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INVESTMENT AND THE ANDEAN PACT:
FROM POLITICAL RESPONSE TO LEGAL STRUCTURES
TO SAFE HARBORS

Robert Carcano

Introduction

Economic development, by definition, involves profound socio-political change.¹ The development process in Latin America attests to this salient fact.² In spite of efforts to modernize, benefits seemed to elude Latin American leaders.³ New international structures had to be forged if economic development was to provide solutions to myriad social concerns.

Regional economic integration was a needed step in creating such structures. Integration promised that problems insurmountable nationally would prove susceptible to regional solution. In the Latin American context economic integration occurred simultaneously with nationalism.⁴ Indeed, nationalism would create the foundation for a new relationship. The new structures at the base of this relationship assured investors that adherence to defined rules would create a safe harbor.⁵

This study is in three parts. Part One explores the political climate which reshaped the relationship between the developed West and the developing Latin States. Part Two commences by addressing the economic rationale which served as motivation for integration. It proceeds to a discussion and analysis of the subregional entity referred to as the Andean Pact. Part Three analyzes the various legal regimes which Andean nations have adopted.

I. Background

A) The Growth of Foreign Participation

Latin American statesmen are quite sensitive to foreign influence in national and regional development efforts. Effective development not only must achieve its economic objective but also "must be under the control of the state Development would not be authentic nor politically acceptable if international cooperation contributed to a perpetuation of financial and technological inferiority."⁶

Dependency theorists had long maintained that foreign participation in national development usurped national control in key areas of the process. Foreign capital displaces national entrepreneurship, pre-empt financing⁷ and allows the foreigner to abuse his unequal bargaining position.⁸

United States participation in the region, however, is a post-Second-World-War phenomenon. From slightly over 5 billion dollars in 1929, investment in the region increased to an estimated 13 billion by the end of the fifties. Of this, 7.4 billion consisted of U.S. direct investments.⁹ The quantitative change which these figures represent belied a more significant qualitative change. Before 1950, investments within the Andean¹⁰ region were primarily directed at the extractive industries. After 1950, the policy of import substitution triggered pervasive foreign participation in manufacturing.

Import substitution policy aims at replacing foreign imports with indigenous efforts. The process begins with finished consumer goods and moves on toward higher stages of manufacture.¹¹ Foreign transnationals rapidly captured the advantages of this system and commenced active participation in the manufacturing sector.¹² Indeed, within the Andean group, investment in the extractive industries rose "from 1.060 million dollars to 1.137 million dollars between 1957 and 1967 while investments in the manufacturing sector rose from 117 million to 396 million during the same period."¹³ In this sense, foreign transnationals fostered import substitution policy. However, they did not ascertain whether the size of the market would permit economically efficient plants. To the foreigner, protected by high trade barriers, questions of economic efficiency were largely immaterial.¹⁴ The only immediate concern was market penetration.

The result of this indiscriminate invasion of foreign capital [into the import substitution process] on the host state was disheartening. With all new production targeted for the internal market, there was no increase of exports yet there was also no reduction of imports. Although the importation of finished products was halted, the import of primary material and intermediate products to manufacture the final product was considerably augmented.¹⁵

Clearly, if foreign capital was to aid national development, developmental strategy would have to address this element meaningfully, delineating between necessary foreign participation and sensitive or undesirable activity.

B) Mergers, Acquisitions and Other Concerns

Certainly, subversion of economic policy frustrated Latin American leaders. Yet the practice of acquiring smaller and medium-sized national firms was also a matter of grave concern.¹⁶ Between 1958 and 1967, for instance, of 96 subsidiaries of foreign enterprises which initiated activity in Columbia, only 48 were entirely new; 12 were unidentifiable as to origin; one was a subsidiary of another while 35 were acquisitions of firms already in existence. In Peru, a similar pattern was evident; of 62 firms, 36 were entirely new while 23 firms were acquisitions of

firms already in existence.¹⁷ Concomitant with these concerns was an increasing inability of the host government to control either the decisions of these foreign enterprises or the impact their decisions had on the host state.¹⁸ The global stance of the true transnationals enabled them to maximize profits globally without considering the environments in which particular subsidiaries operate.¹⁹ And, of course, the interest of the state is not a factor in the invisible hand's search for profits.²⁰

Studies conducted by the Chilean Corporation for Development concluded that "55% of the foreign enterprises questioned responded that it would not be feasible for them to export to the area's market since they had subsidiaries operating in the majority of the states in the area."²¹ The result is de facto division of markets, not necessarily in the nation's best interest. This same study concluded that 70% of those firms consulted paid royalties (abroad) for the use of patented and unpatented technology.²² Providers of technology clearly had a unique bargaining stance in Latin America.

Common contractual provisions used by foreign firms also became a matter of concern. Tying agreements were often utilized as vehicles to remit profits. Through such agreements, a subsidiary of a transnational would be required to utilize an intermediate or primary product of another subsidiary or of the parent. One study concluded that "if ... [Columbia] could reduce the price of its intermediate product and capital goods by ... at least 20%, it could have saved, in 1968, a sum equivalent to 50% of all its exports, excepting coffee and petroleum."²³

What enabled transnationals to perpetuate and further their interests in this manner is the desirability of their technology. Such technology enters the country in the form of goods or is transferred as technical knowledge, formulas, drawings or know-how.

If it arrives as part of direct foreign investment, two situations can arise. One is that technological participation is remunerated as royalty payments which are generally fixed as a percentage of volume of sale of the respective products. The other possibility ... is that technological participation is considered part of capital which carries the right to retire the capital and to remit profits.²⁴

The effects of this are twofold. First equity participation of foreign firms is augmented. Secondly, revenues to the host government are severely diminished.

Inclusion of restrictive clauses also led to a widely held perception that in bilateral negotiations between Andean States and the developed world the latter had an insurmountable advantage.

It would be redundant, in regard to Andean buyers, to state that [negotiating] ability is always on the side of the provider, accustomed to negotiating with buyers

who generally lack the most elemental information and ignore what they are really buying and whether there are other alternatives which could produce similar products.²⁵

Among the clauses most frequently employed were clauses prohibiting export of products manufactured with the imported technology, tying agreements and clauses prohibiting manufacture of products similar to imported goods.²⁶ The problem was clear:

Legislation on industrial property ... did not consider tying an illegal activity ... ; laws regarding patents and trademarks did not correspond to the needs of development.²⁷

C) Political Response: Expropriation

Economic change induces political and social unrest.²⁸ In Latin America, seemingly intractable social issues triggered a search for causes. The legality of foreign activity came under increasingly closer scrutiny and ultimately vehement attack.

Expropriation of property interests held, in large part, by U.S.-based enterprises, has been largely a Latin American phenomenon.²⁹ More properly, expropriation has been a political response³⁰ to pervasive U.S. and Canadian presence in Latin States.

1) Relief in U.S. Courts: The Act of State Doctrine.

In January of 1959, Fidel Castro ascended to power in Cuba. What followed was widespread expropriation of property held by American interests. American firms sought relief in the courts. In 1964 the United States Supreme Court reconsidered the act of state doctrine in the case of Banco Nacional de Cuba v. Sabbatino.³¹ The decision and its progeny served to highlight the fact that foreign investors would have to seek a safe harbor in the same port where they sought to maximize profits.³²

a) Sabbatino

A U.S.-based commodity broker, Farr, Whitlock and Company (hereinafter Farr), entered into a contract to purchase sugar from a subsidiary of Azucarera Vertientes Camaguey de Cuba (hereinafter C.A.V.).

Congress had amended the Sugar Act of 1948³³ to permit the President to reduce the Cuban sugar quota.³⁴ Characterizing this act as one of aggression, the Cuban government adopted Law No. 851,³⁵ which justified retaliation against the property interests of U.S. nationals in several specified companies, C.A.V. among them. Pursuant to Law No. 851,

Cuban government consent was necessary before Farr could ship this sugar. To obtain consent Farr entered into a novation wherein Cuba's Bank for Foreign Commerce³⁶ was substituted for C.A.V. Subsequent to this novation the Bank for Foreign Commerce assigned the bills to Banco National.

Nacional instructed its New York Agent to deliver bill and sight draft to Farr against payment. Farr refused tender. C.A.V. then notified Farr that it claimed the proceeds of the sale as rightful owner of the sugar. C.A.V. obtained Farr's promise not to turn the funds over to Nacional or its New York agent and in return C.A.V. would indemnify Farr for any loss it suffered. Farr then accepted shipping documents, negotiated the bills and received payment.

Farr was then served with an injunction issued by the New York Supreme Court prohibiting it from taking any action which would remove the funds from the State. Farr thereupon transferred the funds to Sabbatino who had been appointed temporary receiver of C.A.V.'s New York assets.

Nacional initiated a suit in Federal District Court for the Southern District of New York alleging conversion of the bills of lading. The District Court held that Farr could not assert ownership against C.A.V. before making payment.³⁷ Since the sugar was within Cuban territory, C.A.V. had a property interest in the sugar subject to the territorial jurisdiction of Cuba.³⁸ However, the court, reasoning that a taking in violation of international law did not convey good title, denied Cuba's claim of title.

The Court of Appeals affirmed. Although unwilling to declare that any one of the infirmities found by the District Court rendered the taking invalid under international law, the higher court found that such was the effect in aggregate.³⁹ The United States Supreme Court reversed, holding that the act of state doctrine bars an inquiry into the acts of a sovereign committed within its own territory.⁴⁰ The Court reasoned that the doctrine is dictated by the basic relationship between the branches of government in a system of separation of powers.⁴¹ The doctrine, explained the court, "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."⁴² It is not compelled either by the inherent nature of sovereign authority or by principles of international law.⁴³ Redress from expropriation, therefore, would have to be pursued through the channels provided by sovereign powers as between themselves.

b) Hickenlooper Amendment

After the Sabbatino decision, Congress amended the Foreign Assistance Act of 1961 to make clear that American Courts should not avoid adjudicating the merits of a case because of the doctrine.⁴⁴ Subsequent litigation sought to clarify the meaning and intent of the legislation.⁴⁵ This litigation made one thing painfully clear: the

role of American courts in redressing expropriation of the property of U.S. nationals abroad would be quite narrow. Sabbatino's "sliding rule"⁴⁶ approach insured that the more politically sensitive an act, the less likelihood of obtaining judicial relief.

This attitude on the part of the courts evinced a keen sensitivity to political reality, a concern for judicial integrity and an awareness of constitutional limitations.⁴⁷ Coupled with the conciliatory approach adopted by the Executive branch of government, judicial attitudes made increasingly clear the need for new rules to clarify the role of foreign capital abroad. If American (municipal) law was capable of articulation, however, articulation of applicable international rules on expropriation was difficult at best.

2) Differing Legal Standards on Expropriation

North American scholarship had articulated a duty between a sovereign and an alien whose property has been expropriated. The sovereign may expropriate property only to effectuate a proper purpose. Expropriation, moreover, may not be discriminatory and provision must be made for prompt payment of adequate compensation.⁴⁸ Latin American scholarship had never accepted the existence of such a standard. As Professor Futuovros indicates,

a second position, also based on traditional international law and supported by the Latin American State, views the international law requirement as of a contingent character, states being bound to treat the property of aliens in substantially the same manner in which they treat the property of their own nationals.⁴⁹

Expropriations, therefore, are a departure from the principle of pacta sunt servanda (agreements must be kept). Agreements are inviolable provided rebus sic stantibus (provided things remain as they were).⁵⁰ However, things had not remained as they were. There was an increasing perception that the international economic order functioned to the detriment of the new citizen states.⁵¹ These nations had not participated in the formation of the economic order. They did not wish to be subservient to it. The wording of expropriation decrees best illustrates this new perception. In Bolivia's nationalisation of the Gulf Oil Co., General Alfredo Quando Cundia stated:

[T]he ... fundamental charter of the state establishes that the private accumulation of economic power in such degree that it may place the economic independence of the state in danger will not be permitted; ... whereas the firm, Bolivia Gulf Oil Company, has set itself up as a new super state, which has at its disposal an economic and political power greater than that of the Bolivian State, incompatible with the principle and practice of national sovereignty [it has violated this mandate].⁵²

The same rationale justified Allende's actions in Chile. The targets of expropriation were those enterprises deemed to have a profound impact upon development of the local economy. These included the extractive and banking interests.⁵³ Indeed, even before Allende, the fate of the North American-based Anaconda Chilean operations had been decided. During the 1964 Presidential elections the only real choice was between nationalisation or Chileanization. When Eduardo Frei Montalvo won the presidency, Chileanization became Law No. 16,425 on January 25, 1966. The objectives included Chilean participation in the ownership and control of copper producing enterprises via the Copper Corporation.⁵⁴

This changed perception was as pervasive as it was permanent. One study by the Rand Corporation concluded that in Peru and Brazil military training had created an expanded concept of national security: "Military leaders began to perceive national security problems as extending beyond conventional military operations in large part because many of the existing social and economic structures seemed so inefficient or unjust as to create conditions for and give legitimacy to, revolutionary protest, and hence, constitute a security threat."⁵⁵ This expanded concept of national security in the hands of a military man can be a powerful persuader of civilian governments.

II. Regional Integration

A) The Search for Optimal Markets

Like their European counterparts, Latin American statesmen came to realize that the success of countries like the United States was at least partly attributable to the economies of scale made possible by large internal markets. This rationale served as the impetus for Latin American integration efforts.

Development would still necessitate industrialization.⁵⁶ Each nation would have to pursue industrialization internally where access to markets was not impeded. But before integration efforts could be undertaken, a concerted effort had to be made to alter traditional trade patterns. There had to be reorientation from importation of manufactured goods from Europe and the United States (and exportation of cash crops and raw materials) to development of regional industries which could utilize the area's supply of primary production and satisfy the regional demand for manufactured products.⁵⁷ This, at a time when import substitution policy was being discredited.⁵⁸ It was quite clear that "unless the volume of sale reached a certain minimum, the cost per unit and the price to the consumer would be high and capacity to compete low."⁵⁹ However, it was becoming increasingly clear that, confined to national boundaries, import substitution destroyed the benefits of economies of scale. Basic semi-manufactures such as iron, steel, chemical fertilizers, pulp and paper, and industrial and farm machinery could be most effectively produced through economies of scale.⁶⁰

Regional integration would also make possible region-wide specialization of industry. Moreover, such specialization would replace

monopoly and complacent national management with multi-plant industries.⁶¹ However, integration would have to be handled carefully. "In particular, if the great difference in degrees of development which presently exist among developing countries are not to increase, it is indispensable to devise special mechanisms in order to ensure that the benefits of integration are equitably distributed among the partner countries."⁶²

B) Integration Options

Creation of a regional market requires coordination of various policies. Common policy on tariff and trade as well as common fiscal, social and investment policy are critical. The development of infra-structure, such as transport and communication networks, is also a matter requiring coordination. Moreover, Latin American leaders realized that the integration process in Europe offered no clues for the creation of a Latin American market. In Europe, "the channels of trade were all there, ready made ... facilities were available In Latin America, on the other hand, [it was] a matter of creating something that never before existed."⁶³ Nevertheless, a first decision had to be made, namely what level of integration was most appropriate to the region. Economic theory provided three integrative mechanisms: free trade areas, common markets and custom unions.⁶⁴

A common market represents the most pervasive and permanent level of integration. Besides removal of internal tariffs and creation of a common external tariff, barriers to mobility of capital, labor and other such factors are also removed. Its increasingly irrevocable nature encourages investment.

