Recent Developments in Latin-American Foreign Investment Laws

The drastic deterioration of U.S.-Latin American economic relations since 1969 is reflected in the foreign investment restrictions enacted during that period.

Future historians may dispute whether the starting point of this development lies in the expropriation of the Peruvian assets of International Petroleum Co. Ltd. (I.P.C.) in 1968, the Consensus of Viña del Mar in 1969 or elsewhere. But there is little disagreement that our relations with Latin America as a whole recently underwent a major structural change of a permanent nature.

To United States investors, the last few years have marked the end of virtually unrestricted access to most of the region's economies. To millions of Latin Americans, including Peru's President General Velasco and Chile's former President Eduardo Frei, this period signifies the second emancipation of their continent. After their political liberation from foreign political domination some 150 years ago, they now feel that the time has come for asserting their economic independence.

In the light of recent events, Governor Rockefeller's plea for "improving the quality of life of the Americas" followed by President Nixon's promised "action for progress in Latin America" in 1969 seem almost as quaint and out-dated as the Platt Amendment which served as our legislative

*LL.B. Yale (1956). Member of the New York Bar and Co-Chairman of the Latin American Law Committee of the American Bar Association's International and Comparative Law Section.

†The article is based on Committee reports summarizing general legal developments in selected Latin American countries from May 1, 1969 to October 15, 1971. The contributions of Miss Mary Marti and Messrs. Allison, Angulo, Cardenas, Crane, Crassweller, Dillenbeck, Dyal, Ford, Hughes, Keffer, Langer, Miller, Nattier, Ritch, Stairs and Watts are especially acknowledged. For a summary of 1968-1969 developments, see 4 Int'l L. 646 (1970).

1Senator Orville Platt of Connecticut attached an amendment to the Army Appropriation Bill of 1901, authorizing the President to terminate the U.S. occupation of Cuba only if that country would agree, among other things, to allow the U.S. to intervene "for the preservation of Cuban independence and for the maintenance of government adequate for the protection of life, property and individual liberty." Cuba's agreement was obtained and remained in effect until 1934. Lieuwen, U.S. Policy in Latin America 63, 66 (Praeger 1963).
Latin American Foreign Investment Laws

basis for more than thirty years of United States intervention in the affairs of Cuba.

It is estimated that United States properties worth more than two billion dollars\(^2\) have been expropriated or forcibly sold since the beginning of 1969. Moreover, under the new foreign investment legislation of the countries of the Andean Common Market, a portion of our remaining direct investment in the region, estimated at about eleven billion dollars, will have to be divested sooner or later.

Some significant bright areas remain. The "Big Three"—Mexico, Brazil, and to a lesser extent, Argentina—continue to welcome foreign investment. This also holds true for Panama, most of the other Central American countries and Paraguay.

But even in the laws of some of those countries we find new entrance requirements for foreign investment, an increasing insistence on local equity participation, restrictions on profit remittances and capital repatriation and limitations on local borrowings. Moreover, there is a growing expansion of the public sector at the expense of private enterprise, both domestic and foreign.

As the following summary of Latin American Law Committee reports since May 1, 1969 indicates, it will take more of the ingenuity of foreign private entrepreneurs than ever, to steer safely between the rocks of nationalism and statism in Latin America to bring their ships home.

Andean Common Market

The significance of the Andean Subregional Common Market ("AN-COM") for Latin American economic integration, was overshadowed in 1971 by its draconic foreign investment restrictions.

Formed in 1969 by Bolivia, Chile, Colombia, Ecuador and Peru under the so-called Cartagena Agreement,\(^3\) the Market has three principal goals:

1) to promote the growth of the region's domestically owned industry and locally developed technology while reducing dependence on foreign capital and technology.

2) to accelerate the region's economic development compared with the

---

\(^2\)This is about the same amount as the estimated value of United States properties expropriated (including U.S. $1.4 billion in Cuba) or forcibly sold in the preceding ten-year period according to U.S. NEWS AND WORLD REPORT, November 3, 1969.

