

10-1-1976

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Recommended Citation

Roberto Dañino, *The Andean Code After Five Years*, 8 U. Miami Inter-Am. L. Rev. 635 (1976)

Available at: <http://repository.law.miami.edu/umialr/vol8/iss3/2>

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THE ANDEAN CODE AFTER FIVE YEARS

ROBERTO DAÑINO*

I. INTRODUCTION

The Andean Foreign Investment Code¹ is likely to attract much attention again since it has recently been announced that a set of regulations is being prepared for the Code's uniform implementation throughout the Andean market. These regulations certainly appear to be a necessity for overcoming the severe uncertainties and lack of uniformity in the Andean countries' implementation of many of the Code's provisions.

The Andean Code's political and economic rationale has been analyzed ad nauseam from a variety of perspectives.² Therefore, this paper will be confined to the less grandiose, but perhaps more useful task of analyzing the Code in the light of the implementation achieved since it was adopted by the Andean Group five years ago. It is hoped that identifying the main problems and divergent attitudes regarding the implementation of the Code in the various Andean countries will prove helpful to the preparation of an adequate set of regulations.

The Code encompasses two systems for controlling foreign investment. First, there is a body of rules (hereafter referred to as the "system of controls") governing the entry of foreign investment; the approval of reinvestments, profit, and capital remittances abroad; use of credit; transfers of technology; and jurisdictional matters. The second system (hereafter referred to as "divestment") requires foreign investors to sell to national investors, progressively and in a limited number of years, the majority share of their investments in the enterprises operating in the host country. The emphasis of this paper will be on the system of controls rather than divestment because the implementation of divestment has been more limited in scope than that of the system of controls. This is due, among other reasons, to the proviso in the Code requiring a delay of at

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least three years for companies to start divesting. Peru is the Andean country which has accumulated the most significant experience with this system because its internal laws required owners of manufacturing industries to divest even before the Andean Code was adopted.

Since the Code is structured as a key feature of a general developmental strategy purportedly common to all Andean countries, the analysis will be preceded by a brief introduction to that strategy. Thus placed in context, each of the rules encompassed by the system of controls will be examined, especially concerning its implementation in the manufacturing sector. Thereafter, a short reference will be made to divestment in Peru.

II. THE ANDEAN INTEGRATION PROCESS: AN OVERALL VIEW

Since 1969 six South American countries—Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela³ (hereinafter referred to as the Andean Group)—have been working on an ambitious scheme for economic development through integration. Their premise is that only an intense and profound integration process will accelerate their development. The scheme effectuating this premise was established by a treaty known as the Andean Pact;⁴ through it they expect to achieve a true economic common market which by 1985 will comprise 106 million inhabitants and generate a gross internal product of at least 85 billion dollars.⁵

A. General

The Andean Group has conceived "integration as a process basically oriented to promote its development overcoming all forms of domination and dependency."⁶ As this declaration reveals, the Andean integration process is conceived within the framework of the *dependencia* theory.⁷ This theory purports not merely to describe underdevelopment, but to identify its basic cause: an international system of social, political and cultural domination. Furthermore, this international domination is conceived to be similarly structured in several regions of the world, although the focal point of contemporary empirical analysis has been the relations of Latin America with the U.S. This relationship is pictured as consisting of a center-country which dominates a number of countries on its periphery. Such domination is asserted to have been implemented within each peripheral country through the fostered formation and growth of a minority ruling class which acts as an intermediary for the achievement of the interests of the center-country, and which achieves a concentration of

wealth and power. It thus dominates the vast majority of the population and is believed to have generated within each peripheral country the existence of two societies in clearly different stages of development, one modern and the other primitive. Their relationship is causal interdependency: the modern society developed and continues to develop through dominating the primitive society, and the primitive society remains underdeveloped because of that dominance. In the international sphere, the same kind of relationship is believed to be reproduced: the center-country maintains its condition through dominating its peripheral countries, and the peripheral countries remain underdeveloped because of that dominance. Thus, from this perspective, there are two crucial factors to be attacked in order to achieve development: the international structure of domination, known as *dependencia*, and the internal structure of domination, known as *dominacion*.⁸

The Andean countries have realized that isolated efforts must fail and that the integration of their efforts is perhaps the only way to achieve sustained development.⁹ Oversimplified, this is the political framework within which the Andean integration process has been conceived.

B. Structure

1. TECHNICAL

Technically, the Andean Pact should be viewed as an outgrowth of the Latin American Free Trade Association (LAFTA).¹⁰ By accelerating their process of development, the Andean countries also wish to achieve the relative economic homogeneity which LAFTA requires to succeed. By the time the Andean Pact was conceptualized, LAFTA had become stagnant. This was mainly due to the great differences in stages of development among LAFTA countries. The less developed members were greatly concerned that the benefits of the free trade area, which was LAFTA's primary goal, would not be equally shared due to the higher stage of development of Argentina, Brazil, and Mexico (ABRAMEX).¹¹ It was feared that ABRAMEX would benefit from the tariff concessions which were implemented on a "most-favored-nation" basis¹² to the detriment of the other less developed members. The tariff negotiations, already entangled in the product-by-product manner in which they were conducted, became stagnant by 1969.¹³

Nevertheless, the Andean Group learned much from the LAFTA experience. Integration requires a relative economic homogeneity among

the participants or at least corrective regulations which allow unequals to be treated unequally.¹⁴ This lesson is reflected in the privileges which the Andean Pact has provided for Bolivia and Ecuador in recognition of the relatively inferior stage of their development.¹⁵ It is inefficient to negotiate tariff concessions on a product-by-product basis. Thus, the Andean Pact provides an automatic and irreversible system of tariff concessions, discussed below.¹⁶

The Andean Group has not abandoned LAFTA, however. By accelerating their development, the Andean countries expect to better participate in LAFTA and forward its goals. In this sense, the Andean integration is not independent of, but rather complementary to LAFTA.¹⁷

2. INSTITUTIONAL

The Andean integration process is conducted by a political entity, the *Comisión*,¹⁸ and by a technical entity, the *Junta*,¹⁹ both headquartered in Lima. The Commission, composed of one plenipotentiary representative from each member country, is charged with developing the integration scheme. It acts through *Decisiones*. The *Junta*, directed by three officers unanimously elected by the Commission, supervises the implementation of the Andean Pact and the Commission's Decisions. It acts through *Resoluciones*. In addition to being the Permanent Secretariat of the Andean Group, the *Junta* conducts research studies and coordinates activities. In this connection, one of its most important duties is the preparation of proposals for the consideration of the Commission, which become Decisions if adopted. Decisions adopted by the Commission must be enacted into national law by each country to have internal legal effect. However, under international law and the treaty obligations imposed under the Andean Pact, once a Decision is adopted the member states become bound to put it into effect. Any system in which the members were free to ignore the Decisions of the Commission would render those decisions mere proposals and be contrary to the language of the Andean Pact. It would also defy logic. Nevertheless, many important Decisions have not been implemented long after they were originally approved and long after the deadlines for doing so had passed.²⁰

The Group is attempting to rectify these difficulties, through, for example, the proposal to form an Andean Court of Justice.²¹ This Court would have exclusive authority to interpret the Andean Pact and the Decisions. It would also judge disputes between member states, the Com-

mission, the *Junta*, or the individual citizens of any Andean country relating to the implementation, interpretation, or violation of the Andean Pact or the Decisions.

Another major institutional organ is the Andean Development Corporation²² (*Corporación Andina de Fomento*, known as CAF). The Group's common financing entity, CAF, is headquartered in Caracas. Initially, its main role had been to channel foreign and subregional lending into the projects and industries which have a high priority in the integration scheme.²³ CAF is now expanding into other financial areas, such as capital market development and other subregional savings mechanisms.²⁴

The institutional structure also includes a Consultative Committee and an Economic and Social Committee,²⁵ as well as Advisory Councils on education, finance, fiscal policy, foreign commerce, health, infrastructural integration, monetary and foreign exchange, planning, tourism, and social affairs.²⁶

The Consultative Committee is the *Junta's* contact with the member governments on particular issues. The Economic and Social Committee is designed as a channel of communication between the non-governmental economic sector and the Group's major organs. The Advisory Councils have been created to bring together experts, appointed by the member governments, in order to advise the *Junta* on long-range or specific policy matters in their areas of special competence.²⁷

In short, this is the institutional structure which has been developed to implement and monitor the Andean integration scheme.

C. Developmental Strategy

The Andean Pact scheme of integration is a development strategy²⁸ composed of five interdependent programs which are briefly summarized below.

The primary goal of the integration process is to create an Andean Common Market (ANCOM). Toward this end, a Trade Liberalization Program²⁹ seeks to eliminate all tariffs and restrictions on the importation of goods produced in any member country.³⁰ Existing trade barriers will be partially eliminated by 1980 and will be completely eliminated by 1990.³¹ In this way, not only will the chronic insufficiency of isolated markets in each country be overcome, but economics of scale inherent in an enlarged market will be realized.

To support Andean producers, a Common External Tariff³² is applied to products imported from non-Andean countries. The scope of this tariff will be expanded, so that by 1980 it will cover all products.

Another key feature of ANCOM is the Sectoral Industrial Development Program.³³ This program seeks to eliminate both duplication of industrial capacity and inefficiency within industries by promoting industrial specialization. Certain industrial sectors, as well as product categories within each sector, are being selected for development and allocated exclusively to one or two member countries for a fixed number of years.³⁴ These selected industries and products are granted special external tariffs and trade liberalization incentives and are entitled to partial financing from CAF.

The physical bases of ANCOM's industrialization are also being developed and integrated.³⁵ Efforts towards this goal are currently focused on eliminating infrastructural bottlenecks in transportation, communications and energy supply.

ANCOM has also implemented an Agricultural Development Program³⁶ which seeks to expand agricultural production by coordinating the individual agricultural policies and developmental plans of the member countries through such means as joint production programs and common systems of marketing, financing, and research. Expanded agricultural production is expected to increase income and demand within the agricultural sector and also to generate greater amounts of raw materials. Thus, through these results, it is also intended to further the goal of industrial development.

Finally, the Andean Pact has adopted a program designed to harmonize and coordinate the social and economic policies of the member countries.³⁷ One of the most important tangible results achieved to date by this program is the creation of a "Common Regime for the Treatment of Foreign Capital, Trademarks, Patents, Licenses, and Royalties."

III. THE ANDEAN CODE

A. General

Since its inception, the Andean Group has been cognizant of the crucial role which foreign investment and technology must play in ANCOM. The usual problem caused by regulating foreign investment in an individual country is magnified in ANCOM because a common market requires

increased financial and technological resources. Thus, the Andean nations became convinced that their isolated efforts could not efficiently cope with the bargaining power of foreign providers of such resources. Only enforcement of common investment regulation by all member countries can effect this result.

The need to adopt a common framework for foreign investment was emphasized by most Latin American countries' recent experience of what is now known as the "protectionist paradox." In the 1950's, these countries fixed high tariffs on the import of goods also produced locally. This action, however, induced foreign investors to establish local plants, especially in the manufacturing industries. This type of restraint on foreign investments made in the absence of any major control or restriction proved to be counterproductive. The local producers were displaced by the foreign investors, and the degree of *dependencia* increased.³⁸

Consequently, the Andean Pact specifically required the Commission to enact a common regulatory system for foreign investment by December 31, 1970.³⁹ On that date, the Commission adopted Decision 24 through which a "Common Regime for the Treatment of Foreign Capital, Trade-marks, Patents, Licenses, and Royalties" was approved. This Decision was modified by Decisions 37 and 37a (hereafter collectively referred to as the "Andean Code" or simply "the Code") and, as amended, has been enacted as local law in all of the six Andean countries.⁴⁰

The Code's effectiveness, let it be emphasized, depends upon its uniform implementation by each Andean country. Even though some margin of difference was given to each country in recognition of differing economic conditions, there are a number of basic rules which were designed to be applied without modification, as we shall see. The joint and uniform application of such rules was conceived to be an unavoidable prerequisite for strengthening the bargaining power of the member countries since in the absence of these rules the foreign investors could easily play off one country against another.⁴¹ Their enforcement was thus conceived to be a means of effectively increasing the bargaining power of the host countries, and averting a war of incentives to obtain foreign resources.⁴²

Accordingly, the Code has expressly precluded better treatment for foreign investors than that offered nationals.⁴³ Furthermore, rights granted by the Code to enterprises of foreign or mixed ownership are established as the maximum which any member country is allowed to grant.⁴⁴ Any country may be more restrictive, but in no case may they be less restrictive than the Code prescribes.⁴⁵

In addition, the member countries have agreed not to establish any incentives to foreign investment other than those contemplated by their industrial development laws at the time the Code became effective. This commitment is to be maintained until the member countries implement the program for common industrial development legislation.⁴⁶ The general provisions for this effort at harmonization were issued through Decisions 49 and 49a; thus far, however, neither has been enacted nor put into practice by any member country.⁴⁷

Additionally the uniform implementation of the Code is seen as one of the principal ways in which the Andean countries can achieve and maintain an adequate inflow of foreign investment and technology. From the beginning, one of the most common and legitimate complaints of foreign investors has been focused on the uncertainty surrounding the legal framework in which their activities are regulated by host governments. "In contrast with his situation in [a developed country], the investor contemplating establishment in many less developed countries . . . is apt to discover that one of his chief legal problems is the sheer difficulty of finding with any degree of precision what his rights and obligations are."⁴⁸ ". . . [C]apital wants to know the rules of the game: whatever the host country decides they may be."⁴⁹

The two incentives designed to assure an adequate supply of capital and technology in ANCOM are the certainty and stability of a legal framework common to the six countries, and the economies of scale inherent in the Andean Common Market.

