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I. INTRODUCTION

The Andean Group (Andean Common Market or ACM) was organized as a subregion of the Latin American Free Trade Association (LAFTA) under the Agreement of Cartagena[1] in 1969. ACM represents a new hope in Latin American economic integration and is certainly the most positive stride forward since 1960. The ACM subregional effort is probably more significant, however, for the substance of its program than for the fact that it is composed of a viable group of countries sharing similar dissatisfactions with the evolution of LAFTA. In an ambitious "chronology,"[2] the ACM signatories pledged their new organization to a concentrated program of drafting regulations to control two of the most sensitive areas of

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1. Acuerdo de Cartagena, signed at Bogotá, Colombia, 26 May 1969 [hereafter Acuerdo]. An English translation may be found in 8 INT'L L. MATERIALS 910 (1969). The subregional agreement was approved by the Permanent Executive Committee of LAFTA in its *Resolución* 179 of 9 July 1969, as compatible with the Treaty of Montevideo. The printed record of the discussions and resolution in DERECHO DE LA INTEGRACIÓN, No. 6 at 118-36 (1970), indicates that the issue of subregional integration was settled beforehand by *Resoluciones* 202, 203 and 222 of the contracting parties to LAFTA.

2. For a concise presentation of ACM's deadlines, see BUSINESS LATIN AMERICA *The Andean Common Market* 37 (published by BUS. INT'L 1970).

operation that the subregional effort at development through integration is likely to encounter: *viz.*, foreign investments[3] and the multinational corporation.[4] Both are matters of vital concern to the developing countries of the Third World.[5]

In some ways, the first years of operation may have been the easiest for ACM, despite its commitment to drafting rapidly regulations sufficient to deal with the complex problems of foreign corporate investment. Following the establishment of a functioning bureaucracy, ACM entered a brave initial period of hope. Yet drafting policy standards, while not a simple matter, may be vastly more simple than the task of making them work. Regardless, one notable aspect of the ACM's drafting efforts is that their product may represent the best indicia of current Latin American attitudes and policies. If at all effective, ACM regulations should establish models for years to come.

The case of foreign investment provides a noteworthy illustration. A recent wave of expropriations in South America has foreign investors concerned and edgy,[6] but even the expropriating countries are not happy with the undefined state of affairs that exists. Decision 24 of the ACM, along with its amendments, may represent the most concrete resolution of the foreign investment problem possible in Latin America today, and perhaps even the truest consensus of the entire Third World. This treatment of the ACM's Rules on Foreign Investment will be developed with these considerations in mind; *i.e.*

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3. *See* Decision 24 of the ACM Commission, promulgated 31 December 1970. Decisions 37 of 24 June 1970 and 37-A of 17 July 1970 amended the original regulations. Properly titled Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties [hereafter Common Regime], the English translation of the final version is available in 11 INT'L L. MATERIALS 126 (1972). The official decrees of each country in approving the Common Regime are collected in GRUPO ANDINO, No. 9 (1971).

4. *See* Decision 46 of the ACM Commission, approved 31 December 1971, to enter into effect by 30 June 1972. *See generally* Peruvian Times, Dec. 31, 1971, at 3.

5. *See, e.g.,* C. FULDA & W. SCHWARTZ, REGULATION OF INTERNATIONAL TRADE AND INVESTMENT: CASES AND MATERIALS 479-536 (1970).

6. *See, e.g.,* Wesley, *Expropriation Challenge in Latin America: Prospects for Accord on Standards and Procedures,* 46 TUL. L. REV. 232 (1971); *Symposium –Foreign Investment in Latin America,* 11 VA. J. INT'L L. 175 (1971); Eder, *Expropriation: Hickenlooper and Hereafter,* 4 INT'L LAWYER 611 (1970); *Foreign Investment in Latin America: Past Policies and Future Trends* (Proceedings of a Regional Meeting of the American Society of International Law, published in 1970 by VA. J. INT'L L.).

ACM Decision 24 and amendments are much more than an isolated effort at solving a unique problem. Rather, they will be viewed here as a benchmark and perhaps a landmark piece of legislation in an area of vital importance to the development of the international economy.

A. *The Overall Scheme*

The keynote of the new regulations is one familiar to those who have followed discussions of the proper role for foreign capital in developing nations. As stated in the preamble to the Andean Foreign Investment Code,

> The investment of foreign capital and the transfer of foreign technology constitute a necessary contribution to the development of Member Countries . . . in the measure in which they really constitute a positive contribution . . . [*i.e.*] stimulate capital formation in the country where established, facilitate extensive participation of national capital in that process, and not create obstacles to regional integration.[7]

The refrain is not entirely new. It is perhaps significant that one of the chief consultants and architects of the ACM's policy, Miguel Wionczek, is from Mexico, a country that has had a restrictive policy toward foreign investment for almost a generation.[8]

To assure that the policy described above is given concrete force, the concept of "fade-out" has been written into the ACM regulations. Basically, fade-out means that foreign investors, in order to take advantage of the subregion's duty-free trade, must sell control of their enterprise by a progressive divestment over fifteen years (twenty years in Bolivia and Ecuador) after making the original investment.[9] Hardened cynics among foreign investors might observe that this is not so far from current practice, where expropriation has occasionally followed the establishment of a foreign enterprise by a generation or less.[10]

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7. Translation from 11 INT'L L. MATERIALS 126-27 (1972), with some change in word order.

8. *See, e.g.*, BOHRISH & KÖNIG, LA POLÍTICA MEXICANA SOBRE INVERSIONES EXTRANJERAS (1968); MENDEZ SILVA, EL RÉGIMEN JURÍDICO DE LAS INVERSIONES EXTRANJERAS EN MÉXICO (1969); RAMOS GARZA, MÉXICO ANTE LA INVERSIÓN EXTRANJERA (1971); WRIGHT, FOREIGN ENTERPRISE IN MEXICO (1971).

9. Common Regime, arts. 27-37.

10. For example, Gulf Oil was recently expropriated in Bolivia 16 years after negotiating its entry into that country; Gulf Sulfur was forced to sell to domestic capital about 20 years after beginning operations in Mexico; and Chile has most recently nationalized several foreign investments of both short and long standing.

Regardless of how true this may be, the new ACM plan establishes rules for an ordered process of progressive transfer of control rather than leaving the matter to abrupt and sometimes uncompensated expropriation.

Although the fade-out provisions have attracted most attention from foreign investors,[11] the drafters of the ACM's new regime probably were more concerned with writing strict controls on the transfer of technology in an attempt to cut off unconscionable hidden profits and exploitation.[12] Nonetheless, the fade-out provisions with their specific period of years and percentages of divestment seem particularly amenable to the sort of extensions, modifications, and delays that often accompany time periods set out in Latin American legislation. In addition, the countries of the ACM have invoked an article of the Common Regime allowing each state individually to exempt oil and gas, banking, insurance, utilities, transportation, mass media and distribution of basic products from the regulations' operation.[13] This should have the effect of concentrating the impact of the ACM regulations in the area of manufacturing, and may heighten their role as an experimental approach to the foreign investment problem by limiting their area of application.

