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

Robert Carcano**

I. INTRODUCTION

The Latin American experience\(^1\) clearly establishes that economic development involves profound social and political change.\(^2\) Despite modernization efforts, economic benefits eluded Latin American leaders.\(^3\) This fact led to the widespread perception that a new international legal structure had to be forged if the region's myriad social concerns were to be addressed. Regional economic integration was a necessary first step.

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3. The failure to reap benefits from modernization efforts led to the perception that the problem lay in the structure of the international economic order. See, e.g., J. D. Cockcroft, A. G. Frank & D. L. Johnson,
Integration enabled Latin American statesmen to address insurmountable national problems on a regional level. In the Latin American context, however, economic integration efforts became intertwined with the new nationalism.\(^4\) Despite this beginning, the structures that eventually arose formed a relationship which assured investors that adherence to definitive rules would preclude uncertainty. Indeed, these new relationships promised creation of a safe harbor.\(^5\)

II. BACKGROUND

A. The Growth of Foreign Participation

Latin American statesmen are quite sensitive to foreign influence in national and regional development efforts. For them, effective development not only must achieve its economic objective but "must be under the control of the state.... Development would not be authentic or politically acceptable if international cooperation

 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 commun de la inversion extranjera en el Grupo Andino, 8 Derecho de la Integracion [D.D.L.I] 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. The phrase "legal structure" may be defined as a system in which rights, duties and obligations are clearly defined. To the investor, this would mean erection of a safe harbor because adherence to these rules would preclude acts of expropriation and render such acts unjustified.
contributed to a perpetuation of financial and technological inferiority."\(^6\)

Dependency theorists have long maintained that foreign participation in national development usurps national control in key areas of the development process and that foreign capital displaces national entrepreneurship, pre-empts financing\(^7\) and allows the foreigner to abuse his unequal bargaining position.\(^8\)

United States participation in the region, however, is a post second world war phenomena. U.S. investment in the Andean region increased dramatically from slightly over five billion dollars in 1929, to an estimated 13 billion dollars by the end of the fifties. Of this amount, 7.4 billion dollars consisted of direct U.S. investments.\(^9\)

The quantitative change which these figures represent belies a more significant qualitative change. Before 1950, investments within the Andean region were primarily directed at the extractive industries. After 1950, the policy of import substitution triggered pervasive foreign participation in manufacturing.

The aim of import substitution policy is the replacement of foreign imports with domestic products. The process begins with finished consumer goods and moves toward

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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. 455 (1975).
10. The phrases "Andean Pact", "Andean nations" or "Andean region", refer collectively to Bolivia, Colombia, Ecuador, Peru and Venezuela.
higher levels of manufactured products. Foreign transnationals rapidly recognized the advantages of this system and began actively participating in the manufacturing sector. 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 dollars during the same period.

In this sense, foreign transnationals fostered import substitution policy. They did not, however, question whether the size of the market permitted economically efficient plants. The host governments concluded that questions of economic efficiency were generally immaterial to foreigners who are protected by high trade barriers. The only immediate concern was penetrating the market:

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 this final product was considerably augmented.

Therefore, if foreign capital was needed to aid national development, developmental strategy would have to


12. Guerrero, supra note 4, at 12.


14. See infra notes 18-21 and accompanying text.

15. Guerrero, supra note 4, at 12.
meaningfully delineate 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 acquisition of smaller and medium sized national firms was also a matter of grave concern. Between 1958 and 1967, for instance, of the ninety-six subsidiaries of foreign enterprises which initiated activity in Columbia, only forty-eight were entirely new, twelve were of unidentifiable origin, one was a subsidiary of another, and thirty-five were acquisitions of firms already in existence. In Peru, a similar pattern was evident, of sixty-two firms, thirty-six were entirely new, and twenty-three were acquisitions of firms already in existence.

Concomitant with these concerns was an increasing inability of the host government to control the decisions of these foreign enterprises or the ramifications of their decisions on the host state. The powerful global stance of the "true transnationals" enabled them to maximize profits without considering the environments in

16. These practices severely handicapped the development of indigenous enterprises.
17. Guerrero, supra note 4, at 13, 16.
18. For an interesting account of international corporate 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.
which particular subsidiaries operated.\textsuperscript{19} Indeed, this situation provided support for the adage that "the interest of the state is not a factor in the invisible hand's search for profits."\textsuperscript{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."\textsuperscript{21}

The result is de facto division of markets, which is not necessarily in the nation's best interest. This same study concluded that 70% of those firms consulted paid royalties for the use of patented and unpatented technology abroad.\textsuperscript{22} Providers of technology clearly had a unique bargaining stance in Latin America.

Antitrust issues such as common contractual provisions used by foreign firms also became a matter of concern. Tying agreements were often utilized as vehicles to

\textsuperscript{19} See, e.g., R.J. Barnet & R.E. Muller, \textit{Global Reach: The Power of the Multinational Corporations} 123-210 (1974). The disruptive aspect 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, \textit{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). (The Dickinson International Trade Annual is an annual compilation of seminar papers submitted by student participants in an International Trade course. The Dickinson International Trade Annual is located only in the Sheely-Lee Law Library of the Dickinson School of Law, Carlisle, Pennsylvania.)

\textsuperscript{20} A policy of enlightened self-interest, however, would indicate the contrary. See A. Smith, \textit{Wealth of Nations} (1776).

\textsuperscript{21} Guerrero, \textit{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.

\textsuperscript{22} Guerrero, \textit{supra} note 4, at 18.
remit profits. Such agreements mandated that a subsidiary use only 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 transnational corporations to perpetuate and further their interests in this manner was the desirability of their technology. Such technology typically 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 effect of this process is 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

23. Guerrero, supra note 4, (citing a study by Constantino V. Vaitos for Departamento Nacional de Planeación, Columbia).
25. Id.
Among the clauses most frequently employed were clauses prohibiting export of products manufactured with imported technology, tying agreements and clauses prohibiting manufacture of products similar to imported goods. 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.

C. Political Response: Expropriation

Economic change induces political and social unrest. 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

26. Certainly questions concerning the extraterritorial effect of U.S. antitrust laws abound. In the context of a post-World War II 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. While the developed world often perceived itself as omnipotent and technologically advanced, the Andean states perceived themselves as impotent. In bilateral transfer of technology negotiations, Andean nations felt obliged to accept contracts of adhesion. North American concepts of arms-length negotiations alone cause conceptual difficulties in accepting the perception of Andean impotence. These conceptual difficulties are clarified, nevertheless, by considering the politics of the day. 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, supra note 2.
American phenomenon. More properly, expropriation has been a political response to pervasive U.S. and Canadian presence in Latin states.


In 1964, the United States Supreme Court reconsidered the act of state doctrine in Banco Nacional de Cuba v. Sabbatino. This decision and its progeny caused foreign investors to seek a safe harbor in the same port in which they sought to maximize profits. Sabbatino provided the High Court with an opportunity to address a sensitive aspect of the Court's role in the conduct of foreign policy.

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. The decision signified the end of gun boat diplomacy. The Marines would no longer be coming to halt expropriation of property.
The Court held that the act of state doctrine bars inquiry into acts of a sovereign within its own territory. The Court reasoned that the doctrine is dictated by the basic relationship between branches of government in a system of separation of powers. This doctrine, explained the Court, "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." It is not compelled by either the inherent nature of sovereign authority or by principles of international law. Redress from expropriation would have to result from negotiations between sovereign powers or from other similar tactics.

2. **Hickenlooper Amendment.**—After the *Sabbatino* decision, Congress amended the Foreign Assistance Act of 1961 to establish the policy that American Courts should

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34. Id.
35. Id.
36. Id. at 419.

(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
not refrain from adjudication of the merits of a case because of the act of state doctrine. Subsequent litigation sought to determine whether the intent of the Amendment was to overrule Sabbatino or to modify its holding. Courts presented with the expropriation problem evidenced a keen sensitivity to political reality, a concern for judicial integrity and an awareness of constitutional limitations. These decisions, coupled with the conciliatory approach adopted by the Executive branch, rendered increasingly clear the need for new rules to clarify the role of foreign capital abroad. If American municipal law was capable of articulation, however, agreement on international rules of expropriation was unlikely, at best.

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38. See, e.g., French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 295 N.Y.S. 2d 433, 242 N.E.2d 704 (1968), see also, Banco Nacional de Cuba v. First National City Bank of New York, 431 F.2d 394 (2d Cir. 1970). This latter case strictly construed the wording and legislative intent of the Hickenlooper Amendment. In pertinent part the Court held that:

One of the principal reasons for the proposed amendment is that it will serve notice that foreign states taking action against U.S. investment in violation of international law cannot market the product of their expropriation in the U.S. free from litigation.

Pointing to legislative history the Court noted that:

Congressman Gross ... urged that the Amendment be broadened to enable the owner of expropriated property to seize Cuban assets
3. **Differing Legal Standards on Expropriation.**--

Acts of expropriation occurred in an intellectually tenuous context. North American scholarship had articulated a duty between a sovereign and an alien whose property had been expropriated. The sovereign could expropriate property only to effectuate a proper purpose. Under this view, expropriation could not be discriminatory, and provision had to be made for payment of compensation.\(^{39}\)

Latin American scholarship, however, had never accepted the existence of such a standard. The

> 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. \(\text{Id. 396-97 and 402.}\)

Moreover the court in *First National* took note of Congressional policy inherent in Subchapters 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.F.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.

39. One statement of the North American scholarly view on expropriation appears in the *RESTATEMENT (SECOND)* of FOREIGN RELATIONS. Section 185 provides that 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....
conventional Latin American position was based on traditional international law. These scholars felt that "states [were] bound to treat the property of aliens in substantially the same manner in which they treat[ed] the property of their own nationals."\(^{40}\)

The international community system had begun to perceive that the international economic order functioned to the detriment of the new citizen states. Those nations which had not participated in the formation of the post-World War II economic order, began to express their discontent. The content of expropriation decrees illustrates this new position. In Bolivia's nationalization of the Gulf Oil Co., General Alfredo Quando Cundia stated:

[The ... 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 ...]

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....

\(^{40}\) 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 Ambassador in Washington to then Secretary of State Hull regarding expropriation of land belonging to U.S. citizens in Mexico in 1927. Hull:
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.]\(^{41}\)

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.\(^{42}\)

Often the military men were the best educated contingent of the population. An expanded concept of national security in the hands of a military man can be a powerful persuader of civilian governments.

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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 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] ... There 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 and 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).
III. REGIONAL INTEGRATION

A. The Search for Optimum Markets

Like their European counterparts, Latin American statesmen came to realize that the success of countries like the United States was at least partially attributable to the economies of scale made possible by large internal markets. That perception served as the impetus for the Latin American Free Trade Association (LAFTA).

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).


42. Einaudi, Latin American Institutional Development: Changing Military Perspective in Peru and Brazil, (1971), Rand 1, l2. 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. nationalization. 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." Id. at 30-31. See also R.E. Nicoll, Peru's Institutional Revolution (1973) and A.F. Lowenthal, The Peruvian Experiment (1975).
Before integration efforts could be undertaken, a concerted effort had to be made to alter traditional trade patterns. Each nation would have to pursue necessary industrialization internally where access to markets was unimpeded. Reorientation from importation of manufactured goods from Europe and the United States and exportation of cash crops and raw materials would be necessary to develop regional industries which could utilize the area's supply of primary production and satisfy the regional demand for manufactured products. 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." Moreover, it was becoming evident that when confined to national boundaries, import substitution destroyed the benefits of economies of scale. Products such as iron, steel, chemical fertilizers, pulp and paper, industrial and farm machinery could be most effectively produced through economies of scale.