In sum, the common enforcement of the Code was conceived to be essential for both the protection of the host countries and the encouragement of foreign investment in their territories. As stated by the Preamble of the Code:

The rules of the common regime must be quite clear in formulating the rights and obligations of foreign investors and the guarantees which foreign investment shall receive in the subregion. Moreover, they must be sufficiently stable for the mutual benefit of the investors and the Member Countries.

B. Enactment

As required by the Andean Pact, the Code was adopted in each member country as local law on June 30, 1971; by Bolivia through Decree

09798, by Ecuador through Decree 974, by Chile through Decree 482,⁵⁰ and by Peru through Decree-Law 18900.

In Colombia, extensive constitutional litigation, which went so far as to question the validity of the adoption of the Andean Pact,⁵¹ considerably delayed the effective enactment of the Code. It was finally adopted on September 15, 1973 through Decree 1900 issued pursuant to Law 8a of that year.⁵² In Chile as well, the *Contraloría* originally objected to the adoption of the Code. Such objection, however, was promptly overcome by a Decree of *insistencia* from President Allende.⁵³ More recently, in July, 1974 Chile enacted Decree-Law 600 purporting to limit the enforcement of the Code to those investors who wished to benefit from the tariff concessions in LAFTA or ANCOM. Under strong pressure from the other Andean countries, however, Chile issued Decree 746 on November 6, 1974, and the full effectiveness of the Code in her territory was ratified thereby.⁵⁴ Six months after adopting the Code, Bolivia enacted a law providing certain tax and import incentives, as well as investment guarantees. These incentives were considered a violation of the Code provision which prohibits member countries from enlarging the foreign investment incentives beyond those in existence on the date the Code became effective. Bolivia asserted, however, that these incentives were designed for general investments and did not relate specifically to those of foreign origin. Consequently, they do not violate Article H of the Transitory Dispositions of the Andean Code.⁵⁵

Finally, Venezuela approved the Code together with the Andean Pact by law dated September 13, 1973, and they were implemented through Regulations 62 and 63, effective April 29, 1974.⁵⁶

C. *Competent National Authority*

In order to apply the rules of the Code, each member country is required to designate a competent national authority⁵⁷ (hereafter referred to as CNA). This entity supervises the performance of the obligations incurred by investors and authorizes the exercise of their rights under the Code. In addition, it is responsible for compiling all statistical data concerning the activities of foreign investors in the country.

This agency is intended to efficiently and coherently administer the Code's rules and thereby avoid the problems which arise when a variety of different public agencies deal with similar matters. To achieve uniform implementation throughout the six countries, the *Junta* was charged with the

duty of coordinating the activities of each country's CNA.⁵⁸ Coordination of this activity is also intended to provide an opportunity for an exchange of information, experience, and reciprocal advice among the various CNAs and the *Junta*.

In practice, however, these commendable goals have not been fully achieved. In several instances there have been great delays in establishing the CNAs, while some countries have tended to designate several agencies as CNAs instead of appointing a single entity.

This latter action has created numerous problems. Jurisdictional overlappings often occur within the same country since the jurisdiction of each CNA is not always clearly delineated. Worse, contradictory constructions of the Code are sometimes sponsored by different CNAs within the same jurisdiction. In one case, for example, this occurred in connection with a royalty payment. The contract for the transfer of technology was approved and authorized by one CNA, while the CNA empowered to regulate foreign exchange denied authorization to purchase foreign currency to pay for the technology on the ground that the contract was illegal under the Code. In another case, a foreign commercial air carrier received authorization from the Ministry of Transportation to establish a branch office. However, the Ministry of Commerce later claimed that authorization should have been obtained from it and that, therefore, the investment was illegal.

It seems increasingly clear that the failure to vest authority in a single CNA hinders the effective implementation of the Code. It is equally clear that a single entity would better administer affairs at the local level and would also facilitate the *Junta's* task of coordination which, partly because of the internal situation in some countries, has not been accomplished. Fortunately, awareness of the convenience of having a single CNA seems to be growing, and the necessary steps are being taken in some countries.⁵⁹

D. Classifications

The Code concerns investors who are classified as national or foreign, and enterprises classified as national, mixed, or foreign.⁶⁰

1. INVESTORS

National investors are defined as the state, national natural persons, national juridical persons who do not pursue a profit-making purpose, and

national enterprises (as defined *infra*). Foreign natural persons, residing without interruption for one year in the country of the investment are also considered as national investors, provided they renounce before the CNA their right to repatriate both capital and profits. In accordance with Decision 48 of the Commission, the Andean Development Corporation, CAF, is also considered a national investor.

It must be noted that renunciation of the right to repatriate capital and profits is expressly limited to natural persons and thus is unavailable to juridical persons. The scope of such renunciation has been interpreted in contradictory fashions. In Ecuador, it may be available with respect to a single investment out of the various ventures which a foreigner may have made in that country. Apparently, under this construction a foreign individual may have some investments classified as national and some as foreign at the same time.⁶¹

Peru, however, believes that partial renunciations would foster the use of the nationalized investments as a means of generating additional profits or other benefits for the investments which remain foreign. As a result of this view, the renunciation must cover the right to re-export *all* capital or profits owned by the investor.⁶²

Investors who are citizens of an Andean country other than the one in which the investment is made are not within the definition of national investors. This matter was extensively discussed by the drafters of the Code, who concluded that the investments of Andean nationals in Andean countries other than their own would be more helpful to the integration process if channeled through Andean Multinational Enterprises rather than made individually.⁶³

However, the Decision providing for the creation of the Andean Multinationals, has not yet been implemented; it will become effective when all the member countries have enacted it, and, thus far, Ecuador and Peru have not done so.⁶⁴ Hence, Andean citizens currently investing in countries other than their own remain characterized as foreign investors. Also, Decision 48, which establishes that CAF's investments will be considered as national investments, has been adopted to date, only by Bolivia, Colombia, Chile, and Peru.

Foreign investors are defined in the Code as the owners of a direct foreign investment, which is defined in turn, as "contributions to the capital of an enterprise coming from abroad and owned by foreign individuals or enterprises [as defined *infra*] and made in freely convertible currency,

industrial plants, machinery or equipment entitled to value repatriation and profits remittance abroad." These, along with those investments in local currency generated by such resources, may be remitted abroad along with profits.

A direct foreign investment may take either of the three following forms: a) freely convertible currency, construed by countries with foreign exchange controls such as Peru, Chile, and Colombia, as "foreign exchange that is both not part of the foreign exchange resources of the country and commonly accepted in its international transaction;"⁶⁵ b) industrial plants, machinery, or equipment, whose importation is subject to different requirements established by the industrial laws of each member country;⁶⁶ or c) national currency entitled to be transferred abroad. This latter concept encompasses, in principle, the foreign investor's initial investment; reinvestments, together with any capital gains or less any net losses; amounts remittable abroad for royalties, service fees, and credit and interest due; and net profits. All forms of investment require the prior approval of the local CNA. When made, they must also be registered with the CNA in freely convertible currency⁶⁷ (as defined) to assure the relative maintenance of their value in case of a local devaluation.

It must be noted as well that several of the provisions distinguish between the foreign investments which existed at the time the Code became effective in each country (hereafter referred to as "old foreign investment") and those investments which entered after that date (hereafter referred to as "new foreign investment"). It may be helpful to recall that the Code became effective on July 1, 1971 in all the Andean countries except Colombia and Venezuela.

2. ENTERPRISES

The Code classifies enterprises as national, mixed, or foreign.⁶⁸ The enterprises are distinguished not on the basis of the ownership of capital, but rather on the identity of those holding effective control. Ownership is only a *juris tantum* factor used in determining who is in control. Therefore, the definitions establish national ownership percentages which in the opinion of the CNA, must be reflected in the technical, financial, administrative, and commercial control of the enterprise.⁶⁹

The Code utilizes the word enterprise (*empresa* in Spanish) and not corporation in order to describe a broader range of business entities than

just juridical persons. This was confirmed by the all-inclusive definition of enterprise in Decision 40: "[E]nterprise is an organization created by one or more persons to pursue a profit oriented activity."

From this perspective, a national enterprise is an enterprise organized in the recipient country more than eighty percent of whose capital is owned by national investors. That proportion must be reflected in the technical, financial, administrative, and commercial management of the enterprise, as determined by the CNA.

A mixed enterprise is an enterprise organized in the recipient country which demonstrates that between fifty-one and eighty percent of its capital is owned by national investors. Again, that proportion must be reflected in the technical, financial, administrative and commercial management of the enterprise, according to the judgment of the CNA. Alternatively, in accordance with Decision 47 adopted by Bolivia, Colombia, and Peru, enterprises in which the state or state-enterprises own at least 30% of the stock will also be considered mixed enterprises provided that the state or a state-enterprise has decision-making capacity. That capacity is construed as the requirement that the representatives of the state or of the state-enterprise concur in the fundamental decisions of the activities of the enterprise. A state-enterprise is defined as one in which the state owns more than eighty percent of the capital and has determining capacity.

Finally, a foreign enterprise is defined as an enterprise in which national investors own less than fifty-one percent of the capital or in which that percentage of national ownership is not reflected in the technical, administrative, or commercial management of the enterprise in the opinion of the CNA. This definition of foreign enterprise has proven to be excessively broad. Indeed, as it stands, it includes both the parent company abroad as well as its local subsidiary.

An important failing for countries having to deal with multinational enterprises is the lack of legal concepts which describe the whole organization. As a result the MNEs' components are treated as single entities. While the definition of foreign enterprise established in the Code is aimed toward overcoming this problem, it fails to differentiate between parent company and subsidiary. Some provisions of the Code designed to refer only to the local subsidiary technically apply also to the parent because the Code term "foreign enterprise" technically encompasses both.⁷⁰ The uniform implementation of the Code thus requires an express differentiation between the two.

Finally, this set of definitions does not adequately define the status of the investments made by a mixed enterprise. Indeed, how should enterprise X be classified if it is owned and controlled in equal proportions by mixed enterprise A, with seventy-nine percent of national control, enterprise B, also with seventy-nine percent of national control, and national enterprise C, with one hundred percent of national control? According to a literal construction of the foregoing definitions, only enterprise C, and not enterprises A or B, is a national investor. Thus, only thirty-three percent of enterprise X is subject to national control, and it remains a foreign enterprise even though all its shareholders are enterprises controlled in the majority by national investors. This result seems illogical and unjust and highlights the need to regulate the status of investments made by mixed enterprises. There are a number of additional queries concerning these definitions. They will be analyzed through the examination of the two mechanisms of the Code: controls and divestment.

IV. CONTROLS

A. Authorization

Foreign investments in an Andean country must be authorized by the CNA in the recipient country.⁷¹ The application to the CNA must contain, at the minimum, information regarding the investor's identity, financial resources in foreign exchange or credit, physical or tangible resources, resources derived from technology or intangibles, and also a brief explanation of how the proposed investment will satisfy specified needs of the recipient country.⁷² The application must also contain a plan for divestment and outline the schedule of development of the investment.⁷³

Utilizing this information and any additional data it may request, the CNA evaluates the application and grants an authorization if the proposal fits within the development priorities of the country and is not barred by certain restrictions which are discussed below.

This requirement of prior authorization is designed to enable the recipient countries to judge their development policies and priorities in light of which investments are really needed.⁷⁴ The underlying assumption is that indiscriminate foreign investment per se is not necessarily an aid to development. If, on the other hand, foreign investment is admitted under

a selective policy, based on a previously determined and planned strategy for development, it can be highly beneficial to the interests of the recipient country.⁷⁵

1. RESTRICTIONS

The Andean countries have agreed to restrict direct foreign investments, as follows:

a) No foreign investment may be authorized for the purchase of stock, shares, or other ownership rights belonging to national investors.⁷⁶ The only exception is for the purchase of the rights of a national investor in order to prevent the bankruptcy of the enterprise. The CNA must verify the imminence of bankruptcy prior to authorizing the purchase. To obtain such authorization, two further conditions must be met: 1) the enterprise must prove it has offered national or sub-regional investors a preferential purchase option; and 2) the foreign investor must commit himself to resell the rights purchased to national investors in a period not exceeding fifteen years.⁷⁷

b) No foreign investment will be authorized in areas which the CNA deems adequately served by existing enterprises.⁷⁸

c) Intangible technological resources do not qualify as capital contributions.⁷⁹ However, the amounts due for authorized technology royalties may be authorized as a foreign investment insofar as they constitute resources which have the right to be remitted abroad.⁸⁰

d) Foreign investment for projects involving products reserved to Ecuador or Bolivia under the Industrial Programs may not be authorized by other Andean countries in their territories.⁸¹

2. RESERVED SECTORS

The member countries are authorized to restrict further the entry of foreign investment in economic sectors reserved for national development.⁸² Also, the Code barred foreign investment in enterprises dedicated to domestic transportation, advertising, radio broadcasting, television, newspapers, and domestic marketing of products of any type;⁸³ insurance, commercial banking, and other financial activities;⁸⁴ public utilities such as water, drainage, electric power and public lighting, health and sanitation services, telephones, mail, and telecommunications.⁸⁵ In addition, these enterprises are subject to more rapid divestment.⁸⁶

The Code, however, also authorized member countries to apply different rules in these sectors, both with respect to the authorization restrictions and the faster divestment, "if special circumstances so require."⁸⁷ Complete information regarding the actual use each country has made of this provision is not available; however, two recent surveys in this connection indicate as follows:⁸⁸

Bolivia: Foreign banks and finance institutions may be authorized under the conditions provided by Supreme Decree 11450 of 1974.

