EWELL E. MURPHY, JR.*

The Andean Decisions on Foreign Investment: An International Matrix of National Law

I. Inductive Yankees, Deductive Latinos

An abiding delight of professional collaboration between a North American lawyer and a Latin American colleague is their charming propensity to reach a common destination by opposite routes. Schooled in the case system, the North American approaches the shared task empirically. For example, if the objective is to design a foreign investment structure, the North American attorney does not ponder legal doctrines so much as he recalls successful instances of similar structures he previously designed, then adds variations to adapt those structures to the new project. In contrast, the Latin American colleague—as a true disciple of his code training in the civil law—reasons from juridical principles, rationalizing and refining them to achieve the intended result. In essence the North American proceeds inductively, like Aristotle, from instances to hypothesis, while the Latin American advances deductively, like Plato, from concept to application. The delight is that their opposite procedures usually lead to an identical conclusion, and in the process each is enriched by exposure to the other's way of thought.

Those divergent thinking patterns are reflected in differing conceptions of the source of international law. North Americans tend to regard a principle of international law as the transnational application of national practices, while Latin Americans are inclined to view it as national recognition of a nation-transcending norm. Nevertheless, those differing perceptions, like the opposite approaches of Yankees and Latinos to lawyerly tasks, are more ingratiating than

* Partner, Baker & Botts, Houston, Texas; Chairman, Section of International Law and Practice (1970-1971). During 1988 Mr. Murphy served as consultant to the Bolivian Ministries of Industrias, Comercio y Turismo, and Planeamiento y Coordinación in the formulation of legislation to implement Decision 220 in Bolivia.

contentious. There is little evidence that nations at a given stage of political and economic development are markedly inconsistent, on grounds of their heritage of common law or civil law, concerning the rules of international law they will apply.

Indeed, the conceptual differences between Aristotelian Yankees and Platonic Latinos concerning the source of international law are as delightful, and as enriching, as their opposite pathways to professional collaboration. "See here!" asserts the Yankee. "There would be no international law at all if nations did not pact to make it so." "Not in the least!" counters the Latino. "The principles that those treaties reiterate are inherent in the just relations of peoples; they are as authoritative as nationhood itself. Besides, international law can create national law, as easily as the other way around." So goes the dialogue.

II. The Andean Argument

In the context of those delightful differences, the last two decades of treaty relations among the Andean nations on the subject of foreign investment constitute a persuasive argument for the Latino view that international law can create national law. Those relations not only constitute an impressive body of public international law, but have produced comprehensive national enactments of private international law and, through those enactments, have become an enduring matrix of purely domestic law as well.

Andean treaty law on foreign investment is a product of the Agreement of Cartagena (1969),[1] which created the Andean Common Market (ANCOM) among Bolivia, Chile, Colombia, Ecuador, and Peru. Article 27 of the Agreement committed those nations to adopt a "common system for the treatment of foreign capital." Pursuant to article 27 the Andean Commission issued Decision 24 (1970),[2] a code of uniform restrictions on foreign investment in the ANCOM nations.

Viewed from our present perspective, Decision 24 seems a rather outmoded artifact of the law. In the last two decades the less developed world has accomplished such an abrupt about-face on the subject of foreign investment that it is difficult to recall to mind the xenophobic era in which the Andean code was born. It was a time of strident protectionism and truculent statism, in which the capital-

---

1. Agreement on Andean Subregional Integration, *opened for signature* May 26, 1969, 49 SÍNTESIS MENSUAL 283 (1969), *reprinted in* 8 I.L.M. 910 (1969) (English translation, incomplete text). (English translations in this article are by the author.)

2. Régimen Común de Tratamiento a los Capitales Extranjeros y sobre Marcas, Patentes, Licencias y Regalías, adopted Dec. 31, 1970, VII(1), RJ 1 [hereinafter Decision 24]. (In this article Decisions under the Agreement of Cartagena and, unless otherwise sourced, items of national legislation are identified by page references to their recompilation in parts (Roman numerals) and volumes (Arabic numerals) of Banco Interamericano de Desarrollo, Instituto Para La Integración De América Latina, RÉGIMEN JURÍDICO DE LAS INVERSIONES EXTRANJERAS EN LOS PAÍSES DE LA ALADI (1985 & Supp. [hereinafter RJ]).

exporting nations were admonished by United Nations resolutions that proclaimed a "New International Economic Order," and foreign equity was excluded or emasculated by such restrictive measures as "Nigerianization," the Malaysian *bumiputra* rules, the Canadian Foreign Investment Review Act, and Mexico's Yankee-blocking Echeverrían Wall.[3] In these sobered 1990s those strictures seem millennia away.