While the ACM Common Regime represents a rallying point for economists and planners of various camps, it also raises problems of special interest to the lawyer. The first real confrontation between national and putative supranational systems in Latin America has occurred on its account.[14] For instance, the harmonization of national laws is especially difficult where the range of domestic attitudes toward foreign investment runs from Colombia's friendly welcome to Peru's new nationalism to Chile's militant socialism. If the participants in the subregion cannot administer a harmonious effort, the subregion may fail to accomplish even a viable beginning in its integration efforts.[15]

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11. *See, e.g., How Will Multinational Firms React to the Andean Pact's Decision 24?*, 25 INT.-AM. ECON. AFFAIRS 55 (1971); Wionczek, *U.S. Reaction to the Andean Group System for Treatment of Foreign Capital,* 21 COMERCIO EXTERIOR 27 (1971); May, *An Analysis of the "Common Regime for Treatment of Foreign Capital, Trademarks, Patents, Licenses, and Royalties,"* (published by the Council of the Americas 1970).

12. Common Regime, arts. 14-26.

13. *See* text accompanying note 96 *infra.*

14. *See* notes 106-15 *infra* and accompanying text.

15. Inner quarrels are cropping up already. *See* Peruvian Times, April 7, 1972, at 3, reporting that Ecuador and Bolivia have complained that Peru and Chile have violated their obligation to remove all non-tariff duties.

B. *Ethos for the Common Regime*

Although this study is aimed at analyzing the basic scheme of ACM's investment rules, with due attention to their legal ramifications and to their effects upon Latin America and its overall integration effort, some background discussion of the economic bases for the ACM Commission's decision is probably necessary for a thorough understanding of the problem. The ACM Common Regime has crystallized a welter of evolving thought concerning foreign investment in the Third World generally and in Latin America in particular. The primary concern of the Andean Group planners has been for industrial planning and development from the conception of the subregional idea.[16] Industrial growth in the ACM is of course impossible without substantial foreign investment and technology, and ACM's policy makers know it. LAFTA not only slighted the industrial programming component of its integration effort in favor of ineffective efforts at creating free trade, but made it clear in 1967 that it would not presume to dictate policy on foreign capital to its eleven member states. The Declaration of American Presidents issued at Punta del Este gave its unequivocal endorsement to the integration effort as a means to development, but noted: "[f]oreign private enterprise will be able to fill an important function in assuring achievement of the objectives of integration within the pertinent policies of each of the countries of Latin America."[17]

The Andean subregion's leaders were already on record as favoring closer regional supervision and control of foreign investment for its "coordination with general development plans."[18] By 1969, in the negotiations toward the final treaty for subregional integration, the drafters' attitude was sufficiently well-defined that they could express a "common policy" of preference for "authentically national" capital from member countries, while at the same time recognizing that

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16. *See, e.g.,* the statements of Salvador Lluch Soler, a Chilean long involved in Latin American integration who has served as Executive Secretary of LAFTA and as a member of the ACM Junta, in *Pacto Andino: Alianza de los Pesos Medianos,* PANORAMA ECONÓMICO, No. 245 at 7 (1969); and *El Acuerdo de Integración Subregional Andino,* apparently an internal document issued by the ACM. A more official version is found in *Orígenes del Régimen Común,* GRUPO ANDINO, No. 1 at 3 (1971).

17. Declaration of the Presidents of America, 6 INT'L L. MATERIALS 535, 537 (1967).

18. Declaration of Bogota, 16 August 1966, in BANCO INDUSTRIAL DEL PERÚ, ACUERDO DE INTEGRACIÓN SUBREGIONAL ANDINO 59, 66-67 (1969).

foreign capital and technology were necessary and "should receive assurances of security consistent with the extent to which they constitute a positive contribution."[19] This was the official policy carried into the Cartagena Agreement of 1969 which created the ACM, along with the obligation to supplement the policy with a regulatory scheme by December 31, 1970, slightly more than nineteen months after the agreement was signed.[20] Although the timetable was swift, and many countries, as well as foreign companies, feared the results of precipitous action,[21] the ACM planners were able to draw on substantial existing expertise and thought, much of it originating in the United States.[22]

The economic theory reflected in the Common Regime is neither new nor unorthodox. It has been developed in recent years by many Latin American economists.[23] In essence, this theory, which has been

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19. Declaration of Lima, 24 November 1969. Similar attitudes were expressed for all of Latin America in the Concensus of Vina del Mar. *See* 8 INT'L L. MATERIALS 974 (1969); Rogers, *United States Investment in Latin America: A Critical Appraisal,* 11 VA. J. INT'L L. 246 (1971).

20. Acuerdo, art. 27.

21. A good summary of investors' reaction is that in Peruvian Times, April 23, 1971, at 6; Wionczek, *supra* note 11.

22. A complete list of those individuals most directly involved in the actual drafting is in *Orígenes del Régimen Común,* GRUPO ANDINO, No. 1 at 4-5 (1971). In addition, discussions and studies obviously drew heavily on the work of Raymond Vernon and his team at the Harvard Business School, most notably VAUPEL & CURHAN, THE MAKING OF INTERNATIONAL ENTERPRISE (1969). Another influential source of policy considerations is Hirschman, *How to Divest in Latin America and Why,* in ESSAYS IN INTERNATIONAL FINANCE, No. 76 (1969).

23. For those whose interest is more general, the author found two recent articles especially helpful, in addition to Hirschman, *supra* note 22: Sunkel, *Big Business and "Dependencia,"* 50 FOREIGN AFFAIRS 517 (1972); García, *Industrialización y Dependencia en América Latina,* 38 TRIMESTRE ECONÓMICO 731 (1971).

There is an abundance of material on the subject. Among the more prominent sources are: CARDOSO & FALETTO, DEPENDENCIA Y DESARROLLO EN AMÉRICA LATINA (1969); DOS SANTOS, EL NUEVO CARACTER DE LA DEPENDENCIA (1969); FURTADO, LOS ESTADOS UNIDOS Y EL SUBDESARROLLO DE AMÉRICA LATINA (1971); JAGUARIBE, LA DEPENDENCIA POLÍTICO-ECONÓMICA DE AMÉRICA LATINA (1970); SUNKEL & PAZ, EL SUBDESARROLLO LATINOAMERICANO Y LA TEORÍA DEL SUBDESARROLLO (1970). In addition, the Latin American journals contain many articles by these and other authors on the subjects of foreign investment and *dependencia.*

accepted by the ACM's planners, is that Latin American foreign investment in a majority of cases has evolved in such a way as to create and perpetuate a crippling dependency on the technologically advanced investing nations; *i.e.* the United States. Perhaps as good a synthesis of orthodox "dependent industrialization" economics as may be found is that of Antonio García:

> [It is a] process characterized by . . . diversification of the productive sector and the instigation of new participant classes in the limited spectrum of traditional Latin American society. . . . [B]ut at the same time more basic structures are not changed and instead new, dynamic, and subtle mechanisms of domination and dependency are introduced. . . . [I]ndustrialization has generated technological and institutional modernization, accelerated urbanization and concentration of population, and modified the physical image of Latin America, but at the cost of establishing an economy split by technical dualism, preserving internal (latifundista) structures of domination, not altering the colonial foundations of the primary-exporter economy, and adding to traditional forms of financial and commercial dependence a new dependency: technological-financial colonialism. [24]