Chile: Decree 746 of 1974 has exempted all of the above sectors from the authorization restrictions and faster divestment. These sectors are regulated in that regard by Decree 600 of 1974. (93)

Colombia: Decree 2719, dated December 28, 1973, allows direct foreign investment in commercial banks and other financial institutions, and also in enterprises dedicated to the internal commercialization of products. This same Decree establishes that no foreign direct investment will be authorized in insurance, television, radio, newspapers, magazines, nor in internal transportation enterprises. Existing companies in these areas must become national enterprises by September 15, 1976.

Ecuador: Supreme Decree 1029, dated July 13, 1971, exempted from the authorization restrictions and the faster divestment requirement, investments in the following sectors: public services, insurance, commercial banks and other financial institutions, internal transportation, publicity, commercial radios, television, newspapers, magazines, and internal commercialization of products.

Peru: Initially, Decree Law 18900, dated June, 1971, exempted all the reserved sectors from the authorization restriction and the faster divestment. However, foreign investment in these sectors has been restricted through a series of subsequent laws, and most of the enterprises operating therein are obliged to become national or mixed, except for some banks and commercialization enterprises which already existed when the Code became effective.

Venezuela: Regulation 62, dated April, 1974, established that no foreign investment would be authorized in the following sectors: telephones, mail, telecommunications, potable water and sewers, electricity, and services of vigilance and security; television, radio, newspapers, and magazines in Spanish, unless they are of scientific or cultural nature;

internal transport of goods and persons, advertising, and internal commercialization of goods and services, except for those produced by the foreign investor in the country; enterprises dedicated to consulting, advice, design, and analysis of projects which require the service of professionals whose activity is regulated by national laws. The enterprises already operating in any of these sectors are required to become national before May 1, 1971. Investments in banking, financing, insurance, and tourism activities remain subject to the previous Venezuelan laws, not to the authorization restriction and faster divestment required by the Code.

Despite the special rules each country has implemented regarding the authorization restrictions and faster divestment, it should be noted that all foreign investment in these sectors remains subject to all the other controls, that is to say, to the rules on reinvestments, profit and capital remittances abroad, credit use, transfers of technology, and jurisdiction.⁹⁰ It should also be noted that the regular system of divestment provided by the Code does not apply in these sectors.⁹¹ Thus, it mainly applies in the manufacturing industry.

Foreign investment in basic resources may be authorized under concession contract during the ten-year period after the Code becomes effective but no contract term may exceed twenty years. The basic resources sector encompasses primary exploration and exploitation concerning minerals of any kind, including liquid and gaseous hydrocarbons, gas and oil pipelines, and timber.⁹² In this sector as well, the Code allows the member countries to establish their own rules for investment authorization, divestment,⁹³ and limitation of profit remittances.⁹⁴ This has been effected in Colombia by Decree 27888-73, in Ecuador by Supreme Decree 1029-71, in Peru by Decree Law 18900-71, in Venezuela by Regulation 63-74, and in Chile by Decrees 746 and 600.

In summary, once a foreign direct investment is authorized in any sector, it is subject to all Code controls except that which limits profit remittances where the investment is made in the basic resources sector. Divestment, however, applies almost exclusively in the manufacturing industry, as will be discussed later.

B. Registration

After the proposed investment is authorized and effectuated, it must be registered with the CNA. Foreign investments existing at the time

the Code became effective were required to be registered within six months thereafter.⁹⁵ Only registered investments qualify as the basis for determining profit and capital remittances.⁹⁶

In the past, most Andean countries did not know how much foreign capital was present in their territories, nor the exact activities in which it was invested. Ten years ago, for example, the Peruvian Government had to resort to the U.S. Embassy to obtain information in connection to the foreign investment in Peru.⁹⁷ A similar situation, found in the other Andean countries, caused many difficulties, especially in the annual forecasting of foreign exchange outflows. Permitting the issuance of bearer stock in most countries compounded the difficulty of identifying those activities controlled by foreign investors.⁹⁸

Since all foreign investment must now be registered, it is expected that the host governments will be able to determine exactly the amount of foreign investment in their territories, as well as the activities to which it is committed. This understanding will help to determine the costs and the benefits of that investment and consequently will enable the host country to quantify its needs for foreign investment in each economic sector.⁹⁹

The Code also established that corporate stock should be issued in nominative form. Existing stock in bearer form was required to be transformed into nominative form within one year after the Code became effective.¹⁰⁰

In addition to registering foreign investment, the CNA supervises the subsequent activities of foreign investors.¹⁰¹

However, testing theory against reality, a recent review of the different systems of registration in each Andean country concludes that registration has not been conducted systematically, and in some instances it does not appear to have been done at all. There is an indication that adequate and reliable figures of the amount of foreign investment in the Andean Group are not available due to the lack of proper uniform forms; what figures do exist may not be totally accurate.¹⁰² Perhaps this is one of the reasons why no complete statistical data is available on the inflow of foreign investment after the Code's adoption. Noticeably absent is any discrimination between fresh capital and the reinvestment of profits.

Different CNA's have deviated from the rules on registration. For example, one CNA has refused to register foreign investments expressing

their value in freely convertible currency as Art. 5 of the Code expressly commands. Another CNA requires, among other documents accompanying the authorization request, a certificate indicating that the foreign investment is already in the country despite the Code requirement that it be authorized first. Additional problems are created by the almost universal requirement of dual or sequential registration. In Bolivia, the CNA for registration was the *Instituto de Inversiones Extranjeras* (INI). However, on September, 1974, Supreme Decree 11774 designated the *Banco Central de Bolivia* as the single CNA for the country. Foreign investments previously registered with INI were required to reinscribe with the Bank. In Chile, Decree 600 of July, 1974 designated as CNA the *Comité de Inversiones Extranjeras*, an agency of the *Corporación de Fomento* (CORFO); however, investments must also be registered with the *Banco Central de Reserva*. In Colombia, investments must be approved by the *Departamento de Planificación* but are registered with the *Banco Central*. In Ecuador, foreign investment must be approved by the *Ministerio de Industria, Comercio e Integración* and registered with the *Banco Central*.¹⁰³ In Peru, Decree Law 18999 of October 1971 established a dual system for both authorizations and registrations: 1) the ministry in charge of the economic sector where the investment is made, and 2) the *Comité de Inversiones y Tecnologías Extranjeras* (CITE), an agency of the *Ministerio de Economía y Finanzas*. In Venezuela, however, both approval and registration are obtained from the *Superintendencia de Inversionistas Extranjeros*, an agency of the *Ministerio de Desarrollo*.

It should be noted that the Code has not established express sanctions for the investments which are not registered or are made without previous authorization. There are quite a large number of investments in this situation. To my knowledge, the authorities have not decided how to treat these investments. The alternatives must be considered.

On the one hand, it may be asserted that these investments should lose the right to remit profits abroad and to be repatriated upon their liquidation because they have not acquired the status of "direct foreign investment," as defined by the Code, which alone is entitled to remittances abroad.

On the other hand, however, if an investor has several investments in the country and fails to register or get authorization for one of them, the above sanction would amount to a partial renunciation and, as noted above, result in undue benefits to the foreign investments. Further, such

sanction would allow juridical persons to circumvent the prohibition against nationalizing some of their investments through renunciation of remittances abroad.

The status of unregistered or unauthorized investments is thus unsettled and controversial. One clear result of this situation is the inability of these enterprises to remit profits. A definitive solution is needed. Perhaps the most sensible sanction would be to admit an invalid authorization and registration in addition to a fine and the obligatory sale to national investors if the authorization is denied.

C. Profit Remittances

Foreign investors have the right to remit abroad, yearly and in freely convertible currency, proven net profits amounting to a maximum of fourteen percent of their foreign direct investment. To exercise this right, prior authorization must be obtained from the CNA.¹⁰⁴

This definitely has been one of the most controversial provisions of the Code.¹⁰⁵ Initially, the controversy centered upon whether the fourteen percent was intended to be a profit limitation. In practice, all the member countries have indicated that it is not and that their intent is merely to regulate the yearly outflow of foreign currency. Therefore, it is merely a mechanism to alleviate balance of payments problems and not a limit on profits remittances.

Nevertheless, there are a number of additional problems with regard to which the member countries differ greatly. One of these is the base against which this percentage is to be applied. For instance, what is the result if investor A invests in enterprises X, Y, and Z and receives profit distributions of ten percent from X, eighteen percent from Y, and fourteen percent from Z. Is the fourteen percent limit computed on the total return from all his investments in the country, or is it applied to each investment separately? It must be recognized that the Code as currently drafted admits either possibility, although the former seems fairer.

Even if the fourteen percent limitation refers to the total return from all investments, what treatment should be accorded any excess? May it be reinvested in full, carried forward and remitted in future years in which the fourteen percent limit is not reached, or must it be retained until the investor liquidates his investment and leaves the country? Some countries, such as Peru, permit the excess to be reinvested in full; but

others, Colombia for example, maintain that it cannot be reinvested, and require that it be carried forward to a year in which the limit is not reached or until the investment is liquidated.¹⁰⁶

All six countries, however, treat the limit as cumulative. That is to say, if in year X net profits do not reach fourteen percent, profits from previous years which exceeded fourteen percent may be remitted together with profits from year X up to fourteen percent of the registered investment in year X.¹⁰⁷ However, if profits exceed fourteen percent every year, what the investor is allowed to do with the excess varies from country to country. As seen above, in Peru he may apply for authorization to reinvest excess profits in full; however, this alternative is not allowed in Colombia, where he must keep the excess in national currency until the moment the investment is liquidated. Only then is he authorized to remit excess profits abroad in foreign currency together with the liquidated capital. The inactivity of such monies seems to produce no benefit for either country as will be discussed further in the analysis of the reinvestment rules.

Not all of the Andean countries have foreign exchange controls, and enforcing the fourteen percent limit on profit remittances seems difficult in countries such as Bolivia and Venezuela, which lack such controls, and Ecuador, which has a limited system of dual rates.¹⁰⁸ This suggests the need for the adoption of a common system of exchange control in the six countries. As of December, 1974, both Bolivia and Ecuador allowed profits in excess of the fourteen percent limit to be paid locally in their national currencies. Only Venezuela had established a prohibition against paying the excesses locally.¹⁰⁹

Another problem is posed by the interpretation of net profits. Tax laws in all of the Andean countries differentiate between the earnings of the enterprise and the earnings of its shareholders, using the term profit (*utilidades*) for the first, and dividends (*dividendos*) for the second.

Each is taxed separately, as follows:

	Corporate profits tax	Dividend Tax for non-residents
Bolivia:	30%	30%
Chile:	42%	40%
Colombia:	21% to 45%	20%
Ecuador:	20% or 40%	40%
Peru:	20% to 55%	40% or 30%
Venezuela:	15% to 50%	15% or 30%

NOTE: This chart is intended solely to give a broad overview; obviously, each country has rules which significantly alter the above figures. (Condensed from Price, Waterhouse, Peat & Co., "Doing Business in Ancom", Lima, December, 1973).

Thus, the return from a foreign investment is taxed at two levels. As phrased by the Code, then, the fourteen percent should be net of the first tax, but not of the second. This appears to be the construction in Colombia, while in Peru and Bolivia the fourteen percent limitation has been applied against the net amount remittable abroad.¹¹⁰

The Code provides three instances in which the fourteen percent limit is discretionary. In the case of investments in the basic resources sector, all the member countries are expressly authorized to establish different limits, if any,¹¹¹ which they are doing under special contracts.¹¹² Second, under special circumstances, any member country may request authorization from the Commission to establish different limits.¹¹³ This exception has not been used to date and prospects for its use are not great¹¹⁴ since it seems feasible only for amending the general limit for all six countries.¹¹⁵ The third exception is established in principle for foreign enterprises which export eighty percent or more of their production to non-Andean markets. These enterprises in accordance with Art. 34 of the Code, are not subject to the rules established in Chapter II of the Code; the chapter which specifies the divestment requirement and establishes the fourteen percent limit on profit remittances. However, the wording of the provision which established the fourteen percent limitation has given rise to different interpretations. The profit limit makes reference to foreign investors, while Art. 34 refers to foreign enterprises. Thus, some argue that the enterprises which export eighty percent of their production to non-Andean markets are still subject to the fourteen percent limitation on profit remittances each year. As discussed previously, the definition of foreign enterprise includes both the foreign investor, (the parent company) and the local subsidiary.¹¹⁶ Con-

sequently, the fourteen percent limitation technically should not apply to profits generated by the enterprises under discussion. This construction is not uniformly accepted by the CNAs; consequently, the provision requires clarification.

