(b) if not so resident, is not liable to income tax in respect of such dividend in the country in which he is resident:

Provided that the relief from income tax created by this subsection shall not exceed, as regards the rate of the tax from which the shareholder is relieved, the rate of tax which would, but for the provisions of this Part of this Act, have been paid by the company on the profits or gains out of which the dividend is paid.

(3) Where a shareholder to whom a dividend is paid pursuant to subsection (1) of this section is not resident in The Gambia and is liable to income tax in respect of such dividend in the country in which he is resident, he shall be relieved from so much of the income tax in respect of that dividend as the Commissioner of Income Tax is satisfied exceeds his liability in respect of such dividend in the country in which he is resident:

Provided that the relief from income tax created by this subsection shall not exceed, as regards the rate of the tax from which the shareholder is relieved, the rate of tax which would, but for the provisions of this Part of this Act, have been paid by the company on the profits or gains out of which the dividend is paid.

PART V.—MISCELLANEOUS

24. (1) Prior to the expiration of his tax holiday period, no person holding a development certificate shall, without the prior written consent of the Minister which shall not unreasonably be withheld, who may impose such conditions as he thinks fit, carry on any trade or business other than a trade or business the whole of the profits of which are derived from his development project.
(2) No factory or place of business used for the purpose of any development project shall, without the prior approval of the Minister which shall not unreasonably be withheld, and subject to such reasonable conditions as the Minister may impose, be used during that project's tax holiday period for any other purpose than that in respect of which the development certificate concerned was granted.

(3) Any person contravening the provisions of subsection (1) of this section or using, or permitting or allowing any other person to use any factory or place of business in contravention of the provisions of subsection (2) of this section shall be guilty of an offence and on conviction therefor shall be liable to a fine.

**FIRST SCHEDULE**

**PART I.—DEVELOPMENT PRODUCTS**

1. Fruit preserves and preparations.
2. Beer and potable spirits.
3. Cigarettes.
4. Paint, polishes and varnishes.
5. Wood pulp, straw pulp.
6. Boxes and containers of paper, paperboard and plastic material.
7. Moulded or extruded plastic products.
8. Soap.
10. Fertilizers.
11. Cement.
12. Wire fencing, barbed wire.
13. Nails, staples, screws and similar products.
15. Metal windows and fittings thereof.
17. Venetian blinds.
18. Spring mattresses.
19. Electric batteries.
20. Dried and smoked fish.
21. Ice cream.
22. Perfumery and cosmetics.
23. Pharmaceutical goods, disinfectants.
24. Boots and shoes.
25. Fancy leather goods.
27. Sacks.
28. Metal buckets and domestic utensils.
29. Metal tools and implements.
30. Safes and strong boxes.
31. Agricultural implements.
32. Bricks, roof tiles, floor tiles.
33. Furniture (wooden, metal or plastic).
34. Toys, sports goods.
35. Musical instruments.
36. Carbonated soft drinks and cordials.

The relief to be granted under the provisions of the Act to any person engaged in the manufacture of any products under item 36 shall be limited to relief from customs duty and purchase tax as provided in Part III of the Act.

37. Candles.
38. Trunks, suitcases, bags and other travel goods.
39. Umbrellas and parasols.
PART II.—DEVELOPMENT ACTIVITIES

Freezing of fish for export.
Canning of fish, meat, fruit and vegetables.
Processing of hides and skins.
Collection, processing and packing of salt.
Foundry.
Galvanising of metal goods.
Retreading of tyres.
Grinding of optical glass.

Assembly of:
   Radio and television sets,

Domestic and electrical equipment,
Office machinery,
Sun-ray heating systems,
Time recorders, precision instruments,
Bicycles,
Road motor vehicles.

Printing and bookbinding (but not issue and distribution of newspapers).

Distilling, blending and bottling of potable spirits.

The relief to be granted under the provisions of the Act to any person engaged in the distilling, blending and bottling of potable spirits shall be limited to relief from customs duty as provided in Part III of the Act.

Bottling of refined ground nut oil.

SECOND SCHEDULE

All building materials, tools, plant, machinery, pipes, pumps, conveyor belts or other appliances and materials necessary for and used in the construction, alteration, reconstruction or extension of any mine, plantation or factory specified in a development certificate granted under section 6 of this Act or for equipping such mine, plantation or factory or any extension thereof.

SUBSIDIARY LEGISLATION

(No subsidiary legislation)

NOTES AND QUESTIONS

1. Compare and contrast the Gambian with the Chinese laws on foreign enterprise.

2. How would Seidman characterize each? What suggestions would Galenson have about each? Who would Seidman and Galenson each answer Question 1?

3.1 In answering Question 1, what characteristics did you think it important to examine in each law? Why those and not others?