True to its xenophobic provenance, Decision 24 pledged the ANCOM nations to restrict foreign investment to a degree that was unprecedented, as a peacetime multistate measure, in the contemporary non-Marxist world. Astounded commentators described Decision 24 as "a new juristic phenomenon,"[4] "[t]he world's first . . . regional system of prior restraints on the entry of new private sector investment from outside,"[5] and "the harshest restrictions on foreign capital and technology imposed by a group of Western countries in recent times."[6]

Except for Chile, which prudently withdrew from ANCOM's hubristic commitment to economic self-reliance, each ANCOM nation ratified and implemented Decision 24 with national enactments in which the restrictive requirements of Decision 24 were met or exceeded. The most zealous implementer was Peru, which had anticipated Decision 24 with industrial sector laws limiting the access of private capital, both national and foreign; those she retained and expanded in the spirit of the new Andean ideal.[7]

As the 1970s and 1980s wore on, however, the restrictions of Decision 24 lost favor in most ANCOM nations, and there ensued two decades of relenting ANCOM Decisions and amending national enactments, in the course of which ANCOM itself was reconstituted by the virtual disassociation of Chile and the accession of Venezuela. The relenting Decisions traced a massive retreat from the rigid prohibitions of Decision 24 to the permissive standards of Decision 220 (1987).[8] The amending enactments anticipated or adopted Decision 220 in every ANCOM nation but Bolivia and, in every ANCOM nation but Peru, substantially liberalized the original national implementations of Decision 24.[9]

History will debate the substantive merits of those measures. Was Decision 24 inherently flawed by economic miscalculation? Could the ANCOM nations have

3. The origins of Decision 24 are described in Murphy, *Decision 24, Mexicanization and the New International Economic Order: The Anatomy of Disincentive*, 13 TEX. INT'L L.J. 289 (1978).

4. Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for a Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763, 763 (1972).

5. *Id.* at 777.

6. Schleisser, *Restrictions on Foreign Investment in the Andean Common Market*, 5 INT'L LAW. 586, 586 (1971).

7. The original legislation implementing Decision 24 is analyzed in Murphy, *The Andean Common Market and Mexico: A Foreign Investment Profile*, 13 TEX. INT'L L.J. 307 (1978).

8. VII(1) RJ (Supp. 3) 1, effective May 11, 1987, *reprinted in* 27 I.L.M. 978 (1988) (English translation) [hereinafter Decision 220].

9. Decision 220 and its national implementations are described in Murphy, *The Quiet Revolution in Andean Foreign Investment Laws*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS ch. 10 (1989).

avoided their chaotic 1990s by encouraging, rather than restricting, foreign capital in the 1970s? Was Decision 220 the appropriate solution, but applied too late? Wise men will differ in their answers to those questions but, regardless of one's views on the merits of the last two decades of ANCOM Decisions and enactments on foreign investment, in terms of juridical origins they reveal two fascinating levels of devolution, in which the public international law of the Decisions created the private international law of the national enactments, and the national enactments in turn engendered significant rules and orientations of purely domestic law.

III. From Public to Private

The first level of devolution that the Andean measures accomplished was inherent in the basic purpose of Decision 24. In order to require the ANCOM nations to maintain uniformly restrictive foreign investment laws, Decision 24 was obliged to say what a foreign investment law should be. Especially in the context of the Western Hemisphere, that was not an easy task. When Decision 24 was adopted, the nearest approximation to a foreign investment law in the United States was (as it remains, now augmented only by the vague contours of Exon-Florio) a miscellaneous grab bag of disclosure requirements and enactments that specified particular industrial sectors in which foreign-owned equity was excluded or especially regulated. In Canada foreign investment regulation was more restrictive and administratively more integrated than in the United States, but only slightly broader in scope. Foreign investment legislation in Mexico, though roughly contemporary with Decision 24 in enactment, was not a single law, but three laws that separately regulated investment, patents and trademarks, and the licensing of technology. The law's original statutory form did not mention foreign exchange at all. Some South American systems focused chiefly on foreign exchange and added other elements as afterthoughts. In short, no single enactment of the Americas gave the ANCOM Commission a particularly helpful clue as to what issues a comprehensive foreign investment law should address.