D. Reinvestments

A reinvestment is defined by the Code as the investment of all or part of the undistributed profits generated by a foreign direct investment in the same enterprise.¹¹⁷ This definition creates a somewhat irrelevant distinction between profits which are reinvested in the enterprise that generated them and profits which are invested in other enterprises. As will be shown, both are subject to essentially the same procedures, and both are characterized ultimately as direct foreign investment.

To effect a reinvestment, as defined, a prior authorization from the local CNA is required.¹¹⁸ Prior authorization is also required to invest profits in another enterprise.¹¹⁹ Once authorized and effected, the reinvestment must be registered;¹²⁰ in this way, it acquires the status of a direct foreign investment.¹²¹ As a result, these reinvested profits enlarge the basis for remittances and may also be repatriated when liquidated.¹²²

Requiring such authorization is designed to enable the government to judge, in light of their developmental priorities and the specific necessities of the respective enterprises, whether additional foreign investment is required and convenient.¹²³

Annual reinvestments which do not exceed five percent of the company's capital are exempt from the authorization requirement.¹²⁴ Such reinvestments are required, however, to be registered after they are made in order to qualify as direct foreign investment and thus be entitled to the above-mentioned rights. In this manner, the Code acknowledges the need of some enterprises to periodically reinvest profits in order to maintain their normal rhythm of operations. The authorization procedure in such cases would only be a dilatory bureaucratic procedure.¹²⁵ This exemption is applicable only to profits invested in the same enterprise which generated them.

The five percent reinvestment limitation is applied against the total capital of the enterprise in which the reinvestment is made, not just against the total direct foreign investment. However, the Code does not define the term "capital."¹²⁶

As applied to corporations, this term is subject to several interpretations: paid stock-capital, total stock-capital (totally subscribed but partially paid), net worth (assets minus liabilities), or perhaps even working capital. It would seem preferable to equate it to the paid stock-capital: if a stock capital definition were adopted it would seem proper to require the payment of the unpaid portion first rather than call for an additional reinvestment. Furthermore, because the exemption is a means of avoiding delays in regularly infusing the capital which an enterprise may require, the concepts of net worth or working capital are inappropriate. They are items which usually require substantial computation before they can be determined; and even then, the results are usually controversial. The paid stock-capital thus gives a more certain base for reference.

In practice, the two articles which regulate reinvestments have been subject to a variety of interpretations.¹²⁷ It has been argued that prior authorization for reinvestment is not applicable to profits generated by mixed or national enterprises. This point of view is based on a literal construction of Art. 12, which refers to the reinvestment of the profits realized by a foreign enterprise. Consequently, it has been alleged that profits realized by other kinds of enterprises, viz., national or mixed, may be reinvested without prior authorization. This argument has been rejected in Peru. However, it must be noted that the poor wording of these articles and of the definition of foreign enterprise leaves room for this type of argument. The definition of foreign enterprise is too broad: it applies both to the parent company and to the local subsidiary. Thus, when the reinvestment rules refer to foreign enterprise, they could well be referring to either the parent or the subsidiary. Therefore, it would seem proper to clear up the ambiguity by restricting the definition of foreign enterprises as suggested or by amending the text of Art. 12 to refer specifically to foreign investors.¹²⁸

An additional difficulty is determining what limit, if any, is established by the Code on the annual reinvestable amounts (per enterprise) which can be authorized by the CNAs. Three constructions have been adopted by different members. 1) The maximum amount which can be reinvested each year is the fourteen percent which can be remitted abroad yearly; this is the alternative implemented by Colombia in 1973.¹²⁹ 2) The maximum amount which can be reinvested yearly is that fourteen percent plus the five percent which does not require authorization; this is

the alternative adopted by Ecuador.¹³⁰ 3) According to the Peruvian construction, the yearly reinvestments are not limited by the Code: the CNA may authorize any amount.

This point of divergence arises because of the construction given to the phrase "amounts which have the right to be remitted abroad."¹³¹ As may be recalled, this concept limits assets which can be classified as direct foreign investment. Thus, if the profits in excess of fourteen percent are not considered remittable abroad in the same year those profits were produced, then alternative 1) is correct. However, if such excess profits are remittable abroad, either in following years or when the capital is liquidated, then alternative 3) is correct. Further, if one follows the intent of the Code draftsmen, then alternative 2) is correct.¹³² In my opinion, the Code should not be construed as imposing any limits on the amounts which can be reinvested. However, this conclusion does not imply that prior authorization is not necessary. If the CNA analyzes the capital requirements of an enterprise and concludes that it needs additional foreign inputs, it would not seem logical to make such sums inactive. This is the result if the amount which can be reinvested is arbitrarily limited without granting the CNA the opportunity to judge each case. However, a unified set of criteria for this and other problems relating to reinvestment rules is dependent, to a large extent, on solutions to the problems of profit remittances.

E. Capital Repatriation

Foreign investors have the right to re-export or repatriate their invested capital (as defined *infra*) in the following cases: 1) when they sell their stock, shares, or other ownership rights, and 2) when the respective enterprise is liquidated.¹³³

Re-exportable capital is defined as the amount of initial registered direct foreign investment, plus any reinvestment made in the same enterprise in accordance with the Code, less any net losses.¹³⁴ In case of a liquidation of the enterprise, the difference between the real value of net assets and the re-exportable capital is considerable as a capital gain and may be remitted abroad after payment of the applicable taxes.¹³⁵

Remittance of the net proceeds of the sale of stock, shares, or other ownership rights is automatic only if the purchaser is a national investor.¹³⁶ In the case of a foreign purchaser, the sale requires previous

authorization from the local CNA. However, payment for such a purchase must be made abroad because the proceeds will not be considered repatriable capital and thus are not entitled to be re-exported in foreign currency.¹³⁷

This provision is designed to afford priority to national investors in acquiring investments sold by foreigners. However, in many cases, CNAs authorize the purchase by another foreign investor if "the transaction does not cause an outflow of foreign currency from the host country."¹³⁸ As has been noted, this is not the purpose of the rule, nor could such outflow legally occur. With such criteria all purchases would be authorized. A preferable alternative would be for the CNA to require proof that the seller has unsuccessfully attempted to find national buyers. To effectuate this end, it could establish as a condition that the securities be offered first through a stock exchange for a reasonable period. If no national buyers are found through the exchange, the CNA could authorize the purchase by a foreign investor.

F. Credit Regulations

1. EXTERNAL

The CNA is required to approve in advance all contracts for foreign source borrowing. The proceeds must be registered with the CNA upon their entry into the country.¹³⁹

This requirement is intended to control the payment of credits and interest which have a significant effect on the balance of payments of the host country. It also corrects the historic abuse of disguising profit remittances as commissions and interest and generating false expenses for the local corporation, thereby unduly diminishing the tax base of the host government.¹⁴⁰

The authorization from the CNA can be requested either for a specific credit or for a global line of credit.¹⁴¹ By admitting this latter form, the Code intends to avoid unnecessary delays and facilitate the operation of those enterprises which require a periodic flow of credit from abroad. Once the CNA approves the line of credit, for a maximum amount and a fixed period of time, the enterprise is required to register the amounts which are used upon their entry into the country.

In cases of credit contracts between a parent company and its affiliate, or between two affiliates of the same parent company, the effective rate of interest may not exceed by more than three points the prime interest rate in the financial market of the country of origin of the currency in which the contract is registered. In all other cases of foreign borrowing, the interest will be determined by the CNA and must closely approximate the prevailing rate of interest in the financial market of the country in which the operation is registered. The effective interest rate is understood to include the total cost to the debtor for the use of the borrowed capital, including commissions and all other charges.¹⁴²

The payment abroad of the capital and interest due is authorized only for the amounts which have been previously registered and authorized with the CNA in accordance with the above-mentioned rules.

Once again, the implementation of these regulations poses a number of problems caused by the lack of clear definitions. Although the rules refer to parent company and to affiliate, the Code does not define them. Accordingly, varying definitions have been implemented by the member countries. For example, the Peruvian CNA has adopted the following operational definitions:

1. An "affiliate" is any foreign enterprise in which fifty percent or more of its capital belongs, directly or indirectly, to a non-resident foreign enterprise, or in which foreign ownership is less than fifty percent but foreign control of the administrative, financial, commercial, or technical functions is greater than fifty percent.
2. A "parent company" is any juridical entity which owns fifty percent or more of the capital stock of a foreign resident enterprise and/or controls its technical, administrative, financial, or commercial activities.
3. A "nonresident affiliate" is any juridical entity not residing in the country (Peru) which depends—financially (through stock ownership) and/or structurally (through administrative, commercial and technical control)—on another nonresident foreign company which is classified as a parent company.

The ambiguity noted above in discussing the general classifications of the Code is also found, to a large extent, in these operational definitions. Moreover, the definitions of parent company and non-resident af-

filiates have been unnecessarily restricted to corporations when, as noted *supra*, the term enterprise was intended by the Code to be more comprehensive. These definitions also have failed to establish guidelines for determining what constitutes a resident or a nonresident enterprise, and, even more critical, what is encompassed by administrative, commercial, financial, and technical control. Obviously, these concepts require common, specific definitions applicable to all six countries.

Finally, the member governments are prohibited from guaranteeing in any way, either directly or through official or semi-official institutions, the external credit operations of foreign enterprises in which the state does not participate.¹⁴³ Since this type of guarantee diminishes the national quotas which the countries have in international organizations, this provision is designed to cover such quotas with guarantees for priority development projects. It is also assumed that the foreign investor usually has international financing contacts which easily can provide such guarantees for him. Within the general strategy of the Code, this restriction is also intended to promote the national or mixed forms of enterprise, which are not subject to this restriction.¹⁴⁴

2. INTERNAL

"Since the activities of foreign investors in developing countries have often been financed almost exclusively with local savings, it was deemed necessary to restrict such use of the national credit sources."¹⁴⁵ Thus, it has been established that foreign enterprises may only borrow short-term capital in the local financial markets of the Andean countries.¹⁴⁶ The terms and conditions of such borrowing were to be specified by the Commission shortly after the enactment of the Code through regulations which have not been issued to date. Therefore, this matter is still subject to the internal laws of each member country.¹⁴⁷ It is unnecessary to emphasize the urgency of enacting such uniform regulations. Hopefully, they will include a clear definition of short-term borrowing as well as rules prohibiting the indefinite renewal of such loans, which is, in fact, medium or long-term borrowing. An additional point to be defined is whether these restrictions apply only to borrowing from credit institutions or also to general market financing, as in the issuance of bonds. The provision appears to refer to all forms of borrowing; however, some governments have established the contrary indirectly or by default and allow, for example, the issuance of bonds by foreign enterprises.¹⁴⁸

National and mixed enterprises are not subject to these restrictions. It is unclear whether foreign enterprises which are divesting are subject to them during the period of their transformation. We will return to this point when examining the effects of divestment.

G. Transfers of Technology

The Code requires that all contracts for the importation of technology, patents, or trademarks must receive prior authorization by the CNA.¹⁴⁹ In screening these contracts, the CNA seeks to assess the real contribution to the development of the country, which will be rendered by the imported technology thereby avoiding the purchase of the obsolete or overpriced.¹⁵⁰ To implement these objectives, the Code provides for the creation of a Subregional Office of Industrial Property.¹⁵¹ This entity is to serve as a coordinating office among the local CNAs and is charged with compiling statistical information concerning the flow of technology to the Andean countries, drafting form contracts for licensing agreements, and rendering general technical advice on these matters to the member countries. The countries are also committed to the development of local technology and the adaptation of imported technology. In this manner the CNAs will obtain the necessary parameters to properly assess the importation contracts for which they are responsible.

1. AUTHORIZATION

The Code has fixed a number of guidelines for the approval of such contracts. Certain clauses must appear in all contracts; while a number have been prohibited. These are:

1. Obligatory clauses:¹⁵²

- a. Identification of the modalities of the imported technology.
- b. Contractual value of each and every element the technology transferred.
- c. Term of the contract.

2. Prohibited clauses:¹⁵³

- a. Clauses by which the recipient of the technology is obliged to buy any kind of goods or to use the services of personnel designated by the provider of the technology. As an exception, it is

permissible to approve clauses which require the purchase of capital or intermediate goods or raw materials, provided that their price corresponds to the international market rates.