\(^3\)Agreement on Andean Subregional Integration signed on May 26, 1969 and ratified on November 15, 1969 (translated in 8 Int'l. Legal Materials [September 1969]). The Market created by the agreement is governed by a Commission composed of representatives of the five member governments and administered by a permanent three-man Secretariat (junta) located in Lima. The Andean Development Corporation ("CORANFO") headquartered in Caracas, is the Market's financial arm.
necessarily slower integration process of the entire continent under the Latin American Free Trade Association (LAFTA);

3) to strengthen the Market's industry against the time when it will have to compete against duty-free imports from the "Big Three"—Argentina, Brazil, and Mexico—under the LAFTA agreement.

Economic Integration

Member countries of the Market, with a total population of about 50,000,000, are committed under the Cartagena Agreement to achieve complete economic integration and specialization in key industries by 1980, and to eliminate trade barriers among member countries as well as to establish uniform import restrictions against third countries by December 31, 1985.

As the least developed ANCOM members, Bolivia and Ecuador are accorded a number of special privileges, since they need additional time to become competitive.

These countries have been granted the highest number of products on the list of goods which each ANCOM country may unilaterally exclude from free trade until December 31, 1985.

The list is as follows: Ecuador 600, Bolivia 500, Peru 450, Chile 250 and Colombia 250.

In addition to unilaterally excludable products, ANCOM integration is based on the manipulation of two other basic product categories:

a. Products for Sectorial Development are those to be produced by one of the member countries for the entire Market. These products will be allocated among the member countries in accordance with sectorial development plans to be completed December 31, 1973.

b. New Products, not produced in the Market when it was formed, are to be free-traded among the member countries.

Foreign Investment Restrictions

The ANCOM countries recently adopted a code of uniform restrictions on foreign investments and foreign technology which is unprecedented in the free world in its harshness and multinational scope.

These restrictions, which went into effect on July 1, 1971, and are officially known as “Common Rules Governing the Treatment of Foreign Capital Trade Markets, Patents, Licenses, and Royalties” (Code) may be summarized as follows:

4The relatively high number of products which Peru is allowed to exclude from free trading was the price which the country exacted for its participation in the Market. It has, however, agreed to reduce this number to 250 by December 31, 1979.

5For a detailed analysis of the Code, see Schliesser, Restrictions on Foreign Investments in the Andean Common Market, 5 INT'L LAWYER 586 (July 1971).
1. Companies in the domestic wholesale and retail trade, the communications media and domestic transportation must reduce foreign equity and management participation to less than 20% by July 1, 1974. (This rule also applies to commercial banks wishing to retain domestic deposits.)

2. Other existing companies in the Market, a majority of whose equity is owned or controlled by foreigners, may opt between selling control and losing ANCOM tariff and other benefits by July 1, 1974.

3. No new direct or indirect foreign investments will be allowed in the domestic wholesale and retail trade, the communications industry, the insurance, financial and public utilities sectors and domestic transportation.

4. New foreign investments will generally be allowed in grass roots ventures and require the prior approval of the authorities. As a prerequisite of such approval, foreign investors must agree eventually to reduce their majority control, if any, to a minority position. The “fade-out” period for new as well as existing investments is a maximum of 15 years in Chile, Colombia and Peru, and 20 years in Bolivia and Ecuador. (The terms of the fade-out agreements will have to be negotiated with the host government in each case.)

5. New foreign investments in the mineral, pipeline, and forestry sectors are limited to a maximum 20-year term of concession and are therefore exempt from the fade-out period.

6. Profit remittances of foreign companies will be limited to 14% of registered investments per year.

7. Remittances of divestment or liquidation proceeds in foreign exchange will be authorized.

8. Local borrowings by foreign companies will be restricted to short term credits. Foreign borrowings will require prior authorization and interest on foreign loans will be limited to three percentage points above the prime rate in the lending country if the lender is a foreign parent or affiliate. If the lender is not affiliated with the borrower, the interest must be reasonably close to such prime rate.

9. All foreign investments and reinvestments will have to be registered.

10. All foreign patent and trademark licensing and other technical know-how agreements must be registered and new agreements will require prior authorization of the local authorities.

11. Remittance of royalties and similar fees to foreign parents or affiliates will be prohibited and such royalties and fees will not be deductible for local tax purposes.

12. A new Subregional Industrial Property Office will be established which will be ANCOM’s policy-making organ in the field of patent rights and may negotiate patent and know-how licenses for the entire Market.