Although developed and elaborated by many economists, the new industrial colonialism of which García writes was applied to the task of drafting a common regime for foreign investment and technology in the ACM by Miguel Wionczek, the Mexican economist. Without attempting to criticize Wionczek's formulation or to classify it according to its proper place in the mass of writing on dependent industrialization, I offer here a brief extract from the documents—prepared by Wionczek and Constantin Vaitsos—that served as basic reference for the drafters of the Andean Common Regime. [25]

Wionczek begins with the proposition that foreign investment has moved over the past decade solidly into manufacturing sectors in

24. García, *supra* note 23, at 731.

25. It may be unfair to give Wionczek as much credit as I have here. In any case, he has quite clearly assumed primary responsibility for explaining the bases of the ACM's foreign investment policy. His works include: *Hacia el Establecimiento de un Trato Común para la Inversión Extranjera en el Mercado Común Andino,* 38 TRIMESTRE ECONÓMICO 477 (1971); *U.S. Reaction to the Andean Group System for Treatment of Foreign Capital,* 21 COMERCIO EXTERIOR 27 (1971); and a series of internal documents prepared for the ACM Junta, including *El Grupo Andino y la Inversion Extranjera Privada* (1970), *Problems Involved in the Establishment of a Common Agreement for Foreign Investment in the Andean Common Market* (1970), *Latin American Economic Integration and Foreign Private Investment* (1970) (with Saavedra), and *La Banca Extranjera en America Latina* (1970). *See also* Vaitsos, *Strategic Choices in the Commercialization of Technology: The Point of View of Developing Countries* (1970).

preference to traditionally-favored sectors such as mining, communications, utilities and commerce. This investment has not taken integration seriously to date; it has not expanded its planning to contemplate regional and subregional markets. On the contrary, according to the theory, it has in fact been a counterweight to economic integration insofar as it is apt to move behind the domestic tariff walls of each individual country and serve the national market, with neither desire nor plans to go beyond. This has led to repetition of the same sorts of investment and installation in several countries, rather than attempts to rationalize manufacture of a given item by maximum efficiency installations in a single country designed to serve a given area.

Wionczek and the other economists who have analyzed this phenomenon are not impressed by the data that indicate that the return on foreign investment is lower in Latin America than in any other part of the Third World.[26] They tend to discount the net profit figure and look to hidden profits such as those taken by overpricing on sales of capital goods and assembly parts by parent companies to foreign subsidiaries, charges for services and technological transfers (often by requiring payment of royalties on patents and processes not used, as a condition for the use of a necessary patent or process), exhorbitant loans and financing charges by the parent corporation to its subsidiaries, and profits remitted to the parent but discounted by a revaluation of assets in the host country. Wionczek notes that the return on Latin American investment belies the amount and breadth of involvement and concludes that the "fact that every attempt to investigate foreign investment in Latin America finds itself before a wall of silence on the part of the companies about their cost accounting [which] suggests that very strange things—to put it mildly—are happening in this respect."[27] In addition to the problems of access to hard and reliable data, few studies exist regarding the operations of foreign enterprises in Latin America or the subregion, perhaps because Latin American countries have had neither the bargaining power to require disclosure nor the expertise to know what to ask for and how to analyze it. However, Wionczek and his brethren

26. The most commonly cited sources of returns on investment in Latin America are the U.S. Department of Commerce and the Council for the Americas. *See* Peruvian Times, April 23, 1971, at 6; May, *The Effects of United States and Other Foreign Investments in Latin America,* (published by the Council of the Americas 1970).

27. Wionczek, *Problems Involved in the Establishment of a Common Agreement for Foreign Investment in the Andean Common Market, supra* note 25, at 14.

are not vindictive.[28] It is not punishment for past sins they seek in exposing these practices but rather guidelines for the future.

The scheme that has been conceived and promulgated by the ACM planners is a *common* regime that depends for its administration upon the national government of each member state in the subregion; it is not a supranational regime. Individually, no Andean country has had either the clout or the expertise necessary to drive a hard bargain with foreign investors. In large part, they have been forced to rely on the blunt instrument of expropriation to assert themselves. Now the subregion has set out to instigate a comprehensive scheme of controls calculated to bend foreign investment to the needs of each country and the subregion. To accomplish this goal, the drafters of the Common Regime were concerned with coordinating answers to the following inter-related problems:[29]

(1) planned growth of the various industrial sectors to provide balanced development throughout the subregion and in each country;
(2) decisional control of foreign enterprise;
(3) foreign acquisitions of domestic enterprise;
(4) utilization of national sources of finance by foreign enterprise;
(5) levels of dependency associated with the introduction of foreign technology;
(6) regulation of repatriation of capital and profits; and,
(7) policies toward subregional multinational corporations and mixed (foreign and national capital) enterprises.

II. Integration, Foreign Investment and Development

The planners of the Andean Group and the drafters of the Common Regime were concerned primarily with insuring that foreign investment play a supporting, rather than a negative, role in integration and economic development of the subregion. To the extent that foreign enterprise has had undesirable effects on development goals of individual countries or the efforts at integration, all blame may not be laid at the doorstep of foreign companies. In fact, foreign investors may have behaved in a way that showed they were

28. *But see* Pazos, *El Financiamiento Externo de la América Latina,* 38 TRIMESTRE ECONÓMICO, No. 150 (1971).

29. This is a hybrid list gleaned primarily from Wionczek and Guerrero, *El Régimen Común de la Inversión Extranjera en el Grupo Andino,* DERECHO DE LA INTEGRACIÓN, No. 8 at 11 (1971).

aware of and responsive to changing currents of economic legislation in Latin America. After World War II, much of the foreign investment in the Andean countries was concentrated in traditional areas such as petroleum, mining, transport and communications. These countries switched to emphasis on import substitution by drafting protectionist systems behind which both foreign and domestic investment could take shelter against outside competition. Typically, "industrial development" laws provided that progressively greater percentages of national inputs had to be utilized in the production of tariff protected items, but placed no restrictions on foreign ownership or control.[30]

By the time the Agreement of Cartagena was signed, foreign investment was entrenched solidly in the manufacturing sector—*viz.*, automobiles, processed food items, chemicals, metallic products and similar enterprises— of Andean economies. These import substituting enterprises undoubtedly have had deleterious effects on development,[31] but often only because they were behaving rationally in the light of existing national laws and conditions. Investments in the manufacturing sector often involved the installation of inefficient plants since investors tended to be concerned primarily with taking advantage of tariff barriers to reach a previously restricted market. In many cases, where plants were simple assembly centers, even the import substitution goal was essentially unrealized because import of finished products was replaced by import of most component parts. Prices were not forced downward on items manufactured in an inefficient manner by assembling mostly imported parts behind high tariff walls. In addition, there was often little chance of export because if costs had not foreclosed successful international competition, planners of the foreign investment often did not contemplate exports since they did not wish to compete with their own subsidiaries in other countries.

Albert Hirschman underscores other, perhaps more subtle, effects of this phenomenon. He notes that the presence of foreign investment

30. *See, e.g.*, Industrial Development Law, Ley No. 13270 of 30 November 1949 (Peru); D.F.L. 258 of 30 May 1960 (Chile).