In fact the field of foreign investment law can be perceived in many different magnitudes. Seen most narrowly, foreign investment law deals only with the transnational movement of equity and has nothing to do with business organizations, loans, the sale of goods or services, licensing, debt/equity swaps, the remittance of profits, or the foreign exchange in which all the others are actualized. Seen most broadly, foreign investment law includes all those elements, plus every other jural norm that can affect an enterprise. Finding a practical median between those two dimensions was the Andean Commission's initial and conceptually most challenging task.

Addressing that task, the Commission wisely realized that, in the twilight of the Twentieth Century, "investing" involves more than the placement of equity; to regulate equity while ignoring credit, foreign exchange, and licensing is to

have a regulatory system for foreign investment that is incomplete. Consequently, the Commission visualized the foreign investment law of an ANCOM nation as an integrated enactment that regulates the influence of foreign enterprise within a national economy with particular reference to: (1) accessible industrial sectors and permitted percentages of equity ownership; (2) available credit and foreign exchange; and (3) acceptable provisions of inbound licenses.

That threefold formula was the structural essence of Decision 24. Regarding equity, Decision 24 limited foreign ownership by sectoral restrictions (specifying, industry by industry, what percentage of foreign-owned equity an ANCOM nation could allow), compulsory divestiture (notably the "fade-out" requirement that any new foreign-controlled enterprise must progressively divest itself to 51 percent national ownership within a specified period), and take-over rules that generally forbade the acquisition by foreign investors of interests owned by nationals. Regarding credit and foreign exchange, Decision 24 subjected inbound loans to any enterprise, foreign or national, to prior authorization and registration; denied foreign investors access to medium- or long-term credit in the national market; limited interest payments to affiliates to a formula amount; and subjected dividend remittances abroad to prior authorization and annual ceilings based on percentage of investment. Regarding licensing, Decision 24 subjected each inbound license of technology, patents, or trademarks to prior approval and registration; prescribed in detail the clauses a license must and must not contain; and prohibited royalties and tax deductibility in licenses between affiliates.

In its perception of the interrelationship of those three aspects of foreign investment, the Andean Commission was at the creative edge of regulatory innovation in the Americas, and by organizing the prohibitions of Decision 24 on that threefold scheme, the Commission invented the profile of a modern Western Hemisphere foreign investment law. To a greater or lesser degree, that profile was followed in the implementing enactments of each ANCOM nation. Even when Decision 220 relaxed the strictures of Decision 24, the same profile persisted in Decision 220 and in the national enactments that anticipated or implemented it. In all probability the profile will endure, long after ANCOM is superseded and forgotten, as a model for foreign investment laws in capital-importing nations of the Americas and elsewhere. Decision 24 thus deserves recognition as a juridical act of significant normative force and as an influential example of that remarkable creature, the pact of public international law that generates—both by its specific edict and by the force of its example—national enactments of private international law.

IV. From International to Domestic

The first level of juridical devolution that the Andean measures accomplished—from public international law to private international law—is manifest

in the explicit national enactments that now govern foreign investment in Colombia, Ecuador, Peru, and Venezuela. The second level of devolution the Andean measure achieved is less obvious, and in two instances has only begun the delicate process of parturition from private international law to purely domestic law. The second level is all the more intriguing, however, for its subtlety and because it addresses four areas of contrariety between Latin Americans and North Americans. Those areas are: (1) identifying the shareholders of corporations; (2) distinguishing the legal personality of a business enterprise in its jurisdiction of formation from the operational presence of the same enterprise in another jurisdiction; (3) standardizing licensing terms; and (4) exorcising the ubiquitous ghost of Carlos Calvo.