- b. Clauses granting the right to provider of the technology to fix the prices of sale or resale of the products produced with his technology.
- c. Clauses restricting the volume or structure of the recipient's production in any way.
- d. Clauses directly or indirectly prohibiting the use of competitive technologies.
- e. Clauses granting the provider of the technology with partial or total purchase options to the goods produced with that technology.
- f. Clauses obliging the transfer, to the provider of any inventions or improvements obtained through the use of such technology.
- g. Clauses obliging the payment of royalties for non-utilized patents.
- h. Clauses prohibiting or limiting in any way the export of products created with the technology. The CNAs are authorized to grant exceptions in cases where they deem it necessary.
- i. Clauses whereby the technology is capitalized.¹⁵⁴
- j. Clauses purporting to submit conflicts to a jurisdiction or laws other than the ones of the recipient country.¹⁵⁵
- k. Clauses allowing subrogation by foreign states of the rights and actions of the provider of the technology.¹⁵⁶
- l. Clauses purporting to obtain an equivalent effect to the above-mentioned.

Contracts for the use of foreign trademarks may not contain the following clauses:¹⁵⁷

- 1. Prohibiting the export to or sale in certain countries of the products manufactured under the licensed trademark, or the sale of similar products;
- 2. Requiring the use of any goods provided by the licensor of the trademark or its affiliates, although an exception may be granted if the prices approximate international standards;

3. Fixing sale or resale prices of the products manufactured under the trademark;
4. Requiring payments for trademarks not used;
5. Requiring the permanent use of personnel from or appointed by the provider of the trademark;
6. Submitting conflicts to a foreign jurisdiction or law;¹⁵⁸
7. Providing subrogation by a foreign state of the actions and rights of the provider of the trademark;¹⁵⁹ and
8. Clauses of equivalent effect.

In screening the contracts, the CNAs are required to give preference to those providing local or subregional technology. The Commission may propose to the member countries the establishment of special duties on products bearing foreign trademarks which embody readily available technology.¹⁶⁰

If these requirements are met, and the economic evaluation is favorable, the CNA will authorize the contracts. As is standard, royalties are remittable only under contracts which have been authorized.¹⁶¹

Royalties may not be paid, however, with respect to intangible technology provided by a parent company to an affiliate or between affiliates of the same company.¹⁶² Nor will they be deductible for income tax purposes.¹⁶³ As noted above, the Code does not define parent company nor affiliate, and it is urgent that common definitions be adopted for these terms. Of even greater importance is the Code's failure to define intangible technological contributions. Some guidance may be derived from a sample form found in Annex No. 1 to the Code, an application for CNA authorization for direct foreign investment in any Andean country. It contains a listing of tangible and intangible resources. But this listing may not be definitive since the prohibition refers to a distinction not between resources, but between tangible and intangible technologies, and this distinction appears to refer to something more specific than resources in general. Some Peruvian officials believe that distinguishing the term intangible technological contributions is intended to exclude foreign trademarks and technical assistance:¹⁶⁴ on the other hand, Venezuela's Decree 63 avoids the distinction between tangible and intangible technologies entirely. The Venezuelan version refers solely to technological contributions, and does not mention intangible. Furthermore, Decree 63 defines

technological contributions as all supply, sale, lease, or assignment of trademarks, patents, or industrial models; assistance on technical or administrative procedures by qualified personnel; instruments, models, documents, or instructions on processes or methods of manufacture; and any other goods or services of a similar nature so qualified by the CNA.¹⁶⁵

A recent decision of the Commission has increased the uncertainty concerning the interpretation of these terms. In Decision 84, the Commission approved the Bases for a Subregional Technological Policy. This decision adopted, among others, two new concepts: modular technology, defined as the knowledge which characterizes or is inherent in a productive process or the rendering of a service; and peripheral technology, defined as the knowledge which is not intrinsic to the creation of a product or process or the rendering of a service; but which is necessary to utilize the modular technology in the production of goods or services or even in the generation of other knowledge.¹⁶⁶

These developments indicate that the distinction between tangible and intangible technologies should be abandoned, and the rule applied to transfers of technology in general. Decision 84 could be helpful insofar as it defines technology as the sets of knowledge which are indispensable for transforming components into products, for using them, or for rendering services. However, if these definitions are restrictively applied to the prohibition of royalty payments between parent and affiliate, they would not encompass payments for trademarks. This discrimination would seem rather illogical; for if payments for technology are forbidden, why shouldn't payments for trademarks between parent and affiliate or between affiliates also be forbidden?¹⁶⁷ In any case, Decision 84 is not yet in force in any Andean country. When it becomes effective, an express amendment will certainly be required to solve the questions regarding the rules for technology.

2. INDUSTRIAL PROPERTY CODE

Within the framework established by Decision 84, the Commission has issued an Industrial Property Code through Decision 85.¹⁶⁹ This Code specifically regulates invention patents, industrial drawings and models, and trademarks. Under its provisions only new inventions which have industrial applicability, or which improve such inventions, may be patented. An invention will not be considered novel if it is known to the public, whether through oral or written description, or by its use or ex-

plotation, or by any other means sufficient to allow the use of the invention before its patent is requested. There are several specific cases which are exempt from this rule.

The invention must be manufactured or used by a form of industry in order to be considered as having industrial applicability. Scientific principles or discoveries, as well as the discovery of substances existing in nature; commercial, financial, accounting, and similar plans; therapeutic methods; and esthetic creations will not qualify as novel. Furthermore, no patents may be granted for inventions which violate the public order or the common good concerning vegetable varieties or animal species, pharmaceutical products, medications, therapeutically active substances, beverages, or food. Foreign inventions for which a patent is requested more than one year after the patent was requested in another country may not be patented. In addition, the member countries may prohibit the granting of patents for processes, products, or groups of products, if they deem fit.

The grant of a patent entitles the holder to its exclusive use, to assign one or more licenses for its use, and to receive royalties for its use by third parties. The patent grant does not include, however, the exclusive right to import the patented product or the product manufactured through the patented procedure. Patents will be valid for a period of five years and may be renewed once for an additional term of five years. The holder of the patent must start using it within three years following its grant and must inform the CNA of the date of initial utilization. Assignments to third parties must also be reported to the CNA.

Trademarks may be registered for a period of five years and are renewable indefinitely. However, only novel, visible, and sufficiently distinctive trademarks may be registered.

In general, these are the main provisions of the Industrial Property Code. A detailed analysis, such as it deserves is beyond the scope of this paper.¹⁷⁰ Decision 85 has not yet been implemented; however, it is expected that the member countries will enact it soon.

H. Jurisdiction

Th Code has prohibited instruments relating to investments or the transfer of technology from including clauses that remove possible con-

flicts from the jurisdiction and laws of the recipient country or allow the subrogation by states to the rights and actions of their national investors.¹⁷¹

This provision is undoubtedly derived from the Calvo Clause.¹⁷² However, it does not require the express submission to the jurisdiction and laws of the recipient country, nor does it require waiver of diplomatic protection, as the original Calvo clause did. Of course, the instruments concerning investments or the transfer of technology will not include clauses expressly removing jurisdiction or allowing subrogation. But, is that equivalent to requesting express submission to the jurisdiction and laws of the recipient country? Has the Code intended to relax the strictness of the Calvo Clause?

Furthermore, the interdiction of contract subrogation only prohibits the investor's state of origin from intervening, not the subrogation by international agencies. Was this intentional, or did it only result from the draftsmen's focus on a traditional sore point? Is this an open door to the future adherence to IDRB's Center for Dispute Settlement?¹⁷³ Or, is it a special provision designed to benefit CAF, the Andean Development Corporation, which is a legal entity in international public law?¹⁷⁴

Thus far, few answers are obvious. This provision initially prevented the Overseas Private Investment Corporation (OPIC) from operating in the Andean Group.¹⁷⁵ However, OPIC's 1974 report indicates coverage has been granted for operations in Bolivia and Venezuela. Bolivia appears to construe the Code's jurisdictional rules as not applying to industries whose products do not benefit from the Andean tariff reductions. Peru has recently waived Peruvian jurisdiction in a contract with Japanese investors for the financing of an oil pipeline.¹⁷⁶ The Peruvian Government has thereby confirmed that the Code does not apply to foreign financing. Chile has also announced its intention to negotiate foreign capital withdrawal guarantees which could be in violation of this provision prohibiting contract subrogation.¹⁷⁷

V. DIVESTMENT

A. Mechanics

The second system contained in the Code is the "Transformacion" (hereafter referred to as Divestment).¹⁷⁸ The Andean Divestment is essentially a system whereby national investors¹⁷⁹ shall acquire the majority

ownership and control of the enterprises operating in the host country progressively and in a maximum number of years. That is to say, in the words of the Code, foreign enterprises shall become national or mixed enterprises.

The Andean system of divestment in its original form is basically applicable to foreign industrial enterprises in the manufacturing sector. As previously indicated, divestment of foreign enterprises in basic resources, public services, internal marketing, mass media, and financing activities is subject to different rules in each country. The emphasis on the manufacturing sector is not misplaced since it is vital to the Andean developmental strategy, and it is in this sector where the highest concentration of foreign investment is found.¹⁸⁰

1. TYPES

The divestment system is obligatory only in certain cases. Those enterprises which were operating or were created on or before June 30, 1971 are not required to divest, but their products do not qualify for the benefits of the Trade Liberalization Program.¹⁸¹

These pre-existing enterprises were granted a three-year period calculated from the time the Code became effective to determine whether to divest.¹⁸² In Colombia and Venezuela, where the Code was adopted later than in the other member countries, the problem facing foreign enterprises is the treatment which their products should receive during the three-year period. It has not been possible to collect any information concerning this problem.

It is important to note that an initial decision to refrain from divesting does not preclude a subsequent contrary decision, in which case the enterprise does qualify for trade benefits.¹⁸³

Divestment is also voluntary for the foreign enterprises which export eighty percent or more of their production to non-Andean markets. Should this percentage decline, these enterprises also will not benefit from the Trade Liberalization Program.¹⁸⁴

Divestment is obligatory for all foreign enterprises created after June 30, 1971. These enterprises must execute a divestment agreement with the local CNA on behalf of their investors.¹⁸⁵ Thus, although it is still possible to establish a totally foreign-owned enterprise, a divestment

agreement on the terms discussed below must be submitted as a precondition to authorization from CNA. Interestingly, the Code has failed to prescribe any sanction, aside from the loss of trading benefits,¹⁸⁶ for enterprises which fail to divest as required. This point needs to be clarified because divestment would in fact become voluntary for all enterprises under the current provisions.

2. SCHEDULES

The time limit for divestment varies in relation to both the country in which the foreign enterprise is located and the date on which it started its activities.

The owners of foreign enterprises operating on or before June 30, 1971, who decide to divest must do so by becoming at least mixed enterprises in a maximum period of fifteen years in Colombia, Chile, Peru, and Venezuela, and twenty years in Ecuador and Bolivia. The maximum period is calculated from the date the Code became effective in each country. Within the first three years fifteen percent of the ownership and control of the enterprise must be transferred to national investors; and at the expiration of two-thirds of the allotted time national investors must have acquired at least a forty-five percent interest in ownership and control of the enterprise.¹⁸⁷ Thus, the divestment time-table for the enterprises operating on or before June 30, 1971 may be summarized as follows:

Colombia, Chile Peru, Venezuela		Bolivia Ecuador	
	<u>%</u>		<u>%</u>
3 years	15	3 years	15
10 years	45	13 years	45
		& 4 months	
15 years	51	20 years	51

NOTE: These figures denote a maximum time and a minimum for percentages of national ownership and control. The time periods are computed from the date the Code became effective.

Owners of foreign enterprises created after June 30, 1971 have a maximum period of fifteen years in Colombia, Chile, Peru, and Venezuela, and twenty years in Ecuador and Bolivia to transform their companies into mixed enterprises. However, owners of such enterprises in Colombia, Chile, Peru and Venezuela must have transferred fifteen percent of their ownership and control to national investors when the enter-

prise commences production. The Code does not specify when production is considered to have started; usually it is established on a case-by-case basis in the divestment agreements contracted with the CNA. When one third of the divestment period has elapsed, national participation must be at least thirty percent and at the two-thirds mark, not less than forty-five percent. At the end of the fifteen-year period, participation of national investors in ownership and control of the enterprise must total fifty-one percent.¹⁸⁸

In Bolivia and Ecuador, national participation in foreign enterprises created after June 30, 1971 must reach at least five percent three years after production begins, ten percent when one-third of the divestment period has elapsed, at least thirty-five percent after two-thirds of the period, and fifty-one percent after twenty years.¹⁸⁹

The time table for this divestment is as follows:

Chile, Colombia Peru, Venezuela		Bolivia and Ecuador	
	%		%
3 years	15	3 years	5
5 years	30	6 years & 8 months	10
10 years	45	13 years & 4 months	35
15 years	51	20 years	51

NOTE: These figures denote a maximum time and a minimum percentage of national ownership and control. The time periods are computed from the day the enterprise commenced production.

The Code provides that enterprises in which the state or state enterprise has a thirty percent participation in the stock and determining capacity will be considered a mixed enterprise.¹⁹⁰ Therefore, this composition constitutes an alternative to the system described above.

3. AGREEMENTS

The divestment system is implemented through required contracts with the local CNA which must contain the following provisions:¹⁹¹

1. The fixed divestment period cannot exceed the limits indicated above.
2. The transfer of ownership and control to the national investors must proceed, at least at the applicable rate indicated above.