31. *See* sources cited notes 23, 25 *supra*. *See also Orígines del Régimen Común*, GRUPO ANDINO, No. 1 at 5-8 (1971); Ikonicoff, *Las Inversiones Extranjeras en América Latina*, GRUPO ANDINO, No. 2 (1971). Able syntheses include Grunwald, *Foreign Private Investment: The Challenge of American Nationalism*, 11 VA. J. INT'L L. 228, 234-36 (1971); Guerrero, *supra* note 29, at 11-12.

32. Hirschman, *Como y Por Que Desinvertir en la América Latina* 4-5 (ACM internal version; published versions unavailable to author).

and technology may stunt the incipient growth of a country by creating permanently missing factors of production. Domestic enterprises might respond if forced to provide missing elements, but often they will rely instead on the foreign sector to supply them. In other words, foreign investors ultimately compete with budding or potential domestic enterprises and prevent rather than complement their development. Since the competition is hardly between equals and because foreign investment seeks the dynamic sectors of the economy, domestic industry consistenly loses and is shut off from the most promising areas of endeavor.[32]

Another problem is that where important segments of any sector are controlled by foreign capital, "irrational" government behavior toward the sector may result.[33] First, foreign interests may tend to tread more softly in the host country than nationals would, thus providing less effective communication with the government. Secondly, the government may trust foreign interests less or discriminate against them for political reasons even when they do press for legitimate development measures. Because the government may be concerned that it not benefit or strengthen the position of the foreign sector, "many policies which are aimed to 'squeeze' the foreigner, have proved irrational from an economic development point of view."[34] Finally, countries often have been most occupied in recent years with establishing sovereignty over their basic resources in the traditional areas of foreign investment, so that they may have devoted less time to understanding and dealing with circumstances and effects of more recent trends in foreign investment.[35]

From its inception, the ACM, with its emphasis on balanced industrial planning and development, has turned its focus on the dynamic manufacturing sector. As contemplated in the Agreement of Cartagena,[36] the ACM Commission has officially set aside about 600 products to be reserved to the subregion's Sectorial Programs of Industrial Development.[37] Consistent with the expressed aims of industrial programming included in ACM's basic treaty, the sectorial programs must serve the following objectives: expansion, diversification and specialization of the subregion's industry; maximum use of available resources; greater economies of scale, productivity and efficiency; and equitable distribution of benefits among participating

33. Hirschman, *supra* note 32, at 7-9.
34. Grunwald, *supra* note 31, at 235.
35. *See* Guerrero, *supra* note 29, at 12.
36. Acuerdo, arts. 33-35.
37. Decision 25 of 31 December 1970.

countries.[38] The reserved products fall into roughly seven sectors, all solidly part of the dynamic manufacturing part of the subregional economy: basic metallurgy, nonmetallic minerals, chemicals and petrochemicals, pulp and paper, auto parts and capital goods, electrical and electronic products and food processing.[39] By the end of 1973, the ACM should have drafted plans assigning the location of industries to various ACM member states.[40] In addition, 73 items currently not produced in any of the ACM countries have been reserved—34 to Bolivia and 39 to Ecuador.[41]

To make operational its ambitious attempt at planning, the ACM almost certainly must rely on strong cooperation from foreign investment. The subregion alone probably cannot muster sufficient resources, capital, technology, and administrative expertise. Thus it wants and needs foreign investment, but is wary of its past performance and effects and is determined to draft wise controls to turn foreign enterprise to the ACM's developmental ends, rather than against them.[42] Industries that have over time duplicated inefficient installations and operations in several ACM countries ought now to take a subregional view and eliminate such duplication. Another consideration is that if the Junta and Commission go about creating comprehensive plans for various products and sectors, their objectives will be served only if the entire plan is in fact carried out. Partial lack of realization can defeat virtually every concern of the plan's drafters and the subregional integration effort by skewing benefits to those countries that are best able to comply with their assigned portions of sectorial development.

The principal goal of the Common Regime is coordination of national concerns within the subregional context. Because of the sectorial and other planning activities,[43] the ACM also is assured of a

38. *See* Acuerdo, art. 32. If any were needed, renewed emphasis on the importance of industrial planning was given in the Declaration of Cuzco, 13 March 1971, signed by the Foreign Affairs Ministers of all five ACM members. *See* 20 COMERCIO EXTERIOR 7-10 (1971).

39. BUSINESS LATIN AMERICA, *The Andean Common Market* 37 (published by BUS. INT'L 1970).

40. Acuerdo, art. 47.

41. Decision 28 of 31 December 1970.

42. *See* Guerrero, *supra* note 29, at 12-13; Wionczek, *Problems Involved in the Establishment of a Common Agreement for Foreign Investment in the Andean Common Market, supra* note 25, at 39-52.

43. Examples include those that will be carried on by the Andean Development Corporation. *See Agreement Establishing the Andean Development Corporation,* 8 INT'L L. MATERIALS 940 (1969).

strong voice in subregional industrialization. The Common Regime has given responsibility and control to member countries, each of whom must set up a "competent national authority" to pass on all foreign investments, which should be authorized only after a full disclosure and justification of their projects by potential investors.[44] It is anticipated that there will be some bargaining between governments and applicants in order to achieve the sort of disclosure of the probable impact of a given project that often has been lacking in Latin American host countries.[45] Once into the host country, the foreign enterprise is subject to the Common Regime's provisions for constant vigilance and disclosure to the competent national authority which admitted it[46] of the foreign investor's operations. There is in all of these devices less of a concrete plan for development than a firm belief in the potential for strong and balanced development wherever host countries and the subregional agencies have full knowledge of performance and activities, an informational advantage Latin American planners have lacked heretofore. There are more specific limitations on national administration—*e.g.*, foreign capital may acquire existing domestic enterprise only in the case of its imminent bankruptcy and lack of domestic purchasers; and foreign enterprises may not be authorized where existing domestic enterprise "adequately covers" the activity[47]—but the overall thrust is one of confidence in the ability of national and international interests to forge an effective program within flexible and evolutionary limits when an adequate information flow has been established.

III. THE FADE-OUT

One of the primary tenets of the *dependencia* doctrine is that while foreign enterprise can fill legitimate breaches in the industrial complex of Latin American economies, it often perpetuates the breach by taking over permanent responsibility for providing the "missing" factor when potential domestic competitors succumb to the tendency not to compete with an obviously superior enterprise. Another complaint concerning foreign capital is that it has a history of

44. Common Regime, art. 2, requires that all applications must follow the comprehensive model appended as Annex No. 1 ("Guidelines for the Authorization, Registration and Supervision of Foreign Investments").

45. *See* Guerrero, *supra* note 29, at 24.

46. Common Regime, arts. 5-6, 12, 14-15, 45.

47. Common Regime, art. 3.

acquiring the more efficient and progressive domestic enterprises,[48] thus co-opting those national elements that hold the best hope of filling the breaches exploited by foreign investors.