Regional integration would also make possible region-wide specialization of industry. Such specialization

46. 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).
would replace monopoly and complacent national management with multi-plant industries: 47

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. 48

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 infrastructures, such as transport and communication networks, is also a matter requiring coordination.

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." 49 Nevertheless, an initial decision had to be made, namely what level of integration would be most

47. 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 regions internal customs structure. These include: tariffs, quotas, import regimes, exchange surcharges, taxes on remittances 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).

48. See supra note 45, at 10.

appropriate to the region. Economic theory provided three integrative mechanisms--free trade areas, common markets and custom unions.50

A common market represents the most pervasive and permanent level of integration. In addition to removal of internal tariffs and creation of a common external tariff, barriers to mobility of capital, labor and other such factors must be eliminated. Its irrevocable nature encourages investment.

A free trade area eliminates tariff and nontariff barriers to trade among the members of the association and allows each member to retain its own commercial policy toward third party nations.51

The third mechanism, custom unions, combines the free trade area with a common external tariff. The principal difficulty here is the creation of a common tariff. Practically speaking, many national laws impinge on trade. The union requires agreement only on those laws which directly relate to trade.

C. Latin American Free Trade Association (LAPTA)

1. Prelude.--Post World War Two Latin America experienced high growth rates. However, by 1958 these rates, made possible by the high price of primary products, decreased dramatically. One commentator has stated that

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50. R. Blough & J. Bochman, Problems of Regional Integration in Latin America 18-23 (1968).
51. 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 movement would defeat the protectionist devices of higher tariff countries. Solution of this abuse lies in strict enforcement of "rules of origin" subjecting violators to estoppel.
only the acceleration of import substitution would ensure continued economic growth. Otherwise, he estimated that:

[D]emand for food stuffs and minerals, principal exports of Latin America, would not expand to a level of 3.9%. This loss of market for primary products would produce a strong limitation on the level of investments ... and the possibility of obtaining external financing to expand productive processes.

These concerns were not shared by all nations. Indeed, Mexico, Argentina and Brazil had practically completed the import substitution process by relying on their larger markets and consequent economies of scale. Together, they had acquired 44% of all Latin American imports. Columbia and Chile also advanced, but the remaining states were either initiating the process or were in the first stages of such development.53

The above figures revealed basic disparities among the economies of the various nations of the would be Latin common market. Only a free trade area would ensure region-wide participation. The preamble to the Treaty of Montevideo54 envisioned the progressive formation of a common market. The effective date for the free trade area was 1973, but this date was subsequently extended to 1980 by resolution.55 LAFTA was later replaced by the Latin American Integration Association.56

53. Id. at 13.
55. Id. at art. 2. Extension of the executory period was accomplished by Resolution 261. See 6 D.D.L.I. (1970), Resolucion 261 (IX) Protocol Modificatorio de el Tratado de Montevideo (Protocol Modifying the Treaty of Montevideo).
56. The text of the Treaty establishing the successor to LAFTA appears at 20 INT'L LEGAL MATERIALS 672 (1981). Article 54 of LAIA provides:
The aim of the Treaty of Montevideo was expansion and diversification of trade. This required gradual abolition of trade restrictions and negotiation of complementarity agreements. Although such agreements would insure monopolization of certain sectors, they were dictated by rational market factors. Complementarity agreements:

- take into account and cultivate natural complementarities through intergovernmental accords. The basic objective is facilitation of industrialization to provide an incentive to industrial investment on a regional basis and aid the integration of a particular industry.

2. LAFTA Structures.—Although the Latin American Integration Association (LAIA) has replaced LAFTA structure, proper analysis of present trends in regional integration should include an historical consideration of LAFTA structures. During the twelve year executory period, member states were required to gradually eliminate duties, charges and all other restrictions on substantially all area products. Each contracting party was to obtain equivalent concessions (effective reciprocity) in the

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The juridical status of the Latin American Free Trade Association shall continue, in the Latin American Integration Association. Accordingly, from the moment of the entry into effect of this Treaty, the rights and obligations of the Latin American Free Trade Association shall correspond to the Latin American Integration Association.

For an analysis of LAIA's structure, see infra notes 117-185 and accompanying text.

58. Whenever an area specializes in the production of goods which it produces most efficiently and trades with other areas within a region doing likewise, economic complementarity is the result. See supra note 43, at 724.
59. Johnson, supra note 43, at 724. The intent to negotiate a complementarity agreement must be communicated to the Committee, and the negotiations must be open to all member states. The agreements must contain accession clauses so that other members may adhere.
60. Treaty of Montevideo, supra note 54, at art. 3.
periodic negotiation of reduction in duties, charges and other trade restrictions.\textsuperscript{61} Reductions achieved through negotiation were to be listed on national schedules. Another schedule, the common schedule, noted those goods on which all member states agreed to remove import duties and restrictions within the twelve year period originally envisioned by LAFTA's promoters. Chapter II, articles 2-13 set out the trade liberalization program. National schedules were to include the largest possible number of products traded among LAFTA countries.\textsuperscript{62} Requests for such concessions were to be exchanged through the Standing Executive Committee.\textsuperscript{63}

Reduction of import duties levied by each member of the association were to average no less than 8\% for each year computed cumulatively. In determining such reductions, realization of import quotas and exchange controls were to be taken into consideration. Negotiation by pairs or groups of nations was allowed. The Standing Executive Committee was responsible for calculating average levels of reductions negotiated by each state to assure that the average reduction negotiated by each state complied with minimum requirements of the Treaty.\textsuperscript{64}

The common schedule, as has already been indicated, lists goods on which all members agree to eliminate duties, charges and other trade restrictions. This aspect of the liberalization program initially envisioned triennial meetings, where all regional trade was to take place.\textsuperscript{65}

Inclusion of products in the common schedule was to be

\begin{thebibliography}{9}
\bibitem{61} Id. at art. 4.
\bibitem{62} Id. at art. 2-13.
\bibitem{63} Id. at art. 4.
\bibitem{64} Id. at art. 5.
\bibitem{65} Id. at art. 7 and at art. 9.
\end{thebibliography}
final. Concessions granted were to be irrevocable. If a concession produced significant disadvantages, a state could request LAFTA members to consider adoption of nonrestrictive measures to remedy the situation. If injury resulted from trade liberalization other than concessions, article 12 compelled the contracting parties to use every effort within their power to remedy the resultant disadvantages.

Chapter VI contains additional savings clauses concerning commodity imports, unfavorable balance of payment and agricultural imports. Article 23 addresses repercussions on specific productive activities of vital importance to a state's economy. Article 24 considers the correction of balance of payment irregularities. It provides that members adopting measures to correct their balance of payment must do so temporarily and without discriminating against products in the LAFTA trade liberalization program. If immediate relief is necessary, no permission is required. In no event, however, are such measures to remain in effect beyond one year without negotiations leading to the termination of such remedial measures.

Moreover, agricultural imports listed in the trade liberalization program may be restricted in order to protect supplies and to maintain prices at a level necessary to supplement domestic production. A state may also apply non-discriminatory measures to equalize the prices of domestic and imported products.

66. Id. at art. 8.
67. Id. at art. 11, 12.
68. Id. at art. 25. See arts. 23 and 24.
69. Id. at art. 26.
70. Id. at ch. VIII, art. 28.
The Treaty includes measures aimed at less developed economies. Such measures include preferential concessions to encourage the introduction or expansion of specific productive capacity, more permissive reduction schedules regarding import duties and other restrictions and more liberal balance of payment corrective measures than article 24. The Treaty also includes a "most favored nation clause." The LAFTA members pledged themselves to facilitate complementarity agreements by coordinating policy on import and export regimes as well as policy on capital goods and services from outside the Association. The pledge is supplemented by Article 16 which addresses the coordination of industrialization policies. Its objective were to sponsor agreements among representatives of the economic sector concerned and to negotiate mutual agreements on complementary economies by industrial sectors.

The Treaty also provides for the juridical personality of LAFTA. All LAFTA employees enjoy diplomatic privileges and immunities.

In 1965 a Council of Ministers of Foreign Affairs was created to terminate the lack of real executive power. The Council is responsible for the establishment of general norms to complement objectives of the Treaty. It also ensures the harmonious process of economic and social integration and resolution of major policy issues.

71. See id. art. 33.
72. Id. at art. 18.
73. Id. at ch. III, art. 25.
74. See id. ch. III, art. 16.
75. See id. ch. IX, art. 46.
Although LAFTA's structure has been the subject of criticism from many sources, none is as prophetic as that of Professor Johnson who stated:

The success of the first four annual conferences has to some extent been due to the fact that initial concessions were easily come by because tariff structures were higher than necessary. As more reliance is placed on negotiations and co-operative commitment, there is less chance that LAFTA will survive basic dissensions especially since the association is devoid of any institutional arrangement for conflict resolution.... Moreover because a concession may be withdrawn from a national schedule upon compensation being made or by virtue of the Treaty's escape clauses, a certain impermanence is imparted to a concession which further inhibits commercial response. 76

3. Dissension From Within.--LAFTA's smaller members did not fare well within the association's framework. They charged that the economic priority of the United States had been replaced by 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 may be contrasted with the middle powers who holding 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. 77 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 required greater concessions, (2) the industrial products produced by the lesser developed countries (L.D.C.'s) were not needed by the

76. See supra note 43, at 722-23.  
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 con-

cessions to the medium and lesser developed states ... how-

over ... [when the Treaty was implemented] ... the three categories were not established."  

Studies would later note that elimination of trade barriers encouraged 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 infrastructure almost guaranteed higher returns on capital.  

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 coun-

tries. 

79. See supra note 45, ch. IV 20.
80. Id. The study indicates that some measures include: (1) allowing smaller-lesser developed countries (S.L.D.C.'s) to keep their barriers up longer, (2) exempting S.L.D.C.'s from requirement of higher customs duty, (3) granting S.L.D.C's preferential access to markets, (4) creating fiscal incentives and state aids to enterprises settling in the less advanced countries, (5) freeing the movement of persons and (6) prioritizing the improvement of their infrastructures. 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.
Other scholars phrased the problem in more poetic terms:

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.

According to Professor Santos, the favorable provisions in the Treaty of Montevideo "do not impose an obligation." Indeed, the transitory nature of such measures fails to attract investors. Neither are these provisions applicable to entire industries. Short-term benefits did not assist the development of L.D.C.'s. Given this impasse, the future was not difficult to predict:

The second series of negotiations, lasting over two years, failed to produce agreement on the second installment of the Common [Schedule], due in part to the reluctance of the small and medium powers to aggravate and perpetuate what seemed to them the unfair distribution of benefits resulting from free trade.

81. Santos, El Problema de la desigualdades en la integración 22-23, D.D.L.I. 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.

82. Id. at 20.

83. Ereli points out that the L.D.C's did in fact petition the big three for such concessions but received no answer. See Ereli, supra note 77, at 490.

84. Id.
D. Subregional Integration Efforts

1. Prelude.--With the meeting of the Presidents of America at Punta del Este, the concept of a subregional agreement came into focus. The meeting revealed a consensus on 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. The document contained two provisions worth noting. First, it envisioned the participation of foreign capital. Secondly, the document granted L.D.C.'s the right "to participate and to obtain preferential conditions in subregional agreements." Subsequent to this agreement on principle, the Conference of Contracting Parties, pursuant to mandate

85. 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 L. MATERIALS 535 (1967) [hereinafter Latin American Common Market Declaration]. 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 February 7, 1968 and has been in effect since January 30, 1970.