A free trade area eliminates tariff and non-tariff barriers to trade among the members of the association while allowing each member to retain its own commercial policy toward third-party nations.⁶⁵

A third mechanism, custom unions, combines the free trade area with a common external tariff. The principal difficulty here revolves around creation of the common tariff. Moreover, practically speaking, many national laws impinge on trade. The union does not require agreement except as to those laws which relate directly to trade.

1) Dissension from Within

Formulation of a regional integration policy demonstrated the wider economic disparity in stages of development of potential member states. The smaller and less developed member states had unique developmental needs. Their participation under the Latin American Free Trade Association convinced them that the economic predominance of the United States has been replaced with that of Argentina, Brazil and Mexico. Between 1962 and 1966 these three states, already holding an aggregate of 80% of regional industrial production, doubled their net regional trade

balance, primarily in the industrial sector. This is in contrast to the middle powers who, with 17% of regional industrial production, doubled their net regional trade deficit. The least developed states, with 3% of regional industrial production, changed from regional creditors to debtors.⁶⁶ Lafta's annual negotiations on a product-by-product basis, subject to reciprocity of benefits, favored Mexico, Brazil and Argentina for several reasons:

- (1) the size of their markets require greater concessions
- (2) the industrial products produced by L.D.C. are not needed by the larger states and
- (3) operation of the most favored nation clause.

Economic disparity was not unforeseen. In 1955 the U.N. Economic Commission for Latin America proposed a draft which suggested recognition of three distinct groups of nations "with the object of allowing the more developed states in the area to grant special and transitory concessions to the medium and lesser developed states ... ; however [when the Treaty was implemented] the three categories were not established."⁶⁷

Studies would later note that elimination of trade barriers furthers the tendency of investments to concentrate in the more advanced countries of the region. Factors such as the existence of a skilled labor force and existing economic infra-structure almost guarantee higher returns on capital.⁶⁸ Concomitantly, participation in an integrated market denies lesser developed states the protection usually afforded to nascent industry.

In short, unless special measures are taken in favor of the weaker country, the establishment of free trade within a regional market would bring into operation or stimulate cumulative processes similar to those which have led the world in general to the existing patterns of relationships between the developed and the developing countries.⁶⁹

Other scholars phrased the problem in other, more poetic, terms. Professor Santos said:

We don't adhere to the Calvinist formula ... of "To he who has, may more be given, and to he who has little, what little he has he may be deprived of." On the contrary, we think that equity lies in a distribution of cost and benefits that favors most he that has least. And not because of international philanthropy but rather because we are certain ... that the accelerated development of the weaker is a problem that concerns all members of the community Seen in this manner, equity is synonymous with collective convenience, and should be practiced in the broadest possible manner.⁷⁰

2) Sub-regional Integration Efforts

With the meeting of the Presidents of America at Punta del Este the concept of a sub-regional agreement came into focus.⁷¹ The meeting revealed a consensus on the creation of a Latin American Common Market (to be in effect by 1985). This larger market was to come into being by the convergence of LAFTA and the Central American Common Market.⁷² The document contained two provisions worth noting. First, it envisioned the participation of foreign capital.⁷³ Secondly, it granted L.D.C.s the right "to participate and to obtain preferential conditions in sub-regional agreements."⁷⁴

Subsequent to this agreement on principle, the Conference of Contracting Parties of the Latin American Free Trade Association, pursuant to mandate issued by the Declaration of Presidents, established the norms by which sub-regional agreements would be judged.⁷⁵ This came in the form of Resolution 203. The Resolution sets out basic principles by which sub-regional agreements were to be guided.⁷⁶ By Resolution 203,⁷⁷ the Council of Ministers approved the outline of the sub-regional agreement presented by Columbia, Chile, Ecuador, Peru and Venezuela. To effectuate the purposes of Resolution 202, the Conference of Contracting Parties approved Resolution 222.⁷⁸

The promotion of the sub-regional agreement had to legitimize the relationship between the Pact and LAFTA.⁷⁹ Indeed, even before the adoption of Resolution 203 a study conducted by a Chilean delegation to LAFTA's Council of Ministers addressed this question.⁸⁰ By giving the agreement the character of a treaty mechanism, the member could profit from application of the most favored nation clause without having to reciprocate. Secondly, the agreements were effectuated by executive act and, hence, legislative approval was bypassed. Since the Treaty of Montevideo imposed upon the Committee the task of facilitating creation of the Latin American Common Market,⁸¹

[i]t is evident that, at Punta del Este, the Presidents of America resolved to put into execution the programmatic norms of Article 54 by adopting the decision to accelerate the process of converting LAFTA into a common market One of the many mechanisms that could be adopted ... [is] precisely the sub-regional agreement. These agreements ... constitute a most efficacious means to create conditions favorable to the establishment of a common market.⁸²

3) The Andean Pact - Structures

With these conceptual difficulties clarified, the path was cleared for the Agreement of Cartagena⁸³ and creation of the Andean Pact. Chapter I of the Agreement states the purpose of the agreement to be promotion of harmonic and balanced development of its member states in order to facilitate creation of a common market.

Chapter II establishes the several bodies of the Treaty. The principal bodies are the Commission and the Junta.⁸⁴ The Commission is the supreme body and is composed of one representative from each of the member governments.⁸⁵ It establishes the general policy of the Agreement and adopts measures to effectuate it. The Commission designates and removes the members of the Junta; it passes upon the Junta's proposals and monitors for compliance with the Treaty of Montevideo.⁸⁶ The Commission meets three times a year and can be called into special session by petition of any state or the Junta. Any such meetings are mandatory.⁸⁷

The Junta is the technical body. It is composed of three members who serve for three year terms. The Junta represents the regional interest.⁸⁸ It fulfills the decisions of the Commission and formulates proposals to facilitate compliance with the Agreement. Moreover, the Junta is charged with formulating development mechanisms of special application to the least developed of its members: Bolivia and Ecuador.⁸⁹ There is no requirement that the Junta's technical staff be of Andean nationality.⁹⁰

Chapter III addresses how the Agreement is to be effectuated. It speaks to common policy formulation regarding development strategy⁹¹ and coordination of development plans⁹² through harmonization of exchange, monetary, financial and fiscal policy (including regimes for regional and foreign capital).⁹³

Article 27 called upon the Commission to approve and submit a common regime for the treatment of foreign capital, trademarks, patents, licenses and royalties, before December 31, 1970. Similarly, the Agreement mandates a common regime for the treatment of multinational enterprises⁹⁴ and for the regulation of competition.⁹⁵

Chapter IV of the Agreement enumerates the savings clauses. They mirror the clauses found in the Treaty of Montevideo.⁹⁶

Chapter V is addressed to trade liberalization. All tariffs and other trade barriers of equivalent effect, whether of a monetary exchange or administrative nature, are to be eliminated.⁹⁷ It is for the Junta to determine what acts constitute prohibited restrictions.⁹⁸

The liberalization program is automatic and irrevocable and it encompasses all products. Total liberalization was to be accomplished by December 31, 1980. The program of liberalization is to apply in different measures to (a) products destined for the Sectoral Program of Industrial Development [hereinafter SPID], (b) products on LAFTA's Common List, (c) products not produced by any states in the subregion and (d) products not comprehended by any of these categories.⁹⁹

With the exception of restrictions applicable to products on SPID, restriction of all types were to be eliminated by December 31, 1970.¹⁰⁰ A special regime is created for Bolivia and Ecuador.

The Junta determines which products are to be reserved for sectoral

development.¹⁰¹ Products listed on LAFTA's Common List were to be free 180 days after the effective date of the agreement. The Commission, pursuant to the Junta's proposal, was to draw up a list of products not produced within the subregion and not reserved for SPID and, concomitantly, was to select those products reserved for Bolivia and Ecuador.¹⁰² As to the list, these products were to be duty free by February 28, 1971.

III. Safe Harbors

The Agreement of Cartagena, establishing the Andean Group,¹⁰³ mandates action that would remove the property interest of U.S. and Canadian-based firms from the instability and uncertainty that characterized expropriation. This mandate is found in articles 26 and 27.¹⁰⁴ It was fulfilled by adoption of the Common Regime for Treatment of Foreign Investments, Trademarks, Patents, Licenses and Royalties in December of 1970 and ratified as Decision 24 on June 1, 1971.¹⁰⁵ The Code addresses a market in excess of 50 million people in an area half as large as the United States.¹⁰⁶

A) Foreign Investment

The Code's preamble recites much of what Punta del Este and the Declaration of Bogota first enunciated:¹⁰⁷ "[F]oreign capital and technology can play an important part in subregional development to the extent that it constitutes an effective contribution toward attaining the objectives of integration and reaching the goals indicated in national development plans."¹⁰⁸ This, of course, proceeds from the realization that integration will require foreign investment, which in turn must be able to assess risks. Consequently, it is necessary to promulgate rules setting out not only the advantages of integration benefiting national or mixed firms¹⁰⁹ but also the rights and obligations of foreign investors including the guarantees that will protect them. The regime must work for the mutual benefit of both investor and member countries.¹¹⁰

The Code is not simply a set of rules regulating foreign investment. Rather, it is a general set of guidelines imposing affirmative obligations on all member states. The goal is clearly to strengthen national firms in order to enable them to participate in overall development.¹¹¹ Likewise, the Code imposes a general obligation upon member states to implement standards and mechanisms which will attract needed technology to national enterprises on reasonable terms¹¹² and allow national capital to participate in existing enterprises. Thus, the Code brings development into national hands.¹¹³

Definitions provided by the Code apply not only to regulation of foreign investment but also to other common regimes promulgated pursuant to the mandate of Decision 24. A direct foreign investment¹¹⁴ is characterized broadly rather than being defined in a limiting fashion. It is a contribution made by a natural or juridical person to the capital

of an enterprise either in freely convertible currency or through industrial plants, machinery (new or used), spare parts, raw materials or intermediate products.¹¹⁵ Also embraced are funds in local currencies which are entitled to be transferred abroad and their reinvestments.

National investors¹¹⁶ are the state, national individual, national non-profit entities and national enterprises. A foreigner can become a national investor by establishing residency of not less than one year and appearing before the competent national authority in order to renounce the right to repatriate capital and to transfer profits abroad. An investment made by a subregional investor will be considered equivalent to a national investment if the investment was authorized by the investor's country of origin and is submitted for prior approval of the host (which requires certification of country of origin). A subregional investor is a national investor of a member country¹¹⁷ different from the host, whereas a foreign investor is defined as an individual of a non-member country who owns a direct investment¹¹⁸ in a member-state.

A national enterprise¹¹⁹ is one not only organized in the recipient country but also owned to the 80% level by national investors. There is a proviso which is meant to insure actual compliance, that is that the 80% level be reflected in the technical, financial, administrative and commercial management of the enterprises.

A mixed enterprise¹²⁰ is one whose capital belongs to national investors in a proportion which may fluctuate between 51% and 80% if the competent national authority determines that the proportion correctly reflects the actual management.

A foreign enterprise¹²¹ is one less than 5% of whose capital is in the hands of national investors or, if that percentage is higher than 51%, it is not, in the opinion of the national competent authority, reflected in its management.

Investments are both defined and characterized. Thus a new investment¹²² is one made after July 1, 1971 in either existing or new enterprises. Reinvestments¹²³ are investment of all or part of undistributed profits.

We have already noted the dependista antagonism to foreign investment. One such conflict involves the power of foreign investors, especially transnationals, to affect important developmental policy.

Addressing this concern, the Code requires that any foreign investor wishing to invest in an Andean country submit an application to the competent national authority (hereinafter CNA). The CNA must then assess the application with a view toward the country's development policy. It will be approved if it is deemed consistent with the national interest.¹²⁴ No member state may approve an investment in an activity already covered by an existing industry. Moreover, no member state may approve an investment where the purpose is to acquire shares, participation or rights owned by national or subregional investors.¹²⁵ This latter proviso is clearly meant to redress the practice of foreign takeover of indigenous firms.

The CNA is empowered to authorize foreign participation in national or mixed firms, if the capital of the respective enterprise is increased and the enterprise at least maintains mixed classification.¹²⁶

Reinvestments are treated as new investments. As such they trigger authorization and registration requirements.¹²⁷ However, the Andean governments may permit reinvestment of profits - as long as they do not exceed 7% of the company's capital.¹²⁸ No authorization is required for these amounts. However, registration is required.¹²⁹

Another route around the reinvestment stricture of art. 12 is the application of undistributed earnings to the acquisition of Portfolio Development Bonds when reinvested earnings and these bonds do not exceed 7% of the company's capital. Registration is required.¹³⁰

The CNA must examine and approve all contracts which touch upon importation of technology, patents or trademarks. It is charged with appraising the effective contribution of the goods in which the technology is incorporated, or with applying any other standard it deems appropriate for measuring the effects of the imported technology.¹³¹

Chapter III addresses special regulation by sectors. Each state is to determine which sectors of economic activity it will reserve for national public or private enterprises. The State must determine whether mixed enterprises will be admitted. The Commission, on recommendation of the Board, may determine the sectors which all states shall reserve for national or private enterprises and whether participation of mixed enterprises will be allowed.¹³²

Foreign firms in these special sectors shall not be obligated to abide by the provisions of Chapter III regarding their transformation into mixed or national firms. They are subject to the other provisions and not to articles 40 and 43.¹³³

During the first 20 years of the Code, foreign firms engaged in the basic products sector (subject to concessions) will not be required to transform as long as their contracts do not exceed 20 years.¹³⁴ Depletion tax allowances are not allowed for basic products sector activity. The preferable form for foreign participation here is a contract of association with the State.