The ACM has responded to these particular problems by including the already well-known fade-out provisions in its Common Regime.[49] It is probably the fade-out provisions, more than any other part of the Common Regime, that have led to its characterization as a scheme of "anti-foreign bias" and the work of "mainly professors and institutional advisors, whose collective attitude toward foreign investment was on the negative side at best."[50] In summary, the fade-out applies to virtually all foreign investments in the manufacturing sector[51] existing or established after July 1, 1971, and means that majority ownership and control must be progressively turned over to national or subregional capital within fifteen or twenty years, depending on whether the investment is in Chile, Colombia, or Peru or in Bolivia or Ecuador.[52] In the three larger countries, minimum standards of progressive fade-out are 15 per cent ownership and control to national investors (including public or private capital from any of the ACM countries or from the Andean Development Corporation)[53] by the time production begins, 30 per cent after no more than five years and 45 per cent after no more than ten years, and 51 per cent after no more than fifteen years.[54] Bolivia and Ecuador, due to their relatively less developed status, have a total of 22 years in which to program foreign divestment. A twenty year period begins to run two years after

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48. *See* Wionczek, *Problems Involved in the Establishment of a Common Agreement for Foreign Investment in the Andean Common Market, supra* note 25, at 7-26 (country-by-country analysis indicating that about half to a third of foreign investments in the manufacturing sectors have been acquisitions of existing enterprises in ACM countries).

49. Common Regime, arts. 27-37.

50. 18 BUS. INT'L, *Supplement to The Andean Common Market* 2 (1971).

51. An exception is made for those foreign enterprises (any business having less than 51% national investment, as defined in article 1 of the Common Regime) that do not wish to participate in the advantages of the subregional duty-free commercial traffic. Common Regime, arts. 27, 34.

52. Common Regime, art. 30.

53. Common Regime, art. 35. This is a modification of the original provision, which would have required a first refusal to the host state on each divestment. The change is probably due to Colombia's strong opposition to the original provision. *See* Peruvian Times, July 2, 1971, at 3.

54. Common Regime, art. 30. The standards set out here are the most lenient permitted. Any country may impose stricter time periods or greater percentages of divestment. *Id.* art. 33.

production begins, with 5 per cent control and ownership to be in the hands of national investors three years after beginning production, 10 per cent at nine years, and 35 per cent at fifteen years, with a final period of seven years in which to divest the last 16 per cent up to 51 per cent.[55]

All new investment must come into the ACM on the basis of an approved fade-out plan, but existing foreign investments have three years to decide whether to commit themselves to a process of divestment.[56] To take advantage of the benefits of duty reduction under the Cartagena Agreement, foreign companies must agree to fade out.[57] If they choose to divest, they must have sold at least 15 per cent of control to national capital at the end of the third year from the effective date of the Common Regime, June 31, 1974.[58] Otherwise, the time periods and percentages for fade-out are the same as for new investments, but the grace period of three years may be important. In the long run, assuming effective integration, it is unlikely that it will benefit any existing business to forego participation in the subregional program and suffer the competition of duty-free products from more efficient competitors. In the short run, however, an entrepreneur may use his three years' grace to test the climate for foreign investment in the ACM. If his evaluation is a pessimistic one, or if he has special circumstances to consider, he may find it advantageous to maintain 100 per cent control, take his short-term profits while he can and then assume a loss when forced out at some future date. In the meantime, such an investor may buy time in the hope that events or policies will shift in his favor or that the ACM program will fail to prove effective. Especially if the conditions imposed by the ACM or the country in which he is situated became less favorable to foreign investment, he may be no worse off in fifteen or twenty years than those who choose to apply for participation in the fade-out program. Indeed, he will have realized proportionately greater profits in the meantime.

In time, existing foreign investors who choose not to fade out should be the only foreign controlled enterprises in the manufacturing sectors of the ACM. Possible avenues of circumvention or entry have been carefully foreclosed. Acquisition of existing domestic enterprises

55. Common Regime, art. 30.

56. Common Regime, art. 28.

57. Common Regime, art. 27. The basis for control is through certificates of origin, which will be issued only to companies that have achieved mixed or national status (as defined in article 1) or are in the process of transforming themselves to achieve it. *Id.*, art. 24.

58. Common Regime, art. 28.

is prohibited except where bankruptcy is imminent and no national investor comes forward. Even then, the foreign investor must enter under a fade-out agreement divesting control in fifteen years or less, according to terms negotiated with the competent national authority.[59] Foreign capital may be allowed to participate in existing enterprise to increase its capital, but only so long as it does not take majority control away from national capital.[60]

Foreign enterprise has turned increasingly to internal credit to finance its Latin American operations.[61] This has proved to be a sound business practice because national banks have found established foreign investors to be better credit risks than the usual national borrower. Consequently, loans are relatively easy for the former to obtain. Moreover, inflation may create negative real interest rates—an official policy often utilized to redistribute income, but badly misapplied insofar as the redistribution is to large foreign industry at the expense of national interests. Finally, foreign enterprises may turn to local sources of credit in order to avoid utilizing precious company capital and, where the debtor has subsidiaries in several countries, it may be able to juggle finances to derive still additional benefits.[62] Under the Common Regime, however, foreign access to local credit is drastically curtailed. Under the original plan, all local credit would have been prohibited except in exceptional circumstances, but a modification before the regulations became effective allows short-term credit for new foreign investment.[63]

The sum of all the Common Regime's provisions on control, acquisitions and finance is to drive foreign investment to the negotiating table with competent local authorities of the country in which the investment would be placed. Since in many cases only one

59. Common Regime, art. 3.

60. Common Regime, art. 4. In some cases, national capital must constitute not less than 80% of control.

61. *See* M. WIONCZEK, LA BANCA EXTRANJERA EN AMERICA LATINA (1970).

62. *See* Guerrero, *supra* note 29, at 22.

63. Common Regime, art. 17. Like other provisions in the ACM regulations, this article probably reflects Peruvian legislation, in this case Decree-Law 18858 of 19 May 1971. If the ACM follows the general outline of Peru's approach, short-term credit may be permitted to the total of the company's capital and reserves, but only for loans of a year or less. When the term is over a year, short-term credit in Peru is limited to three times the value of the locally-owned portion of the enterprise. *See* Peruvian Times, July 2, 1971, at 3. The ACM will promulgate its own regulations by Commission decision. Common Regime, art. 17.

ACM country will be designated as proper for a given investment,[64] no battle of incentives should develop between member countries. By the same mechanism, the bargaining power of the ACM member with the potential investor should steadily increase since a greater market is at stake and the investor cannot seek entry through another country. Thus, the fade-out mechanism should be imposed throughout the dynamic import substitution sectors in order to assure avoidance of crippling *dependencia* by forcing the initiative on national capital.[65]

Several problems with the ACM scheme seem noteworthy. Although the theory seems viable, it ultimately depends upon the existence of sufficient national capital[66] to acquire the progressive percentages of ownership offered by foreign investors as they fade out of ACM enterprises. Wionczek estimates that in 1966-67, foreign investments in the five ACM countries totaled $3,052,000,000. Of this total, $369,000,000 was in manufacturing enterprises.[67] If foreign investors tender shares in accord with their fade-out agreements and available national captial to carry out the purchase is not forthcoming, it is hard to believe that either national or ACM authorities would insist on the sanction of article 32 of the Common Regime, which is designed to take away the benefits of the subregional integration program until the scheduled divestment is complete. More likely, some form of moratorium would be worked out.

