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Occasionally the workings of the democratic institutions of a country are painfully slow in fulfilling their constitutionally assigned roles. Yet slow-paced as they may be, the mere fact of their function is verification that the democratic processes of which they form a part are alive and throbbing. This is particularly true when the institution in question is the judicial branch of government and takes on added and profound significance when the phenomenon occurs in Latin America, where the present state of affairs of democratic institutions is deeply disturbing. The Supreme Court of Colombia, a vital and truly independent branch of the Colombian Government, has recently handed down a decision which apparently will be the final and authoritative pronouncement in the protracted series of battles over the constitutionality of the *Acuerdo Subregional Andino,* or *Acuerdo de Cartagena,* more commonly referred to as the *Pacto Andino* (Andean Pact). In none of the member countries has the Pact been subjected to the intense judicial scrutiny it has undergone in Colombia.

On May 26, 1969 in the city of Bogotá, the representatives of Bolivia, Chile, Colombia, Ecuador and Peru signed the *Acuerdo de Cartagena.*[1] The purpose of the Pact is to bring about the economic integration of the subregion covered by the territories of the member countries.[2] The Pact provides for mechanisms by means of which the member countries are bound by the rules issued by agencies of the Pact such as the Commission (made up of plenipotentiary representatives of the member countries) which is the chief legislative branch of the Pact, and the *Junta* (Technical Secretariat) comprised of three persons who must be citizens of the member countries but who are required to act in a non-representative capacity. Among the main functions of the *Junta* are to propose projects for Commission approval, to determine whether acts by individual member countries constitute illegal restrictions on intra-Pact imports.

Almost from the very inception of its juridical life the Andean Pact was subjected to strenuous tests of constitutionality before Colombia's highest tribunals. Some of the tests proved successful, resulting in a general uncertainty within the private sector as to whether the Pact was part of the law of Colombia or not. Particularly disquieting were the doubts created as to the legal existence of a number of Commission resolutions

referred to, in Pact terminology, as Decisions including the much discussed and debated Decision 24 "A Common System for Treatment of Foreign Capital, Trademarks, Patents, Licenses and Royalties."[3]

The first test of constitutionality was brought in Colombia's Council of State[4] and the second before the Supreme Court.[5] In both instances the courts refused to rule on the cases for lack of jurisdiction.

When by Decree 1299 of June 30, 1971 the Government attempted to make the Cartagena Agreement part of the internal law of the country, it too was submitted to a judicial test of constitutionality. On January 20, 1972 the Supreme Court handed down its judgment. It found that Decree 1299 was in fact unconstitutional on the basis that the Executive Branch had usurped legislative power since the government had acted by decree without first seeking legislative ratification. The Court, in substance, distinguished between the Government's signing of the Cartagena Agreement by which it joined the Market, and its enactment of the ANCOM Code, on the grounds that the former constituted an international act, which the President was authorized to implement by executive agreement, whereas the latter was a matter primarily of domestic concern and required legislative approval.

The Court's action wiped the Andean Code off the books as far as Colombian law was concerned. As a result, the pre-Andean Code rules for foreign investment[6] became governing enactments once more.

Through the device of new regulations expanding Colombia's former foreign investment laws, the Executive quickly revived a substantial number of the Andean Code provisions.

The first of these regulations, promulgated by Presidential Decree 1234 of July 18, 1972, re-introduced (in somewhat modified form) most of the Andean Code rules, governing approval of license and technology agreements for royalty remittance purposes.[7] The second, Resolution 17 of July 19, 1972 of the National Economic and Social Policy Council, re-introduced (in still more modified form) various other Andean Code rules, including the "fade-out" requirements (limited to new enterprises), as well as setting forth detailed rules for calculating the net investment value for purposes of determining reinvestment, profit remittance and capital repatriation ceilings.

After lengthy Congressional debates and hearings on the Pact and its ancillary laws, the Colombian Congress on April 14, 1973 passed Law 8 whereby it approved the Pact. This was then followed by the Government's

adoption of the Foreign Investment Decisions 24, 37 and 37-A by Decree 1900 of September 13, 1973. In adopting the Pact, Congress imposed a number of conditions and directions addressed to the Executive Branch.

a) The National Government was authorized to put into legal effect the decisions of the Pact Commission and *Junta* that did not modify existing domestic legislation nor were legislative subject matter.

b) Pact decisions would, on the other hand, have to be submitted to Congress for approval whenever the subject matter covered by them was within the jurisdiction of Congress, when they modified existing legislation or when the Government had not been properly empowered with legal authority.

c) The Government was required to solicit the prior views of a special Congressional Committee before approving Commission Decisions relating to certain matters such as, modifications of the Cartagena Agreement and programs of harmonization of the instruments which regulate the foreign trade of the Pact members.