Upon authorization by the CNA, the owner of a direct foreign investment shall have the right to transfer abroad, in freely convertible currency, the verified net profits resulting from the direct foreign investments but not in excess of 20% of that investment annually. However, member countries may authorize greater percentages and shall communicate to the Commission the provisions or decisions taken in this respect. The CNA may also authorize the investment of excess distributed earnings, in which case such investments shall be considered direct foreign investments.

There are to be no new investments in the public service sector.¹³⁵ The only exemptions are those investments made to insure the technical and economic efficiency of currently existing firms.¹³⁶

The Code proscribes new direct foreign investment in insurance, commercial banking and other financial institutions. Foreign banks in existence in member states had three years from the Code's effective date to cease receiving local deposits in current accounts, savings accounts or time accounts. Such banks could stay in business if they converted into national enterprises,¹³⁷ that is, sold 80% of their capital to national investors within the three year period.

No new direct foreign investment is permitted in domestic transportation enterprises, advertising enterprises, commercial radio stations, television stations, newspapers, magazines, or enterprises engaged in domestic marketing of products of any kind. Foreign firms already in these sectors must also convert into national enterprises.¹³⁸

The sanctions for non-compliance (when a host country does not grant exemption from these provisions) are that the products shall not enjoy the advantages of the duty-free program of the Cartagena Agreement.¹³⁹

The Code requires an investor to register the agreement reached with the CNA. The agreement must specify the terms of authorization. The amount of the investment is registered in freely convertible currency.¹⁴⁰

The authority which registers the investment is responsible for supervising its fulfillment. Among other things, the CNA must supervise fulfillment of commitments for national participation in the enterprise's technical, administrative, financial and commercial management and in its capital structure.¹⁴¹ It must authorize the purchase of shares and participation of rights of national or mixed enterprises by foreign investors, as per article 3 and 4.¹⁴² The CNA must establish an information and price control system of the intermediate products that may be furnished by suppliers of foreign technology or capital. It must authorize the transfer abroad of all amounts authorized by the Code or by national law, centralize statistical accounting and supervisory records connected with direct foreign investments and authorize licensing contracts for the use of imported technology, trademarks and patents.¹⁴³

Only national or mixed firms or foreign firms which transform into national or mixed firms can enjoy the advantages derived from the duty-free program of the Cartagena Agreement.¹⁴⁴ In order to avail itself of the program, a foreign firm must, within three years of the regime's effective date, register to divest itself. After the three years there must be national investor participation of not less than 15%. Time periods for fade-out vary, it is 15 years in Columbia, Peru and Venezuela and 20 years in Bolivia and Ecuador commencing January 1, 1974. The divestment program contemplates that after two-thirds of the time period, participation of national investors must not be less than 45%.¹⁴⁵ Foreign firms established after July 1, 1971 must agree to place on sale, as per art. 31, a percentage of shares so that they are transformed as per the above program.¹⁴⁶

Only firms who indicate (within the three year period) their willingness to transform, will be granted certificates of origin of

merchandise by the national authority responsible for it.¹⁴⁷ Foreign firm fade-out agreements must stipulate certain matters.¹⁴⁸ During the period of this transformation foreign firms will enjoy the advantages of the duty-free program. However, any breach of their agreement effectively terminates such benefits.¹⁴⁹ The CNA controls the fade-out obligations and the manner of sale.¹⁵⁰ The rights granted by the Code are the maximum that can be granted,¹⁵¹ though to be sure each state can impose stricter requirements.

A foreign firm which exports 80% or more of its products into third countries shall not be obligated to abide by the provisions of the Code. Of course, it cannot participate in the duty-free program established by the Agreement.¹⁵² Upon authorization by the CNA, the owners of a direct foreign investment can transfer abroad, in freely convertible currency, the verified net profits resulting from the direct foreign investment, as long as they are not in excess of 20% of that investment annually. A member state can authorize a greater percentage but must communicate this to the Commission.¹⁵³

A registered investor can repatriate invested capital when shares are sold to national or subregional investors or upon reinvestment. However, sale of shares to another foreign firm must be authorized and will not be considered for re-exportation of capital.¹⁵⁴ The Code defines re-exportable capital as the original investment registered and actually made plus any reinvestments made in the same enterprise in accordance with the provisions of the Code minus any net losses.¹⁵⁵

Upon liquidation, the difference between the real value of the net assets and the re-exportable capital, as defined above, is considered capital gains and can be transferred abroad after payment of taxes.¹⁵⁶ After payment of taxes a foreign investor acquires the right to transfer abroad amounts obtained from the sale of shares or other rights.¹⁵⁷ Conversion is to be at the rate of exchange prevailing at the time the draft is drawn.¹⁵⁸

Transfer covering amortization or interest because of the use of foreign credits shall be authorized as per the registered contracts. Foreign credit agreements between a parent and its subsidiary may not have a real rate of interest which exceeds by more than three points the interest rate of first class securities prevailing in the financial market of the country of origin of the currency in which the transaction is registered.¹⁵⁹ The CNA must determine the real rate of interest for any other external credit contract. Nevertheless, it must be closely related to the prevailing conditions of the financial market of the country in which the transaction has been registered.

The Code closes one large loophole involving profit remittance by allowing intangible technological contributions the right to payment of royalties, upon authorization by the CNA. Caveat: they may not be computed as capital contributions. If furnished to a foreign enterprise by its parent or an affiliate, however, no payment of royalties shall be authorized and no deduction is allowed for tax purposes.¹⁶⁰

The Code also addresses importation of foreign technology. Contracts for the importation of technology must contain clauses identifying terms of transfer, stating the value assigned in the contract to the various components of the technology, expressed in a form similar to that followed in the registration of direct foreign investments.¹⁶¹ Any contract containing anticompetitive clauses is to be automatically denied authorization.¹⁶² The exception is where the CNA allows limitation of the product manufactured. In no cases can clauses of this nature be accepted in connection with subregional trade or exportation of similar products to third parties.¹⁶³

CNA's are charged with keeping abreast of the available technology on the world market in order to have alternative solutions to recommend to the Board for subregional development.¹⁶⁴ Preference is to be given to products incorporating indigenous technology. Upon Board recommendation, the Commission may propose to the member countries the establishment of charges for products using trademarks of foreign origin for which royalties have to be paid when generally known or easily accessible technology can be used in their production.¹⁶⁵

The Code charged the Commission with articulating a policy on subregional technology.¹⁶⁶ Such a policy would prohibit the use of restrictive covenants.¹⁶⁷ Lastly, at the Board's proposal, the Commission may indicate productive processes or groups of products with respect to which no patent privilege may be granted in any of the member countries. It may also revise privileges already granted.¹⁶⁸

As has already been mentioned, the Code imposes upon member states an affirmative obligation to follow a set course of conduct. It should come as no surprise that the system should experience internal dissension. An instance of such dissension occurred during 1976 with Chile's insistence on a revision of the Code. The controversy briefly sketched below illustrates how potential conflicts can come about intraregionally and how the Code, as already analyzed, came to be.¹⁶⁹

B) Dissension and Modification

Prior to the incorporation of the Code into the Chilean legal order, the regulation of foreign investment was characterized by absence of a unified developmental policy. "The preceding legal order sought to formalize rather than to regulate. The restrictions on foreign investments aimed at safeguarding the financial integrity of the transactions rather than at furthering specific development objectives."¹⁷⁰

Chile was a party to the Agreement of Cartagena when Eduardo Frei was President. The Code was incorporated through Decree Law 482 of the Chilean Ministry of Foreign Relations in June of 1971. The decree established the Code's operating mechanisms and abrogated any inconsistent law.¹⁷¹ Frei was succeeded by Allende. Allende had expressed agreement with the Code, however. With the ouster of Allende's regime in September of 1973 came the realization that the Code could not

dictate solutions to so many of Chile's grave economic problems then "accentuated by a world-wide drop in copper."¹⁷² The economic needs of Chilean society were obvious: curtail inflation and accelerate growth. This was to be accomplished by attracting foreign capital. On July 13, 1974 Chile enacted Decree Law 600.¹⁷³

The first confrontation with the Andean Group came at the Fifteenth Ordinary Session of the Cartagena Agreement on September 10-12, 1974,¹⁷⁴ at which time member states were to negotiate a tariff-cutting schedule. "The session ended with the presentation of a joint declaration by Bolivia, Columbia, Ecuador and Venezuela stating that Chilean D.L. 600 contravened the Cartagena Agreement in its spirit and philosophy and constituted a parallel regime...which has internationally generated expectations contrary to the subregional interest."¹⁷⁵

The fear was that Chilean D.L. 600¹⁷⁶ would create pressure within the other member states to attract foreign capital and hence hurt the integration movement. It was also felt that only through a collective effort could foreign capital be made to respond to regional needs.

Inherent in Chile's stance was the statement that Andean Group measures are not ipso facto supreme (as the Agreement contemplates). The Chilean position seemed to be that such measures are national law only to the extent that they are congruent with national needs.¹⁷⁷ Or the Chilean position could have been interpreted to mean that, although supreme, Andean measures could be departed from when special circumstances affected the national interest. Both positions would contravene the purposes of the Agreement.

The Andean members pointed out that D.L. 600 had no fade-out provision, that the limitation on profit remittances was excluded, that it did not limit access to credit and that it favored foreign investors.¹⁷⁸

Resolution of the problem occurred during the Sixteenth Ordinary Session of the Cartagena Agreement. D.L. 600 was effectively limited to articles 34 and 44 of the Code.¹⁷⁹ However, Chile found that "it could not eliminate investors' doubts; ... a lack of investor confidence, exacerbated by uncertainty as to the outcome of the clash with D.24, transformed the promise of D.L. 600 into an illusion."¹⁸⁰ During the summer of 1976 Chile intensified its attack on D.24 refusing to approve revision of the tariff reduction schedule.¹⁸¹ At this point, the member states were willing to meet some of Chile's demands.¹⁸² The member states agreed to a protocol establishing a special commission between Bolivia, Columbia, Ecuador, Peru and Venezuela on one hand and Chile on the other.¹⁸³ The protocol sought a complete resolution of the crisis. Article 2 of the protocol, however, provided that

if by the completion of the period indicated in the preceding article (24 days from the protocol's effective date) an agreement between the parties should not be reached, then they agree, by virtue of this agreement, to Chile's withdrawal from the

Cartagena Agreement, renouncing all its rights and ending its obligations derived from that Agreement ... except the rights and obligations emanating from Decisions 40, 46, 56 and 94 which shall remain fully in force.¹⁸⁴

Chile was adamant, and would not be placated. Hence, at their Seventh Ordinary Session, the Commission of the Cartagena Agreement adopted Decision 102, giving effect to the protocol of October 5 and creating a committee to study how the laws not affected were to be implemented.¹⁸⁵

Chile's actions had a profound influence on the character of the Code. During October 30, 1976, the Commission approved reforms to the Code. Other reforms were approved during November 25 to 30, 1976.¹⁸⁶ Taken together the reforms were extensive.

Prior to the reform, investors who had established a one year residency and renounced repatriation had been considered national investors.¹⁸⁷ Now one or both of these conditions can be waived.¹⁸⁸

The reform also created a new class of investor, the subregional investor. He enjoys the right to repatriate capital and remit profits but is considered a national investor for purposes of the Code. For a foreign investor to be considered a subregional investor he must get authorization from both the country of origin and the receptor country.¹⁸⁹ No subregional investments can be authorized for industries producing products reserved to other member countries.¹⁹⁰

Another reform opens up medium term credit (three years or less)¹⁹¹ to foreign investors. It also returns to national legislation, determination of the terms and condition under which short-and-medium-term credit is to be granted to foreign firms.¹⁹²

The Code required a foreign investor wishing to participate in a national or mixed enterprise to meet two conditions. First, the investor had to increase the capital of the enterprise and second, it could not alter the nature of the enterprise invested in. The reform does not affect the first requirement. As to the second, it requires that the receptor maintain its quality as a mixed firm. Hence, the investor is given a wider choice of methods.¹⁹³

The reform also addresses investment of excess profits. The low percentage limits imposed on these profits created an anomalous situation: the accumulation of resources belonging to foreign investors without right of convertibility nor right of repatriation. They fit neither the definition of direct investment nor national investment (because of the nationality of the owners). The reform

included a new provision with which governments could authorize investment of the excess of the annual profits produced by foreign investment. The norm

requires that [the subject matter] be profits distributed to ... investors Once authorized as investment of [excess profit] they are converted to foreign direct investment with the privileges inherent to these.¹⁹⁴

When the original Code was promulgated, the requirement that foreign firms fade out was contingent on the agreement entering into force simultaneously on July 1, 1971. However, Venezuela did not adopt the Code until 1974, and there were questions as to its constitutionality in Columbia. The Commission decided to attempt some uniformity as to transformation by utilizing January 1, 1974 as the date at which transformations were to begin.¹⁹⁵ Further, the reform established the possibility of realizing this transformation through capital increase of the enterprise.¹⁹⁶ The reform also established that international financial entities and foreign governmental agencies of developmental cooperation can qualify their investments as neutral.¹⁹⁷

Since Chile's departure from the Andean group, her fortune has been mixed.¹⁹⁸ The other Andean states continue to work under the regime in one way or another.¹⁹⁹ One member state, Venezuela, deserves brief mention. Venezuela's decision to join the Andean Group was announced by President Caldera in 1973. This is noteworthy because in the early 60's the prevalent opinion was that "any common market or free trade area will leave us producing nothing but petroleum and iron ore, and importing everything else. Our textiles cannot compete with Brazilian textiles, our coffee cannot compete with Columbian coffee and our meat cannot compete with Uruguayan meat."²⁰⁰ By 1972 the attitude had changed. "[I]t had become apparent to many of the nation's decisionmakers that participation in these organizations was essential if Venezuel were to continue its economic growth and to avoid exclusion from important trading markets."²⁰¹ Venezuela had little difficulty accepting the underlying philosophy of the Code. By 1971²⁰² Venezuela's national legislation already incorporated many of the basic concepts of the Code. By 1974, Venezuela had fulfilled the steps required to bring it into the Andean fold.²⁰³

C) Emerging Antitrust Concepts

During their Sixteenth Extraordinary Session, the Commission of the Agreement of Cartagena approved Decision 45 addressed to regulation of competition.²⁰⁴ The decision was taken pursuant to the mandate of Chapter III of the Agreement imposing a duty to harmonize laws. Correcting practices that distort competition comes within the mandate since the liberalization program of the Agreement has as an objective putting at the disposition of subregional consumers a growing volume of goods produced within the subregion in conditions of ever more favorable price and quality.²⁰⁵