86. 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." Ereli, supra note 71, at 487.

87. See Latin American Common Market Declaration, supra note 85, at 537.

88. Latin American Common Market Declaration, supra note 85, at ch. 1(2)(d).
issued by the Declaration of Presidents, established the norms by which subregional agreements would be judged. 89 These norms were presented in the form of Resolution 203. The Resolution sets out basic principles by which subregional agreements should be guided. 90 By Resolution 203, the Council of Ministers approved the outline of the subregional agreement presented by Columbia, Chile, Ecuador, Peru and Venezuela. To effectuate the purposes of Resolution 202, the Conference of Contracting Parties approved Resolution 222. 92

90. The Resolution states ten basic 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 (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.
92. Resolución 222 (VII) of 17 Dec. 1967, 2 D.D.L.I. 165 (1968). The resolution incorporated the guides discussed in Resolution 202 (note 90 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.
The promotion of the subregional agreement served to legitimize the relationship between the Andean Pact and LAFTA. Indeed, even before the adoption of Resolution 203, a study conducted by a Chilean delegation to the Council of Ministers addressed this question. By giving the agreement the character of a treaty mechanism, members could profit from application of the most favored nation clause without having to reciprocate. Secondly, the agreements were effectuated by executive act, thus bypassing legislative approval. Since the Treaty of Montevideo imposes upon the Committee the task of facilitating creation of the Latin American Common Market:

[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 ... are precisely the subregional agreements. These agreements ... constitute a most efficacious means to create conditions favorable to the establishment of a common market.

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.

93. See generally G. Amador, Andean Legal Order Ch. II (1978).

94. Compatibility of Subregional Agreements with the Treaty of Montevideo, 2 D.D.L.I. 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 America Latina (Toward accelerated development of Latin America) Mexico, Fondo de Cultura Economica (1965).

95. Art. 54 of the Treaty of Montevideo.

96. Compatibility of Subregional Agreements with the Treaty of Montevideo, 2 D.D.L.I. at 171, n.60. See also 6 D.D.L.I. 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.)
2. The Andean Pact.--With these conceptual difficulties clarified, the path was cleared for the Agreement of Cartagena and creation of the Andean Pact. Chapter I sets forth the purpose of the agreement, to promote harmonic and balanced development of its member states 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." The Commission is the supreme body and is composed of one representative from each of the member governments. It establishes the general policy of the Agreement and adopts measures to effectuate them. The Commission appoints and removes the members of the "Junta," it passes upon the "Junta's" proposals and monitors for compliance with the Treaty of Montevideo. The Commission meets three times a year and can be called into special session by petition of any state or the "Junta." These meetings are mandatory.

The "Junta" is composed of three members who serve for a three year term. The "Junta" represents the regional interest by executing decisions of the Commission, and formulating proposals to facilitate compliance with the agreement. Moreover, the "Junta" is charged with formulating

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98. Id. at art. 5.

99. Id. at art. 6.

100. Id. at art. 7.

101. Id. at art. 10.

102. Id. at art. 13.
development mechanisms of special application to the least
developed of its members, Bolivia and Ecuador.\(^{103}\) There
is no requirement that the "Junta's" technical staff be of
Andean nationality.\(^{104}\)

Chapter III dictates the manner in which the Agree-
ment is to be effectuated. It addresses common policy
formulation regarding development strategy\(^{105}\) and coordi-
nation of development plans\(^{106}\) through harmonization of
exchange, monetary, financial and fiscal policy (including
regimes for regional and foreign capital).\(^{107}\)

Article 27 required the Commission to approve and
submit a common procedure 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
enterprises\(^{108}\) and for the regulation of
competition.\(^{109}\)

Chapter IV of the Agreement enumerates the savings
clauses which correspond to the savings clauses contained
in the Treaty of Montevideo.\(^{110}\)

Chapter V addresses trade liberalization. All
tariffs and other trade barriers of equivalent effect,
whether of a monetary exchange or administrative nature,
are eliminated.\(^{111}\) The "Junta" determines which acts
constitute prohibited restrictions.\(^{112}\)

\(^{103}\) Id. at art. 15.
\(^{104}\) Id. at art. 16.
\(^{105}\) Id. at art. 25.
\(^{106}\) Id. at art. 26.
\(^{107}\) Id. at art. 26(d), 27.
\(^{108}\) Id. at art. 28.
\(^{109}\) Art. 75, ch. VIII, LAFTA, through Resolution 65
(II) of the Conference of Contracting Parties, had already
created norms governing competition.
\(^{110}\) See supra notes 66-70 and art. 78-81 of the
Agreement.
\(^{111}\) Art. 42.
\(^{112}\) Art. 43.
The liberalization program is automatic and irrevocable, and includes all products. Total liberalization was to be accomplished by December 31, 1980. The program of liberalization is to apply in varying measure to (1) products destined for the Sectoral Program of Industrial Development (SPID), (2) products of LAFTA's Common List, (3) products not produced by any states in the subregion and (4) products not encompassed within any of these categories. 113

With the exception of restrictions applicable to products on the SPID, restrictions of all types were to be eliminated by December 31, 1970. 114 A special regime is created for Bolivia and Ecuador.

The "Junta" determines which products are to be reserved for sectoral development. 115 Products listed on LAFTA's common list were mandated to be duty free 180 days after the effective date of the agreement. The Commission, pursuant to the "Junta's" proposal, was required to design a list of products not produced within the subregion and not reserved for SPID and also was required to select those products reserved for Bolivia and Ecuador. 116 Products on the list were to be duty free by February 28, 1971.

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113. Art. 45.
114. Art. 46.
115. Art. 47.
116. 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, 2 LAW. AM. 152 (1979)
Latin American Integration Association (LAIA)

Latin American statesmen and social scientists were painfully aware of LAFTA's shortcomings. LAFTA's transformation into a viable organization would require "a change of attitude[s] and the participation of high level government representatives with full political support." One commentator also noted that:

"In LAFTA's evolution, political backing has been very limited. From its very beginning the support it has received from the diverse governments have been more of form than substance.... The future of LAFTA weighs little in the conscience of public opinion among participating countries... But... what is much more dramatic is that... some LAFTA member countries, in different ways and on many occasions, have demonstrated that they can make important international political decisions (without thinking of the regional interest) or can... forget traditional positions."

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 transmissions 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.

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

117. Gonzalez, Reflexiones Sobre el futuro de la ALALC, Integración Latino America 7 (Oct. 1979). An initiative toward this end had been taken with Resolution 370 approved by XVIII Ordinary Conference of the Association.

118. Id. at 8.
LAFTA's shortcomings involved more than attitudinal problems. Closer cooperation was essential on issues such as the free movement of labor.\(^{119}\) Moreover, structural limitations in LAFTA existed, such as the relationship between smaller and less developed countries.\(^{120}\) A further limitation was the slow pace of liberalization.\(^{121}\) Perhaps the most glaring deficiency was the lack of a mechanism to address regional interests.\(^{122}\)

Although LAFTA's promoters were aware of the criticisms leveled at LAFTA, they nevertheless felt that continuing the integration process was essential. On August 12, 1980, LAFTA's members\(^ {123}\) subscribed to the Treaty of Montevideo of 1980. This Treaty created the Latin American Integration Association (LAIA or Association).\(^ {124}\)


\(^{120}\) See Gonzalez, supra note 117.

\(^{121}\) This slow pace may best be contrasted with the irrevocable nature of liberalization within the Andean Group. See G. Amador, supra note 93, at 26.

\(^{122}\) See Gonzalez, supra note 117, at 18-34 for a proposed program of readjustment. See also Fernandez, supra note 116, at 160 for the various concessions granted at LAFTA's last meeting.

\(^{123}\) In alphabetical order; Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, Venezuela. These nations now constitute LAIA.

\(^{124}\) Treaty of Montevideo Establishing the Latin American Integration Association, [Done August 12, 1980] reprinted in 20 INT'L LEGAL MATERIALS 672 (1981) [hereinafter cited as Treaty of Montevideo]. Article 54 provides that LAIA will succeed to all the rights and responsibilities of LAFTA. Chapter IX of the Treaty provides that the Treaty is to enter into effect 30 days after the third country ratifies it. For the remaining countries, the Treaty becomes effective 13 days after deposit of the instrument of ratification with the depository (Uruguay). Moreover, no country can subscribe to the treaty with reservations. For those signatories who have not ratified LAIA, "the juridical structure of the Treaty of Montevideo of February 18, 1960 shall apply ... both in regard to their reciprocal relations and in their relations with the signatory countries that have ratified, with respect to all corresponding matters...." Id. at art. 65.
The treaty evinces a new approach to integration in Latin America. Each member state agrees to grant to other members a regional tariff preference. Unlike LAFTA which had a designated life span of 12 years, LAIA is an agreement of infinite duration. LAIA's ultimate purpose is the creation of a Latin American common market.

1. Organization of the LAIA

The Association is guided by four policy making bodies. The function of each is set forth in Chapter VI of the Treaty. These policy bodies are the Council of Foreign Ministers, the Conference of Evaluation and Convergence, the Committee of Representatives and the Secretariat.

125. See supra notes 50-51 and accompanying text. See also Diane Tussie, Latin American Integration: From LAFTA to LAIA, JOURNAL OF WORLD TRADE LAW 399.
126. Treaty of Montevideo, supra note 124 at arts. 4, 5. Other than this mandatory regional tariff preference, agreements of partial or regional scope (defined in articles 7 and 6, respectively) may be made if members so desire.
127. See supra note 60 and accompanying text.
129. Id. at art. 1.
130. Id. at art. 28(a). The Council is composed of the Minister of Foreign Affairs of each member. However should a member state assign responsibility for integration to someone other than the Minister of Foreign Affairs that official shall be the nation's representative. Id. at art. 31. The Council meets when the Committee summons it to a meeting. Id. at art. 32; see note 132 infra.
131. Id. at art. 28(b). The Conference is composed of the plenipotentiaries of the members and it meets every three years except when called into special session by the Committee. Id. at art. 34. See note 132 infra.
132. Id. at art. 28(c). The Committee is to be composed of a permanent representative from each member and an alternate.
133. Id. at art. 29. The Secretary General directs the Secretariats who hold office for a three-year term and may be reelected for another term. Id. at art. 38.
The Council of Foreign Ministers (the Council) is the highest ranking body of the Association, which sets the Association's policy on integration. In addition, the Council has the power to hold hearings to resolve problems referred by other policy bodies. It also has the power to delegate decision-making power to other policy bodies.

As overseer of the integration process, the Council defines the norms by which the integration process will be conducted. The Council also establishes the norms that will guide the functioning of the other policy bodies. Moreover, the Council must "revise and update the basic norms regulating the agreements of convergence and cooperation with other developing countries and the respective areas of economic integration." It must do likewise for other regional associations or international organizations.