Even if sufficient capital is available to make all fade-out purchases on time, the success of the program will still depend upon the vigor with which it is administered in each country by the "competent local authority." There are requirements in the Common Regime that will assist the individual authorities in their vigilance and control: all foreign investments, existing or new, must be registered;[68] and bearer stocks, common in the ACM, must be converted to registered shares.[69] Ultimately, however, registry, vigilance and all other elements of effective control must be generated and sustained by the national authorities. This is an area of the Common Regime that seems

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64. *See* notes 37-40 *supra* and accompanying text. *See also* Common Regime, Temporary Provision H (proscribing such competition).

65. Article 31 of the Common Regime contains the required elements of the agreement to be negotiated between national authorities and foreign investors.

66. For the purposes of figuring fade-out percentages, "national investors" include the Andean Development Corporation or investors from any ACM country. Common Regime, art. 30.

67. M. WIONCZEK, EL GRUPO ANDINO Y LA INVERSION EXTRANJERA 6-7 (1970).

68. Common Regime, art. 5, Temporary Provision B.

69. Common Regime, art. 45.

particularly amenable to ad hoc modification and shadings of application. Although the general principle that increasing national ownership and control is necessary to combat *dependencia* would probably be accepted by all ACM member countries, there is wide divergence in specific approach to foreign investment.[70] If these differences manifest themselves in varying standards applied by the national authorities responsible for enforcement, the objective of subregional planning and coordination could be defeated.

IV. TECHNOLOGY TRANSFERS, REPATRIATION AND DEPENDENCIA

Technology transfers probably constitute the most complex matter taken up by the Common Regime. As in the area of investments generally, ACM planners and economists feel that there is a great lack of knowledge regarding precisely how transfers of technology have been carried out, under what terms, and at what profits to the supplier, with what ultimate effects on internal policies and interests of recipient states.[71] Nonetheless, it is generally recognized that the negative effects have been many, again perhaps because suppliers have been economically rational in maximizing profits where they found that they could exploit weak bargaining positions on the part of recipients and lack of expertise in handling the questions on the part of governments.[72] Specific complaints against technology transfer include its use as a hidden means of repatriating capital by the simple expedient of over charging for an item of technology or by tying unnecessary technology to a contract for one desired item so that there is payment for all instead of one. This is of course not the only method of hidden repatriation that foreign investors have used.[73] The Common Regime has taken pains to see that most of the known possibilities for *sub rosa* repatriation are curtailed. Again, the basic mechanism is one of registration and disclosure.

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70. *See* Peruvian Times, January 8, 1971, at 3-4.

71. The best overviews and analyses of the subject, which bring together most of the existing data and thought, are easily VAITSOS, STRATEGIC CHOICES IN THE COMMERCIALIZATION OF TECHNOLOGY: THE POINT OF VIEW OF DEVELOPING COUNTRIES (1970); VAITSOS, TRANSFER OF RESOURCES AND PRESERVATION OF MONOPOLY RENTS (1970); and SÁBATO, PRODUCCIÓN Y COMERCIALIZACIÓN DE TECNOLOGÍA (1970).

72. *See* Aracama-Zorraquín, *El Derecho de las Patentes en América Latina*, DERECHO DE LA INTEGRACIÓN, No. 9 at 75 (1971).

73. *See* notes 26-27 *supra* and accompanying text.

74. Common Regime, Temporary Provision E.

All agreements on foreign patents, trademark licensing and other existing[74] or new[75] technical assistance arrangements must be registered with the designated national authority. All such contracts are also subject to approval by the recipient national authority, which must make an appraisal of "the effective contribution" of the technology in question.[76] Apparently, this means that some measure must be made of the incremental profits that should result from the use of the technology.[77] To prevent the inclusion of useless technology in transfer agreements, all such contracts must include and clearly identify the value of each element of technology.[78] Transfers of intangible technology may not be computed as capital contributions to ACM-based enterprises.[79] In addition, the ACM Commission may intervene to review patent privileges already granted and to set aside "production processes, products, or groups of products, with respect to which no patent privileges may be granted in any of the Member Countries."[80]

The Common Regime specifies a maximum profit of 14 per cent over capital per year, all of which may be repatriated to the home company.[81] To guarantee against hidden profits and repatriations and

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75. Common Regime, art. 6(f).

76. Common Regime, art. 18. Without such prior approval no remittance of royalties in foreign exchange will be permitted. *Id.*, art. 21.

77. *See* Schliesser, *Restrictions on Foreign Investments in the Andean Common Market*, 5 INT'L LAWYER 586, 596 (1971).

78. Common Regime, art. 19. Clauses providing for royalty payments on unused patents or trademarks are prohibited. *Id.*, arts. 20(g) and 25(d).

79. Common Regime, art. 21.

80. Common Regime, art. 26.

81. Common Regime, art. 37. The figure of 14% return should not be a disincentive to invest in Latin America. If figures or profits from other areas are reliable, 14.1% is the highest profit being made by U.S. investors in any part of the world except for recently reported returns of 28.7% in the Middle and Far East. *See* note 26 *supra* and authorities cited there. There may be some question whether the 14% profit is a binding figure for ACM countries and for all foreign investments. In applying the Common Regime in Ecuador, that country specifically excepted the basic products (petroleum and other minerals and forest exploitation) from the 14% limitation, citing article 40, which would appear to support Ecuador's right to unilaterally make such a decision. *See* Supreme Decree No. 1029 of 13 July 1971, art. 2, in GRUPO ANDINO, No. 8 (1971). Article 37, on the other hand, would appear to require ACM Commission authorization for any deviation from 14%, regardless of the circumstances. One possibility is that since articles 37 and 40 are in different chapters of the Common Regime, they are not mutually exclusive, and apply to only the subject matter of their respective chapters.

to control balance of payments, however, the Common Regime includes several provisions that directly affect repatriations and external financial arrangements. Foreign investors must re-export the capital that they have invested as they divest, and must secure authorization for new investment.[82] Up to 5 per cent of the company's capital may be reinvested each year without prior authorization, but registration of such investment is required[83] and anything over that limited percentage must be applied for as a new investment.[84]

Supervision extends to foreign loans, which may not be contracted for at more than three points over the prevailing rate in the country of contract, with prior authorization and registration in the appropriate agency.[85] In addition, access to internal credit is limited to short-term loans, as defined by ACM regulations.[86] No ACM country can endorse or guarantee any foreign loan for an enterprise that has no state participation.[87]

Repatriation and credit are matters of such central concern because foreign manufacturing investments, perhaps more than any others, have tended to be a drain on host countries' payments credits. Unlike extractive industries and other traditional areas of investment, import substitution generates little or no export income at the same time that it often relies on substantial imports of technology and inputs.[88] Thus, the ACM planners seek to insure that while the fade-out is in progress foreign owners do not exploit past methods of siphoning "non-profit" funds out of the host country, and that in the future they make a reasonable, but not unconscionable, return on investment.