3. Assurances must be given concerning the progressive participation of national investors, or their representatives, in the direction of the technical, financial, managerial, and business aspects of the enterprise, from the date it starts production.
4. The manner in which the stock, shares or equity rights shall be valued at the time of their sale must be specified.
5. A system of assured transfer to national investors of stock, shares, or rights must be indicated.

4. EFFECTS

Foreign enterprises in the process of divesting will qualify for tariff benefits under the free trade system in the Andean countries.¹⁹² Upon qualifying as mixed or national enterprises, they continue their ANCOM free trade benefits and, in addition, should be relieved from restrictions on their access to local credit and from limits on reinvestment. They also become eligible for activity in the country's reserved sectors. It remains uncertain, however, which of these restrictions are lifted with respect to the enterprises which are in the process of divesting but are not yet national or mixed enterprises.

B. Implementation

Implementation of the divestment system has been more limited in scope than implementation of the system of controls. Among other reasons, this results from the Code having provided a delay of at least three years before the companies are forced to start divesting. Peru has accumulated the most significant experience with this system through the implementation of internal laws which required owners of manufacturing industries to divest even before the Andean Code was adopted. The following discussion will be based on the Peruvian experience.¹⁹³

In July of 1970, Peru enacted a General Law of Industries,¹⁹⁴ requiring all privately-owned industrial enterprises employing six or more persons and with an annual gross income of more than U.S. \$22,000 to establish an Industrial Community. That Community is a juridical person comprising all of the workers of the enterprise. Each year the enterprise must distribute ten percent of its net income to the members of the Community. In addition, another fifteen percent of the net income must be

reinvested by the Community in the enterprise and capitalized. If the capital is not needed, the fifteen percent contribution is used to buy existing shares from the stockholders, who are obliged to sell in equal proportions until the Community acquires fifty percent of the capital of the enterprise. At that point the yearly distributions cease. Initially, the Community is represented by a single member on the board of directors, but its representation increases in proportion to its ownership share.¹⁹⁵

It should be noted that the Peruvian General Law of Industries did not specify a time limit within which the Communities must acquire a fifty percent ownership share. Accordingly, several large firms have managed to keep the growth of the community stock participation to a minimum.¹⁹⁶

When Peru adopted the Andean Code, it also amended its Law of Industries to conform with the time limits fixed therein for achieving majority national ownership.¹⁹⁷ In Decree Law 18999, a twofold mechanism was specified whereby national participation is created: first, through the yearly fifteen percent participation of the Community; and secondly, through a forced sale by the foreign investors if the Community's participation is not sufficient to meet the timing deadlines of divestment. If the foreign investor has not been able to sell the required amount to a national investor within thirty days before the deadline, he is obligated to sell to the Community and to grant a credit to the Community on the conditions fixed by Art. 13 of Decree Law 18999. To date foreign investors have been able in most cases to divest to national investors other than the Community.¹⁹⁸

A novel aspect of the Peruvian implementation is the scope of divestment. Decree Law 18999 established that *all* manufacturing industries and fishing enterprises should become mixed or national enterprises within the maximum time limits fixed by the Andean Code. (Since fishing enterprises were expropriated by the state through Decree Law 20000, the divestment requirement is now applied to manufacturing industries alone.) Divestment is obligatory for all manufacturing industries, regardless of whether they are interested in benefitting from the free trade in ANCOM. This obligation was ratified through Decree Laws 19262 and 19863.¹⁹⁹ Contrast this result with the Code, which makes divestment voluntary for pre-existing enterprises.

Decree Law 19863 also established that the divestment agreements should be consummated by June 30, 1974. Additionally, manufacturing

enterprises were required to have achieved fifteen percent national participation by that date. An example of the results of this provision is the U.S. car manufacturer which was required to sell seventeen percent of its equity to two local businessmen, while the participation of its Community remained at one percent.²⁰⁰

Aside from the Community's participation, the divestment agreements allow national participation to be established by any one or more of the following means: 1) sale to national investors; 2) renunciation by the foreign investor of the re-exportation of capital and profit remittance abroad; 3) merger of enterprises; 4) thirty percent state participation with veto power; 5) capital increases through contributions of national investors.

The valuation of stock sold to a national investor, is established under Decree Law 18999 as that price payable by a buyer in an arm's length transaction. If no agreement is reached, it will be fixed considering the quotation for those securities in the Lima stock exchange. In the absence of a quotation for that stock (which is most likely in view of the incipient state of Peru's stock market), the value must be established in accordance with the appraisal system established by Decree Law 19419: the difference between assets and liabilities, qualified by Title II of this Decree, essentially establishes a modified book value approach.

As to the rules "assuring the progressive participation of national investors, or their representatives, in the technical, financial, managerial, and business direction of the enterprise," the Peruvian CNA has looked to the nationality of the members of the board of directors and of the top managers. Toward this end, the enterprises were obliged to communicate to the CNA the nationality of their directors and top managers, and to inform it of any changes in makeup. In fact, the staff of most enterprises is already largely, if not totally, composed of Peruvian nationals.

Until recently, the Peruvian CNA has been "temporarily" classifying enterprises as national, mixed, or foreign exclusively on the nationality of their stockholders. Apparently, they will start, or have started, to re-classify the enterprises by considering the nationality of the directors and top managers. Neither criteria, however, assures a change in the behavior of the enterprises.²⁰¹

VI. FINAL COMMENT

Obviously the implementation of the Code is anything but clear and uniform. Commencing with the delayed enactment of several Decisions and, indeed, of the Code itself, and continuing through the varying and contradictory interpretations of numerous Code provisions, uniformity and clarity have been manifestly lacking.

As noted, the common and joint implementation of a minimal legal framework for foreign investment by the six member countries is essential both for the protection of the host countries and for the encouragement of an adequate inflow of foreign resources. The effectiveness of the Code was conceived as depending on a common implementation. In reality, however, the series of ambiguities and divergent practices have served to blunt its usefulness.

The adoption of a comprehensive set of regulations for the Andean Code thus appears to be of utmost necessity in order to overcome the current uncertainties. The foregoing examination is intended as a very minor contribution to the identification of some of the main points of divergence or uncertainty which should be clarified through the adoption of such common regulations. I believe that the enactment of uniform regulations and, consequently, the consistent implementation of the Andean Code may be the foremost test of the genuine will of the Andean countries for an integration beyond that of deceptive rhetoric.

NOTES

¹The text of the Code, as amended, appears in 11 I.L.M. 126 (1972).

²For a general analysis of the Code from the perspective of the Andean scholars, see especially Guerrero, *El Régimen Común de la Inversión Extranjera en el Grupo Andino, La Dimensión Jurídica de la Integración*, INTAL, Buenos Aires (1973); MacLean, *Consideraciones Preliminares a un Estudio del Régimen Legal de las Inversiones Extranjeras en el Perú*, 31 DERECHO 89, Pontificia Universidad Católica del Perú, Lima (1974). See also, R. Dañino, *El Régimen Andino Sobre Inversiones Extranjeras*, Pontificia Universidad Católica del Perú, Lima (1974). Among the studies published in the U.S.A., see A. Lopez-Valdez, *The Andean Investment Code: An Analysis*, 7 J. INT'L. L. & ECON. (1972); C. Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L. L. 763 (1972); Schliesser, *Restrictions on Foreign Investment in the Andean Common Market*, 5 INT'L. LAWYER 586 (1971), and *Recent Developments in Latin American Foreign Investment Laws*, 7 INT'L. LAWYER 357 (1973); F. Schill, *The Mexican and Andean Investment Codes*, 6 L. & POLICY IN INT'L. BUS. (1974); Council of the Americas, *The Common Treatment of Foreign Capital in Andean Bloc*, memorandum of comments, New York (1971), and *Andean Pact: Definitions, Design and Analysis*, November (1973); R. Diaz, *The Andean*

Common Market: Challenge to Foreign Investors, 6 COLUM. J. WORLD BUS. 22 (July-August, 1971); and, Swan, *The Andean Code: A Preliminary Appraisal*, 5 LAWYER OF THE AMERICAS 259 (1973). See also D. Furnish, *El Régimen Común del Grupo Andino para las inversiones extranjeras*, 14 DERECHO DE LA INTEGRACION 85, INTAL, Buenos Aires (1973).

³Although Venezuela only adhered to the Andean Pact on February 13, 1973, she took part in all the negotiations and conferences leading to the signing of the Pact and, thereafter, kept close ties with the development process. Ratification became effective on January 1, 1974, in accordance with the law that Venezuela enacted on September 13, 1973. The text of the ratification appears in 12 I.L.M. 344 (1973).

⁴The Acuerdo de Cartagena or Andean Pact was signed in Bogota on May 26, 1969, by the representatives of Bolivia, Colombia, Chile, Ecuador, and Peru. The Pact became effective on October 16, 1969 in Bolivia, Chile, Ecuador, and Peru. In Colombia the Andean Pact was approved on April 14, 1973, through Law 8A of 1973, after extensive constitutional litigation (See F. Orrego, *La Incorporación del Ordenamiento Jurídico Subregional al Derecho Interno: Análisis de la práctica y jurisprudencia de Colombia*, LA DIMENSION JURIDICA DE LA INTEGRACION, INTAL, Buenos Aires, 1973.) Consequently, the Andean Pact is currently in force in all of the six Andean countries. Its text appears in 8 I.L.M. 910.

⁵The dollar figure refers to the purchasing power of the U.S. dollar in 1960. Junta del Acuerdo de Cartagena, *Grupo Andino: Origen, Objetivos, Mecanismos, Logros*, Unidad de Comunicaciones, Lima, 1973, mimeo.

⁶*Acta Fnal de la IV Reunión de los Cancilleres del Acuerdo de Cartagena*, El Peruano, Lima, August 7, 1973, at 1.

⁷For a full explanation of the theory, see F. CARDOSO & E. FALETTO, *DEPENDENCIA Y DESARROLLO EN AMERICA LATINA*, México, Ed. Siglo XXI, 1971; T. DOS SANTOS, *LA DEPENDENCIA ECONOMICA EN AMERICA LATINA*, México, Ed. Siglo XXI, 1969; C. FURTADO, *DESARROLLO Y SUB-DESARROLLO*, Buenos Aires, Ed., Eudeba, 1970.

⁸In this context, obviously, foreign investment is one of the most, if not the most, sensitive issues. See R. Vernon, ed., *How Latin America Views the U.S. Investor*, New York, Praeger, 1966. See also K. Waltz, *The Myth of National Interdependence* in C. Kindelberger, ed., "The International Corporation: A Symposium, Cambridge, MIT Press, 1970, at 205. Cf. R. Vernon, *Multinational Enterprises in Developing Countries: Issues in Dependency and Interdependence*, Yale University, mimeo, June 1, 1974.

⁹See G. SALGADO, *ECUADOR Y LA INTEGRACION ECONOMICA DE AMERICA LATINA*, BID/INTAL, Buenos Aires, 1971.

¹⁰LAFTA is composed of Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela.

11	Population (millions)	GDP (Billions of 1960 US \$)	GDP per capita (1960 US \$)
Andean Group	67	31	461
Argentina	24	22	920
Brazil	93	32	340
Mexico	51	33	650

J. Pate, *The Andean Group: A Critical Look After Four Years*, unpublished essay, Lima, 1973.

¹²See F. Peña, *La Cláusula de la Nación Más Favorecida en el Sistema Jurídico de la Asociación Latinoamericana de Libre Comercio*, 9 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1971.

¹³See S. HELDT, *THE ANDEAN GROUP: AN ANSWER TO SOME LAFTA PROBLEMS*, Institut für Weltwirtschaft, Kiel, 1972. See also S. Lluch, *Pacto Andino: Alianza de los Pesos Medianos*, 245 PANORAMA ECONOMICO, 1969, at 7.

¹⁴G. SALGADO, *supra* n. 9 at 79.

¹⁵A variety of special rules and privileges have been provided for Bolivia and Ecuador, both in the Andean Pact (Chapter XIII) and in the Andean Code (Article 46).

¹⁶See the analysis of the Trade Liberalization Program at p. 6, *infra*.

¹⁷Article 1 of the Andean Pact states: "The purpose of this Agreement is to promote the balanced and harmonious development of the Member Countries, accelerate their economic growth through economic integration, facilitate their participation in the integration process designed by the Montevideo Treaty (whereby LAFTA was created) and establish favorable conditions for the transformation of LAFTA into a common market, all this with the ultimate purpose of achieving a constant betterment of the living conditions of the inhabitants of the Sub-region". The Permanent Executive Committee of LAFTA, through Resolution 179, approved and declared that the Andean Pact was compatible with LAFTA. (See 6 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1970.) However, such compatibility has been a source of strong controversy among Latin American scholars. See C. Lafer, *Un Análisis de la Compatibilidad de los Artículos 27 y 28 del Pacto Andino con el Ordenamiento Jurídico de la ALALC*, 6 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1970; cf. E. Cárdenas and F. Peña, *Los Acuerdos Subregionales y el Tratado de Montevideo*, 2 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1969.

¹⁸The organization and powers of the Commission are established in Articles 5 through 12 of the Andean Pact; its by-laws appear in 7 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1970. Its functions with regard to foreign investment are contained in Chapter V of the Andean Code.