The Council also has the power to admit new member countries into LAIA. If the integration process requires corrective measures, the Council must adopt

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134. Id. at art. 30.
135. Id. at art. 30(g).
136. Id. at art. 30(h).
137. Id. at art. 30(a).
138. Id. at art. 30(d).
139. The treaty defines convergence as "[T]he progressive multilateralization of agreements of partial scope through periodic negotiations among the member countries." Id. at art. 3(b). One of the principal features of LAIA is its concern that member states seek agreements as well as closer ties in other economic integration areas. Id. at art. 24 and 25.
140. Id. at art. 30(f).
141. Id. at art. 30(e).
142. Id. at art. 30(i). Chapter IX of the Treaty provides that the Treaty is to remain open for adherence of Latin American countries who so desire. After admission the Treaty enters into force for such adhering country. At that time the adherent must put commitments into effect which derive from regional tariff preferences.
them. If necessary, the Council can propose additions or amendments to the Treaty.

The Conference of Evaluation and Convergence, (the Conference) serves as an advisory body to the Council. While the Council bears responsibility for adopting corrective measures, the Conference is charged with ascertaining and recommending the need for such action. The Conference can call upon the Secretariat to study a particular problem and recommend solutions.

The Conference must also promote economic integration. First, the Conference must evaluate the results of differential treatment accorded less developed countries and current treatment of lesser developed countries. Second, the Conference must encourage agreements on a regional level. Other duties of the Conference include negotiating for the regional tariff preference and facilitating convergence of agreements of limited scope.

The Committee of Representatives (the Committee) provides needed continuity to the character of the Association. The extensive list of duties and powers applicable to this policy body is a form of trouble shooting. This framework allows the Committee to serve the vital role of responding to specific problem areas.

143. Id. at art. 30(c).
144. Id. at art. 30(j).
145. Id. at art. 30(c).
146. Id. at art. 33(a). The Conference must also fulfill all assignments requested by the Council. Id. at art. 33(g).
147. Id. at art. 33(h). The Secretariat is the technical body of the Association. It is also charged with representing the "regional" interest.
148. Id. at art. 33(b).
149. Id. at art. 33(c).
150. Id. at art. 33(d).
151. Id. at art. 33(f).
152. Id. at art. 33(e), 33(a).
153. Id. at art. 35(a)-(r).
The Committee represents LAIA before third party nations. The Committee is empowered to undertake any matter of common interest not delegated by the treaty to another body. It can also establish auxiliary bodies, although it is not clear for what purposes.

The Committee performs an administrative function by convening the Council and the Conference, when necessary. The Committee can refer proposals to either body. It is also charged with more mundane administrative tasks.

The Secretariat is the Association's technical and administrative body. Its primary function is to formulate proposals for achievement of the objectives of the association. In this context, the Secretariat is charged with carrying out studies requested by other LAIA bodies. It is also charged with assisting the governments of member states to adopt agreements contemplated by the Treaty.

Most importantly for the future of integration, and like the Andean Pact's "Junta," LAIA's Secretariat is

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154. Id. at art. 35(i).
155. Id. at art. 35(r).
156. Id. at art. 35(p). Presumably the Committee can create bodies that would address, either separately or in conjunction with the Secretariat, particular regional concerns. To the extent this is true it can serve as a powerful force for integration.
157. Id. at arts. 35(h) and (k).
158. The Committee must approve the Association's annual work program and budget to set the contributions of the members and must also approve the structure of the Secretariat. Id. at arts. 35(e), 35(f) and 35(g).
159. Id. at art. 38(a) and (c).
160. Id. at art. 38(b).
161. Id. at art. 38(c).
charged with representing the regional view. The Secretariat's advice must not champion the view of any member state. Indeed, LAIA members pledge to respect the Secretariat's neutrality in this respect.

2. Treatment of the Less Developed Members

LAIA's structure avoids one of LAFTA's major pitfalls: procedures for dealing with the lesser developed members. The Association recognizes three groups of nations according to their degree of development. In so doing, LAIA, unlike its predecessor, has adopted the advice of the United Nations.

Chapter III addresses the treatment of the less developed members. The treaty mandates creation of favorable conditions for the participation of the less developed countries (LDC's), based on "non-reciprocity and communitarian principles." This mandate is set forth in article 16 which requires the member countries to open their markets and approve other programs of cooperation.

The more developed members are required to eliminate custom and other restrictions on products (preferably industrial products) originating in the LDC's. The members also

162. See notes 102 and 122 and accompanying text supra. See also Riesenfeld, Legal Systems of Regional Economic Integration, 22 AM. J. COMP. LAW 415, 417-18 (1974).
164. Id. at art. 41.
165. See Treaty of Montevideo, supra note 124, at art. 3(d). See also supra note 80 and accompanying text.
166. See supra note 78 and accompanying text.
167. Treaty of Montevideo, supra note 124 at art. 15. See also supra notes 79-84 and accompanying text.
develop procedures to expand these "free trade" lists. Where intraregional trade works to the detriment of LDC's, the members should seek efficacious compensation mechanisms.\textsuperscript{168}

To assure regional cooperation, the more developed members must negotiate "Special Programs of Cooperation" with LDC's.\textsuperscript{169} Members are also encouraged to establish special programs of cooperation in financing, technology and related areas.\textsuperscript{170} This concern for LDC's is most evident with regard to the favorable treatment given land-locked Bolivia and Paraguay.\textsuperscript{171}

In this context, the Secretariat is required to create an Economic Promotion Division for LDC's. After its formulation, the Division shall obtain technical and financial resources for the fulfillment of the promotion program. The Division must also monitor the assistance program for LDC's.\textsuperscript{172}

In addition to requiring a common regional tariff,\textsuperscript{173} the Treaty addresses agreements of regional and partial scope.\textsuperscript{174} As noted above, negotiation of these agreements as well as of the regional tariff preference is the function of the Conference of Evaluation and Convergence.\textsuperscript{175} These regional and partial agreements are

\textsuperscript{168} Treaty of Montevideo, supra note 124, at art. 18.
\textsuperscript{169} Id. at art. 20.
\textsuperscript{170} Id. at art. 21.
\textsuperscript{171} Id. at art. 22. Article 23 states "The member countries shall endeavor to grant facilities for the establishment in their territories of free zones, deposit areas or ports and other international transit administrative facilities, in favor of the landlocked countries."
\textsuperscript{172} Id. at art. 38(1). Promotion programs refer to agreements relating to non-tariff matters. Id. at art. 13.
\textsuperscript{173} See supra note 126.
\textsuperscript{174} See Treaty of Montevideo, supra note 124, at art. 4.
\textsuperscript{175} See supra notes 151-152 and accompanying text.
a focal point of the integration process. The system of support for less developed countries consists of both regional and partial types of agreements.\(^{176}\) To that extent they are clearly mandatory. However, agreements of regional and partial scope can address commerce, economic integration, agriculture, the promotion of commerce, as well as other matters.\(^{177}\) In place of LAFTA's emphasis on yearly rounds of product negotiations, LAIA emphasizes multilateral agreements on matters of interest. The new attitude among LAIA's promoters is a flexible one.\(^{178}\)

Chapter VII provides that the advantages, favors, rights, immunities and privileges members enjoy by agreement with another member or a non-member but which are not granted the Treaty creating LAIA or the Andean Pact, shall be extended unconditionally to all other members.\(^{179}\)

No discrimination is allowed in matters of tax, charges,\(^{180}\) internal duties or investment capital originating in member states.\(^{181}\) Moreover, goods imported or exported by member countries shall enjoy freedom of transit in the territories of other member countries.\(^{182}\)

Concerning products that come within the regional tariff preference not produced or produced in insubstantial quantities in their own territory, members are admonished to avoid erosion of benefits obtained through negotiations by application of internal taxes or other measures.\(^{183}\)

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\(^{176}\) See supra notes 165-172 and accompanying text. See also Treaty of Montevideo, supra note 124, at art. 18-23.

\(^{177}\) Id. at art. 6, 8.

\(^{178}\) Id. at art. 3(d).

\(^{179}\) Id. at art. 44.

\(^{180}\) Id. at art. 46.

\(^{181}\) Id. at art. 48.

\(^{182}\) Id. at art. 51.

\(^{183}\) Id. at art. 47.
Members may establish complementary norms of commerce which regulate matters such as application of nontariff barriers, rules of origin and export incentive measures. \(^{184}\)

Members may withdraw from the Association. To do so they must communicate this intention to the other members during a session of the Committee. One year later, the member state must present a formal document of denunciation. At that time, the member's rights and obligations automatically cease. However, the rights and obligations arising from the regional tariff preference remain effective for five years unless the member states agree to the contrary at the time of renunciation. \(^{185}\)

IV. SAFE HARBORS

The Agreement of Cartagena, establishing the Andean Group, \(^{186}\) in effect mandates the exclusion of the property interests of U.S. and Canadian based firms from the instability and uncertainty characterizing expropriation. \(^{187}\) This mandate 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. \(^{188}\)

\(^{184}\) Id. at art. 49.

\(^{185}\) Id. at art. 63.

\(^{186}\) See supra note 97.

\(^{187}\) Treaty of Montevideo, supra note 124, at arts. 2, 26, 27.

A. Foreign Investment

The Andean Foreign Investment Code addresses a market in excess of 50 million people in an area half as large as the United States.\footnote{189} The Code's preamble recites ideals of foreign investment quite similar to those first enunciated by Punta del Este and the Declaration of Bogota:\footnote{190} "foreign 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."\footnote{191} This theory is an extension of the realization that integration will require foreign investment which in turn must be able to incur risks. Consequently, it is necessary to promulgate rules setting out not only the advantages of integration benefitting national or mixed firms,\footnote{192} but also the rights and obligations of foreign investors, such as guarantees of protection. The regime must work for the mutual benefit of both the investor and the member countries.\footnote{193}

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.

\footnote{189} Schliesser, Restrictions on Foreign Investment in the Andean Common Market, 5 INT'L LAW. 586 (1971).
\footnote{190} See supra note 85.
\footnote{191} Andean Foreign Investment Code supra note 188, at 139.
\footnote{192} Id. The Code refers to a national competent authority, which is the policy body in each member state which is responsible for implementing the provisos of the Code within its territory.
\footnote{193} See Treaty of Montevideo supra note 124, at art. 3.
to enable them to participate in overall development.\textsuperscript{194} 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 terms,\textsuperscript{195} and allow national capital to participate in existing enterprises. In this manner, the Code places development in national hands.\textsuperscript{196}

Definitions provided by the Code apply not only to regulation of foreign investment but also to other common regimes promulgated pursuant to mandate of Decision 24. A "direct foreign investment"\textsuperscript{197} is defined broadly as a contribution made by a natural or juridical person to the capital of an enterprise either in freely convertible currency or through industrial plants, new or used machinery, spare parts, raw materials or intermediate products. The definition of "direct foreign investment" also includes funds in local currencies.\textsuperscript{198} These funds may be transferred abroad and reinvested.

"National investors"\textsuperscript{199} are defined as the state, national individual, national non-profit entities and national enterprises. A foreigner can become a national investor by establishing residency of at least one year, and by appearing before the national competent authority to renounce his or her 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

\textsuperscript{194} Andean Foreign Investment Code, supra note 188 at art. 5.
\textsuperscript{195} Id. at art. 6.
\textsuperscript{196} Id. at art. 7.
\textsuperscript{197} Id. at art. 1(a).
\textsuperscript{198} Id. at Annex 162 I-II(b).
\textsuperscript{199} Andean Foreign Investment Code, supra note 188, at I(b).
origin and is submitted for prior approval of the host (which requires certification of the country of origin). A subregional investor is a national investor of a member country other than the host, whereas a foreign investor is defined as a national of a non-member country and owns a direct investment in a member state.