The decision establishes per se violations. They are dumping, price manipulation,²⁰⁶ conduct whose purpose is to influence the normal flow

of primary materials²⁰⁷ and any other (conduct) of equivalent effect.²⁰⁸

Any member state which feels aggrieved by the conduct of any other member state can present its case to the Junta²⁰⁹ together with the facts giving rise to the claim.²¹⁰ The Junta must communicate with the member complained about within 48 hours in order to solicit information on the matter. This information must be returned to the Junta within 15 days. The Junta is empowered to take any measure (conducting a study or convoking a meeting of the parties) necessary.²¹¹

If the parties do not arrive at a solution, and the Junta feels there is sufficient evidence for the adoption of corrective measures, it may order application of such measures. Such measures are to be adopted within 30 days of the time (15 days) measured in art. 4, but the Junta is to expedite the corresponding resolution.²¹² It then communicates this to the interested parties, to the other member states and to the Commission at its next meeting.²¹³ The Decision provides for summary proceeding for situations wherein time is of the essence.²¹⁴

In order to carry out the provisions of the Decision, the Junta can authorize imposition of restrictions and barriers to those products which are the object of distortion of competition.²¹⁵ The restrictions are in effect subject to approval by the Commission. If no action is taken by the Commission at its next meeting, the decision of the Junta is to remain in effect.²¹⁶

There is a right of direct review of the Junta's resolution by the Commission. This right must be exercised within 60 days following the effective date of the resolution.²¹⁷ If the offending practices emanate from a country outside the subregion²¹⁸ and affect products upon which compromises have been granted, the affected state must solicit the Junta to apply article 8 restrictions. If not, unilateral action is permitted,²¹⁹ as long as the Junta and Commission are notified. When the Junta determines that the conduct which gave rise to Article 8 restrictions has ceased, it shall communicate this and its actions lifting the restrictions to the state.²²⁰

The Decision places an affirmative obligation upon the bodies involved in the Cartagena Agreement to evaluate conduct which causes distortion in order to enable characterization of practices as per se offensive or as acceptable within certain parameters.

D) Regime on Multinational Enterprises

Article 28 of the Agreement imposes upon the Andean States (through the Commission) the task of developing a common regime for the treatment of sub-regional capital. The Uniform Regime on Multinational Enterprises and Regulation of Subregional Capital was promulgated by the Commission in December of 1971 to fulfill this mandate.²²¹

A subregional investor is defined as the national investor of a member state distinct from the receptor country.²²² The purpose of the Decision is to encourage investments in a newly created vehicle: the Multinational Enterprise (hereinafter MNE).²²³ To this end the investor obtains authorization from the CNA of the country of origin to invest in an MNE or to transfer capital to the receptor (host) country. The CNA can establish a method of profit remittance but may not authorize repatriation of capital nor transfer of profits to any country other than to the country of capital origin.²²⁴

Further, CNAs cannot authorize acquisition by foreign investors of shares or rights of subregional investment property. Sale of any shares or rights to an investor of a different nationality must be authorized by the CNA of the receptor country.²²⁵

A MNE is an enterprise whose business purpose revolves around either the sectorial programs of industrial development, infra-structure projects aimed at furthering integration, programs rationalizing the production of existing industries and joint programs for the development of agriculture and cattle raising²²⁶ or any other program which the Commission determines is of subregional importance. Moreover, an MNE may not allow foreign participation greater than 40%;²²⁷ participation of national investors of member countries cannot be less than 15% of the subregional total²²⁸ and subregional capital must be reflected in the technical, financial and administrative management of the firm.²²⁹ The capital of an MNE is to be evidenced by denominated shares²³⁰ whose value is to be expressed in the monetary unit of the enterprise's country of principal domicile.²³¹

The charter of said enterprise must conform to the requirements of arts. 8 and 9,²³² as well as to the requirements of national legislation.²³³ The promoters must obtain authorization from the Commission of the Cartagena Agreement²³⁴ certifying compliance with arts. 8 and 9. Once received, the CNA must forward copies of these documents to the Junta and to the rest of the member states.²³⁵ Upon a finding of non-compliance with the prerequisites of article 8, the CNAs of the office member states may complain to the CNA of the enterprise's principal domicile.²³⁶ This must be done within 60 days of receiving the documents characterizing the MNE. After said 60 days have expired, or any questions have been resolved, the CNA of principle domicile is to conclude the charter.²³⁷

The "sweeteners"²³⁸ are found in Chapter VI of the Decision. MNE's shall enjoy the advantages of the liberalization program.²³⁹ They are entitled to the same treatment as national investors²⁴⁰ in matters pertaining to state acquisition of their products. Further, they are not subject to divestment requirements of the Code;²⁴¹ they have access to internal credit²⁴² as national investors and they require no prior authorization to reinvest profits.²⁴³ They are entitled to participate in the economic activities of the member states reserved for national enterprises.²⁴⁴ They also have the right to transfer the net (proved) profits resulting from their direct investment, after the payment of any taxes and after obtaining authorization from the NCA.²⁴⁵

Lastly, article 37 establishes that MNE's are to enjoy the benefits of trade liberalization and relaxed restrictions on transfer of start-up capital in all the member states. They are entitled to the benefits granted by articles 30-36, only in the member states whose nationals participate in capitalization as per art. 11.²⁴⁶

E) Subregional Technological Policy

During their Thirteenth Extraordinary Session which took place between May 27 and June 5 of 1974, the Commission of the Agreement of Cartagena adopted Decision No. 84, entitled "Bases for a Subregional Technological Policy."²⁴⁷

The decision recognized the enormous role that technology plays in development²⁴⁸ and undertakes to establish within the subregion the scientific and technical infra-structure requisite to fulfill the needs of development.²⁴⁹ It imposes upon the member states a common policy the purpose of which is to promote the application of technical know-how which will favor subregional development.²⁵⁰ This must be done with a view toward equalized development between small and medium states on one hand and large states on the other.²⁵¹

The decision requires the member states to take "concrete action" with regard to various programs of development, including evaluation, selection and control of imported technology,²⁵² the simulation, adaptation and copying of foreign technologies²⁵³ and obtaining and diffusing information relating to available technology.²⁵⁴

Chapter III addresses importation of technology. It imposes upon the CNA's of member states a duty to evaluate contracts involving importation of technology with a view toward determining its effect upon the subregion. One such effect is the repercussions of such imported technology on the development of indigenous technology, its contributions to specific projects of interest to the nation or the subregion and the effect on the balance of payments.²⁵⁵ Moreover, when the technology affects the national interest, the decision requires an applicant to come before the CNA and establish what other sources of technology are available, their cost and the reasons why he chose the present one.²⁵⁶

In addition to the information required by the Code,²⁵⁷ the CNA may also request information which would enable it to break down the imported technology into its various components, in order to determine which should be obtained locally and which must be imported.²⁵⁸ To effectuate these purposes all member state CNAs are to cooperate²⁵⁹ in investigating sources of technology, and all member states must include clauses incorporating these requirements (as well as those of Decision 24) into the norms, guides and financing requirements of projects or studies commissioned by them.²⁶⁰

Chapter IV establishes the methodology by which technology will be assimilated and developed. It calls upon member states to adopt mechanisms to increase the capacity to generate technology, i.e. creation

of incentives to stimulate demand.²⁶¹ Further, it requires member states to prefer natural persons, national firms, mixed and multinational firms when they contract for consulting, engineering or other such services²⁶² if circumstances permit.²⁶³ With regard to those contracts negotiated with third-party countries, there must be agreement that the project will provide for the participation of national, mixed or multinational enterprises.²⁶⁴

The Commission, through recommendation of the Junta, can approve "Andean Projects of Technological Development." These projects have a dual purpose: to find solutions to specific problems of common interest relating to technology or to help develop a policy on how best to cooperate internationally in technology markets. Two or more member states can present such a plan to the Junta. The junta must then analyze and communicate its findings which includes a proposal to effectuate the plan to the Commission.²⁶⁵

To be acceptable the project proposal must include data such as a definition of the problem that will be addressed, the objectives of the project including justification for the particular choice, an estimate of possible benefits (social and economic), a determination and organization of the technological and scientific activities necessary for the execution of the project, the mode through which other member states can participate and other enumerated matters.²⁶⁶ Another matter that must be provided for is a financing plan.²⁶⁷

F) Industrial Property

The Andean Group has also acted to address industrial property. In June of 1974 during their Thirteenth Extraordinary Session the Commission adopted Decision 85.²⁶⁸ The decision introduces regulations of patents, licenses, trademarks and other (intangible) property rights.

Chapter I addresses patents.²⁶⁹ It provides for the grant of a patent for new inventions (or improvements on existing inventions) which have industrial application.²⁷⁰ An invention is not new if it has been made public via an oral or written description, by its exploitation, or through any other means sufficient to permit its production prior to presentation of the application.²⁷¹

An inadvertent disclosure such as a bad-faith disclosure of the idea by a collaborator or employee of the inventor (or theft of the idea) does not constitute publication so as to divest the investor of a right to a patent. Likewise an inventor will not be deemed to have lost his patent right when he has exhibited the invention in an exposition recognized by a member state, or when conducting experiments to determine its application to industry.²⁷²

Anything that can be manufactured and used in any type of industry is susceptible of a patent.²⁷³ Excluded are: scientific principles and scientific discoveries, the discovery of material existing in nature, commercial, financial and accounting plans, game rules or any other

system, which are abstract in nature. Esthetic creations and therapeutic methods for diagnostic treatment of humans or animals are also excluded.²⁷⁴

No patents shall be granted to inventions contrary to public policy. No patent will be issued for inventions relating to essentially biological procedures. Also excluded are pharmaceutical or nutritional products whether for human, animal or vegetable use. No right will derive from a solicitation on foreign invention if a prior solicitation has been submitted in another state.²⁷⁵

Patents can be held by natural or juridical persons. The first to apply obtains the right except where there are joint applicants, where each takes in common.²⁷⁶ An inventor whose invention has been stolen can challenge and get title to the patent during the 90 days following publication of patent solicitation or he can seek judicial action if the patent has already been granted.²⁷⁷ The opposition proceeding is commenced by a filing at the national office. It is then forwarded to the proper jurisdictional body. The applicant must then answer in accordance with his national rules. There is a two year statute of limitation for bringing an opposition proceeding.²⁷⁸ Unless otherwise agreed, an invention produced by an employee under contract shall belong to his employer.²⁷⁹ A prior patent solicitation in any member state grants the applicant priority (as of the petition date) in all the member states.²⁸⁰ All applications are to be made to the national office in charge.²⁸¹

Once presented, the patent application is examined by the national authority to determine whether it meets patentability requirements and whether the proper documents have been filed.²⁸² If the authority finds non-compliance, it must communicate this to the applicant, who then has 60 days in which to correct it. If the applicant does not correct the application within this time, he is deemed to have abandoned the application. Further, an invention once filed cannot be altered except as the respective national office shall provide.²⁸³

If the invention meets the requirements, it is to be published in a body of adequate publicity.²⁸⁴ During the next 90 days anyone can present observations tending to divest the invention of patentability.²⁸⁵ The decision further provides that the applicant may defend his invention by showing its merit. He has 60 days to do this.²⁸⁶ Nevertheless, after the period has expired the national authority is to weigh the patentability²⁸⁷ and, if it is found to be meritorious, the patent or an amended patent will be issued.²⁸⁸

Member states can decide to have complete exams conducted upon the state of art that may affect patentability in specific sectors.²⁸⁹ The national authorities can seek expert opinion to determine the novelties of the invention.²⁹⁰ Member states are to maintain each other and the Junta fully informed as to granted patents.²⁹¹ Any invention affecting national security can be granted subject to restriction.²⁹² Classification and ordering of patents are to conform to the International Classification of Invention Patents, subscribed 19

December, 1954. Member states must subscribe to this system within a year of the decision's effective date.²⁹³

A patent grants its holder the exclusive right to exploit the invention, to grant licences and to receive royalties or compensation for allowing third parties to exploit the invention. The patent does not grant an exclusive right to import the patented product or one produced by the patented process.²⁹⁴ The monopoly is for a maximum term of ten years.²⁹⁵

Once granted, the patent holder has three years to communicate to the national authority that he has commenced exploitation.²⁹⁶ The patent holder must also register any license or assignment or any other arrangement allowing a third party title to the patent.²⁹⁷

Licenses to third parties must be in writing or they are invalid. Moreover, they must be registered and approved by the national authority.²⁹⁸ A patent holder that has not communicated that he has used the patent (within the three years period) may find that the state will license someone else. Any one of various statutory evils empowers an individual to seek compulsory licensing. These include: failure to use (within three years), suspension of use (for one year), failure of production to meet national (market) needs, or failure of the patent holder to grant a license on reasonable terms. Further, after five years, the national authority can grant the license without finding the above. The holder of the forced license, however, must pay the patent holder adequate compensation.²⁹⁹ Compensation is to be fixed by the national authority after hearing the parties. A licensee cannot grant sublicenses without authorization from the patent holder.³⁰⁰

Once a compulsory license is granted, it must be used or the same statutory evils that allowed its grant can empower its divestiture.³⁰¹ Any use of a patent without authorization from its holder or the national authority is subject to fine (in favor of the nation). The patent holder must pursue whatever remedy is provided by national law.³⁰²

The decision also provides for the registration of models and drawings.³⁰³ The process provided for parallels the process described for patents except that there are no provisions made for compulsory sharing.³⁰⁴

Chapter III addresses trademarks. It provides that service or trademarks which are distinctive or novel, can be registered³⁰⁵ by private or public enterprises, cooperatives or any other grouping of juridical persons.³⁰⁶

Any mark contrary to good public order, or which tends to deceive public consumers or commercial entities, as to the nature, source, mode of manufacture, characteristics or attributes of the product will be denied registration.³⁰⁷ If the mark is a foreign name or a geographic name, it shall state at the base of the product, the place of manufacture.

The procedure for obtaining a trademark is (except for subject

matter) nearly identical to the procedure for obtaining a patent. After the presentation of a trademark application, the national authority must examine whether it meets the requirements enumerated by the statute. If it does not, it must notify the applicant who has 60 days to correct any fault with the application. Once corrected, the mark issues.