A. Identifying the Shareholders

A fundamental difference in the way business enterprise law has evolved in North America, as distinguished from Latin America, lies in the identification of shareholders of corporations. North American business corporation acts contemplate that certificates of share ownership will be issued in a manner that will identify the shareholder and that such issuance and any subsequent transfer of the certificated shares will be reflected in a stock record book maintained by the enterprise in a manner to identify each issuee or transferee. Latin American law classifies that as a system of nominative shares (in Spanish, *acciones nominativas,* sometimes confusingly translated as "registered shares"). Historically, Latin American business enterprise laws have not required certificates of share ownership to be in nominative form. Instead they have permitted, either explicitly or by silence, share certificates to be issued without identification of the issuee, and have not required issuers or transferees to be identified in stock record books maintained by the enterprise. In Spanish parlance such shares are issued *al portador* (to bearer) and are considered to belong to whoever physically possesses the share certificates at the relevant time.

North and South have exchanged many aspersions on the subject of *acciones nominativas* versus *acciones al portador.* North Americans perceive the bearer share system as a calculated adjunct to tax evasion and other breaches of law. Latin Americans regard the nominative share system as an unnecessary violation of privacy and a paperwork impediment to share transfers. Nevertheless, in recent years non-tax-haven Latin American nations have tended both to restrict the use of *acciones al portador* and to require nominative shares to be used, either generally or in especially regulated contexts.

The Latin American trend toward nominative shares received a powerful impetus from Decision 24. In order to restrict foreign investment by industrial sectors, and to police the "fade-out" requirement that a new foreign-controlled enterprise divest itself to national control, ANCOM nations were required to

classify business enterprises on the basis of the percentages by which they were owned by foreigners. Rather than requiring disclosures of share ownership to be made only by foreigners or only by enterprises in which foreigners were involved, the disclosure requirement was made universal by outlawing bearer shares in all enterprises. Decision 24 imposed that requirement, not merely as an admonition to ANCOM nations, but as a measure of direct legal effect: "The capital of companies having shares must be represented by nominative shares."[10] A following sentence required all existing bearer shares to be changed to nominative form within one year. Decision 220 repeated the quoted words verbatim.[11] (It omitted the following sentence, because more than a year had elapsed since Decision 24 became effective.) The prohibition of bearer shares is therefore effective in every ANCOM nation, either by a specific enactment adopting Decision 24 and (later) Decision 220 in their entireties, or by virtue of legislation that gives all Decisions of the Andean Commission immediate national effect. Venezuela separately included an explicit prohibition of new bearer shares in the liberalized foreign investment law by which she anticipated Decision 220.[12]

Legalisms aside, ANCOM's repudiation of *acciones al portador* is a rather amusing example of adversarial imitation. In order to protect themselves from the privacy-insensitive, paperwork-prone Yankees, the ANCOM nations felt obliged to adopt the privacy-insensitive, paperwork-prone Yankee institution of nominative shares.

B. Subsidiary Versus Branch

In Latin America the legal conceptualization of business enterprises has developed at different, but somewhat reciprocal, levels of sophistication than in North America. As regards differentiation among locally formed enterprises, a typical Latin American business enterprise law offers a broader and more explicitly correlated array of enterprises than does corresponding North American legislation. For example, in a single *Ley General de Sociedades Mercantiles*[13] Mexico makes available for formation a *sociedad anónima* (ordinary corporation), a *sociedad de responsabilidad limitada* (limited liability company), a *sociedad en comandita simple* (limited partnership), a *sociedad en comandita por acciones* (joint stock company), a *sociedad en nombre colectivo* (general partnership), and a *sociedad cooperativa* (cooperative society), plus a variable capital alternative of five of them. By contrast, of those eleven types of enter-

10. Decision 24, *supra* note 2, art. 45.
11. Decision 220, *supra* note 8, art. 30.
12. Decreto No. 1200, art. 84, VII(3) RJ (Supp. 2) 1, effective Aug. 29, 1986.
13. Editorial Porrúa, Código De Comercio y Leyes Complementarias 173–229 (34th ed. 1978).

prises, the basic Texas legislation on commercial enterprises,[14] by dint of three separate statutes, can muster only three.