A "national enterprise," is an enterprise which is organized in the recipient country and is controlled by at least 80% national investors. There is a proviso to ensure compliance, which demands that the 80% ownership be reflected in the technical, financial, administrative and commercial management of the enterprises.

The capital of a "mixed enterprise" belongs to national investors in a proportion which may fluctuate between 51% and 80% if the national competent authority determines whether the proportion correctly reflects the actual management.

In a "foreign enterprise," less than 51% of the capital is owned by national investors. Even if national investors hold greater than 51% of the capital of a "foreign enterprise", a national competent authority may decide that the management does not reflect domestic control.

The Code further defines and characterizes investments. Thus, a "new investment" is made after

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200. Id. at art. (c).
201. Id. at art. (d).
202. Id. at art. (e).
203. Id. at art. 1(f). The Commission of the Cartagena Agreement through Decision 110 is responsible for deciding the treatment to be accorded investments of mixed enterprises.
204. Id. at art. (g).
205. Id. at art. (h).
July 1, 1971 in existing or new enterprises. "Reinvestments" are investments of all or part of undistributed profits.

The dependista antagonism to foreign investment has previously been noted above. One such conflict involves the ability 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 national competent authority (NCA). The NCA must then process the application, considering the country's development policy. The application will be approved if it is deemed consistent with the national interest. No member state may approve an investment in an activity already covered by an existing industry. Moreover, no member state may approve an investment the purpose of which is to acquire shares, participation, or rights owned by national or subregional investors.

The NCA is empowered to authorize foreign participation in national or mixed firms if the capital of the respective enterprise is increased and the enterprise maintains mixed classification.

The Code considers reinvestments to be new investments, and requires authorization and registration.

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206. Id. at art. (i). Art. (j) added to the Code by art. 33 of Decision 70. See 12 INT'L LEGAL MATERIALS 349 (1973).

207. See Andean Foreign Investment Code, supra note 188, at art. 2. See Appendix II--a list of information required for the assessment.

208. Andean Foreign Investment Code, supra note 188 at art. 3. This proviso was intended to address the practice of foreign acquisition of domestic firms.

209. Id. at art. 4.

210. Id. at art. 12.
However, the Andean governments may permit reinvestment of profits as long as they do not exceed 7% of the company's capital. No authorization is required for amounts up to 7%. Registration, however, is required.

Another means used to circumvent the reinvestment structure of article 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 for the acquisition of these bonds.

The NCA must examine and approve all contracts which concern 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.

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

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211. The amount was increased from 5% to 7% after Chile protested. See infra notes 253-286 and accompanying text.

212. Andean Foreign Investment Code, supra, note 188 at art. 12.

213. Id. at art. (j), added to the Code by art. 33 of Decision 70. See 12 INT'L LEGAL MATERIALS 349 (1973). The required registration is 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.

214. Andean Foreign Investment Code supra, note 188, at art. 18.

215. Id. at ch. III, art. 38.
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 to articles 40 and 43.216

During the first 20 years of the Code's existence, foreign firms engaged in the basic products sector (subject to concessions) will not be required to transform so long as their contracts do not exceed 20 years.217 Depletion tax allowances are not allowed for basic products sector activity. The preferable form for foreign participation here are contracts of association with the State.

Upon authorization by the NCA, the owner of a direct foreign investment has the right to transfer abroad in freely convertible currency, the verified net profits resulting from the direct foreign investments. Transfer in excess of 20% annually is prohibited. However, member countries may authorize greater percentages so long as the Commission is notified. The NCA may also authorize the investment of excess distributed earnings, in which case such investments shall be considered direct foreign investments. No new investments are permitted in the public service sector.218 The only exemption are those investments made to ensure the technical and economic efficiency of currently existing firms.219

216. Id. at art. 39.
217. Id. at art. 40. "[T]he basic products sector is [defined as] ... exploration and exploitation of any minerals, of any kind, including liquid and gaseous hydrocarbons, gas pipelines, oil pipelines, and exploitation of forests. For Bolivia and Ecuador this sector also includes primary agricultural and livestock activities."
218. New investments are defined in the Code as "drinking water, sewers, electric power and lighting, cleaning and sanitary, telephone, postal and telecommunication services." Id.
219. Id. at art. 41.
The Code proscribes 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 receipt of local deposits in current accounts, savings accounts or time accounts. These banks could only stay in business if they converted into national enterprises, which entails selling 80% of their capital to national investors within the three year period.

The Code mandates that 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." Further, foreign firms already "in these sectors must also convert into national enterprises." The sanctions for noncompliance, or for situations when a host country does not grant exemption from these provisions provide that the products are not permitted duty-free status under the Cartagena Agreement.

Pursuant to the goal of maintaining local control of economic policy, the Code requires an investor to register the agreement reached with the NCA. The agreement must specify the terms of authorization. A further required stipulation is the amount of the investment which will be registered in freely convertible currency.

The host country registering the investment must also supervise fulfillment of the Code. Other Code provisions require the NCA to "(1) supervise fulfillment of commitments

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220. Id. at art. 42.
221. Id. at art. 43.
222. Id. at art. 44.
223. Id. at art. 5.
commitments for national participation in the enterprises, technical, administrative, financial and commercial management and in its capital" [structure];

"(2) authorize in exceptional cases the purchase of shares, participations, or rights of national or mixed enterprises by foreign investors, in accordance with the provisions of Articles 3 and 4;" (3) establish an information and price control system of the intermediate products that may be furnished by suppliers of foreign technology or capital." 

"(4) 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." 226

Only national or mixed firms or foreign firms which transform into national or mixed firms can enjoy "[t]he advantages deriv[ed] from the duty free program of the Cartagena Agreement." 227 To avail itself of the program, a foreign firm must, within three years of the regime's effective date, register to divest itself. After three years, there must be national investor participation of not less than 15%. Time periods for divestment range from a maximum of 15 years in Colombia, Peru and Venezuela to a maximum of 20 years in Bolivia and Ecuador, beginning on January 1, 1974. The divestment program contemplates that a passage of two-thirds of the time period will bring about

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224. The purpose of this structure is to assure the host government that a minority foreign shareholder of a fragmented entity shall not control the enterprise.

225. See supra note 41.

226. Andean Foreign Investment Code, supra, note 188, art. 6.

227. Id. at art. 27.
a percentage of national investors in firms at not less than 45%. Foreign firms established after July 1, 1971 must agree to place on sale, according to article 31, a specified percentage of shares so that they are transformed in compliance with the program.

Only firms which 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. Foreign firm fade-out agreements must stipulate certain matters. During the period

228. Id. at art. 28.
229. Id. at art. 30. In Colombia, Chile and Peru the agreement must stipulate participation by national investors in the following percentages:
Fifteen percent at the beginning of production, thirty percent upon completion of one-third of the time period, no less than forty-five percent after two-thirds of the time period.

In Bolivia and Ecuador, five percent upon completion of three years of production, no less than ten percent upon completion of one-third of the time period and no less than thirty-five percent after two-thirds of the time period.
In all states other than Ecuador and Bolivia, the twenty year period commences two years after production begins.
230. Id. at art. 29. The certificates, by specifying that the firm is a participant in the Andean Group, act as a license exempting the products from payment of duties.
231. Id. at art. 31. The required items which must be stipulated include:

(a) The period of time for compliance with the obligation to transform the foreign enterprise into a mixed enterprise;

(b) The gradual scale for the transfer of shares, participations, or rights to national investors...

(c) Regulations that will ensure the progressive participation of national investors or their representatives in the technical, financial, commercial, and administrative management of the enterprise, at least as of the date on which the enterprise begins production;
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(c) Regulations that will ensure the progressive participation of national investors or their representatives in the technical, financial, commercial, and administrative management of the enterprise, at least as of the date on which the enterprise begins production;
of transformation, foreign firms will enjoy the advantages of the duty free program. However, any breach of their agreement effectively terminates such benefits. The NCA controls the fade-out obligations and the manner of sale. The rights granted by the Code are the maximum which can be granted, though 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.

Upon authorization by the NCA, "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 it is not in excess of 20% of that investment annually." A member state can authorize a greater percentage but must communicate this to the Commission.

A registered investor can repatriate invested capital when shares are sold to national or subregional investors.

(d) The method of determining value of the shares, participations, or rights at the time of their sale; and

(e) The systems that will ensure the transfer of shares, participations or rights to national investors.

Id.

232. Id. at art. 32.
233. 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."
234. Id. at art. 33.
235. Id. at art. 34.
236. Id. at art. 37.
or upon reinvestment. However, sale of shares to another foreign firm must be authorized and will not be considered for re-exportation of capital.\textsuperscript{237} 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.\textsuperscript{238}

Upon liquidation, "the difference between the real value of the net assets and the re-exportable capital, as defined [above is] considered as capital gain and may be transferred abroad after payment of ... taxes."\textsuperscript{239} Following payment of taxes, a foreign investor acquires the right to transfer abroad amounts obtained from the sale of shares or other rights.\textsuperscript{240} Conversion is at the rate of exchange prevailing at the time the draft is drawn.\textsuperscript{241}

"Transfers abroad made by enterprises covering amortization or interest because of the use of foreign credits shall be authorized in accordance with terms of the registered contract."\textsuperscript{242} Foreign credit agreements between a parent and its subsidiary may not have a 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.\textsuperscript{243} The NCA must determine the rate of interest for any other external credit contract.

\textsuperscript{237} Id. at art. 7.
\textsuperscript{238} Id. at art. 8.
\textsuperscript{239} Id. at art. 9.
\textsuperscript{240} Id. at art. 10.
\textsuperscript{241} Id. at art. 11.
\textsuperscript{242} Id.
\textsuperscript{243} Real rate of interest may be defined as "the total that must be paid by the debtor for the use of the credit -- including commissions and expenses of any kind." Id.
Nevertheless, the rate of interest 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 NCA. However, they may not be computed as capital contributions. If furnished to a foreign enterprise by its parent or an affiliate, no payment of royalties is authorized and no deduction is allowed for tax purposes. 244

The Code also addresses imports of foreign technology. Contracts for the importation of technology must contain clauses identifying terms of transfer and stating the value assigned in the contract to the various components of the technology. The values must be expressed in a form similar to that followed in the registration of direct foreign investments. 245 Any contract containing anticompetitive clauses is automatically denied authorization. 246 Clauses of this nature are not accepted in connection with subregional trade or export of similar products to third parties. 247

NCAs are responsible for knowing about the available technology on the world market in order to have alternative

244. Id. at art. 21.
245. Id. at art. 19.
246. 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, (3) obligating purchaser to transfer improvements to supplier, and (f) "clauses of similar effect." An exception exists when the NCA decides to limit the manufacture of these products.
247. Id.
solutions to recommend to the Board for subregional development. Preference is given products incorporating indigenous technology. Based upon Board recommendation, the Commission may propose to member countries the establishment of charges for products using trademarks of foreign origin. These trademarks include those for which royalties must be paid or those for which easily accessible technology may be used in production.

The Code requires the Commission to formulate a program to promote subregional technology before November 30, 1972, and prohibits the use of restrictive covenants. At the Board's proposal, the Commission may specify productive processes or groups of products for which no patent privilege may be granted in any of the member countries. The Commission may also revise previously granted privileges.