The ACM is concerned with much more than just the use of technology agreements for surreptitious repatriation of capital. Technology is probably the area of the most clearly defined dependence on developed and industrialized nations. Experts in this field initially point out that Latin American purchasers have little knowledge of what they are purchasing, with little conception of alternatives or reasonable pricing. Mauricio Guerrero of the ACM Junta legal staff comments: "Curiously, these [technology] contracts often contain obligations only for the concessionaire and only in exceptional cases

82. Common Regime, arts. 7-10.
83. Common Regime, art. 13.
84. Common Regime, art. 12.
85. Common Regime, arts. 14-16.
86. Common Regime, art. 17.
87. Common Regime, art. 15.
88. *See* Guerrero, *supra* note 29, at 16-17.

impose obligations on the supplier."[89] Typical clauses have included prohibitions against export of products manufactured with the technology in question, the commitment to use only inputs and personnel of the supplier, prohibitions against production of similar products, specified volumes of production, quality control by the supplier, price-fixing, limitations on export, commitments to turn over improvements in technology to the supplier and so forth. All such clauses have been flatly prohibited by the Common Regime.[90] This may be of some help in preventing the sort of situation that Guerrero posits, where a country provides incentives to export a given product while at the same time a supplier of necessary technology for that product demands in his contract with the local producer a clause limiting or prohibiting its export.[91]

A larger and more difficult problem is that of how to develop an indigenous technology to escape the crippling dependency on foreign suppliers from industrialized nations. The Common Regime makes a strong attempt at establishing a system that will achieve that goal, but a foreign supplier cannot be divested of his technology in the same way as can a foreign investment. When one considers the massive commitments of resources and manpower necessary to maintain constantly advancing states of the art in so many varied industries, it is difficult to visualize a time in the near future when the ACM will be able to free itself of reliance on foreign technology in many or most areas.

Nonetheless, the Commission is given broad powers to activate technological development within the ACM. This is to be done primarily through tax and other incentives for technological research and production, "especially that connected with the intensive use of input items of subregional origin or those designed to make efficient use of subregional productive factors," and some unspecified means of channeling domestic savings into national and subregional research and development centers.[92] The Commission has also promulgated a new Industrial Property Law for the ACM, and set up a Subregional Industrial Property Office.[93] Member countries should favor purchases of products that include subregional technology in their manufacture, again under Commission guidelines.[94] Only time will

89. Guerrero, *supra* note 29, at 20.
90. Common Regime, arts. 20, 25.
91. Guerrero, *supra* note 29, at 21.
92. Common Regime, art. 23.
93. Common Regime, Temporary Provisions F and G.
94. Common Regime, art. 24.

prove whether the effort to develop subregional technology can prosper. In any event, it probably represents the most ambitious of the goals contained in the Common Regime.

V. HARMONY IN THE COMMON REGIME

The Common Regime depends for its success upon independent application and implementation of its provisions by member countries. The significance of this fact is difficult to overestimate. As the European Common Market's experience demonstrates,[95] the task of effectively harmonizing laws and policies is a formidable one. It has already been noted that the various countries have widely divergent legal attitudes on many of the issues dealt with in the Common Regime. Diversity of approach is almost guaranteed in those sectors covered by articles 40-43 of the Common Regime (basic products, public services, financial institutions, transportation and communications) since Bolivia, Colombia, Ecuador and Peru have exercised their option under article 44 to draft their own regulations for these sectors, which are exempt from the Common Regime's restrictive stance on foreign investment.[96] Chile has not made such exemption, most probably because it had already decided unilaterally to apply either the ACM standards or ones more stringent in those key areas of the economy.

Even in the manufacturing sectors at which the Common Regime was primarily aimed, and for which no exemptions are possible, only minimum standards of control are established. Any member country may depart from the ACM standard to apply its own stricter regulations. Peru, from whose recent Industries Law[97] much of the

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95. *See, e.g.*, E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS (1971); *Symposium–International Unification of Law*, 16 AM. J. COMP. L. 1 (1968).

96. *See* text accompanying note 13 *supra*.

97. Decree-Law 18350 of 27 July 1970, with its companion Decree-Law 18384 of 1 September 1970. These laws instituted the "Velasco Doctrine," named for President Juan Velasco, of divestment of foreign investment within a specified time period. It is of course nothing more than the application of the theories of the economists and other prophets of *dependencia* cited in note 23 *supra*, but the tag has stuck. For analysis of the Peruvian laws, see Brisk, *Pressure Groups Under Pressure: The Peruvian Industrial Law of 1970* (paper presented at the Rocky Mountain Political Science Association, May 7, 1971); STRASMA, SOME ECONOMIC ASPECTS OF NON-VIOLENT REVOLUTION IN CHILE

ACM system was taken, is an example. The Common Regime would have exempted from the fade-out both companies that wished to trade only on the domestic market rather than within the ACM and those companies whose trade was least 80 per cent export to countries outside the ACM.[98] Peru's legislation made no provision for such exceptions. After some confusion[99] concerning whether the Decree-Law adopting the Common Regime in Peru[100] incorporated the exceptions when it stated that the ACM rules had the force of domestic law, a ministerial letter was issued to the National Industrial Society stating that "all foreign companies which are set up in the country" definitely must fade out regardless of whether they anticipate trade within the ACM.[101]

Peru has also coordinated its concept of the industrial community with the ACM's fade-out requirements. In Peru, both foreign and domestic investment must divest by turning over company ownership to employees at the rate of 15 per cent of profits each year, until the employees own 50 per cent of the enterprise.[102] Since the promulgation of the Common Regime, the employees must buy the divestment shares of the foreign investor. The method is that the company must transfer the requisite shares to the industrial community and at the same time issue a loan against the 15 per cent remission of annual profits to the community.[103] This means that in Peru the capital to buy out the foreign investor will often be paid by the foreign investor himself, amortizing a loan that has passed control to domestic sources within the required time period. This also means that Peru may be more successful than other ACM countries in finding the necessary domestic capital to achieve divestment.

AND PERU 12-13, 27-29 (1971). For the official statements of policy which went into Peru's laws, see INSTITUTO NACIONAL DE PLANIFICACIÓN, MID-TERM DEVELOPMENT POLICY: BASIC GUIDELINES (1970) (English summary of a more complete document, LINEAMIENTOS BÁSICOS DE POLÍTICA DE DESARROLLO A MEDIANO PLAZO, published in Lima at the same time).

98. *See* note 51 *supra*; Common Regime, arts. 27, 34.

99. *See* Peruvian Times, October 29, 1971, at 1; November 19, 1971, at 2.

100. Decree-Law 18999 of 20 October 1971.

101. Portions of the letter translated in Peruvian Times, February 18, 1972, at 6.

102. This is the system set up by Decree-Law 18384 of 1 September 1970. *See* Brisk, *supra* note 97, at 18-20.

103. *See* Peruvian Times, October 29, 1971, at 1 (interpreting Decree-Law 18999 of 20 October 1971).