13. ANCOM protection for foreign patents will be restricted to those thought to further the Market’s economic development.

14. Exceptions from the restrictions under items 1, 3 and 5 above may be invoked by the member governments and Ecuador and Peru have already done so. However, resort to such exceptions results in the automatic forfeiture of Market benefits for the enterprises in question.

Among its many other tasks, the Commission is scheduled to prepare double taxation treaties among members and third countries, to approve uniform rules for multinational enterprises and to issue directives for the harmonization of the industrial incentive laws of the ANCOM countries.

International Lawyer, Vol. 6, No. 1
Argentina

Argentina, which has long been hospitable to foreign investors, imposed restrictions on the inflow and repatriation of foreign capital and goods in 1971.

Foreign Investment Restrictions

Under Articles 4 and 10 of Law 19151 of July 30, 1971, only such investments will henceforth be eligible for profit remittances and capital repatriation, as have been approved by the Argentine Government and registered with its Control Office. The new law will become effective when its regulations are published (G.O. of August 5, 1971).

Even upon such registration, profit remittances will be subject to the terms imposed by the Government as a pre-requisite to approving the investment, and capital repatriation will be limited to the amount of the original investment plus reinvested profits (Art. 9).

Moreover, companies whose majority is foreign-owned will be able to borrow only up to a maximum of 50% of their registered capital, plus accumulated reserves in short term or working capital credits. However, export credits are exempt from this limitation (Art. 12).

It should also be noted that enterprises with foreign investments approved under the law must ordinarily have a minimum of 85% of their managerial, technical and professional positions staffed by Argentine nationals (Art. 4).

In approving investments for registration, the Government will weigh a large number of factors, including potential contribution to Argentine development; adequacy of the investment to accomplish its purposes; benefits to Argentina from the foreign exchange balance of the investment; fundamental importance of the investment to the country; number of similar existing enterprises; the commitment of the investor to reinvest profits; the degree of association of the new investment with local capital; potential benefit to exports; new technology, employment of Argentine technicians and professionals; the proposed policy concerning profit and capital repatriation; and several other criteria. If similar investments compete for authorization, the decision as among them will be based in part upon a preference for those investments that are associated with Argentine capital (Arts. 4 and 5).

With the exception of the registration requirement and the credit limitation referred to above, the new law is not applicable to foreign investments governed by previous arrangements.

Majority foreign-owned companies, as well as companies 20 percent or more of whose directors, management and technical supervisory personnel
are foreign, will be generally excluded from bidding on Government projects, and selling goods to the Government under the "Buy Argentine" requirements of Law 18875, which went into effect on January 1, 1971.

Registered foreign investments will, however, remain eligible for certain fiscal incentives, such as reduced taxes and import duties under Law 15587 of February 11, 1970, which has been left largely intact.

**Licensing Agreements**

Law 19,231, published on September 13, 1971, requires the registration of all patent, trademark and know-how licensing agreements providing for payments to foreign recipients.

Under this law all existing agreements must be recorded in the newly created National Register of License and Know-How Agreements by January 1, 1972. [The control agency for this purpose is the Ministry of Industry, Commerce and Mining.]

In the case of new agreements, the control agency may refuse registration for reasons including disproportionate prices, availability of technology within the country, tying arrangements, export prohibitions and the fixing of resale prices.

The control agency will also be permitted to set maximum rates for licensing fees. Disputes arising out of these agreements will have to be referred to the Argentine courts. Agreements which are not registered in accordance with the law will be deemed invalid and are not enforceable in Argentina.

**Import Curbs**

In September, 1971, a severe trade deficit and foreign exchange shortage forced the Government to impose a near-total ban on imports.

The ban was subsequently relaxed, but very high import duties continue in effect under Law 18588 of February 11, 1970.

**Bolivia**

Three coups d'état and the expropriation of two major U.S. investments since September 1969, have further weakened Bolivia's economy. Though the latest coup brought a military junta favoring private enterprise to power, no rapid improvement in the country's fortunes is foreseen.