248. Id. at art. 22.
249. Id. at art. 24.
250. Id. at art. 25. Restrictive covenants include, but are not limited to, prohibition or limitation on the export or sale in certain countries of products manufactured under the trademark concerned, tying arrangements, and price fixing.
251. Id. at art. 26. Article 54 further requires member states to establish a Sub-regional Industrial Property Office which shall have the following functions:

(a) To serve as liaison between the national industrial property offices;

(b) To compile information on industrial property and distribute it to the national offices;

(c) To prepare model licensing contracts for the use of trademarks and patents in the Sub-region;

(d) To advise national offices on all matters connected with the implementation of common regulations on industrial property.
As noted above, the Code imposes upon member states an affirmative obligation to follow a prescribed course of conduct. Consequently, the system has experienced internal dissension. An example of this dissension occurred in 1976 when Chile insisted on a revision of the Code. The controversy briefly sketched below illustrates how potential conflicts can arise intraregionally, and why the Code was adopted.252

B. Dissension and Modification

Prior to the incorporation of the Code into the Chilean legal order, the regulation of foreign investment was characterized by an 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."253

Chile was a party to the Agreement of Cartagena when Eduardo Frei was President. The Code was incorporated...

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(e) To carry out studies and to submit recommendations to the Member Countries on invention patents.


253. Id. at 150.
into Chilean law by 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.254

Frei was succeeded in office by Salvador Allende, who had expressed agreement with the Code. The ouster of Allende's regime in September of 1973, proved that the Code could not provide solutions to many of Chile's grave economic problems at the time, "... accentuated by a world-wide drop in copper."255 Chilean society desperately needed to curtail inflation and accelerate growth. On July 13, 1974, Chile enacted Decree Law 600256 to attract foreign capital.

The initial confrontation with the Andean Group occurred at the Fifteenth Ordinary Session of the Cartagena Agreement on September 10-12, 1974.257 At this session, member states were negotiating a tariff-reduction schedule.


255. See Chile: Decree Law 600, 13 INT'L. L. MATERIALS 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 preordained. In particular, it becomes obvious that foreign capital and technology must perform a central function within the developing nation." Comment, supra note 252, at 156.

256. "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." 1976 BUS. LATIN AM., AnCom is Pressured to Focus Attention on D.24 Issue, 217, 218.

257. Comment, supra note 252, at 156.
"The presentation of a joint declaration by Bolivia, Colombia, Ecuador and Venezuela signified the end of the session stated. The declaration formally announced that Chilean Decree Law 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."258

Proponents of Andean economic integration feared that Chilean Decree Law 600259 would create pressure within the other member states to attract foreign capital, contrary to interests of the integration movement. They also felt that only a collective effort would enable foreign capital to respond to regional needs. The Chilean position was based on the principle that Andean Group measures are national law to the extent that they are consistent with national needs.260 The Chilean's action also showed that although Andean measures were supreme, they could be ignored when special circumstances affect national interests.

The Andean members pointed out that Decree Law 600 had no fade-out provision, that the limitation on profit

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258. For a detailed account of the controversy, see G. Amador, The Andean Legal Order 1-44 (1978).
259. See notes 77-116 and accompanying text supra.
260. 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 nondiscrimination between foreign and national capital. Article 6 grants a right to petition when the investor feels a provision has discriminated against him. Chapter V provides for a compensation scheme for foreigners who have suffered damage due to a discriminatory provision. The rules regarding remittances of profits, taxation, etc. are also more liberal.
remittances were excluded, that it did not limit access to credit, and favored foreign investors.\textsuperscript{261}

A resolution was adopted at the Sixteenth Ordinary Session of the Cartagena Agreement. Decree Law 600 was effectively limited to Articles 34 and 44 of the Code.\textsuperscript{262} However, Chile found that "it could not eliminate investors' doubts ... lack of investor confidence, exacerbated by uncertainty as to the outcome of the clash with [Decision 24], transformed the promise of [Decree Law] 600 into an illusion."\textsuperscript{263}

During the summer of 1976, Chile intensified its attack on Decision 24; refusing to approve revision of the tariff reduction schedule.\textsuperscript{264} At this juncture, the member states were willing to meet some of Chile's demands.\textsuperscript{265} The member states agreed to a protocol establishing a special commission between Bolivia, Colombia, Ecuador, Peru, and Venezuela \textit{and} Chile.\textsuperscript{266} The protocol sought a complete resolution of the crisis. Article 2 of the protocol provided, however, that:

\begin{itemize}
  \item Articles 3 and 19 of D.L. 600 attempted to incorporate Chile's obligations to foreign investors under LAFTA and the Agreement. 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.
  \item 261. Art. 34 exempts enterprises exporting 80% or more of their production outside the common market area. Articles 41-44 allow exemptions but entail loss of the trade benefits.
  \item 262. Comment, supra note 252, at 167.
  \item 263. See supra note 256.
  \item 264. 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 increasing capitalization to fade out foreign firms, (4) granting of medium term credits.
  \item 265. See supra note 258, at 11 (Protocol of Oct. 5).
  \item 266. Id. at 12.
\end{itemize}
if by the completion of the period indicated in the preceding article [twenty-four 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. 267

Chile was adamant in its position and could not be placated. At the 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 the way unaffected laws were to be implemented. 268

Chile's actions had a profound influence on the character of the Code. During October 30, 1976, the Commission approved reforms to the Code. Additional reforms were approved from November 25 to 30, 1976. 269 The reforms as a whole were extensive.

Prior to the reform, investors who had established a one year residency and renounced repatriation were considered national investors. 270 Currently, one or both of these conditions may be waived. 271


268. 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%." 269. See supra note 199 and accompanying text.

270. See generally Decision 103, art. 1; Chaparro, Las reformas al Regimen Andino de Inversiones Extranjeras. (Reforms to the Andean Regime of Foreign Investments) 24 D.D.L.I. 133 (1977).

271. Id. Decision 103, art. 1 and art. 4.
The reform also created a new class of investor, the subregional investor. The subregional investor enjoys the right to repatriate capital and remit profits but is considered a national investor for purposes of the Code. To be considered a subregional investor, a foreign investor must receive authorization from the country of origin and the receptor country. No subregional investments may be authorized for industries producing products reserved to other member countries.

Another reform opens up medium term credit of three years or less to foreign investors. This reform also refers determination of the terms and conditions under which short and medium credit must be granted to foreign firms to national decisionmakers.

The Code required a foreign investor, who wanted 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 requires that the recipient maintain its quality as a mixed firm, but does not affect its obligation to increase capital. Thus, the investor is given a wider choice of methods.

The reform also addresses investment of excess profits. The low percentage limits imposed on these profits created an anomalous situation, the accumulation

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272. See art. 32 and 55 (Industrial Programming section of the Agreement).
273. 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.
274. See supra note 268, Decision 103, art. 6.
275. Id. at art. 3.
276. See Chaparro, supra note 270, at 135. Decision 103, art. 10.
of resources belonging to foreign investors without right of convertibility or 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.277

When the original Code was promulgated, the requirement that foreign firms fade out was contingent upon 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 Colombia. The Commission decided to promote uniformity in transformation by specifying that January 1, 1974 would be the date on which transformations were to begin.278 Further, the reform established the possibility of achieving this transformation through capital increase of the enterprise.279 The reform also established that the investments of international financial entities and foreign governmental agencies of developmental cooperation could qualify as neutral.280

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277. See supra note 268, Decision 103, art. 7.
278. Id. at art. 8.
279. Id. at art. 11.
280. "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
Since Chile's departure from the Andean Group, the country has experienced hardship. The other Andean states continue to work under the regime in one manner or another. One member state, Venezuela, deserves brief mention. Venezuela's decision to join the Andean Group was announced by President Caldera in 1973. This decision is noteworthy because prevalent Venezuelan opinion in the early 60's held 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 Colombian coffee and our meat cannot compete with Uruguayan meat." By 1972, this attitude changed: "[i]t had become apparent to many of the nation's decision makers that participation in these organizations was essential if Venezuela were to 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.


continue its economic growth and to avoid exclusion from important trading markets." 284 Venezuela had little difficulty accepting the underlying philosophy of the Code. By 1971, 285 Venezuela's national legislation had 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. 286

C. Emerging Antitrust Concepts

During their Sixteenth Extraordinary Session, the Commission of the Agreement of Cartagena approved Decision 45 regarding regulation of competition. 287 The decision was made 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 is designed to make available to subregional consumers a growing volume of goods produced within the subregion in conditions of increasingly favorable price and quality. 288

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284. "... As outlined by the subcommittee, 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.


287. Id. at 196.

288. From the wording of the statute, it does not appear that all such price manipulations is proscribed. The word "indebido" is used. This word means "unnecessary." Hence a rule of reason might be applicable.
The decision establishes *per se* violations. They are dumping, price manipulation, conduct which influences the normal flow of primary materials as well as any other conduct having equivalent effect.

Any member state which is aggrieved by the conduct of any other member state may present its case to the "Junta," together with the facts giving rise to the claim. The "Junta" must solicit information on the matter from the offending state within forty-eight hours. This information must be returned to the "Junta" within fifteen days. The "Junta" is empowered to take any measure necessary, to resolve the conflict.

If the parties do not arrive at a solution, the "Junta" may order implementation of corrective measures. Within thirty days of the time period in article 4, the "Junta" is required to expedite the corresponding resolution. The resolution is then communicated to the interested parties, to the other member states and to the Commission at its next meeting.

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289. This apparently encompasses agreements to limit production or sale.
290. *Acuerdo de Cartagena*, supra note 286, at art. 2.
291. The "Junta" is the technical branch of the Cartagena Agreement responsible for representing the subregional interest. See id. at app. I.
292. *Id.* at art. 3.
293. *Id.* at art. 4.
294. *Id.* at art. 5. For example, the "Junta" may conduct a study or convocate a meeting of the parties.
295. *Id.* at art. 6.
296. *Id.* at art. 7.
297. The Decision provides for a summary proceeding where time is of the essence. *Id.* at art. 8. Art. 9 delineates the factors the "Junta" will consider in analyzing the situation.
Under the provisions of the Decision, the "Junta" can authorize restrictions on and import barriers to those products which interfere with competition. 298 The restrictions are subject to approval by the Commission. 299 The Commission has a right of direct review of the "Junta's" resolution within sixty days after the effective date of the resolution. 300

If the offensive practices emanate from a country outside the subregion, 301 and affect products granted a compromise, the affected state must request that the "Junta" apply Article 8 restrictions. The "Junta" and Commission must be notified of any independent action taken. 302

When the "Junta" determines that the conduct invoking article 8 restrictions has ceased, it notifies the State and lifts the restrictions. 303

The Decision places an affirmative obligation upon the bodies of the Cartagena Agreement to evaluate conduct which interferes with competition. This facilitates characterization of practices as either per se offensive or as acceptable within certain parameters.

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298. Id. at art. 11.
299. Id. at art. 10. If no action is taken by the Commission, the decision of the "Junta" remains in effect.
300. The countries seem to be non-Andean Group Latin States as opposed to third party nonmembers, i.e., the United States.
301. Id. at art. 12.
302. Id. at art. 13.
D. Regime on Multinational Enterprises

Article 28 of the Agreement imposes upon the Andean States the task of developing a common regime for the treatment of subregional capital. The Commission enforces this article. The Uniform Regime on Multinational Enterprises and Regulation of Subregional Capital\textsuperscript{304} was promulgated by the Commission on December of 1971 to fulfill this mandate.