As regards differentiation between a locally formed enterprise and the local presence of an enterprise formed elsewhere, however, Latin America's practice is less developed. In Spanish even the vocabulary of such differentiation is imprecise. When we say in English that Corporation *X* was "formed in," "incorporated in," or "organized under the laws of," Delaware, we clearly convey the idea that Corporation *X* was born when its certificate of incorporation was filed with the secretary of state of Delaware; and when we say that Corporation *X* "established a branch in," or "qualified to do business in," Texas, we are equally explicit that the secretary of state of Texas has issued it a certificate of authority. The Spanish equivalents are a bit more vague. If Corporation *X* is *constituida* in Nation *Z*, presumably it is incorporated under *Z*'s laws, but what if it is merely *establecida* or *existente* in Nation *Z*? The inference is not always clear. As to branches, communication between North and South is further confused by the tendency of Latin American lawyers to think of Corporation *X* and its foreign branch as separate legal entities, so that it becomes uncertain whether *casa matriz* means "parent corporation" or merely "head office"; whether *filial* means "affiliate," "subsidiary," or "branch"; and, for that matter, whether a parent corporation and its branch are a single *empresa* (enterprise) or two.

Decision 24 and its amending Decisions used those terminologies with only approximate consistency[15] and, in particular, failed to distinguish explicitly the locally incorporated subsidiary of a foreign corporation from its locally registered branch.[16] The regulatory responsibilities the Decisions placed upon ANCOM nations have, however, resulted in implementing enactments that are considerably more precise. Thus, Colombia clearly offers the foreign investor only two foreign investment structures, a Colombian company (*sociedad mercantil*)

14. Texas Business Corporation Act, 3A TEX REV. STAT. ANN. (Vernon 1980 & Supp. 1990); Texas Revised Limited Partnership Act, TEX. REV. CIV. STAT. ANN. art. 6132a-1 (Vernon Supp. 1990); Texas Uniform Partnership Act, TEX. REV. CIV. STAT. ANN. art. 6132b (Vernon 1970 & Supp. 1990).

15. The Decisions generally use *constituida* to mean "incorporated," *establecida* to mean "registered or functioning as a branch," and *empresa* to mean either an enterprise or its branch. *See, e.g.*, Decision 24, *supra* note 2, arts. 1, 6(a), 8, 9, 12–15, 17; *see also* Decision 24, *supra* note 2, art. 1, as amended by Decision 103, VII(1) RJ 72. The "fade-out" provisions of Decision 24, however, introduce the uncoordinated concept of enterprises that are *actualmente existentes* ("presently existing") on certain dates, and amending Decisions inconsistently refer to such enterprises as being *constituidas* or *establecidas*. *See* Decision 24, *supra* note 2, art. 28, as amended by Decision 103, VII(1) RJ 17. Compare the use of *existentes* in Decision 24, *supra* note 2, arts. 29, 40–41. Decision 24 also contains uncoordinated references to foreign enterprises *que se establezcan* ("that are established"), Decision 24, *supra* note 2, art. 30, and *que operan* ("that operate"), Decision 24, *supra* note 2, art. 43.

16. *See* Decision 24, *supra* note 2, art. 16 (regarding intra-group interest rates) and art. 21 (regarding intra-group royalties), which use *casa matriz* and *filiales* in a generalized manner that may refer to parent/subsidiary, head office/branch, or both.

or the Colombian branch (*sucursal*) of a non-Colombian company.[17] Except for local activities of service contractors and "domiciliations" required by law, Ecuador requires minimum assigned capital for an Ecuadorean branch (*sucursal*), prohibits certain branch activities, and imposes special obligations on branches engaged in banking, insurance, finance, and oil and gas operations.[18] Venezuela accepts the "domiciliation" of foreign enterprises as service contractors,[19] but expressly contemplates the formation by foreign enterprises of Venezuelan subsidiaries,[20] and requires certain Venezuelan branches of foreign enterprises to be transformed into Venezuelan companies.[21]

Comparing the language of the ANCOM Decisions with that of the national enactments, one has the impression that the Andean Commission took the intellectual liberty of regarding foreign investment as an economic abstraction, thus devolving upon the ANCOM nations the functional responsibility of dealing with specific foreign investment structures. The discharge of that responsibility appears to have had the beneficial result of increasing the sophistication of discrimination between subsidiaries and branches in the ANCOM nations' domestic business law.