¹⁹The organization and powers of the *Junta* are established in Articles 13 through 18 of the Andean Pact; its by-laws appear in 7 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1970. Its functions with regard to foreign investment regulation are contained in Chapter V of the Andean Code.

²⁰The analysis of the legal status of the Decisions of the Commission has been condensed from the study by Professor Pate, of IESA, Caracas, referred to in n. 11 *supra*. See also F. Kramer, *Sistematización de la estructura jurídica del Acuerdo de Cartagena*, 12 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1973; and, F. Orrego, *La Incorporación del Ordenamiento Jurídico Subregional al Derecho Interno: Análisis de la práctica y jurisprudencia de Colombia*, 7 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1970; and especially, M. Casanova, *Algunos Aspectos del Derecho Económico de Integración Regional en América Latina, con especial referencia al derecho andino*, 13 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1973.

²¹See Junta del Acuerdo de Cartagena, X Período de Sesiones Extraordinarias de la Comisión del Acuerdo de Cartagena, *Informe de la Junta Sobre el Establecimiento de un Órgano Jurisdiccional del Acuerdo de Cartagena*, Unidad de Comunicaciones, Lima, 1972, mimeo. See also *Proyecto de Creación de un Tribunal de Justicia*, 13 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1973.

²²See *Agreement Establishing the Andean Development Corporation*, 8 I.L.M. 940, 1969. See also R. Fressard, *El Tratado Que Creó La Corporación Andina de Fomento*, 3 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1969.

²³See A. Linares, *Labores Iniciales de la CAF*, 16 BOLETIN DE LATINO AMERICA, Caracas, 1970.

²⁴J. Pate, *supra* n. 11.

²⁵Their organization and functions are established in Chapter II, Section C, Articles 19 through 22, of the Andean Pact, and their by-laws were approved through Decisions 19 and 17, respectively, which appear in 7 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1970. The regulations of the Economic and Social Council have been modified by Decisions 55, 72, and 74 of the Commission.

²⁶These were created by Decisions 22, 36, 39, 68, and 71 of the Commission.

²⁷J. Pate, *supra* n. 11.

²⁸See especially Junta del Acuerdo de Cartagena, *Bases Generales Para Una Estrategia Subregional del Desarrollo*, Unidad de Comunicaciones, Lima, 1972. See also INTAL, *El Acuerdo de Cartagena y la Estrategia Subregional de Desarrollo*, in 7 BOLETIN DE LA INTEGRACION 575, INTAL Buenos Aires, 1972.

²⁹See Chapter V, Articles 41 through 60, of the Andean Pact. See also Junta del Acuerdo de Cartagena, *Programa de Liberación y Arancel Externo Mínimo Común*, Unidad de Comunicaciones, Lima, 1971.

³⁰Products are required certificates of origin from the CNA. The guidelines for determining the origin of the products are found in Chapter X of the Andean Pact, and more specific rules have been established by Resolutions 1 and 2 of the Junta.

³¹A number of products have been exempted until December 31, 1985 for Chile, Colombia, Perú, and Venezuela, and, until 1990, for Bolivia and Ecuador. See PRICE, WATERHOUSE, PEAT & CO., *DOING BUSINESS IN THE ANDEAN COMMON MARKET (ANCOM)*, Lima, December 31, 1973, at 14.

³²See Chapter VI, Articles 61 through 63, of the Andean Pact, and Junta del Acuerdo de Cartagena, *Grupo Andino: Programa de Liberación y Arancel Externo Mínimo Común*, Unidad de Comunicaciones, Lima, 1971.

³³See Chapter IV, Articles 32 through 40, of the Andean Pact and Decision 57 (on light engineering products). See also M. Guerrero, *La Programación Conjunta del Desarrollo Industrial Subregional y el Primer Programa Sectorial de la Industria Metalmeccánica*, in 12 DERECHO DE LA INTEGRACION 35, INTAL, Buenos Aires, 1973.

³⁴Decision 25 approved the list of products reserved for sectoral programs of industrial development. See D. SCHYDLOWSKY, *ALLOCATING INTEGRATION INDUSTRIES IN THE ANDEAN GROUP*, Harvard Institute of Economic Research at 165, Cambridge, 1971. See also INTAL, *La Programación Industrial en el Grupo Andino*, 7 BOLETIN DE LA INTEGRACION 767, INTAL, Buenos Aires, 1973.

³⁵See Chapter XI, Articles 86 through 88, of the Andean Pact, and Decisions 50 and 56 providing rules to facilitate border traffic, and Decision 71 creating the Territorial Integration Council. See D. Morawetz, *Problemas del Transporte y de las Comunicaciones en el Grupo Andino*, 11 REVISTA DE LA INTEGRACION, INTAL/BID, Buenos Aires, 1972; and, *El Transporte Carretero Internacional y el Desarrollo del Comercio Exterior en Sudamérica*, 7 BOLETIN DE LA INTEGRACION 543, INTAL, Buenos Aires, 1974.

³⁶See Chapter VII, Articles 69 to 74, of the Andean Pact, and, Decision 16 approving the lists of products under Articles 72, 73, and 99 of the Andean Pact. See also Decision 43 on methods for the commercialization of agricultural products; and, *Agricultural Policy in the Andean Countries Signatory to the Andean Sub-regional Integration Agreement*, 2 ECON. COMMUNICATIONS FOR LATIN AMERICA 91, Santiago, 1971.

³⁷See Chapter III, Articles 25 to 31, of the Andean Pact. Aside from the Andean Code, substantial legislative harmonization is being achieved by the Andean Group. Decisions 46 and 40 are among the most important achievements of this Program, in connection to foreign investment. The former provides a system for the creation of Andean Multinational Corporations, which will be discussed below, and, the latter

created a system to avoid double taxation and is currently in force in Ecuador, Bolivia, Perú, and Venezuela. See *Convenio Sobre Doble Tributación*, 10 DERECHO DE LA INTEGRACION, INTAL, Buenos Aires, 1972.

³⁸See M. WIONCZEK, *INVERSION Y TECNOLOGIA EXTRANJERA EN AMERICA LATINA*, Mexico, Ed. Nunez (1971) at 63.

³⁹Article 27, Andean Pact.

⁴⁰See *supra* n. 3.

⁴¹See M. WIONCZEK, *supra* n. 38, at 69.

⁴²M. Guerrero, *supra* n. 2, at 268.

⁴³Article 50, Andean Code. See C. Oliver, *supra* n. 2, at 773.

⁴⁴Article 33, Andean Code.

⁴⁵See M. Guerrero, *supra* n. 2, at 268-9.

⁴⁶Article H, Transitory Dispositions, Andean Code.

⁴⁷See S. Rose, *The Andean Pact and its Foreign Investment Code*, in TAX MANAGEMENT INT'L J., January, 1975, at 5.

⁴⁸H. STEINER & D. VACTS, *TRANSNATIONAL LEGAL PROBLEMS*, Foundation Press (2nd Edition), New York (1976).

⁴⁹C. Oliver, n. 2 *supra* at 764.

⁵⁰See G. Pardo, *Comentario al Nuevo Estatuto de la Inversión Extranjera en Chile*, Comercio Exterior, October, 1974; cf. M. Casanova, *Anotaciones a la Aplicación de la Decisión 24: El Caso de Chile*, 15 DERECHO DE LA INTEGRACION 239, INTAL, Buenos Aires, 1974.

⁵¹See L. Thomas, *The Colombian Supreme Court Decision on the Andean Foreign Investment Code and Its Implications For The Law of Treaties*, 8 J. INT'L LAW & ECON 113, 1973.

⁵²See *supra* n. 4.

⁵³See D. Furnish, *supra* n. 2, at 89.

⁵⁴See Junta del Acuerdo de Cartagena, *Exposición del Coordinador de la Junta, Germánico Salgado Peñaherrera*, in XVI Período de Sesiones Ordinarias de la Comisión, Unidad de Comunicaciones, Lima, November, 1974. See also Latin America, *Andean Pact: Beggar Thy Neighbour*, Vol. VIII, No. 33, London, August 23, 1974.

⁵⁵See S. Rose, *supra* n. 47, at 5.

⁵⁶See *supra* n. 3.

⁵⁷Article 6, Andean Code.

⁵⁸Article 48, Andean Code.

⁵⁹It is my understanding that the Peruvian Government, at least, is studying a project creating a single CNA charged with handling all matters in connection with foreign investment.

⁶⁰Unless otherwise indicated, all these definitions are contained in Article 1 of the Andean Code.

⁶¹The partial renunciation theory was especially supported but not solely by Ecuadorian lawyers and authorities present at the 2nd Andean Pact Lawyers Congress, held in Guayaquil, in November, 1973.

⁶²See R. McLean, n. 2 *supra* at 97; as of March, 1973 496 foreigners, representing 3% of the total of foreign direct investment in Perú, had renounced under such construction.

⁶³See G. Fernández, *El Régimen Uniforme de la Empresa Multinacional En el Grupo Andino*, LA DIMENSION JURIDICA DE LA INTEGRACION, INTAL/BID, Buenos Aires, 1973, at 275.

⁶⁴Decision 46 of the Commission has provided a system for the creation of Andean Multinational Enterprises whose investments will be considered as made by national investors, and will be entitled to receive special tariff, financing, and tax incentives. An Andean Multinational must be organized in corporate form, its principal activity must be of priority interest in the integration process, have its domicile in one of the member countries and receive contributions to its capital from national investors from two or more Andean countries. Each such countries must be represented by at least 15% of the total Andean participation in the capital and control of the enterprise, and foreign participation may not exceed 40% of the total capital of the enterprise. For a detailed analysis of this Decision, see G. Fernández, n. 63 *supra*. But see D. Perenzin, *Multi-National Companies Under the Andean Pact—A Sweetener for Foreign Investors?* 7 INT'L LAWYER 396, 1973; cf. Vagts, *The Multinational Enterprise: A New Challenge For Transnational Law*, 83 HARV. INT'L L. J. 739, 781 (1970).

Compare with R. Scheman, *The Multinational in a New Mode: Ownership by the Developing Countries*, INT'L DEVELOPMENT REV., 1973/2, at 22.

⁶⁵See R. McLean, *supra* n. 2, at 98.

⁶⁶The Peruvian General Law for Industries, i.e., requires that equivalent goods produced locally shall have priority, except for the exemptions specifically provided by Supreme Decree 001-71-IC/Ds. The imported goods must, in principle, be new and technologically modern. See generally Decree-Law 18350, Articles 157 ff.

⁶⁷Article 5, Andean Code. See Part IV, *infra*.

⁶⁸These definitions are also contained by Article 1 of the Andean Code, unless otherwise indicated. As discussed in Section 4, *infra*, these classifications carry with them various benefits or restrictions. See A. López-Valdez, n. 2 *supra*, at 7.

⁶⁹For an analysis of this provision, see my *Regulating the Multinational: A Note On The Joint Venture Myth*, forthcoming in HARV. INT'L L. J. (Spring edition, 1976).

⁷⁰See Sections C, D, F and G of Part IV, *infra*.

⁷¹Article 2, Andean Code.

⁷²See Annex 1 to the Andean Code.

⁷³Article 5, Andean Code.

⁷⁴"The most important weapon any country has is the possibility of accepting or rejecting the entry of a multinational enterprise into its economy." F. Orrego, *El Control de las Empresas Multinacionales*, XIV FORO INTERNACIONAL 106, Chile (1973).

⁷⁵M. Guerrero, *supra* n. 2, at 252.

⁷⁶Article 3(b), Andean Code. This provision is aimed at stopping the take-overs of national enterprises by foreign investors. Between 1958 and 1967, 96 foreign subsidiaries initiated activities in Colombia; 35 were take-overs. During the same period, 62 subsidiaries initiated activities in Perú; 23 were take-overs. (Vaupel and Curhan, *The Making of Multinational Enterprises*, M. Guerrero, n. 2 *supra* at 232) A study on the origin of 1,325 U.S. subsidiaries abroad revealed that 40% had originated from take-overs (G. Meeken, *Fade-Out Joint Venture: Can it work for Latin America*, M. WIONCZEK, *supra* n. 38 at 25 ff). On the various effects of this trend see M. Guerrero, *supra* n. 2 at 233.

⁷⁷"It seems foolish, to say the least, to expect that a foreign investor is going to accept to buy into a company which is about to go bankrupt for the sole purpose of saving it from economic disaster, and then as soon as the company is back on its feet, or shortly thereafter, the investor will relinquish control thereof being allowed to keep only a maximum of 20% of the shares." Raisbeck, *Foreign Investment—Do they have a future in Colombia?*, 5 CAMARA DE COMERCIO COLOMBO-AMERICANA, 1973. However, as foolish as it may seem, several of such purchases have taken place.

⁷⁸Article 3(a), Andean Code. "The power of foreign enterprises, their technological resources, and their easy access to external and internal credit, as well as the advantages of a centralized management on a world-wide level, make it little less than impossible for the local entrepreneur to have access to his own market without strong support from the State . . . (thus, one) of the risks of foreign investment is . . . its entry into production sectors where the national enterprise is satisfying the demand . . ." M. Guerrero, *supra* n. 2 at 233-4.