A subregional investor is defined as the national investor of a member state other than the recipient country.\textsuperscript{305} The purpose of the Decision is to encourage investments in a newly created vehicle; the Multinational Enterprise (MNE).\textsuperscript{306} Toward this end, the investor obtains authorization from the NCA of the country of origin to invest in an MNE or to transfer capital to the receptor (host country). The NCA can establish a method of profit remittance but may not authorize repatriation of capital or transfer of profits to any country other than to the country of capital origin.\textsuperscript{307}

Further, NCAs 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

\begin{footnotesize}
\begin{enumerate}
\item 304. Id. at I, 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.
\item 305. Id. at art. 2.
\item 306. Id. at art. 3.
\item 307. Id. at art. 4.
\end{enumerate}
\end{footnotesize}
different nationality must be authorized by the NCA of the receptor country. 308

An MNE is an enterprise whose business purpose revolves around either the sectorial programs of industrial development, infrastructure projects aimed at furthering integration, programs rationalizing the production of existing industries and joint programs for the development of agriculture and cattle raising, 309 or any other program the Commission determines is of subregional importance. Moreover, an MNE may not allow foreign participation greater than 40%. 310 Participation of national investors of member countries cannot be less than 15% of the subregional total. 311 Sub-regional capital must be reflected in the technical, financial and administrative management of the firm. 312 The capital of an MNE is evidenced by denominated shares, 313 the value of which is expressed in the monetary unit of the enterprise's country of principal domicile. 314

The charter of this enterprise must conform to the requirements of Articles 8 and 9, 315 as well as to the requirements of national legislation. 316 The promoters must obtain authorization from the Commission certifying compliance with Articles 8 and 9 of the Cartagena

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308. Id. at ch. II, ch. III, art. 8, 9.
309. Id. at art. 10.
310. Id. at art. 11.
311. Id. at art. 8. The decision establishes special payment schedule when investors include Bolivian or Ecuadorian nationals. Id. at art. 12.
312. Id. at art. 14.
313. Id. at art. 15.
314. Id. at art. 19.
315. Id. at art. 18.
316. Id. at art. 19.
Agreement. After receiving the documents, the NCA must forward copies to the "Junta" and the other member states. The NCAs of the other states may, upon a finding of deviation from Article 8, complain to the NCA of the enterprise's principal domicile. This complaint must be made within sixty days of receiving the documents characterizing the MNE. After the sixty days have expired, or after problems have been resolved, the NCA of principal domicile shall conclude the charter.

The benefits of MNEs are found in Chapter VI of the Decision. MNEs enjoy the advantages of the liberalization program. They are entitled to treatment equal to that of national investors in matters pertaining to state acquisition of their products and they are not subject to divestment requirements of the Code. MNEs have access to internal credit also equal to that of national investors and they require no prior authorization to reinvest profits. They are entitled to participate in the economic activities of the member states reserved for national enterprises. If they

317. Id. at art. 20.
318. Id. at art. 21.
319. Id. at art. 22.
322. Id. at art. 30.
323. Id. at art. 31.
324. Id. at art. 34.
325. Id. at art. 33.
326. Id. at art. 36.
327. Id. at art. 35.
receive NCA authorization, these investors have the right to transfer any actual net profits resulting from their direct investment after taxes.  

Finally, article 37 establishes that MNE's shall 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 in the member states whose nationals participate in capitalization according to article 11.

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." The decision recognizes the enormous role that technology plays in development and undertakes to establish within the subregion the scientific and technical infrastructure required for development.

328. Id. at art. 37.
330. Id. at 131-32.
331. The decision envisions a process consisting of several stages. During the first stage information is to be exchanged, existing technological infrastructure 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 to be analyzed 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 space does not allow a full analysis of the document, it is reproduced at 16 D.D.L.I. 138 (1974).
The decision imposes on the member states a common policy with the purpose of promoting the application of technical know-how favoring subregional development. This promotion should be made with a view toward equalized development between small and medium states and large states.

The decision requires the member states to take "concrete action" to promote to various programs of development including evaluation, selection and control of imported technology, the simulation, adaptation and copying of foreign technologies and the search for obtaining and diffusing of information relating to available technology.

Chapter III addresses imports of technology. It imposes upon the NCAs of member states a duty to evaluate contracts involving importation of technology to determine its effect on the subregion. The NCAs analyze 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 payment. When the technology affects the national interest, the decision requires that an applicant present alternative sources of available technology, their cost and the reasons for the applicant's choice to the NCA.

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333. Id. at art. 2(c).
334. Id. at art. 4(c).
335. Id. at art. 4(d).
337. See note 330 supra, at ch. III, art. 7(a)(c)(d). The term, balance of payments, is not defined.
338. Id. at art. 8.
339. Decision 24 at art. 2 and 19.
In addition to the information required by the Code, the NCA may also request information which would enable them to categorize the components of the imported technology into those which should be obtained locally and those which must be imported. All member state NCAs must cooperate in the investigation of sources of technology. All member states must also incorporate the results and those related to Decision 24 into the norms, guides and financing requirements of projects or studies commissioned by them.

Chapter IV establishes the method by which technology is to be assimilated and developed. It directs member states to create incentives to stimulate demand for technology. Further, it obligates member states to contract with natural persons, national firms, and mixed and multinational firms consulting, engineering and related purposes, whenever possible. Contracts must involve national, mixed or multinational enterprises.

The Commission may, upon recommendation of the "Junta," approve "Andean Projects of Technological Development." The projects serve one of two functions. They either seek solutions to specific technological problems

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341. Id. at art. 10.
342. Id. at art. 11.
343. Id. at ch. IV, art. 12(a).
344. "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. Id.
345. Id. at art. 12(b).
346. Id. at art. 12(c).
347. 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.
of common interest, or they develop diplomatic strategies for participation in international technology markets. Two or more member states may present such a plan to the "Junta." If the "Junta" decides that the plan is feasible, it makes a proposal for implementation to the Commission.348

To be acceptable, the project proposal must include a definition of the problem addressed, the objectives of the project, including justification for the particular choice, an estimate of possible social and economic benefits, the technological and scientific activities necessary for the execution of the project, a means for participation by other member states, as well as other specified data.349 A financial plan must also be provided.350

F. Industrial Property

The Andean Group has also regulated the subject of Industrial Property. In June of 1974, during their Thirteenth Extraordinary Session, the Commission adopted Decision 85.351

348. Id. at art. 16, 18.
349. Id. at art. 17. The remaining text of the decision relates to support tasks and common programming. Chapter V lays down rules and guidelines for the implementation of such projects. The purpose is to assure as much as 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.

351. 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. Id.
This decision introduces regulations for patents, licenses, trademarks and other intangible property rights.

Chapter I addresses patents, and provides for the grant of a patent to new inventions or improvements on existing inventions with industrial application. A "new invention" is one which has not been made public via an oral or written description. The new invention cannot have been made available for production through any means prior to presentation of the application.

An inadvertent disclosure does not constitute publication which would divest the inventor of a right to a patent. An inventor has not lost his patent right if he has exhibited the invention in an exposition recognized by a member state, or if he has conducted experiments to determine the patent's application to industry.

Any invention which can be manufactured and used in industry may merit a patent. The following are not eligible for a patent: scientific principles and discoveries, the discovery of material existing in nature, commercial, financial and accounting plans, game rules and any other abstract system.

No patents will be granted to inventions which will operate contrary to public policy. No patent will be issued for inventions relating to essentially biological procedures. Pharmaceutical or nutritional products for

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352. Id. at ch. I, § 1, art. 1,
353. Id. at art. 2.
354. Id. at art. 2(a)(b).
355. Id. at art. 3.
356. Id. at art. 4.
357. Esthetic creations and therapeutic methods for diagnostic treatment of humans or animals are also excluded. Id. at art. 5.

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products for human, animal or vegetable use are also excluded from patentability. No intellectual property right will be granted as a result of the solicitation of a foreign invention if a prior solicitation has been submitted in another state.\textsuperscript{358}

Patents can be held by natural or juridical persons. The first applicant obtains the patent right if granted, except where there are joint applicants. In the latter situation, the applicants hold the patent right in common.\textsuperscript{359} An inventor whose invention has been stolen can challenge and gain title to the patent during the ninety days following publication of patent solicitation or he can seek judicial action if the patent has already been granted.\textsuperscript{360} The proceeding in opposition is commenced by filing at the National Office. The actions are then forwarded to the proper jurisdictional body. The applicant must answer according to the rules of his country. There is a two year statute of limitation for bringing an opposition proceeding.\textsuperscript{361}

Unless otherwise agreed, an invention created by an employee under contract shall belong to his employer.\textsuperscript{362} A prior patent solicitation in any member state grants the applicant priority in all the member states.\textsuperscript{363} All applications are to be made to the national office.\textsuperscript{364}

Once presented, the patent application is examined by the national authority to determine whether it meets

\begin{itemize}
\item \textsuperscript{358} Id. at ch. I, § 2, art. 6.
\item \textsuperscript{359} Id. at art. 7.
\item \textsuperscript{360} Id.
\item \textsuperscript{361} Id. at art. 8.
\item \textsuperscript{362} Id. at art. 10.
\item \textsuperscript{363} Id. at art. 11.
\item \textsuperscript{364} Id. at ch. I, § IV, art. 14.
\end{itemize}
patentability requirements and whether the proper documents have been filed. If the authority does not find compliance, it must notify the applicant. The applicant has sixty days in which to correct the problem. If the applicant does not correct the application within this time, he is deemed to have abandoned the application. Generally, once an application is filed it cannot be altered other than as required by the respective national office.

If the invention is approved, notice of the pending patent must be published. During the next ninety days anyone may oppose the application. The applicant may defend his invention by showing its merit within sixty days. After the sixty day period, the national authority weighs the patentability of the invention. If the invention is deemed meritorious, the patent or an amended patent will be issued.

Member states may conduct examinations on the state of art which may affect patentability in specific sectors. The national authorities may seek expert opinion to determine the novelties of the invention. Member states must notify one another and the "Junta" of patents granted. A patent on an invention affecting national security can be restricted. The classification and ordering of patents must conform to the International

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365. Id. at art. 15.
366. Id. at art. 16.
367. Id. at art. 17.
368. Id. at art. 18.
369. Id. at art. 19.
370. Id. at art. 20.
371. Id. at art. 21.
372. Id. at art. 22.
373. Id. at art. 26.
374. Id. at art. 24.
375. Id. at art. 25.
Classification of Invention Patents, subscribed to on December 19, 1954. Member states had to subscribe to this system within a year of the decision's effective date.\textsuperscript{376}

A patent grants its holder the exclusive rights to sell the invention, to grant licenses and to receive royalties or compensation for allowing third parties to market the invention. The patent does not award an exclusive right to import the patented product or one produced by the patented process.\textsuperscript{377} The patent is granted for a maximum of ten years.\textsuperscript{378}

Once granted, the patent holder must report within a three year period to the national authority that he has commenced using the patent.\textsuperscript{379} The patent holder must also register any license or assignment or any other arrangement allowing a third party title to the patent.\textsuperscript{380}

Licenses granted third parties are invalid unless they are in writing. They must also be registered and approved by the national authority.\textsuperscript{381} A patent holder who has not reported use of the patent within three years may find that the state has licensed someone else to use the patent. Several reasons advanced for providing an individual with compulsory licensing included the following: failure to use the patent within three years, suspension of use for one year,

\textsuperscript{376} Id. at sec. V, art. 28.
\textsuperscript{377} Id. at art. 29. Originally for five, renewable for five more.
\textsuperscript{378} Id. at sec. VI, art. 30(a).
\textsuperscript{379} Id. at art. 30(b).
\textsuperscript{380} Id. at sec. VII, art. 32. This means, as art. 33 makes clear, that the licenses must conform to Decision 24 (art. 20).
\textsuperscript{381} Id. at art. 34. Art. 35 allows the national authority to grant licenses whenever it deems the process requires more than one exploiter.
failure of production to meet national marketing needs, or
the patent holder's refusal to grant a license on reason-
able terms. After five years, the national authority can
grant the license without reference to any of the afore-
mentioned bases. The holder of the compulsory license must
pay the patent holder adequate compensation. Compensa-
tion is fixed by the national authority after hearing the
parties.