When granted, it is published in a journal to be designated by each national legislature. Within 30 days, parties can file an opposition proceeding.³⁰⁸ The trademark grants protection in only one class. Those seeking protection in more than one class must file separate applications. Classification is as per the international agreement of Nice, signed June 15, 1957.³⁰⁹ Member states not already signatories have a year to become so.

Registration grants exclusive right to the mark.³¹⁰ The mark may be cancelled if the holder has abused it³¹¹ or when the registration has expired.³¹²

G) The Role of Law in Integration

As early as its first periodic meeting, the Andean Pact leaders recognized the need to establish a body to resolve controversies³¹³ related to the interpretation of the Agreement, Decisions and Resolutions which emanated from other bodies.³¹⁴ The Junta commenced work early and by 1974 had submitted to the respective governments a projected treaty to establish a Court of Justice. The proposal was discussed in various meetings³¹⁵ and partially modified until a definitive version was considered in successive reunions of plenipotentiary representatives convened to negotiate the treaty of the tribunal's creation which took place in Lima in February and March of 1979."³¹⁶

In the context of Andean subregional integration, the very complexity of the Andean Group mandates a judicial arbiter. The nature of the Agreement imposes upon the national judicial structure a regional one which has primacy over the national.

We have already seen that the principal policy instruments are the Decision (approved by the Commission) and the Resolution (which is the Junta's mode of judicial expression).

The Decision³¹⁷ is characterized by its binding nature and its direct application in the member states. It obligates the member states to incorporate the decision content into internal law. At this point, a conceptual distinction must be made between economic collaboration and economic integration. As Professor Zuldveno and others have noted,

[s]tates participating in a scheme of cooperation seek methods of convergence through permanent negotiations [T]he institutional route generally is ... an organ integrated by plenipotentiary delegates ... whose decisions are taken unanimously and who lacking unanimity bind only those voting. For [their] part

integration schemes create organs with appropriate decision making powers [These decisions] are generally taken by majority and obligate all members, even those who voted against it.³¹⁸

This is a factor of international structure building which creates new relationships between sovereign states. An example is the structure of the European Economic Community.³¹⁹

The institutional system of the Andean Group is similar to that of the European Communities.³²⁰ It is not surprising that the rationale and structure of the judicial system should be also. In its proposal, the Junta addressed three basic considerations: first, that integration was to be carried out subject to the rules emanating from the structure of the Agreement and pursuant to an unquestioned application of the principle of pacta sunt servanda, second, the existence of an organ which represents national interests and lastly, the overriding concern that inevitable conflicts do not destroy the community.³²¹

The Treaty³²² creating the Andean Court sets out the juridical structure of the Agreement to be the Cartagena Agreement, its Protocols and Additional Instruments, the Treaty establishing the Court, Decisions of the Commission and Resolutions of the Junta.³²³ It provides that Decisions are obligatory on all member states as of the date they are approved by the Commission.³²⁴ They must therefore be incorporated as internal law.³²⁵ The Junta's resolutions enter into force on the date and under conditions established in the resolutions.³²⁶

The Court, designated as one of the principal institutions of the Cartagena Agreement,³²⁷ is composed of five justices (nationals of the member countries), who are to be fully independent in the exercise of their functions.³²⁸ Justices are to be chosen from lists presented by each member and selected by unanimous vote of the plenipotentiaries accredited for the purpose. They serve for six year terms, (they can be re-elected once) and they are to be partially replaced every three years.³²⁹ There are to be two designated alternates to replace any judges who die or are otherwise removed.³³⁰ A justice can be removed upon complaint of the government of a member if, in the exercise of his function, he has committed any of certain statutory evils.³³¹ The Court enjoys the privileges and immunities recognized under international practices. Justices have the rank of chief of a diplomatic mission.³³²

The Court may nullify the decisions of the Commission and any Resolution of the Junta which violate the Agreement's juridical structures.³³³ Any natural or juridical person who is affected by a Decision or Resolution may institute such an action of nullification.³³⁴ There is an estoppel applied to the member states in that they can bring an action of nullification only when the decision in question was approved without their affirmative vote.³³⁵ Any such action must be brought within a year of the offending legislation's effective date.³³⁶ The body whose act is found to violate Cartagena's norms must take the necessary steps to fulfill the Court's decision. The treaty allows the Junta to communicate its observation of non-compliance

to the offending member, who must respond in a manner compatible with the urgency of the matter, i.e., within a period not to exceed two months.³³⁷ If the Junta finds non-compliance and the member state persists, the Junta is authorized to initiate a proceeding seeking the Court's decision.³³⁸ A member state may initiate the same procedure. However, if the Junta issues its opinion but does not initiate action within two months, the complainant may present the matter directly to the Court. Moreover, if the Junta has not issued an opinion after three months, then the country can go directly to the Court,³³⁹ which rules on the controversy. If it finds non-compliance, it will determine to what extent the aggrieved party may suspend or limit the advantages deriving from the Agreement.³⁴⁰ Within one year from the date of the ruling, or within two months of the discovery of any matter which alters the Court's ruling, the parties may file a petition for a review.³⁴¹ Natural and juridical persons retain the right to institute suit in the national forum of the non-complying state.³⁴²

The Court may render advisory opinions to national judges who require an interpretation of anything regarding the juridical structure of the Agreement, provided that the ruling is appealable within the national system. In this context, the Court is forbidden to interpret the content and scope of domestic law or judge the substantive facts of the case.³⁴³

The member states must submit any matter occasioned by the Agreement, or any part of its juridical structure, to the Court. States are forbidden from applying to any other forum.³⁴⁴ All states are also to accept the Treaty without reservation.³⁴⁵ Lastly, and perhaps most interestingly, the Treaty provides that it shall remain in effect for as long as the Cartagena Agreement is in effect. It cannot be denounced independently. Both the Cartagena Agreement and the Treaty remain in effect independently of the Treaty of Montevideo.³⁴⁶ It is clear that the Andean Group hence insured their survival independent of the fall of the Treaty of Montevideo of 1960.

CONCLUSION

The initial focus of this paper was to be on the legal structure that controlled foreign investments within the Andean region. It soon became obvious that an understanding of the black letter law would not do. Simple truths still apply: a little knowledge is a dangerous thing. Perhaps in no other areas is the interaction between law and popular political expression so inextricably connected as in Latin American investment.

Latin American statesmen have been impelled by more than a desire to see their countries rise. That is common to all leaders. What distinguishes them is the way in which they control the fire lighted under their feet. Popular political expression, what many style the revolution of rising expectations, has insured that the civilian leader who cannot get things done (and done quickly) has no political future.

An analysis of the economic and political factors of underdevelopment has convinced many that the international economy with its (predominantly) American character have made Latin states into economic appendages. The response has varied but has everywhere been sparked by popular sentiment.

To the more belligerent states the response was clear--expropriate. Uncertain legal concepts, the sensitivity of foreign relations and State Department response to such expropriations have largely convinced our courts that they are not equipped to address the problem.

Some social scientists have sought to understand expropriation (and hence understand the future) by developing institutional models. One such model posits that military education, usually superior to the civilian education Latin leaders may have received, has created an expanded concept of national security. The enemy is no longer limited to soldiers on the field. The enemy is anything or anyone who gives legitimacy to the political subversives within the nation. The oft-repeated charge that the national future was in the hands of foreigners falls squarely within the expanded concept of national security.

To be sure, neither theory excludes the other. Taken together one thing was clear--if foreign investments were to be secure within Latin states, some sort of structure would have to develop to assuage popular expression and yet maintain much needed foreign investments. Such a structure was created with the passage of Decision 24 regulating the form and extent of foreign participation in development. Born of compromise, the Decision embodies both the benefits and drawbacks of such an approach.

Such drawbacks were evident in Chile's withdrawal from the Agreement. Inherent in such a move was the statement that those who need must accept; they cannot impose obligations on the providers. Inherent in Venezuela's entry is a statement of the potential benefits.

As research continued it became evident that Decision 24 was only the first of a series of laws aimed at subjecting the foreign investor to the will of the state.

Among the principal targets of dependency theorists were the restrictive clauses foreigners employed and the ramifications of such clauses on national development. Decision 45 extends the mandate in 24 in this regard; it establishes the basic norms regulating competition. Decision 46 provides a regime to control subregional capital. It also creates the multinational firm. Such a firm, promoted and owned by nationals of the Andean states (with limited foreign participation allowed), would serve as the vehicle with which to address specific development tasks. Decision 84 addresses the formulation of a subregional technology policy. Decision 85 establishes a regime regulating patents, trademarks, licenses and royalties and hence addresses the last aspect of Decision 24's mandate.

The shape this structure may take, and hence the opportunity that may be created for a mutual growth, is apparent in the strides the Andean

Group has made. These include the creation of a Court of Justice to be the final arbiter of disputes. The Court is specifically empowered to address the legality of the Commission's Decisions.

To be sure this study cannot claim to be exhaustive of any of the areas it has addressed. Rather, the aim was to understand the laws regulating the various aspects of investment in a foreign climate, albeit this is affected by the political and economic underpinnings of the law.

As the Andean Court grows in stature, it is to be expected that the community interest will be more clearly defined and perhaps the Decisions herein analyzed will be reassessed. Meanwhile, the foreign investor has a choice of vehicles he can utilize to participate in the benefits of duty-free trade. Moreover, for the first time in decades he has a guarantee that his property will not be taken as long as he plays by the rules.

FOOTNOTES

- * All translations are by the author. The article published here is excerpted from 2 Dick. Int. L. Ann. 1 (1983) which contained a fuller treatment of expropriation and of the regional integration effort in Latin America.
1. The relationship between economic change and social unrest has provided political theorists with fertile grounds for thought. See, e.g., C. Welsch, Political Modernization (1976); L. Pye, Aspects of Political Development (1966); S. Huntington, Political Order in Changing Societies (1968); C. Johnson, Revolutionary Change (1960); C. Welch & M. Taintor, Revolution and Political Change (1972); I. Gurr, Why Men Rebel (1970).
 2. See, e.g., C. Taylor & M. Hudson, World Handbook of Political and Social Indicators, ch. 3 (1975). The spirit of this transformation is illustrated in a speech made by Fidel Castro entitled History Will Absolve Me. "The demagogues and professional politicians [deceive]...everyone about everything...[T]he people we counted on in our struggle were five hundred thousand farm laborers inhabiting miserable shacks, who work four months of the year and starve for the rest of the year, sharing their misery with their children" reprinted in B. Mazlish, A. Kaledin & D. Ralston, Revolution, A Reader 381 (1971).
 3. This led to the perception that the problem lay in the structure of the international economic order. See, e.g., J. Cockcroft, A. Frank & D. Johnson, Dependence and Underdevelopment: Latin America's Political Economy (1972). See also, H. Magdoff, The Age of Imperialism (1969). Indeed, the perception forms the basis for modern political dialogue. See, e.g., Final Report, Latin American seminar on the New International Economic Order held June 2-6, 1980 in Havana under the auspices of the University of the United Nations.
 4. Guerrero, El Regimen comun de la inversion extranjera en el Grup Andino in 8 Derecho de la Integracion 8, 10 (1977). "We ... reaffirm ... our ... [conviction] regarding the plain sovereign rights of nations to freely dispose of their natural resources It shall be ... [our] policy to give preference in economic development of the subregion to capital and enterprises which are authentically national" Id.
 5. Id. "The investment of capital and the transfer of foreign technology are necessary contributions for the development of our countries and should receive assurance of stability in accordance with the extent to which they constitute positive contributions" Id. Your author uses the phrase "legal structure"

to define a system in which rights, duties and obligations are clearly defined. To the investor, this would mean erection of a safe harbor since adherence to these rules would preclude (indeed render unjustified) acts of expropriation.

6. Saavedra, El regimen uniforme de la empresa multi-nacional en el Grupo Andino, 11 Derecho de la Integración, 11, 18 (1972).
7. See, e.g., K. Fann & D. Hodges, Readings in U.S. Imperialism (1971). See also note 3 supra.
8. For a brief outline of major concerns of dependency theorists, see Jova, Private Investment in Latin America, Renegotiating the Bargain, 10 Tex. J. Int'l L., 495 (1975).
9. Grunwald, Foreign Private Investment. The Challenge of Latin American Nationalism, 11 Va. J. Int'l L., 228, 230 (1971).
10. The phrase Andean Pact, Andean nations or Andean region, refers collectively to Bolivia, Colombia, Ecuador, Peru and Venezuela.
11. See generally the works of Hirschman, The Political Economy of Import Substituting Industrialization in Latin America, 82 Q. Econ. (Feb. 1968). See also U. N. ECLA, The Process of Industrial Development in Latin America, U.N. Doc. E/CN.12/716/Rev. 1 (1966). For a discussion of the sequence of economic development see Chenery, Patterns of Industrial Growth, 50 Am. Econ. Rev. 624 (1960).
12. Guerrero, supra, note 4 at 12.
13. Figures are from M. Wionczek, El Grupo Andino v. La Inversión extranjera (1970), cited in Guerrero, supra note 4 at 12.
14. See notes 18-21 and accompanying text infra.
15. Guerrero, supra note 4 at 12.
16. These practices severely handicapped the development of indigenous enterprises.
17. Guerrero, supra note 4, at 13, 16.
18. For an interesting account of corporate (international) misconduct, see A. Sampson, The Sovereign State of I.T.T. (1973). "While I.T.T. was so passionately devoting itself to blocking and bringing down a Marxist government in Chile, it was at the very same time negotiating with the communists in Moscow to open up the huge potential new market as the Cold War thawed...." Id. at 294.