C. License Terms

If xenophobia was the economic religion of the 1970s in the less developed world, in the theology of that religion foreign equity was assigned a lower level of perdition than foreign technology. Foreign equity was to be excluded entirely, if possible. If than were not possible, only minority shares were to be permitted. Foreign technology, in contrast, was welcome, provided it came under nononerous conditions. Ideally, the technology should be "transferred" (once paid for, always owned) and not "licensed" (available only during the paid-for period). If it must be "licensed," the license terms should not be overly restrictive of the licensee.

The vocabulary of Decision 24 echoes that litany. Although its caption[22] and earliest antecedent reference[23] speak in terms of licensing, a later antecedent reference[24] and most of its operative provisions[25] are couched in terms of the

17. Decreto No. 1265, July 10, 1987, Legislación Económica, July 1987, at 41, art. 8.
18. Decreto No. 3095, July 29, 1987, Registro Oficial July 29, 1987, at 5, arts. 33–48.
19. Decreto No. 1200, *supra* note 12, note 1(11).
20. *Id.* art. 52.
21. *Id.* art. 53.
22. Régimen Común de Tratamiento a los Capitales Extranjeros y sobre Marcas, Patentes, *Licencias* y Regalías (emphasis added).
23. "[*E*]*l uso de la moderna tecnología*" (*considerando* clause, quoting from the Declaration of Bogotá, *proclaimed* Aug. 16, 1966, 15 Síntesis Mensual 35 (Sept. 1966), *reprinted in* Inter-American Institute of International Legal Studies, Instruments Relating to the Economic Integration of Latin America and in the Caribbean 149 (1975)).
24. "[*E*]*l traspaso de tecnologías extranjeras*" *Id.* (quoting from the first meeting of ANCOM's Foreign Ministers).
25. *See* Decision 24, *supra* note 2, arts. 19, 48, 51, 52, & transitory art. D. *Compare* "*aporte . . . de tecnología foránea*" (Declaratory Clause 1) and "*el mayor acceso posible a la tecnología moderna*" (Declaratory Clause 6).

"transfer" or "importation" of technology. Occasional verbiage distinctions suggest that while patents and trademarks may be the subject of contract or license, technology as such must be "transferred" or "imported."[26]

In a document as significant as Decision 24, such usage has undoubtedly reinforced in the domestic legal thinking of ANCOM nations the concept that inbound foreign technology is not merely "licensed" but "transferred." More specific accomplishments of Decision 24 are its clauses that prescribe what an inbound conveyance of intellectual property rights must and must not contain. The prohibition lists, in particular, are quite detailed. As to technology and patents, they forbid clauses that require the recipient to buy goods or services from specified sources; that allow the grantor to prescribe the prices the recipient charges third parties; that limit the recipient's production; that restrict the recipient's use of competing technology; that give the grantor a purchase option; that impose grant-backs of the recipient's related technology innovations; that require the recipient to pay license fees for unused patents; and (with exceptions) that restrict the recipient's exports.[27] As to trademarks, the prohibitions are analogous.[28]

Those prohibitions were reiterated in Decision 220 and thus remain legally effective in all ANCOM nations. They were independently enacted, with embellishments, by Venezuela.[29] Although they are phrased as applicable to inbound transactions,[30] they are of such universal relevance that practitioners in ANCOM nations will most likely use them as a standard negotiating checklist—something of an informal law merchant—for all licenses, whether inbound, outbound, or purely domestic. If so, it will be another example of second-tier devolution, from international to domestic law, accomplished by Decision 24.

D. Exorcising the Ghost

The ephemeral nature of explicit legislative restrictions on foreign investment is aptly demonstrated by the last two decades of ANCOM enactments: when policies change, statutes are amended and repealed. Some impediments to the entry of foreign capital, however, are more difficult to dislodge because they are not merely legislated but are implanted in the cultural mind-set of a nation or region. In Latin America the cultural impediment to foreign investment that most tenaciously resists dislodging is the Calvo Doctrine, the principle that dispositions of a foreign investor's assets must ultimately be determined by the

26. *Id.* arts. 18, 20, 25. *But cf.* art. 6(f).