**Expropriations**

On April 30, 1971, the government of General Torres cancelled the

---

6The first of the coups occurred on September 26, 1969, when General Alfredo Ovando Candia ousted President Luis Adolfo Siles. General Ovando stayed in power until October 4, 1970 when his government was toppled by General Torres. General Torres was, in turn, toppled by the centrist military regime of General Hugo Banzer on August 22, 1971.
twenty-year lease of some 2,500 ha of zinc, cadmium, lead, silver and gold concession areas which COMIBOL, the Bolivian Government mining corporation, had granted in 1966 to Mina Matilda Corporation, a company jointly owned by the U.S. Steel Corporation and Minerals and Chemical Corporation. At the same time the government ordered the company's Bolivian bank accounts to be frozen. The decree in question (Decree Law 9699, G.O. 556 of April 30, 1971) states that the Matilda lease had violated Art. 25 of the Bolivian Constitution which prohibits foreigners from exercising mining rights within a zone of about 30 miles (50 km) from the border. A Government Commission has been appointed to value the expropriated assets.

The action was preceded by the Government's expropriation on October 16, 1969, of all of the installations and concessions of the Bolivian Gulf Oil Company under Supreme Decree 08956 (G.O. 474 of October 17, 1969).

"The Bolivian Gulf Oil Company," the preamble to the Decree reads, "has grown into a new superstate economically and politically more powerful than the Bolivian State. This creates a situation incompatible with the principles and practice of sovereignty" and thus "violates the dignity of the nation."

The legal underpinning of Gulf's operations had been removed one month earlier by the abrogation of the Petroleum Code of October 26, 1955 (Supreme Decree 08936 of September 26, 1969, G.O. 471 of September 30, 1969). The preamble to that decree, which marked the first legislative act of General Ovando's government, states that the Petroleum Code, also known as the "Davenport Code," had been "categorically rejected by the Bolivian people as impairing the nation's independence." The preamble further points out that the Code had been drafted by "foreign lawyers for the benefit of foreign private interests at a time when the country was totally inexperienced in these matters."

Ten days later, the Government reinstated the suspended 1967 Constitution which, in Art. 31, prohibits any divestment of the country's oil and gas resources even if only by concession, and, in Art. 144, stipulates that Bolivia's sovereignty must not be sacrificed to economic development. (Supreme Decree 08947 of October 6, 1969, G.O. 472 of October 10, 1969). Both of these articles were later cited in the aforementioned Gulf expropriation decree.

Pursuant to Supreme Decree 93881 of September 10, 1970 (G.O. 524 of September 16, 1970), Gulf is to be paid compensation of up to $78,622,171.44 for its losses which the company had estimated to amount to $150 million. Payments to Gulf are to be made out of 25% of the proceeds from the sale of natural gas from three former Gulf production

International Lawyer, Vol. 6, No. 1
areas in southeastern Bolivia, near the Argentine border. These payments are to start on January 1, 1973 or three months after the first natural gas export to Argentina, and are to terminate twenty years later, even if Gulf has not received the full amount of compensation by that time. Among other conditions precedent, payments to Gulf are subject to the procurement of loan funds from the World Bank and other international lending agencies, for the construction of a natural gas pipeline linking Santa Cruz in Bolivia with Yacuiba in Argentina.

The compensation decree notes that Geopetrole, a French company, had appraised Gulf's expropriated assets for the Bolivian Government at about $101 million, but that the Government had arrived at the lower amount by disallowing Gulf's claims for indirect expenditures, interest on deferred compensation payments and the value of the expropriated concession areas and reserves.

**State Monopoly on Ore Exports**

Under Supreme Decree 08950, (G.O. 472 of October 6, 1969) all tin ore has to be offered for sale to ENAF, the Government agency operating Bolivia's first tin smelter. Ore in excess of the new smelter's capacity may be exported in accordance with special permits issued by the Bolivian Government Mining Bank, Banco Minero (BAMIN). BAMIN was given the monopoly for ore and metal exports, and is to pay for its ore and metal purchases at prices prevailing on the London Metal Exchange. Existing contracts will be honored until their expiration.

**Fiscal Emergency Measures**

To restore confidence in the country's financial stability, the Government imposed a price-wage freeze and tightened foreign exchange controls, while reiterating its commitment to a fixed rate of exchange of 11.8 Bolivian pesos to the dollar (Supreme Decree Nos. 08959, G.O. 475 of October 25, 1969, and 08986, G.O. 477 of November 7, 1969).