Whereas Peru functions with the advantage of a military dictatorship, which speeds its political process considerably,[104] other ACM participants have active legislative bodies. Even if the mere logistical problems of incorporating a sweeping piece of legislation like the Common Regime into a domestic system could be easily resolved, the policy battles that might surface if a manifesto such as the Common Regime were submitted to full debate in each national congress would almost surely result in some substantive changes and an un-Common Regime, with the ACM's Decision 24 and modifications reduced to the function of a model act. Executives of the ACM countries, which have thus far strongly supported the subregional effort, no doubt realize this fact. Consequently, they have carried out virtually all ACM matters by executive decree, avoiding legislative intervention and consideration.[105] However, a confrontation over the legislative role in subregional integration is brewing. In Columbia, both the Supreme Court[106] and *Consejo de Estado*[107] have been asked to consider the validity of the Cartagena Agreement, promulgated as a straight executive act without congressional approval. In Chile, the Decree that bound that country to the Common Regime was not accepted by the Chilean *Contraloría*, which must review every executive decree, but was promulgated over the non-binding *Contraloría* opinion, as provided for under Chilean law.[108]

It is difficult to predict when the problem of the proper means by which ACM regulations should be received by member countries will be resolved. It is almost certain, however, that the problem will not disappear. Some tentative doctrine, or at least the focal point of the issue, may be emerging. The Treaty of Montevideo, which created LAFTA in 1960, has from the outset been characterized as a *tratado marco* ("framework"), or a "convention which only sets out general principles, creates mechanisms and establishes organs committed to its goals, which fill out the full structure of the convention by action and

104. And makes it easy to issue a final Decree-Law sweeping all the questions created by the Common Regime into a comprehensive piece of legislation. *See* Decree-Law 19262 of 6 January 1972, discussed in Peruvian Times, January 21, 1972, at 4.

105. *See* GRUPO ANDINO, *supra* note 81 (collected decrees approving the Common Regime).

106. *See Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Primera, ejecutoria* of 2 March 1971.

107. The case is reported in Diario Juridico (Colombia), August 21, 1971, at 249-56; August 28, 1971, at 257-60 (one dissenting vote).

108., *See* the decrees and *Contraloría* opinion in Diario Oficial (Chile), June 30, 1971, at 2485-93.

practice."[109] When the eleven members of LAFTA approved the Treaty of Montevideo, they did so by act of Congress, usually delegating to the executive sufficient power to implement the integrationist movement personified by that initial treaty. The subregional movement was clearly placed in the context of LAFTA, specifically by resolutions of the LAFTA governing body that contemplated such a development and established guidelines for it.[110]

The Agreement of Cartagena, as the basic structural document for subregional integration, is therefore essentially a framework within a framework, complementary to and contemplated by the overall integration program of LAFTA and the Treaty of Montevideo. Despite the general nature of the subregional agreement and the extensive preparation for it in LAFTA, its adoption by executive act has been attacked in Colombia, probably by business interests that want to torpedo the ACM.[111] The holding of the Colombian Supreme Court was that the executive was competent to bind Colombia without consulting Congress because the Agreement of Cartagena was a "measure conducive to the development of the Treaty of Montevideo, not a new treaty . . . but an act of government necessary for the evolution of the original or basic treaty, which is legally proper within the [constitutional provisions on executive powers]."[112] A determinative factor was probably the specific delegation of power by the Congress to the executive "to adopt all conducive measures and to create those institutes and dependencies which may prove necessary . . . for the development of this treaty" at the time the legislature approved the Treaty of Montevideo.[113]

The Chilean *Contraloría*, faced with an executive promulgation of the Common Regime, found a changed set of considerations. Its opinion notes that the Agreement of Cartagena was also properly

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109. Definition quoted by the Chilean *Contraloría, supra* note 108, at 2491. For more detailed treatment of the concept of the *tratado marco,* see INSTITUTO INTERAMERICANO DE ESTUDIOS JURÍDICOS INTERNACIONALES, DERECHO DE LA INTEGRACIÓN 842-48 (1969). JIMÉNEZ DE ARÉCHAGA & PAOLILLO, CONTRALOR DE LA LEGALIDAD DE LOS ACTOS COMUNITARIOS, DERECHO DE LA INTEGRACIÓN, No. 1 at 11 (1967).

110. *See* Resolutions 100, 202, 203 and 222 of the LAFTA Conference, synthesized by the Colombian Supreme Court in Diario Jurídico, *supra* note 107, at 254-55.

111. *See* Wionczek, *supra* note 11, at 29. Wionczek also states that Japanese and European interests refused to join in the anti-ACM movement. *Id.* at 28.

112. Diario Jurídico, *supra* note 107, at 256.

113. Law 88 of 19 September 1961, art. 2.

accepted in Chile by executive decree, but that at the time the Minister of Foreign Relations appeared before the Senate to assure that body that "to the extent [the integration process] involved the adoption of resolutions which affect specific Chilean internal policies, it will be necessary to enact a law."[114] The *Contraloría* apparently felt that the Minister's statement was not only a correct statement of the law, but that the circumstances of the Common Regime's provisions, "to the extent [they] imply the modification of internal legal regimes in full effect,"[115] should require congressional consideration and approval, "the only sanction within our institutional system which could give them the necessary force for their due application as laws of the Republic."[116]

Although the Colombian Supreme Court and the Chilean *Contraloría* differed in their final resolutions, one approving and one disapproving the executive exercise, their results do not seem inconsistent. The lesson for the future is that at some point the judicial branch of one or several ACM countries may take up an issue such as the validity of non-legislative approval of new ACM tax, labor, patent, corporation or other laws and find that the domestic system, while committed to integration as a general proposition, does not permit the integration process to dictate its internal policies. If not, we will have in the ACM one of the truest supranational systems in existence. Whether the Common Regime described in this study will be the occasion for such a test is unknown. Should such a test take place, it will be before a body that has more than the quasi-advisory powers of review possessed by the *Contraloría.*

VI. CONCLUSION

The ACM's Common Regime of Treatment of Foreign Capital seems to be a well-balanced set of rules representing an ambitious attempt at reconciling national and regional development interests with the need for foreign capital and technology on terms equitable and remunerative to those who supply them. As in the case of virtually every piece of development legislation based heavily on economic theory and aimed at wholesale change of an existing situation, the Common Regime has plunged into largely uncharted areas in which its ultimate effects are impossible to predict. It is not,

114. Diario Oficial, *supra* note 108, at 2491.
115. *Id.*
116. *Id.*

however, a "lyrical" piece of drafting.[117] Because it is serious and because so many other countries will observe its effects, it is extremely important. What Latin America and the Third World do about foreign investment in the future may likely be better measured by observation of the Common Regime and its application than by any other measure available.

The Common Regime is almost certainly not so bad as some United States business interests would paint it;[118] likewise, it is almost certainly not so definitive an answer to the problems it contemplates as its drafters, ACM interests, and other defenders might wish. This is all good theater, not unfamiliar to even casual observers of the breast-beating that goes on in inter-American relations. It is worth noting, however, that the Common Regime is, more than perhaps anything else, an invitation to all the participants—domestic and foreign, public and private—in the ACM economies to reason together and forge a mutually beneficial *modus vivendi* built on disclosure and common concern.

117. *See* Rosenn, *The Jeito,* 19 AM. J. COMP. L. 514, 528-31 (1971).

118. *See* notes 21 and 50 *supra* and accompanying text.

119. *See, e.g.,* VI BOLETIN DE LA INTEGRACIÓN 553 (1971) (Japan); *Id.* at 379 (Canada); *Id.* at 551 (European Common Market).