Once a compulsory license is granted, it must be used
or statutory sanctions may also authorize its divesti-
ture. The use of a patent without authorization from
its holder or the national authority is subject to a
fine.

Decision 85 also provides for the registration of
models and drawings. This process parallels the
procedure described for patents except that there are no
provisions made for compulsory joint ownership.

Chapter III addresses trademarks. It provides that
services or trademarks which are distinctive or novel can
be registered by private or public enterprises, coop-
eratives or any other grouping of juridical persons.

382. Id. at art. 38.
383. Id. at art. 41.
384. Id. at art. 42.
385. Id. at ch. II, art. 45-55. The patent holder
must then pursue a private remedy provided by national law.
386. 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.
387. Id. at ch. III, § 1, art. 56.
388. Id. at art. 57.
389. 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
Applications are rejected if the related trademark would contravene public policy or would generally confuse the consuming public. An applicant who has not met any other statutory requirement will be directed to correct the mistake, within sixty days once the mistake is corrected.

If the application is then approved, the trademark is published in a journal chosen by the legislature. Within thirty days, parties may file an opposition proceeding. Classification is made according to the International Agreement of Nice, signed June 15, 1957. Registration grants exclusive right to the trademark. The trademark may be cancelled if the holder abuses it, or when the registration expires.

V. THE ROLE OF LAW IN INTEGRATION

At their first meeting, the Andean Pact leaders recognized the need to respond in a uniform manner 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.

390. Id. at arts. 61-67.
391. Id. at art. 68.
392. Id. at art. 72.
393. Manipulated price or quality or entered into other conduct detrimental to the public. Id. at art. 75.
394. Id. at art. 76.
to various enforcement bodies' interpretations of the Agreement, and any Decisions and Resolutions resulting therefrom.\textsuperscript{397} The reaction of the "Junta" was to submit to foreign governments a proposal for a Court of Justice. By 1974, the "Junta" had submitted to foreign governments a projected treaty to establish a Court of Justice. The "Junta" discussed the proposal\textsuperscript{398} "and partially modified [it] 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."\textsuperscript{399}

In the context of Andean subregional integration, the complexity of the Andean Group mandates a judicial arbiter. The Agreement imposes a regional judicial structure upon the national structure, the former having priority over the latter.

\textsuperscript{397} 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.

\textsuperscript{398} See Zalduendo, supra note 396. "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 Vicuña, supra note 395, at 31.

\textsuperscript{399} See generally Zalduendo, supra note 396; Vicuña, supra note 395. For a full exposition of the legal theory underlying the relationship of the Junta, the Commission and the individual states see Amador, supra note 258.
It has been previously noted that the principal policy instruments are the Decisions approved by the Commission, and the Resolutions, the "Junta's" mode of judicial expression.

States participating in a scheme of cooperation seek methods of convergence through permanent negotiations ... the 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 oblige all members even those who voted against it.401

Building international economic integration structures creates new relationships between sovereign states. One current example is the European Economic Community.402

The institutional system of the Andean Group is similar to that of the European Community.403 It is

400. Zalduendo, supra note 396, at 33. The Decision is characterized by its binding nature and its direct application to member states. It obligates member states to codify their internal policies.

401. "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.


403. Vicuña, supra note 395, at 38.
not surprising that the rationale and structure of the judicial system should also be similar. In its proposal, the "Junta" addressed three basic considerations. First, integration was to be carried out subject to the rules of the Agreement, and pursuant to an unquestioned application of the principle of pacta sunt servanda. Second, a forum was necessary to represent national interests. Third, it was essential to prevent inevitable conflicts from destroying the community. 404

The Treaty 405 creating the Court establishes the juridical structure as that set forth in the Cartagena Agreement, its Protocols and Additional Instruments, the Treaty establishing the Court, Decisions of the Commission and Resolutions of the "Junta." 406 The Agreement provides that Decisions are obligatory on all member states as of the date they are approved by the Commission. 407 Decisions must therefore be incorporated as internal law. 408 The "Junta's" resolutions enter into force on the date and under conditions established in the Resolutions. 409

404. Andean Group: Treaty Creating the Court of Justice of the Cartagena Agreement (Signed at Cartagena, May 28, 1979), 18 INT'L. L. MATERIALS 1203 (1979). Since the agreement is considered 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.

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

406. Id. at art. 2.

407. Id. at art. 3.

408. Id. at art. 4.
The Court, designated as one of the principal institutions of the Cartagena Agreement is composed of five justices (nationals of the member countries), who are to be fully independent in the exercise of their functions. Justices are chosen from lists presented by each member and selected by unanimous vote of the plenipotentiaries designated for this purpose. There are two alternates designated to replace any judges who die or who are otherwise removed. A justice may be removed upon complaint of a member if, in the exercise of his function, he has committed any statutorily proscribed acts. The Court enjoys the privileges and immunities recognized under international practices.

The Court may nullify any Decision of the Commission and any Resolution of the "Junta" which violates the Agreement's juridical structures. Any natural or juridical person who is affected by a Decision or Resolution may seek to have the Decision or Resolution nullified by the court.

410. Id. at art. 6.
411. Id. at art. 7.
412. Id. at art. 8. Justices serve a six year term, and can be reelected once. There is a partial turnover every three years.
413. Id. at art. 10.
414. Id. at art. 11. These acts 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.
415. Id. at art. 13.
416. Id. at ch. III, art. 17.
417. Id. at art. 19. Note that 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.
Member states are estopped from bringing an action of nullification unless the Decision in question was approved without the member's affirmative vote. Any such action must be commenced within a year of the offending legislation's effective date. A violator of Cartagena's norms must conform to any directives by the Court.

The treaty also provides for the "Junta" to communicate noncompliance to any offending member. If the member state's noncompliance persists, the "Junta" is authorized to initiate a proceeding seeking the Court's decision on the matter. A member state may initiate the same procedure. 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, the country can then proceed directly to the Court, which will issue a ruling on the controversy. If the Court finds noncompliance, it will determine to what extent the aggrieved party may suspend or limit the advantages of the Agreement. The parties may file a petition for review within one year of the date of the ruling, or within two months of the discovery of information which alters the Court's ruling. Natural and juridical persons also

418. Id. at art. 18.  
419. Id. at art. 20.  
420. Id. at art. 22. The members must then comply within two months.  
421. Id. at art. 23.  
422. Id. at art. 24.  
423. Id. at art. 25.  
424. Id. at art. 26.
have the right to institute suit in the national forum of the noncomplying state.\textsuperscript{425}

The Court may render advisory opinions to national judges who require an interpretation of any matter concerning the juridical structure of the Agreement, provided that the ruling is appealable within the national system. Otherwise, the Court is forbidden from interpreting the content and scope of domestic law or from judging the substantive facts of the case.\textsuperscript{426}

The member states must submit any dispute related to the Agreement or to any part of its juridical structure to the Court. Member states are forbidden from seeking settlement of any such controversy in any other forum.\textsuperscript{427} States must conform to the Treaty requirements without reservation.\textsuperscript{428} Article 38 is a significant and most interesting provision of the Treaty. It provides that the Treaty shall remain in effect so long as the Cartagena Agreement is in effect. The Cartagena Agreement and the Treaty also remain in effect independently of the Treaty of Montevideo.\textsuperscript{429} These provisions ensure the survival of the Andean Group, independently of the failure of the Treaty of Montevideo of 1960.

VI. CONCLUSION

The initial focus of this discussion is the legal structure controlling foreign investments within the Andean region. An examination of the underlying social and political influences is imperative to the successful development of this topic. Perhaps in no other area

\textsuperscript{425} Id. at art. 27.
\textsuperscript{426} Id. at art. 30.
\textsuperscript{427} Id. at art. 33.
\textsuperscript{428} Id. at art. 36.
\textsuperscript{429} Id. at art. 38.
is the interaction between law and popular political expression so inextricably interconnected as in Latin American investment.

Latin American statesmen have been influenced by much more than the desire to see their countries rise to a position of power and authority in the world. What distinguishes Latin American leaders from others is the way they control the "fire lighted under their feet." A popular political expression, which many style the "revolution of rising expectations," has ensured that the civilian leader who accomplishes little or who does not act quickly has no political future.

Many scholars and politicians who have analyzed the economic and political structure of underdeveloped countries have been convinced that American domination of the international economy has transformed Latin American states into U.S. "economic appendages."

The more belligerent states responded to American economic domination with expropriation. Tenuous legal concepts, the sensitive nature of foreign relations, and State Department response to such expropriations has largely convinced U.S. Courts that they are not equipped to address this dilemma.

Social scientists have sought to understand expropriation by developing institutional models. One such model posits that military education, usually superior to the civilian education Latin leaders probably 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 lends credence to the political subversives within the nation. The oft-repeated
charge that the future of Latin America is in the hands of foreigners is an example of this expanded concept of national security.

Certainly, these theories are not mutually exclusive. When considered together, they led to the conclusion that if foreign investments were to be secure within Latin states, some sort of structure would have to develop to assuage popular expression, and at the same time encourage much needed foreign investments.

This type of structure was created within Decision 24. Decision 24 regulates the form and extent of foreign participation in the Andean countries' economic development. The benefits and drawbacks of a strategic approach have been displayed in the implementation of the Decision.

Drawbacks were evidenced by Chile's withdrawal from the Agreement. Chile's reaction may be summarized by the adage that "those who need must accept, they cannot impose obligations on the providers." On the other hand, Venezuela's entry is an indication of the Agreement's potential benefits.

Decision 24 was only the first of a series of laws aimed at subjecting the foreign investor to the will of the state. One of 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 Decision 24 in this regard by regulating competition. Decision 46 provides a format to control subregional capital and creates the multinational firm. Multinational firms are promoted and
owned by nationals of the Andean states though they permit limited foreign participation. The firms serve as the vehicle by which specific developmental tasks are addressed. Decision 84 involves the formulation of a subregional technology policy. Decision 85 regulates patents, trademarks, licenses and royalties.

The opportunities for growth and development created by Decision 24 are apparent in its implementation by the Andean Group. The Decision has facilitated the creation of a Court of Justice, the ultimate arbiter of disputes. The Court is specifically authorized to address the legality of the Commission's Decisions, providing a "checks and balances" system for the Andean government.

This study is far from exhaustive of any of the areas addressed. Its aim was a comprehensive overview of the laws regulating the various aspects of investment in a foreign climate. This aim was accomplished by means of an analysis of the political and economic underpinnings of foreign investment laws.

As the Andean Court gains in stature, the community interest will probably become more clearly defined, and perhaps, the Decisions herein analyzed will be reassessed. Meanwhile, the foreign investor may choose the means which allow him to benefit from duty free trade. Moreover, for the first time in decades he has a guarantee that his property in an Andean Pact member state will remain his own, and will not be seized, so long as he adheres to the rules.