Austerity measures adopted by the Bolivian Government under Supreme Decree No. 08959 of October 25, 1969 (G.O. 475 of October 25, 1969, regulated by Supreme Decree 08986 of November 7, 1969, G.O. 477 of November 7, 1969), included the requirement that exporters of Bolivian products surrender to the Bolivian Central Bank all of their foreign exchange receipts, and a levy of a tax at the rate of 9% p.a. on the principal amount of all commercial and private loans.

**Pharmaceutical Industry**

Pharmaceutical manufacturers will be required to start local production.
of certain imported drugs by July 31, 1972 or lose import privileges. (Supreme Decree 08878 of July 31, 1969, G.O. 463 of August 4, 1969.)

Brazil

The Brazilian Government has maintained a climate of economic stability favorable to foreign investment, with a firm hand. The acquisition of rural land is the only significant new restriction affecting foreigners involved.

Political and Penal Law

Among the most important recent developments in constitutional and political law was the Constitutional Amendment No. 1 of October 17, 1969 (D.O. October 20, 1969), under which a virtually new Constitution embodying 58 changes from the 1967 charter was promulgated. The new Constitution provides for the indirect election by Congress of the President and Vice-President and removes Congressional immunity in cases involving defamation, insult, calumny or offenses specified in the new National Security Law.

Under the National Security Law (Decree-law 898 of September 29, 1969, D.O. October 29, 1969), subversion and revolution are punishable by from two years imprisonment to death. Offenders are tried before military courts under the Code of Military Justice which does not provide for bail. Decisions are appealable for all purposes and the death sentence can be carried out only 30 days after the President of the Republic has been advised and only if he does not commute it to life imprisonment.


Territorial Limits


Banking and Finance

"Gold Clause" legislation since 1933 has nullified contract clauses calling for payment in gold or foreign currency or which limit the cruzeiro's
efficacy as legal tender, with exceptions for genuinely international transactions. Decree-law 857 of September 11, (D.O., September 12, 1969) codified and updated the legislation. Two significant decisions have codified and updated the legislation. The Supreme Court in Appeal 21,575 upheld a clause specifying payment in foreign currency for machinery purchased abroad but ruled that enforcement should be by ordinary rather than executory action.

However, loans contracted abroad in foreign currency now require prior approval by the Central Bank. Under Decree 65,071 of August 27, 1969 (D.O., August 29, 1969), approval of the Commission on Foreign Loans (CEMPEX) is required for loans to any Brazilian borrower by foreign governmental or international agencies; and Central Bank Resolution 125, of September 12, 1969 (D.O., September 17, 1969), requires other foreign currency loans to be approved by the Office of Registry of Foreign Capital (FIRCE) of the Central Bank.

The move to uniformity in the form of negotiable instruments continues, albeit slowly. Central Bank Circular 31, of October 17, 1969 (D.O., November 13, 1969), prescribes the required characteristics of checks, including magnetic characters; but Circular 137, of June 29, 1970 (D.O., July 3, 1970), postponed obligatory use of the form a second time. Recently the Supreme Court stepped in, ruling that the Uniform Law on Checks adopted by the Geneva Convention, which Brazil approved by Decree-law 54 of 1964 and Decree 57,595 of 1966, be put into effect immediately, “including aspects which modify internal legislation.”

Commercial Law

A new Corporation Law, reported to form a part of the draft of a new Civil Code, is expected to be submitted to Congress shortly.

The Industrial Development Council (CDI), headed by the Minister of Industry and Commerce, succeeded the former Industrial Development Commission as the agency in charge of policy and priorities for industrial development. Through its Project Study Group (GEP), the Council supervises the eleven Executive Groups which administer the incentive laws, all as provided in Decree 65,016, of August 18, 1969 (D.O., August 22, 1969) and Decree 65,203 of September 22, 1969 (D.O., September 23, 1969).

A new Industrial Property Code, replacing the Code of 1967 and prescribing a new schedule of fees, was adopted by Decree-law 1,005 of October 21, 1969 (D.O., October 21, 1969). The new regime is to speed up the processing of patent and trademark applications. Under Law 5,648 of December 11, 1970 (D.O., December 14, 1970), the National Institute of Industrial Property was created, attached to the Ministry of Industry and
Commerce. The Institute is to carry out the functions of the former National Department of Industrial Property, which is abolished. Patent protection continues to be denied for food products, pharmaceuticals and medicine.