19. See, e.g., R. Barnett & R. Muller, Global Reach The Power of the Multi-national Corporations 123-210 (1974). The disruptive aspects of corporate activity is the subject of United Nations efforts under the auspices of the Transnational Corporation Center. At this writing a draft has been completed. See, e.g., Rutledge, United Nations Code of Conduct for Transnationals -- The Mask of Law Hiding the Deceit of Politics, 6 Dick. Int'l Trade Ann. 269 (1978-79) (unpublished intramural law review).
20. Although a policy of enlightened self-interest would indicate the contrary. See A. Smith, Wealth of Nations (1776).
21. Guerrero, supra note 4 at 17 (citing a study conducted by the Chilean Corporation for Development, Comportamiento de las principales empresas industriales extranjeras acogidas al DFL 258 Santiago de Chile (1970). DFL 280 is the statute which regulates investment.
22. Guerrero, supra note 4, at 18.
23. Guerrero, supra note 4, (citing a study by Constantino v. Vaitzos for Departamento Nacional de Planeacion, Columbia).
24. Guerrero, supra note 4 at 20.
25. Id.
26. Certainly questions of the extraterritorial effect of U.S. antitrust laws abound. In context of a post World War Two Andean World the point being made differs. Political response bespeaks perceptions. The perception generated by economic relations between these states and the developed world was a study of contrasts. On one hand omnipotence, technological and otherwise, on the other perceived impotence. In bilateral transfer of technology negotiations, Andean nations felt obliged to accept what we would term contracts of adhesion. Taken alone North American concepts of arms length negotiations cause conceptual difficulties in accepting this perception of Andean impotence. In the light of the politics of the day, conceptual difficulties are clarified. See, e.g., Comment, Sherman Act Litigation: A Modern Generic Approach to Objective Territorial Jurisdiction And The Act of State Doctrine, 84 Dick. L. Rev. 645 (1980).
27. Guerrero, supra note 4, at 21.
28. See, note 1, supra.
29. Mexico - land seizures in 1915; Bolivia - Standard Oil 1936; Mexico - nationalization of all Petroleum properties and rights 1938; Argentina (Peron) - confiscation of the major American and Foreign

Power Subsidiaries 1943-1946; Bolivia - tin mines 1952; Guatemala - United Fruit Company 1963; Argentina - expropriation of another American and Foreign Power affiliate 1958; Brazil - 1959; Venezuela - Sulphur Corporation properties and revocation of concessions; these are some of the major cases. Eder, Expropriation: Hickenlooper and Hereafter, 4 Int'l Law, 611-12 (1970).

30. Even the motivation behind the Foreign Aid program became suspect. See, e.g., S. Weissman, The Trojan Horse: A Radical Look at Foreign Aid (1975).
31. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). "Expropriations take place for a variety of reasons, political and ideological as well as economic If the political branches are unwilling to exercise their ample powers to effect compensation, this reflects a judgment of the national interest which the judiciary would be ill-advised to undermine indirectly." Id. at 435-36.
32. It was quite clear that the Executive would not send in the Marines.
33. 74 Stat. 330.
34. The President exercised the power by Proclamation No. 3355, 25 Fed. Reg. 6414 (1960).
35. "Whereas the attitude assumed by the government and legislative Power of the United States of North America, which constitutes an aggression for political purposes, against the basic interest of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act just enacted ... forces the Revolutionary Government to adopt ... all and whatever measures it may deem appropriate ... for the due defense of the national sovereignty and protection of our economic development process ... whereas, it is advisable ... to confer upon the President and Prime Minister full authority to carry out the nationalization of the enterprises and property owned by physical and corporate persons, who are nationals of the United States of North America" As translated in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401, n.3 (1964).
36. Banco Para El Comercio Exterior.
37. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 407 (1964).
38. Id.
39. Id.
40. Id. at 821.
41. Id.

42. Id.

43. Id. at 819.

44. Foreign Assistance Act of 1961, 22 U.S.C. § 2370(e)(2), Supp. V. (1970). The Hickenlooper amendment states:

(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of principles, of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

45. See French v. Banco Nacional de Cuba, 23 N.Y. 2d 46 (1968) and Banco Nacional de Cuba v. First National City Bank of New York, 431 F. 2d 394 (2d Cir. 1970). French involved Cuban suspension of convertability of certain certificates of tax exemption owned by an American. In deciding whether such suspension was a "faking" the court had to address the effect of the Hickenlooper Amendment on the Sabbatino decision. The key was construction of the term "property" (See supra note 44). The court held that the term referred to tangible personal property. Since the claimant had no right to a specific fund of dollars - no "taking" had occurred. The court concluded that the Amendment was addressed to the kind of problem exemplified by Sabbatino, "a claim or title or other right to specific property which has been expropriated abroad." In First National, First National City Bank of New York [hereinafter City] contended that Cuban expropriation of its property abroad justified

its retention of a substantial excess after sale of collateral posted with city as security for loans made to the Cuban Banco Nacional. Denying the contention, the court narrowly construed the congressional intent behind Hickenlooper, saying:

Congressman Gross ... urged that the Amendment be broadened to enable the owner of expropriated property to seize Cuban assets in the United States as an offset for the value of property seized by Cuba However, First National City has cited no legislative history and we have found none, which indicates that Mr. Gross's suggestion was thought to have been adopted by Congress when it reenacted the Hickenlooper Amendment.

Id. at 402.

46. See note 31, at 823.
47. The court in First National took note of Congressional policy inherent in Subchapter V of the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1643-1643k (1970 Supp.) in which Congress provided for "the determination of the amount and validity of Claims against the Government of Cuba ... arising out of nationalization, expropriation intervention, or other takings of ... property of nationals of the U.S." The Court also took note of the fact that Congress and the Executive had acted pursuant to the Trading with the Enemy Act, 50 U.S.C. App. 5 (1970 Supp.) Proc. 3447, 22 Fed. Reg. 1085, 3 C.P.R. (1959-63) to block all Cuban assets present in the U.S. but had not provided for vesting of the blocked Cuban assets. Id. at 403.
48. For instance: Restatement (Second) Foreign Relations Law. Section 185 ... taking is wrongful under International Law ... when (a) it is not for a public purpose, (b) there is not reasonable provision for the determination and payment of just compensation ... under the law and practice of the state in effect at the time of taking....

Comment b. [T]here is little authority in international law establishing any useful criteria by which a state's own determination of public purpose can be questioned The concept ... originating in municipal law systems may have had a reasonably definite meaning in international law when municipal systems ... were based on private ownership of the means of production. However, in view of the increasingly broad area of governmental activity in nearly all states, the concept of public purpose ... seems increasingly vague and of doubtful usefulness in the future.

Comment c. It is often stated that the taking of an alien's property is a violation of international law unless the state pays just compensation. Since payment is frequently delayed until sometime after the taking this would suggest that the legality of the taking may be determined ab initio by subsequent events ... The subsequent determination could present serious problems to third parties (which treat a taking as ineffective in passing title) ... The rule stated ... treats a taking as unlawful on the ground of failure to pay just compensation only if it does not appear at the time of the taking that just compensation will be provided

49. See, e.g., Futuovros, International Law and the Third World, 50 Va. L. Rev. 783, 807-08 (1964). The consistency of this viewpoint can be gauged by the interchange between the then Mexican Minister for Foreign Affairs in Washington to then Secretary of State Hull regarding expropriation of land belonging to U.S. Citizens in Mexico in 1927.

Hull, The taking of property without compensation is not expropriation. It is confiscation If it were permissible for a government to take the private property of the citizens of other countries and pay for it as and when, in the judgment of that Government, its economic circumstances and its local legislation may perhaps permit, the safeguards which ... established international law has sought to provide would be illusory

Reply, Without attempting to refute the point of view of the American Government, I wish to draw your attention ... to the fact that agrarian reform is ... one of the aspects of a program of social betterment [within a government's ambit] [T]here does not exist in international law any principle universally accepted by the countries, nor by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character. Nevertheless, Mexico admits, in obedience to her own laws, that she is indeed under an obligation to indemnify ... but [as] she maintains ... based on the most authoritative ... writers ... on international law ... that time and manner of such payments must be determined by her own laws.

3 Hackworth, Digest of International Law, 656-68 (1942).

50. See Eder, supra note 29, at 617. For a discussion of the various legal mechanisms available to protect against expropriation in the original contract see, Wesley, Expropriation Challenge in Latin America: Prospects for Accord on Standards and Procedures, 46 Tul. L. Rev. 232, 254-91 (1971).

51. See notes 3 and 8, supra.

52. Bolivia: Nationalization of Bolivia Gulf, Oct. 17, 1969. 8 Int'l Leg. Mat. 1663 (1969). After arduous negotiations, a compensation arrangement was finally arrived at on September 10, 1970. The government agreed to pay \$78,622,171 to be tendered in installments over a 20 year period beginning in 1973. Wesley, supra note 50, at 233, 238-40.
53. See Wesley supra note 50, at 243.
54. See 9 Int'l Leg. Mat. 921 (1970). For the Peruvian dealings with the International Petroleum Company and International Telephone and Telegraph see 7 Int'l Leg. Mat. 1201 (1968); 8 Int'l Leg. Mat. 765 (1969); 9 Int'l Leg. Mat. 80, 186 (1970).
55. Einaudi, Latin American Institutional Development: Changing Military Perspective in Peru and Brazil (1971), Rand. 1, 12. General Cavero then director of CAEM (the Peruvian Center for Higher Military Studies) spoke at a time when relations with the United States had improved from a low ebb in early 1969 when (application of the Hickenlooper Amendment seemed imminent, threatening to cut U.S. economic assistance and sugar quotas in response to the I.P.C. nationalizing); "The threat has varied over time. At first it was narrowly military in nature. Then new and subtler psychological and ideological threats arose against the security of each country. Today we face a new threat: economic aggression ... we are now fighting against economic aggression." Einaudi at 30-31. See also R. Nicoll, Peru's Institutional Revolution (1973) and A. Lowenthal, The Peruvian Experiment (1975).
56. See generally U.N. ECLA, The Process of Industrial Development in Latin America U.N. Doc. E/CN. 12/716/Rev. 1, 1966. For a discussion of the usual sequence of industrial development see Chenery, Patterns of Industrial Growth, vol. #50 Am. Econ. Rev. (Sept. 1960).
57. Johnson, The Montevideo Treaty for a Latin American Free Trade Area, 1965 U. Ill. L.F. 715.
58. See note 11, supra.
59. U.N. Conference on Trade and Development, Trade Expansion and Economic Integration Among Developing Countries, TD/B/85 Rev. 1 (1966).
60. Indeed if Latin American "demand for steel over the next ten years were satisfied in the framework of a regionally integrated market ... investment capital amounting to \$3.7 billion could be saved." Id. at 7. See also B. Balassa, The Theory of Economic Integration 120-43 (1961).

61. Early studies conducted by the U.N.'s Economic Council on Latin America concluded that the main obstacle to the creation of a free trade area would be the region's internal customs structure. These include: tariffs, quotas, import regimes, exchange surcharges, taxes on remittance of funds, consular fees, prior deposit requirement and direct controls such as license requirements and exchange quotas. See U.N. ECLA, U.N. Doc. E/CN.12 1554 (1961).
62. See note 59, supra, at 10.
63. S. Dell, The Early Years of LAFTA's Experience, Michael Wionczek, (ed.), Latin American Economic Integration: Experience and Prospects 107 (1966). See also Dell, Trade Blocs and Common Markets (1963).
64. R. Blough & J. Bochman, Problems of Regional Integration in Latin America 18-23 (1968). Space constraints have not permitted full exposition of integration efforts in Latin America. Rather the focus here is on the creation of the subregional entity known as the Andean Pact. The Pact derives its juridical personality from the Latin American Integration Association (LAIA). For a full treatment of LAIA and its predecessor, the Latin American Free Trade Association (LAFTA) see this writer's treatment in 2 Dick. Int'l L. Ann. 1 (1983). See also Treaty of Montevideo, Feb. 18, 1960 Multilateral Un. Doc. E/CN/621 (1962) creating LAFTA and 20 Int'l Leg. Mat. 672 (1981) creating LAIA.
65. This arrangement is subject to abuse. It may be profitable to move goods from outside the region into the free trade area through the country having the lowest tariff. This defeats the protectionist (and revenue producing) effects of higher tariff countries. Solution of this abuse lies in strict enforcement of "rules of origin" subjecting violators to estoppel.
66. Erelí, The Andean Common Market, 8 Hous. L. Rev. 487, 489 (1971).
67. Andean, 5 Derecho de la Integración 117 (1968).
68. See note 59 supra, ch. IV 20.
69. Id. The study indicates that some measures include: (1) letting smaller-lesser developed countries (S.L.D.C.s) keep their barriers up longer, (2) exemption for S.L.D.C.s from requirement of higher customs duty, (3) granting S.L.D.C. preferential access to markets, (4) creation of fiscal incentives and state aids to enterprises settling in the less advanced countries, (5) freeing the movement of persons and (6) priority to improving their infra-structure. See id. at 23-25. See also B. I. Watsons, Function of Fiscal Incentives in Modifying the Imbalance in the

Distribution of Costs and Benefits in the Regional Integration Efforts of Developing Countries in Actual Problems of Economic Integration, UNCTAD Pt. TD/B/517, at 18.

70. Santos, El Problema de la desigualdades en la integracion 22-23 Derecho de la Integración 14, 16 (1976). The Author's comments deserve full exposition. "Classical theorists of international commerce maintain that any interference in the free and spontaneous forces of the market causes perturbation and is the font of inefficiency This utopian vision only served to assure that the big fish would eat the small ... that the countries on the underdeveloped periphery would provide the industrialized center with cheap primary goods in exchange for costly manufacture Calvin would rejoice from his grave seeing that the moral of (the) fable has such ideal application in the world."
71. Latin American Common Market: Declaration of Presidents of O.A.S. Member States--Signed at Punta Del Este, Uruguay, April 14, 1967, 6 Int'l Leg. Mat., 535 (1967).
Before this meeting Colombia had called a meeting of the Presidents of Chile, Venezuela and presidential representatives from Bolivia, Ecuador and Peru to discuss their common position in view of the forthcoming meeting of the Presidents, already referred to. At this meeting the Presidents agreed to establish an Andean Development Corporation and closer economic ties. (So-called Bogota Declaration).
The Corporation, whose purpose is to foster subregional integration by identifying investment opportunities and participating in them, has an authorized capital of \$100 million. Payment of subscribed capital is to be in five annual installments. The first installment was to be in U.S. currency. The remaining; half in American and half in national currency, provided that full convertibility be maintained. The agreement was signed on 2/7/68 and has been in effect since January 30, 1970.
72. Id. at ch. 1(a)(b), at 537. Hostilities between El Salvador and Honduras starting in 1969 halted the operation of the Central American Common Market Organizations LAFTA ... could not reach agreement on how to proceed from a free trade area to a common market and twice decided to postpone the decision. From Erelí, supra note 66, at 487.
73. See supra note 71, at 537.
74. Id. at ch. 1(2)(d).
75. Resolution 202 COM-II (VI-E) Norms of Subregional Agreements, Sept. 2, 1967, 2 Derecho de la Integración 161 (1968).
76. The Resolution states ten such principles--which can be summarized as follows: (1) Can be by two or more parties, (2) shall

establish the terms of their commercial policy regarding trade liberalization (§ 3 must be general--that is, not restricted to specific sectors) and external tariff policy, (4) must take into account the subscribers obligations to LAFTA, (5) complementation agreements must conform to the principals set out in the Treaty of Montevideo, (6) shall be transitory, establishing effective date and duration, (7) the Executive organization shall be designated by the participants, (8) approval of Contracting Parties is required--the Conference shall analyze the agreements annual Progress.