27. *Id.* art. 20.

28. *Id.* art. 23.

29. Decreto No. 1200, *supra* note 12, arts. 66, 70–71.

30. Literally, "*contratos sobre transferencia de tecnología externa o sobre patentes*" (contracts concerning transfer of foreign technology or concerning patents) and "*contratos de licencia para la explotación de marcas de origen extranjero en el territorio de los Países Miembros*" (license contracts for the exploitation of trademarks of foreign origin in the territory of Member Nations). Decision 220, *supra* note 8, arts. 20, 25.

courts and law of the receiving nation and cannot be subrogated to a foreign sovereign or relegated to an external institution or a foreign law.

From the standpoint of a capital-importing nation, the Calvo Doctrine had some plausibility a century ago, when Carlos Calvo, the Argentine diplomat and jurist, articulated it.[31] It was the age of gunboat diplomacy and bilateral confrontation, when investment disputes were resolved by a capitalist nation's naval blockade. Now times have changed. We live in a world of multilateral arbitration treaties, and of impartial dispute-resolution agencies such as the International Centre for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA), in which are reliable, consensually chosen, third-party deciders of foreign investment disputes. But the ghost of Carlos Calvo still haunts the mind-set of Latin America. For example, of the twenty independent nations of continental Latin America only twelve adhere to the Inter-American Convention on Commercial Arbitration, only ten to the United Nations Arbitration Convention, only five to ICSID, and only three to MIGA;[32] and experience demonstrates that such impediments-by-omission to foreign investment are much more difficult than ordinary legislation to repeal.

On that score the Andean measures have substantially advanced the access of foreign investment and technology, not by an affirmative action but by the elimination of a negative one. Decision 24 expressly instituted the Calvo Doctrine as obligatory for all ANCOM nations: "In no instrument related to investments or transfer of technology will be admitted clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the receiving country or that permit the subrogation by States of the rights and claims of their national investors."[33] If that edict had remained in place, and were literally applied, it would have alienated prospective investors and licensors by denying even consensual access to external arbitration, private or institutional, for the resolution of investment or licensing disputes. Fortunately, Decision 220 repealed it, leaving each ANCOM nation free to adopt the law of dispute resolution that it chooses: "In the solution of controversies or conflicts derived from direct foreign investments or from the transfer of foreign technology, the Member Nations will apply that provided in their internal legislations."[34] While the ghost of Carlos Calvo is not yet exorcised from Latin America, Decision 220 has denied it an ANCOM passport to roam the Andes at will.

V. A Ruler from the Grave

Viewed from the perspective of the 1990s, Decision 24 is reminiscent of Maitland's famous epigram, "The forms of action we have buried, but they still

31. C. Calvo, Derecho Internacional Teórico y Práctico de Europa y América (1868).
32. *See* 5 Institute for Transnational Arbitration, News & Notes, No. 1, Jan. 1990.
33. Decision 24, *supra* note 2, art. 51.
34. Decision 220, *supra* note 8, art. 34.

rule us from their graves.''[35] In a very real sense Decision 24 has been buried, not only by Decision 220 and its national implementations, but also by the less developed world's sea change in attitude toward foreign investment since the xenophobic 1970s.

Buried though it may be, Decision 24 still exercises from its grave a powerful normative force over the public and private law of the ANCOM nations and beyond. Although it failed to discharge its basic public international law purpose of requiring a highly restrictive standard in the foreign investment laws of the ANCOM nations, the profile Decision 24 created of a modern foreign investment law is unsurpassed in conceptual scope and will in all likelihood endure as a form of private international law for many nations and decades to come. The norms that Decision 24 generated of standard license terms and regulatory distinctions between branches and subsidiaries have increased the sophistication of Latin American business law in areas of private international law that will impact purely domestic law. Certainly Decision 24's prohibition of bearer shares has significantly altered the domestic business enterprise law of ANCOM nations. And history will probably record that the most affirmative encouragement of foreign investment produced by any Andean measure of the last two decades was Decision 24's unintended rebuff, by failed endorsement, of Carlos Calvo.

35. F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1909, 1948 reprint).