In an action brought before the Supreme Court, the Tribunal was asked to declare unconstitutional the conditions and restrictions imposed on the Executive Branch by Congress in Law 8. In a decision of February 27, 1975 the Court found that it had jurisdiction to hear the case despite the fact that there existed a string of Supreme Court decisions dating back to 1914 holding that the Court had no jurisdiction to hear cases in which claims are made as to the unconstitutionality of laws approving public treaties. The Court brushed past these decisions holding that in the instant case none of the clauses of Law 8 which are claimed to be unconstitutional in fact approve any treaty but rather are aimed at regulating the effects of the measures which might be adopted by the Commission and the *Junta*. To some this is a very narrow view of the scope of prior decisions and may very well have reflected a desire to state the final word on the constitutionality of the Andean Pact.

The Court proceeded to restate the Constitutional principles it found decisive in disposing of the issues in the case.

1. Once a treaty has been lawfully entered into, it rests with the Executive Branch to determine which are the means most efficacious for fulfilling the treaty obligations. Consequently, paragraph 3 of Art. 2 of Law 8 was held unconstitutional in that it required that Commission decisions be submitted to Congress for approval and implementation when they involve matters within the jurisdiction of the Legislature.

2. International treaties signed by the President and approved by Congress are binding.[8] Once so approved a treaty has the force of law and cannot be denied recognition, not even by laws enacted subsequent to the one approving the treaty. It follows that treaties are of higher rank and force than simple legislative acts, including the very act by which the treaty is approved. In view of these principles Art. 2 of Law 8 was found unconstitutional in that it contradicted the Andean Pact by requiring certain conditions be met before Pact decisions could become operative in Colombia e.g. prior congressional approval of decisions which modify existing internal legislation.

3. The Constitution provides that the State may, through legally adopted treaties, bind itself to "the creation of supra-national institutions whose objective is to promote and consolidate economic integration with other States."[9] When such institutions are created, as in the case of the Commission and *Junta*, they have the power to dictate regional rules hierarchically superior to internal law of Colombia. For this reason also the Colombian Legislature had no authority to subject Commission of *Junta* decisions to the requirement of prior congressional approval regardless of their effect on local legislation.

Is one to conclude from these unequivocal terms that regardless of what determinations or decisions are made by the Andean Pact Commission and *Junta*, Colombia is bound thereby? The Court is careful to point out that such is not the case.

> When member countries of the Andean Zone or the Pact agencies themselves attempt to impose on other members conduct which they believe to be violative of the Cartagena Agreement, they may and should recur to the means which the Agreement provides for resolving differences over the interpretation or meaning of the Commission's decisions,[10] or the various appropriate international remedies, if they are inadequate.

Of particular interest in this connection is the Court's statement with respect to recourses available within the normal Colombian procedural system:

> When, as has been indicated, national acts which carry out and execute Andean decisions are reputed to be contrary to superior rules of Colombian law, legal control over them may be exercised by the correctional processes available and applicable in the country.

The proposition the Court appears to be setting forth is that it is not possible to question the legality of an Andean Pact decision *per se* through the normal procedural channels, however when the decision is internally implemented by a local decree or law then the full range of national controls over legality and constitutionality are available. If this is the meaning of the foregoing language then the degree of definitiveness of Andean Pact decisions within Colombia may be considerably lessened, given the country's penchant for strict constitutional control of laws.

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NOTES

[1]Venezuela joined the Pact subsequently.

[2]Art. 1 of the Pact states that:
The objectives of the present Agreement are to promote the balanced and harmonic development of the Member Countries, to accelerate their growth through economic integration, to facilitate their participation in the integration process foreseen in the Treaty of Montevideo, and to establish favorable, conditions for the conversion of LAFTA into a common market, all of this with the final aim of achieving a persistent improvement in the standard of living of the inhabitants of the Subregion.

[3]See Schliesser Restrictions on Foreign Investment in the Andean Common Market, in 5 The Int'l Law 3 (1971), Perenzin, Regulation of the Andean Investment Code: Colombia, in 4 Lawyer of the Americas, L.J. 15 (1972).

[4]Council of State Decision of June 5, 1971.

[5]Supreme Court Decision of July 27, 1971.

[6]Decree Laws 444 and 688 of 1967.

[7]Those contained in Decree 1299 of 1971, Arts. 19 and 20 and Decree 2153 of 1971, Arts. 23, 24, 27, 28, 29 (last sentence) and 30-3.

[8]Constitution, Art. 76-18 and 120-20.

[9]Constitution Art. 78-18.

[10]Art. 23 of the Cartagena Agreement provides:
It shall correspond to the Commission to carry out the procedures of negotiation, good offices, mediation and conciliation that may be necessary when discrepancies arise over the interpretation or execution of the present Agreement or of the Decisions of the Commission.

If agreement is not reached, the Member Countries shall subject themselves to the procedures established in the "Protocol for the Solution of Controversies" signed in Asunción on September 2. 1967 by the Foreign Ministers of the Contracting Parties of the Treaty of Montevideo.

For the purposes contemplated in the third clause of Art. 16 of that Protocol, the Member Countries declare that it shall cover all matters included in the present Agreement and in the Decisions of the Commission.

For the purposes of Art. 36 of the said Protocol, the Member Countries commit themselves to take steps to attain its ratification as rapidly as possible.