77. Resolución 203 CCM-II (VI-E) 2 Sep. 1967, 2 Derecho de la Integración 162 (1968). Pages 162-165 of the Resolution annexed the bases of the agreement.
78. Resolución 222 (VII) of 17 Dec. 1967, 2 Derecho de la Integración 165 (1968). The resolution incorporated the guides discussed in Resolución 202 (note 76 supra) as affirmative obligations and added several more to effectuate them (dividing tasks to specific LAFTA organizations). Some of the provisions deserve mention here: Art. 13--Any contracting parties proposing the creation of a subregional agreement shall communicate same to the Committee by their representative accompanied by information supporting the request. The Committee shall communicate this to the rest of the contracting parties. Art. 14--In order to accomplish Art. 13 the Contracting Parties will elevate the text of their agreement to the Permanent Executive Committee. Art. 15--All subregional agreements require, to be effective, the approval of the Permanent Executive Committee which shall resolve with an affirmative vote of at least two-thirds of the contracting parties. The Committee should meet no later than 30 days after being presented with the subregional agreement.
79. See generally G. Amador, Andean Legal Order ch. II (1978).
80. Compatibility of Subregional Agreements with the Treaty of Montevideo, 2 Derecho de la Integración 170 (1968). Former President Eduardo Frei of Chile requested in 1964 a study of the issue of integration, (how it could be more rapidly achieved). The study's recommendations were later to be incorporated into the Cartagena Agreement. See Hacia la integración acelerada de América Latina (Toward accelerated development of Latin America) Mexico, Fondo de Cultura Económica (1965).
81. Art. 54 of the Treaty of Montevideo, see note 64, supra.
82. Compatibility of Subregional Agreements with the Treaty of Montevideo, 2 Derecho de la Integración 171 n. 60. See also Derecho de la Integración 118 (1970) - (A question and answer transcript of sessions between the representatives of the Permanent Executive Committee and the Mixed Commission of the Andean Group.

83. Acuerdo de Cartagena (Agreement of Cartagena) 5 Derecho de la Integración (1969). The members are Colombia, Bolivia, Ecuador, Peru and Venezuela.
84. Id. at art. 5.
85. Id. at art. 6.
86. Id. at art. 7.
87. Id. at art. 10.
88. Supra note 83, at art. 13. The Junta's members appear to serve contemporary 3 year terms, not staggered terms.
89. Id. at art. 15.
90. Id. at art. 16.
91. Id. at art. 25.
92. Id. at art. 26.
93. Id. at art. 26(d), 27.
94. Supra note 83, at art. 28.
95. Art. 75, ch. VIII, LAFTA, through Resolution 65 (II) of the Conference of Contracting Parties had already created norms governing competition.
96. See arts. 8, 11, 12, 25, 26 and ch. VIII, art. 28 and art. 78-81 of the Agreement.
97. Art. 42.
98. Art. 43.
99. Art. 45.
100. Art. 46.
101. Art. 47.
102. Art. 49. "The Andean Pact continues to make impressive strides. The automotive industry is a success story. By 1985 the regional demand for vehicles will surpass \$10 billion. The market, moreover is well protected by the common, external and other advantages inherent in the auto sectorial program." Fernandez, Latin American Economic Integration, II Law Am. 152 (1979).

The Commission's automotive initiative establishes a compensated exchange of parts. Under the system, companies will be able to import components duty free from other Ancom members or third country, provided they export an equivalent value outside the bloc. However, they will not be permitted to import products that have been allocated to any member country under the sectoral programs The program meshes perfectly with General Motors plan to export at least 100,000 automotive transmission from Venezuela, and a similar number of manual transmissions from Ecuador to countries outside the Andean region.

Andean Group Enacts Autoparts Import Scheme: Regional Court Planned, 1978 Bus. Latin Am. 366 (A discussion of the Andean court is included *infra*).

The Group has addressed itself to liberalizing products on the sectoral lists and has continued to study various proposals relating to *infra*-structure. A recently completed study proposes development of an Andean Highway System. The system will ultimately link all five Andean countries. Fernandez, *supra* at 153.

103. See note 83, supra.
104. See note 83, supra.
105. References to the Code are to 16 Int'l Leg. Mat. 138 (1977).
106. Estimates from Schliesser, Restrictions on Foreign Investment in the Andean Common Market, 5 Int'l L. 586 (1971).
107. See note 71 supra.
108. See note 105 supra at 2 under General principles.
109. See note 105 supra, at 1 under General Principles. Reference will be made to a national competent authority. This is the body (in each member state) charged with implementing the provisos of the Code within their territory.
110. See note 105 supra, at art. 3.
111. Id. at art. 5.
112. Id. at art. 6.
113. Id. at art. 7.
114. Id. at art. 1(a).

115. See Annex 1-II(b) in the Code.
116. See note 105 supra at 1(b).
117. Id. at art. 1(c).
118. Id. at art. 1(d).
119. Id. at art. 1(e).
120. Id. at art. 1(f). The Commission of the Cartagena Agreement through Decision 110 was to decide the treatment which was to be accorded investments of mixed enterprises
121. Id. at art. 1(g).
122. Id. at art. 1(h).
123. Id. at art. 1(i). Art. 1(j) added to the Code via art. 33 of Decision 70. See 12 Int'l Leg. Mat., 349 (1973).
124. See note 105 supra, at art. 2. See Appendix II -- a list of information required for the assessment.
125. Id. at art. 3.
126. Id. at art. 4.
127. Id. at art. 12.
128. The amount was upped from 5% to 7% after Chile's uproar. See discussion infra.
129. See note 105 supra, at art. 12.
130. Id. at art. 1(j), added to the Code via art. 33 of Decision 70. See 12 Int'l Leg. Mat., 349 (1973). It is defined as a title or obligation issued for developmental purposes and publicly offered by the state, a state entity, quasi state entities, national or mixed firms or by the Andean Development Corporation.
131. See note 105 supra, at art. 18.
132. Id. at ch. III, art. 38.
133. Id. at art. 39.
134. Id. at art. 40. The basic products sector is defined as exploration and exploitation of any minerals, including liquid and gaseous hydrocarbons, gas pipelines, oil pipelines and forestry.

For Bolivia and Ecuador the sector also includes primary agriculture and livestock.

135. Defined as drinking water, sewers, electric power and lighting, cleaning and sanitary, telephone, postal and telecommunications services.
136. See note 105 supra, at art. 41.
137. Id. at art. 42.
138. Id. at art. 43.
139. Id. at art. 44.
140. Id. at art. 5.
141. The purpose of the stricture is to assure the host government that a minority foreign shareholder of fragmented body shall not control the enterprise.
142. See notes 53 and 54 supra.
143. See note 105 supra, at art. 6.
144. Id. at art. 27.
145. Id. at art. 28.
146. Id. at art. 30. In the case of Colombia and Peru the agreement must stipulate participation by national investors in the following percentages. Fifteen percent at beginning of production, 30% upon completion of 1/3 of time period, no less than 45% after 2/3. In the case of Bolivia and Ecuador -- 5%, three years after production begins; no less than 10% upon completion of 1/3, and no less than 35% after 2/3. In all cases excepting Ecuador and Bolivia, the 20 year period commences two years after production begins.
147. Id. at art. 29--the certificates, by specifying that the firm is a participant in the Andean Group, acts as a license exempting the products from payment of duties.
148. Id. at art. 31-- (1) time period for compliance, (2) scale for transfer of shares participation, or rights to national investors, (3) registration to insure national investor participation in the technical, financial, commercial and administrative management of the enterprise, at least as of the date on which the enterprise begins production and (4) a method of determining the value of shares or rights at the time of their sale and a system to insure the transfer of shares.

149. Id. at art. 32.
150. Id. at art. 35--see also art. 36. As long as the State has a determining voice in decision making, an enterprise can be styled, mixed even if less than 51% capital is national. The Commission or Board recommendation must establish minimum percentage of participation of the State or State enterprises within three months after the regime's effective date.
151. Id. at art. 33.
152. Id. at art. 34.
153. Id. at art. 37.
154. Id. at art. 7.
155. Id. at art. 8.
156. Id. at art. 9.
157. Id. at art. 10.
158. Id. at art. 11.
159. Real rate of interest is defined as the total that must be paid by the debtor for the use of the credit--including commissions and expenses of any kind.
160. Id. at art. 21.
161. Id. at art. 19.
162. Id. at art. 20. These include, inter alia, clauses (1) tying the technology to permanent use of particular personnel, raw materials, products or other (specific source) technology, (2) fixing prices of finished product, (c) restricting volume and structure of production, (d) prohibiting use of competing technology, (e) obligating purchaser to transfer improvements to supplier, and (f) "clauses of similar effect."
163. Id.
164. Id. at art. 22.
165. Id. at art. 24.
166. This has been implemented as Decision 84 and is addressed in detail infra.

167. See note 105 supra, at art. 25., i.e., prohibition or limitation on the exportation or sale in certain countries of products manufactured under the trademark concerned, tying arrangements, price fixing, etc. Patents are also addressed. See note infra.
168. See note 105 supra, at art. 26. Article 54 requires member states to establish a subregional Industrial Property Office which shall, inter alia, (a) serve as liaison between the different national industrial property office, (b) compile information on industrial property and distribute it to national offices and (c) prepare model licensing contracts for the use of trademark and patents in the subregion. Art. 55 states that upon the recommendation of the Board, the Commission shall establish a subregional system for the development, promotion, production and adaptation of technology As to the Code see generally Valdez, The Andean Foreign Investment Code, An Analysis, J. Int'l L. Econ. 1 (1972); Fouts, The Andean Foreign Investment Code, 10 Tex. Int'l L.J. 537 (1975); Furnish, The Andean Common Market's Regime for Foreign Investments, 5 Vand. J. Transnat'l L. 313 (1972); Darino, The Andean Code After Five Years, 8 Law. Am. 635 (1976).
169. It should be re-emphasized that the analysis of the Code just presented proceeded from a text incorporating the modifications instigated by Chile.
170. Comment, Chile's Rejection of the Andean Common Market Regulation of Foreign Investment, 16 Colum. J. Transnat'l L. 138, 149 (1977).
171. Id. at 150.
172. Id. at 151. See also Casanova, Annotations a la aplicacion de la Decision, No. 24: El Caso de Chile (Notes on the application of Decision 24: The Chilean Case). 15 Derecho de la Integración 239 (1974).
173. See Chile: Decree Law 600, 13 Int'l Leg. Mat. 1176 (1974). "Once accelerated growth has become the primary objective of development policy, the implementation of certain economic policies and structures within the capitalist model is largely proclaimed. In particular, it becomes obvious that foreign capital and technology must perform a central function within the developing nation. See Comment, supra note 170, at 152.
174. "Chile has refused to discuss any other pressing issues until the matter of foreign capital treatment is resolved [It] has proposed the total elimination of the fade out provision, particularly for international companies that operate only locally and do not desire to take advantage of AnCom benefits All members with the exception of Chile adamantly refuse to lift the

prohibition on the capitalization of technology." AnCom is Pressured to Focus Attention on U.24 Issue, 1976 Bus. Latin Am., 217, 218.

175. See Comment, supra note 170, at 156.
176. For a detailed account of the controversy see G. Amador, The Andean Legal Order 1-44 (1978).
177. See notes 66-102 and accompanying text supra.
178. As originally promulgated D.L. 600 was quite favorable to foreign investors. It established a Foreign Investment Committee with which foreign investors were to negotiate contracts. The terms of the contracts were to be freely negotiated between the parties. Article 5 guaranteed non-discrimination between foreign and national capital. Article 6 grants a right to petition (often one year of rule on provision being in effect) when the investor feels a provision has discriminated against him. Chapter V provides for a compensation scheme when foreigners have suffered damage due to a discriminatory provision. The rules regarding remittances of profits, taxation, etc. are also more liberal. Articles 3 and 19 of D.L. 600 attempted to incorporate Chile's obligations under LAFTA and the Agreement to the foreign investor: under art. 19, to be entitled to share in the benefits of LAFTA and AnCom--a foreign investor must comply with D.L. 600 and all those other resolutions and decisions arising out of said international commitments.
179. Art. 34 exempts enterprises exporting 80% or more of their production outside the common market area. Articles 41-44 allow exemption but entail loss of the trade benefits.
180. See Comment, supra note 170, at 167.
181. See note 174, supra.
182. These modifications included (1) raising the remittance level to 20% and giving the member an option to raise the limit further, (2) raising the limit on reinvested profits from 5% to 7%, (3) using increased capitalization to fade out foreign firms, (4) granting of medium term credits.
183. See note 176 supra, at 11 (Protocol of Oct. 5).
184. Id. at 12.
185. Decision 102: Cessation for Chile of the Rights and Obligations derived from the Agreement of Cartagena, 24 Derecho de la

Integración 163 (1977).

186. See id. Decision 103 at 164, Decision 109 at 165 and Decision 110 at 166. See also AnCom Modification of D.24 Turns Out Quite Extensive (inter alia), 1976 Bus. Latin Am. 292. The principal changes involve the profit remittance ceiling based on registered capital and the ceiling on reinvestment for purposes of increasing the base that are automatic without official approval. The former goes from 14% to 20% member countries having an option to make it higher Moreover, governments would be free to permit any portion over 20% to be reinvested. The 5% ceiling for automatic reinvestment would go to 7%.
187. See note 105 and accompanying text supra.
188. See generally Decision 103, art. 1; Chaparro, Las reformas al Regimen Andino de Inversiones Extranjeras. (Reforms to the Andean Regime of Foreign Investments) 24 Derecho de la Integración 133 (1977).
189. Id. Decision 103, art. 1 and art. 4.
190. See art. 32 and 55 (Industrial Programming section) of the Agreement.
191. Prior legislation only permitted short-term credit subject to terms and conditions imposed by the Commission, see art. 17 of the Code and art. 6 of Decision 103.
192. See note 185 supra, Decision 103, art. 6.
193. Id. at art. 3.
194. See Chaparro, supra note 188 at 135. Decision 103, art. 10.
195. See note 186 supra, Decision 103, art. 7.
196. Id. at art. 8.
197. Id. at art. 11.
198. "Despite specific areas of concern ... executives surveyed generally have a high regard for Chile's economic performance and the policies that brought about recovery For manufactures, Chile's main handicap is the modest size of the market Another element ... is the country's liberal tariff policies Cheap duties benefit foreign investors by ridding the economy of inefficient producers At the same time however, low duties provide international corporations with a very persuasive argument to service the Chilean market from abroad, rather than setting up

operations inside the country." Investing in Chile: Corporate Survey Reveals Pros and Cons, 1978 Bus. Latin Am. 1362.