⁷⁹Article 21, Andean Code. *But see* analysis of the term intangible at 45ff *infra*. "When there exists a relation of dependency, the price paid for the technology is freely determined within the system of the transnational society, consequently, its amount is generally excessively high and constitutes one of the main ways whereby these enterprises disguise profits. Usually this technological contribution is computed as a capital contribution, thereby not only its value, which is in the majority of cases fixed arbitrarily, is withdrawn but, also profits are remitted abroad for the use of that fictitious capital." M. Guerrero, *supra* n. 2, at 264.

⁸⁰Articles 21(a) and 1(a)(ii), Andean Code. However, Article 21(b) prohibits payment of royalties to parent company, or between affiliates. *See* analysis at 45 ff *infra*.

⁸¹Article 46, Andean Code. *See* n. 15 and *supra* n. 31.

⁸²Article 38, Andean Code.

⁸³Article 43, Andean Code.

⁸⁴Article 42, Andean Code.

⁸⁵Article 41, Andean Code.

⁸⁶Articles 41, 42, 43, Andean Code.

⁸⁷Article 44, Andean Code.

⁸⁸*See* S. Rose, *supra* n. 47 at 14. *See also* Business Latin America, *LA's Foreign Investment Stance: Current Rules and Future Trends*, November 13, 1974, at 363ff. *See also* PRICE, WATERHOUSE, PEAT & CO., *supra* n. 31 at 46.

⁸⁹INTAL, LATIN AMERICAN INTEGRATION BULL., at 963, Nov.-Dec., 1974.

⁹⁰*See* M. Guerrero, *supra* n. 2 at 254.

⁹¹Article 39, Andean Code.

⁹²Article 40, Andean Code.

⁹³Article 39, Andean Code.

⁹⁴Article 40, Andean Code.

⁹⁵Article 5, Andean Code.

⁹⁶*See* P. Schliesser, *Restrictions on Foreign Investment in the Andean Common Market*, 5 INT'L LAWYER 3, at 589.

⁹⁷S. HUNT, LA EVALUACION DE LA INVERSION EXTRANJERA EN AMERICA LATINA, Bogotá, Fedesarrollo, Julio, 1973.

⁹⁸See INTAL, *El Régimen de las Sociedades Anónimas en los Países de la ALALC*, Serie BID/INTAL, Buenos Aires, Argentina.

⁹⁹G. SALGADO, *supra* n. 9.

¹⁰⁰Article 45, Andean Code.

¹⁰¹Article 6, Andean Code.

¹⁰²S. Rose, *supra* n. 47 at 6.

¹⁰³*Id.* at 5 and 6; and Business Latin America, *supra* n. 89 at 364.

¹⁰⁴Article 37, Andean Code.

¹⁰⁵On the one side, see Council of the Americas, *supra* n. 2; on the other, see M. Guerrero, *supra* n. 2 at 262.

¹⁰⁶See S. Rose, n. 47 at 10 and 14.

¹⁰⁷*Id.* at 10.

¹⁰⁸See PRICE, WATERHOUSE, PEAT & CO., *supra* n. 31 at 46.

¹⁰⁹See S. Rose, *supra* n. 47 at 10.

¹¹⁰*Id.* at 10.

¹¹¹Article 40, Andean Code.

¹¹²For an analysis of some of these contracts, see Council of the Americas, *Andean Pact: Definitions, Design, and Analysis*, New York, November, 1973.

¹¹³Article 37, Andean Code.

¹¹⁴See ARTHUR ANDERSEN & CO., THE ANDEAN COMMON MARKET (ANCOM), Lima, February, 1973, at 53. See also J. Raisbeck, *supra* n. 77 at 5.

¹¹⁵Andean officials state that the average return from foreign investment, during the decade of the 1960's, fluctuated between 8% and 11% depending on the economic sector. Consequently, it is alleged that 14% gives a sufficient margin. (L. Barandiarán, *Seminario de Integración*, CAF/COFIDE, Lima, July, 1973, mimeo) Nevertheless, it should be taken into account that several of the rules of the Code close the doors to a series of means whereby profits have been traditionally disguised. Thus, a survey on the average of return after the implementation of the Code could very well prove the 14% to be insufficient.

¹¹⁶See Raisbeck, *supra* n. 77 at 6.

¹¹⁷Article 1, Andean Code.

¹¹⁸Article 12, Andean Code.

¹¹⁹Articles 1 and 2, Andean Code.

¹²⁰Article 12, Andean Code.

¹²¹Article 5, Andean Code.

¹²²See Sections 3.3. *supra*, and 3.5. *infra*.

¹²³"The limits on repatriation may have another adverse effect in that they act as an incentive for the foreign corporation to displace workers in favor of machines. The foreign corporation by reinvesting its profits above the 14% mark in durable long term machinery may benefits in two ways: (1) the effect on the new machinery may be to make the enterprise more profitable, and (2) the new durable machinery expands the base upon which the 14% limitation on repatriation is figured. Hence,

the following year the foreign corporation can repatriate even more profits. Given the large pool of labor in the Andean countries, this induced bias would not seem to be in the best interests of the Andean Nations." A. López Valdez, *supra* n. 2 at 12. Certainly it is not, and precisely for this reason prior authorization is required.

¹²⁴Article 13, Andean Code.

¹²⁵See Guerrero, *supra* n. 2 at 254.

¹²⁶See S. Rose, *supra* n. 47 at 7.

¹²⁷Article 12: "The reinvestment of the profits realized by the foreign enterprises shall be considered as a new investment and may not be made without prior authorization and registration." Article 13: "The governments of the Member Countries may admit the reinvestment of profits realized by the foreign enterprise, without requiring a particular authorization, for an amount not exceeding, per annum, five percent of the respective enterprise. In these cases the obligation to register said investment shall continue to apply."

¹²⁸It would also be convenient to define the term profit. See Council of the Americas, *supra* n. 2 at 56.

¹²⁹See S. Rose, *supra* n. 47 at 12.

¹³⁰*Id.*

¹³¹Article 1(a)(ii), Andean Code.

¹³²See F. Salazar Santos, *Una Visión General del Grupo Andino*, 93 BOLETIN DE LA INTEGRACION, INTAL, Buenos Aires, 1973.

¹³³Article 7, Andean Code.

¹³⁴Article 8, Andean Code.

¹³⁵Article 9, Andean Code.

¹³⁶Article 10, Andean Code.

¹³⁷Article 7, Andean Code.

¹³⁸COMITE DE INVERSIONES Y TECNOLOGIAS EXTRANJERAS (CITE), MINISTERIO DE ECONOMIA Y FINANZAS, MANUAL DE TRATAMIENTO AL CAPITAL EXTRANJERO, Lima, 1973, Section 3.4.

¹³⁹Article 14, Andean Code.

¹⁴⁰See M. Guerrero, *supra* n. 2 at 249.

¹⁴¹Article 14, Andean Code.

¹⁴²Article 16, Andean Code.

¹⁴³Article 15, Andean Code.

¹⁴⁴Guerrero, *supra* n. 2 at 263.

¹⁴⁵*Id.* at 249.

¹⁴⁶Article 17, Andean Code.

¹⁴⁷For a comparative analysis see S. Rose, *supra* n. 47, but for Peru see Decree-Law 19470 which suspended the enforcement of article 17 of the Andean Code.

¹⁴⁸See Decree-Law 19262 in Perú which allows such issuance for all industrial enterprises. However, it must be noted that all of these enterprises are obliged to become mixed in accordance with Decree-Law 18999.

¹⁴⁹Article 18, Andean Code.

¹⁵⁰See UNITED NATIONS, *THE ACQUISITION OF TECHNOLOGY FROM MULTINATIONAL CORPORATIONS BY DEVELOPING COUNTRIES*, U.N. E. 74, II, A, 7, New York, 1974. See also C. VAITSOS, *LA COMERCIALIZACION DE TECNOLOGIA EN EL PACTO ANDINO*, IEP, Lima, 1973.

¹⁵¹Article 54, Andean Code.

¹⁵²Article 19, Andean Code.

¹⁵³Unless otherwise indicated, these prohibitions are contained in Article 20, Andean Code.

¹⁵⁴Article 20, Andean Code.

¹⁵⁵Article 51, Andean Code.

¹⁵⁶*Id.*

¹⁵⁷Unless otherwise indicated, these prohibitions are contained in Article 25, Andean Code.

¹⁵⁸Article 51, Andean Code.

¹⁵⁹*Id.*

¹⁶⁰Article 24, Andean Code.

¹⁶¹Article 21, Andean Code.

¹⁶²For the rationale of this provision see comment n. 78 *supra*. It is further asserted that the marginal transfer cost for the technology, within the MNE, is frequently equivalent to zero. (Guerrero, n. 2 *supra*, at 246.)

¹⁶³Article 21, Andean Code.

¹⁶⁴Information from the Comité de Inversiones y Tecnologías Extranjeras (CITE), Ministerio de Economía y Finanzas (May, 1974).

¹⁶⁵S. Rose, *supra* n. 47 at 12.

¹⁶⁶The text of Decision 84 appears in 13 I.L.M. 1478, November 1974.

¹⁶⁷Their prices are still fixed arbitrarily within the MNE and their marginal costs are much more frequently equivalent to zero. See n. 79 *supra*.

¹⁶⁸The following comments are condensed from the review published by INTAL, 110 BOLETIN DE LA INTEGRACION 384, Buenos Aires, 1975.

¹⁶⁹The text of Decision 85 appears in 13 I.L.M. 1489, November 1974.

¹⁷⁰For a thorough analysis of Decision 85 see A. Alessandri, *Andean Group's Decision 85*, unpublished I.L.M. thesis, at Harvard Law School Library (ILS), Cambridge, May 1975.

¹⁷¹Article 51, Andean Code.

¹⁷²See D. Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, in 6 TEXAS INT'L L.E. 2 (1971), 289 290ff. But see E. Ferrero, *LOS ALCANCES DE LA PROTECCION DIPLOMATICA, CON ESPECIAL REFERENCIA AL DERECHO PERUANO*, PUC/PAD, Lima, 1971, at 204 ff. See also H. STEINER and D. VACTS, *TRANSNATIONAL LEGAL PROBLEMS*, University Casebook Series, Foundation Press, New York, at 419 ff (1968).

¹⁷³See C. Oliver, *supra* n. 2 at 773.

¹⁷⁴See Junta del Acuerdo de Cartagena, *The Andean Group*, Unidad de Comunicaciones, Lima, 1975.

¹⁷⁵See A. López-Valdez, *supra* n. 2 at 15.

¹⁷⁶See *El Comercio*, Lima, November 20 through December 15, 1974.

¹⁷⁷*Peruvian Times*, Lima, March 8, 1974, at 4.

¹⁷⁸Also known as "disinvestment" or "fade-out". See generally A. Hirschman, *How to Divest in Latin America, And Why*, Princeton Essays in International Finance, No. 76, 1969.

¹⁷⁹As noted before "national investor" encompasses the state, natural national persons, national juridical persons who do not pursue a profit making purpose, national enterprises (as defined), foreign natural persons who renounce the right to re-export abroad, and CAF. The term, however, does not include mixed enterprises.

¹⁸⁰See R. Vernon, *Multinational Enterprises in Developing Countries: An Analysis of National Goals and Policies*, Draft of the paper prepared for the United Nations Industrial Development Organization, June 7, 1974, at 2c ff. (Copy at the Harvard Center for International Affairs.)

¹⁸¹Article 28, Andean Code.

¹⁸²*Id.*

¹⁸³Official interpretation by the Junta del Acuerdo de Cartagena, 106 BOLETIN DE LA INTEGRACION, INTAL, Buenos Aires, 1974, at 559.

¹⁸⁴Article 34, Andean Code.

¹⁸⁵Article 30, Andean Code.

¹⁸⁶Article 32, Andean Code.

¹⁸⁷Article 28, Andean Code.

¹⁸⁸Article 30, Andean Code.

¹⁸⁹*Id.*

¹⁹⁰Article 36, Andean Code.

¹⁹¹Article 31, Andean Code.

¹⁹²Article 29, Andean Code.

¹⁹³The following is condensed from *supra* n. 2.

¹⁹⁴Decree Law 18350 of July 27, 1970, General Law of Industries, appears in 9 I.L.M. 1225, 1970.

¹⁹⁵See Comment, *The Peruvian General Law of Industries*, 12 HARV. INT'L L.J. 312, 1971. See also J. Pearson, *The Comunidad Industrial: Perú's Experiment in Worker Management*, 27 INTER-AMERICAN ECONOMIC AFFAIRS 15, 1973.

¹⁹⁶See Comment, *The Peruvian Social Property Law*, 16 HARV. INT'L L.J. 132, 134 (1975).

¹⁹⁷See Decree Law 19262 of January 6, 1972, 11 I.L.M. 383, 1972.

¹⁹⁸See n. 196 *supra* at 139. See also BOLETIN DE LA INTEGRACION 106, INTAL, Buenos Aires, 1974 at 559.

¹⁹⁹See *supra* n. 197.

²⁰⁰See *supra* n. 197 at 134.

²⁰¹For a detailed analysis of the effectiveness of divestment see *supra* n. 169.