199. Time limitations prohibit a country-by-country analysis of major policy variance. Material that can be consulted include Colombia: The Code as well as the Cartagena Agreement was subjected to constitutional attack. See specifically Acuerdo de Cartagena: So constitucionalidad y la de Decision No. 24 en Colombia. (The Cartagena Agreement: Its constitutionally and that of Decision 24 in Regulation of the Andean Investment Code: Colombia 4 Law. Am. 15 (1972); Peru: See Decree Law 18, 350 on the Law of Industries (July 17, 1970), 9 Int'l Leg. Mat. 1125 (1970). As to non-Andean LAFTA members see Argentina: Stebbings, The Argentine Foreign Investment Law and its Andean Common Market Inspiration, 8 Vand. J. Transnat'l L. 280 (1975).
200. Statement by an official of the Bank of Venezuela, Banco de Venezuela, Boletin de Economias y Financias, Sept. 1960.
201. Carl & Johnson, Venezuela and the Andean Common Market, 7 Den. J. Int'l L. Pol'y 151, 154 (1978). The article focuses on the changes in internal law effected by Chile upon joining the Andean Common Market.
202. "As outlined by the sub-committee, the working paper apparently reflects private-sector apprehensions about steering away foreign investors, but manages to blend in some ideas that seem close to AnCom's restrictive rules" Venezuela's Proposed Investment Law Shows Influence of AnCom Regulations, 1972 Bus. Latin Am. 71.
203. See Andean Commission--Venezuela--Final Act of the Negotiations on the Entry of Venezuela into the Cartagena Agreement (Lima, February 13, 1973) in 12 Int'l Leg. Mat. 344 (1973); Venezuela Decrees Concerning the Regulation of Foreign Investment in Accordance with Decisions of the Andean Pact (Decree No. 62 - April 28, 1974) and Regulation Governing Common Treatment of Foreign Capital, Trademarks, Patents, Licenses and Royalties Approved by Decisions No. 24, 37, 37A and 70 of the Commission of the Agreement of Cartagena (Decree No. 63), 13 Int'l Leg. Mat. 1220 (1974).
204. Acuerdo de Cartagena--Normas sobre Competencia, 10 Derecho de la Integración 1953 (1972).
205. Id. at 196.
206. From the wording of the statute, it does not appear that all such price manipulations is proscribed. The word "indebido" is used. The word means "unnecessary". Hence a rule of reason might be applicable.

207. This apparently goes to agreements to limit production or sale.
208. Note 204 supra, at art. 2.
209. It will be recalled that the Junta is the technical branch of the Agreement charged with representing the subregional interest. See id. at app. 1.
210. Id. at art. 3.
211. Id. at art. 4.
212. Id. at art. 5.
213. Id. at art. 6.
214. Id. at art. 7.
215. Id. at art. 8. Art. 9 relates to the factors the Junta shall consider in its analysis of the situation.
216. Id. at art. 11.
217. Id. at art. 10.
218. The countries seem to be non-Andean-Group Latin States as opposed to third party non-members, i.e. U.S.
219. Id. at art. 12.
220. Id. at art. 19.
221. Acuerdo de Cartagena: Regimen uniforme de la Empresa multinacional y reglamento del tratamiento aplicable al capital subregional. (Decision 46). 10 Derecho de la Integración 190 (1972).
222. Id. at 1, art. 1. Note that the definition is identical to that employed by Decision 24A (as amended by D.103, art. 1 and also Decision 46, art. 5). Note also that a foreigner can be a subregional investor. See id. at art. 10.
223. Id. at art. 2.
224. Id. at art. 3.
225. Id. at art. 4.
226. Id. at ch. II, ch. III, art. 8, 9.
227. Id. at art. 10.

228. Id. at art. 11.
229. Id. at art. 8. The decision establishes special payment schedule when investors include Bolivian or Ecuadorian nationals. Id. at art. 12.
230. Id. at art. 14.
231. Id. at art. 15.
232. Id. at art. 19.
233. Id. at art. 18.
234. Id. at art. 19.
235. Id. at art. 20.
236. Id. at art. 21.
237. Id. at art. 22.
238. See generally Saavedra, El regimen uniforme de la empresa multinacional en el Grupo Andino, 11 Derecho de la Integración (1972); Perezin, Multinational Companies Under the Andean Pact--A Sweetener for Foreign Investors? 7 Int'l Law 396 (1973).
239. See note 221 supra, at ch. V, art. 28.
240. Id. at art. 30.
241. Id. at art. 31.
242. Id. at art. 34.
243. Id. at art. 33.
244. Id. at art. 36.
245. Id. at art. 35.
246. Id. at art. 37.
247. Acuerdo de Cartagena: Bases para una politica tecnologica subregional, 16 Derecho de la Integración 131 (1974). The decision is pursuant to mandate of articles 25, 27, 38, 70 and 106 of the Agreement, as well as Decisions 24 and 46.
248. Id. at 131-32.
249. The decision envisions a process consisting of several stages.

During the first stage information is to be exchanged, existing technological infra-structure is to be perfected and new ones developed through special projects and incentives. During the second stage an evaluation is to take place of the results obtained during the first stage and policy formulated thereon.

The provisions we shall analyze are geared to enable this first stage to bear fruit. (Among the documents utilized by the Commission in arriving at the Decision was document Com/XIII/dt. 2/Rev. 1 which addressed "Fundamental Consideration for a subregional policy of technological development.") Though time does not allow a full analysis of the document, it is reproduced at 16 Derecho de la Integración 138 (1974).

250. See note 247 supra, at ch. II, art. 2(a).
251. Id. at art. 2(c).
252. Id. at art. 4(c).
253. Id. at art. 4(d).
254. Id. at art. 4(f). See also United Nations Conference on Trade and Development, Committee on Transfer of Technology. "Legislation and Regulation on Technology Transfer: Empirical Analysis of Their Effects in Selected Countries." TD/B/C.6/55 28 August, 1980.
255. See note 247 supra, at ch. III, art. 7(a)(c)(d). The term, "balance of payments," is not defined.
256. Id. at art. 8.
257. Decision 24, articles 2 and 19 discussed supra.
258. Note 247 supra, at art. 9.
259. Id. at art. 10.
260. Id. at art. 11.
261. Id. at ch. IV, art 12(a).
262. "As opposed to persons or enterprises from third party states." It is clear that this would not exclude foreign participation since the enumerated vehicles may all encompass a degree of foreign participation.
263. Id. at art. 12(b).
264. Id. at art. 12(c).
265. Id. at art. 13. Article 12(e) and (f) mandate member states to

adopt capitalization schemes for such projects. Article 14 requires the Junta to consider levels of development (and technological needs) when giving priority to states.

266. Id. at art. 16, 18.
267. Id. at art. 17. The remaining text of the decision relates to support task and common programming. (Chapter V) and various disposition, Chapter VI. Chapter V lays down rules and guidelines for the implementation of such projects. The purpose is to assure to the fullest extent, possible subregional sharing of benefits. Such matters include determination by the Junta of the effect of the technology, a mandate to search in common for solutions to technological problems, etc. Chapter II provides for other general matters such as requiring member states to adopt guides by which the Andean Corporation can participate in such projects.
268. Acuerdo de Cartagena: Propiedad Industrial Reglamento para la aplicacion de las normas sobre propiedad industrial, 16 Derecho de la Integración 162 (1974).
269. The chapter is divided into nine sections. The first addresses requisites for patentability; the second, who can hold titles; the third, the application process; fourth, how the NCA is to treat the application; fifth, the rights the patent grants; sixth, obligations imposed upon the holder; seventh, the system of licenses; eighth, legal protection; ninth, nullity of the patent.
270. See note 268 supra, at ch. I, § 1, art. 1.
271. Id. at art. 2.
272. Id. at art. 2(a)(b).
273. Id. at art. 3.
274. Id. at art. 4.
275. Id. at art. 5.
276. Id. at ch. I, § 2, art. 6.
277. Id. at art. 7.
278. Id.
279. Id. at art. 8.
280. Id. at art. 10.

281. The statute provides a list of required information at art. 11.
282. Id. at ch. I, § IV, art. 14.
283. Id. at art. 15.
284. Id. at art. 16.
285. Id. at art. 17.
286. Id. at art. 18.
287. Id. at art. 19.
288. Id. at art. 20.
289. Id. at art. 21.
290. Id. at art. 22.
291. Id. at art. 26.
292. Id. at art. 24.
293. Id. at art. 25.
294. Id. at sec. V, art. 28.
295. Id. at art. 29. Originally for five, renewable for five more.
296. Id. at sec. VI, art. 30(a).
297. Id. at art. 30(b).
298. Id. at sec. VII, art. 32. This means, as art. 33 makes clear, that the licences must conform to Decision 24 (art. 20).
299. Id. at art. 34. Art. 35 allows the national authority to grant licences whenever it deems the process requires more than one exploiter.
300. Id. at art. 38.
301. Id. at art. 41.
302. Id. at art. 42.
303. Id. at ch. II, art. 45-55.
304. Article 55 imposes upon the members the obligation, of subscribing to the International Classification established by the Arrangement

of Locarno, October 8, 1968, within a year of the decision's effective date.

305. Id. at ch. III, § 1, art. 56.
306. Id. at art. 57.
307. This prohibition goes to the form, its color or shape, descriptive markings or any other signals, any word (in any language) which has become usual designation (has acquired secondary meaning). Also forbidden are any unauthorized reproduction of emblems, coats of arms, markings of a state or international organization, those marks which may be confused with one already granted, names, pictures, pseudonyms of living persons or of deceased people without authorization of their heirs. A person may trademark his own name as long as it is sufficiently distinctive. Id. at art. 58.
308. Id. at art. 61-67.
309. Id. at art. 68.
310. Id. at art. 72.
311. Manipulated price or quality or entered into other conduct detrimental to the public. Id. at art. 75.
312. Id. at art. 76.
313. See, e.g., Vicuna, La creación de un tribunal de justicia en el Grupo Andino, 15 Derecho de la Integración 31, 33 (1974). For a study of the principle conflicts involved in legal structures for integration, see generally Paolillo y Carlos, in Estudio de los procedimientos de hecho utilizados para la solución de conflictos en la ALARL (a study on the proceedings made to solve conflicts in LAFTA), 9 Derecho de la Integración 73 (1971).
314. Zalduendo, El Tribunal Andino de Justicia, 4 Integración Latino-Americana 32 (1979).
315. The experts at these meetings included Professor Gerard Olivier, Deputy General Director of the Legal Service of the European Community and Dr. Pierre Pescapore, a judge on the European court. Walter Munch, General Director of the Juridical Service of the Commission of the Communities and Maurice Lagrange, Attorney-General of the Court of the Communities as well as a host of Latin jurists.
316. See Zalduendo, supra note 314. The absence of a judicial organ is explained partly because in the majority of the cases the scheme of integration was conceived by economists as a relatively simple

mechanism of free trade On the other hand ... (economists feared) the implantation of an economic scheme which could often clash with the legal norms enunciated within the traditional perspectives of national development. It was feared that the process association with national jurist, who often were not familiar with the development of international law and the law of an integration movement could be a factor of paralysis ... above all the risk of restricted interpretations by national legislatures. This coupled with the traditional fear of these states to submit to any international jurisdiction was another factor. See Vicuna, supra note 313, at 31.

317. See generally Zalduendo, supra note 314; Vicuna, supra note 313 for a full exposition of the legal theory underlying the relationship of the Junta, the Commission and the individual states see Amador, supra note 176.
318. Zalduendo, supra note 314, at 33.
319. "The structure of the European Economic Community comprehend one organ, the Council, formed by delegates of the member states which still look like the traditional international organs but (also) three additional institutions with different objects ... the Commission, guardian of the common interest, whose members, independent and not removable receive their investiture by collective decision of the states and which are not subjected to represent the national interest of their country of origin. The European Parliament, the expression of popular opinion, and the Court of Justice, custodian of judicial values." Id.
320. Indeed, they get more so each year. See Andean Group: Agreement establishing the Andean Council, 3 Int'l Leg. Mat. 612 (1980). See also Salazar, Solucion de conflictos interestatales para la integración economica y otras formas de cooperación económica, 28-29 Derecho de la Integración 20 (1975).
321. Vicuna, supra note 313, at 38.
322. Andean Group: Treaty Creating the Court of Justice of the Cartagena Agreement (Done at Cartagena, May 28, 1979), 18 Int'l Leg. Mat. 1203 (1979). Since a treaty, it is not dependent upon the existence of LAFTA. Further should LAFTA fail, the Agreement of Cartagena would survive as a mechanism of this new treaty. The preamble states:

Certain that both the stability of the Cartagena Agreement and the rights and obligations deriving from it must be safeguarded by a juridical entity at the highest level, independent of the governments of the member countries and from the other bodies of the

Cartagena Agreement, with authority to define
Communitarian law, resolve the controversies which
arise under it and to interpret it uniformly.

323. Id. at ch. I, art. 1.

324. Id. at art. 2.

325. Id. at art. 3.

326. Id. at art. 4.

327. Id. at art. 6.

328. Id. at art. 7.

329. Id. at art. 8.

330. Id. at art. 10.

331. Id. at art. 11. These evils are enumerated in the statute of the Court. The statute is to be approved by the Commission and is to govern both the functioning of the Court and the judicial procedure to which the causes of action contemplated by the Treaty shall be subject. Id. at art. 14. The Commission can also create the position of Attorney General. Id. at art. 7.

332. Id. at art. 13.

333. Id. at ch. III, art. 17.

334. Id. at art. 19. Note that the foreigners are not specifically excluded. It is presumed that they can institute such proceedings since by now foreigners can only own up to 49% of an enterprise.

335. Id. at art. 18.

336. Id. at art. 20.

337. Id. at art. 22.

338. Id. at art. 23.

339. Id. at art. 24.

340. Id. at art. 25.

341. Id. at art. 26.

342. Id. at art. 27.

343. Id. at art. 30.

344. Id. at art. 33.

345. Id. at art. 36.

346. Id. at art. 38.