**Customs**

In a major step, Brazil adopted a new Brazilian Merchandise Nomenclature (NMB), based on the Brussels Nomenclature, and in the same Decree-law 1,154 of March 1, 1971 (D.O., March 4, 1971), promulgated a new Customs Tariff adapted to that Nomenclature.

Consolidating import regulations, CACEX, the Foreign Trade Department of the Bank of Brasil, issued Communication 343, on May 10, 1971 (D.O.II, May 21, 1971).

**Foreigners**

The legislation on aliens was brought together and updated by a comprehensive new Law on Foreigners, Decree-law 941 of October 13, 1969 (D.O., October 15, 1969). Regulations were promulgated by Decree 66,689 of June 11, 1970 (D.O., June 24, 1970).

Decree-law 494, of March 10, 1969 (D.O., March 11, 1969), forbade acquisition of rural land in Brazil by non-resident aliens, individuals or companies. On October 10, 1969, this prohibition was relaxed by Decree-law 924 (D.O., October 13, 1969), which made an exception for industrial undertakings of interest to the economy which are approved by the appropriate agencies. Only a few days later, Decree-law 941, supra, reiterated the prohibition (Article 118) without mention of the exception, as did Decree 66,689. Reports continue to appear that the law is about to be changed.

Employment contracts under which foreign technicians domiciled abroad are brought to Brazil for specialized services, compensation being payable in foreign currency, are regulated by Decree-law 691, of July 18, 1969 (D.O., July 21, 1969).

**Incentives**

Imaginative and effective use of tax and other incentives continued to channel energies and resources into priority applications which included regional development, industries, exports, housing and other social programs, and investment in the country's securities market.

Regional development again was allocated the bulk of incentive resources. Regulations governing the application of the substantial incentives and the conditions to which they are subject for both the Amazon and the

A major new phase of regional development is the "National Integration Program" instituted by Decree-law 1,106, of June 16, 1970 (D.O., June 17, 1970). The program aims to hasten the integration of the Amazon and Northeast Regions into the national economy, initially by building the Trans-Amazon Highway and a road from Cuiabá in the west to Santare in on the lower Amazon, both with a 10 kilometer strip on both sides reserved for colonization; and by an intensified irrigation program in the Northeast. From 1971 through 1974, 30% of all amounts applied by taxpayers under existing development incentive programs are to be devoted to the National Integration Program. Decree-law 1,164 of April 1, 1971 (D.O., April 2, 1971), expropriated uncultivated lands in a 100-kilometer strip along both sides of several roads in the Amazon area, for colonization. Decree 68,524, of April 16, 1971 (D.O., April 19, 1971), authorizes participation of private colonizing companies in the program, with approval of the National Institute for Colonization and Agrarian Reform.

Incentives are available to industrial projects in a variety of fields, when approved by the Industrial Development Council and its Project Study Group, supra, consisting of certain exemptions from import duties, credit facilities, registration of foreign loans and possible tariff protection. Decree-law 767, of August 18, 1969 (D.O., August 22, 1969), and Decree 67,707, of December 7, 1970 (D.O., December 7, 1970), specify particulars. Tax incentives are also provided for agriculture, mining, fishing, forestry and reforestation, as well as for development of tourism. Exports of manufactured goods are promoted by a number of important incentives.

Chile

With the election of Dr. Salvador Allende, a Marxist Senator, as Chile's President, on October 24, 1970, the country's new leftist government embarked on a policy of nationalizing some of the country's major private companies, particularly in the mining sector.

Expropriations and Interventions

The remaining 49% interest of Anaconda and Kennecott and the 70% interest of Cerro in their Chilean copper mines were recently nationalized under an amendment of Art. 10 of the Chilean Constitution pursuant to
Law 17,450 of July 15, 1971 (G.O. 27,999 of July 16, 1971), which had been unanimously adopted by the Chilean legislature.

The amendment provides for setting the compensation at book value payable over a period of not more than 30 years and at a rate of interest not in excess of 3% per annum.

Under the transitional provisions of that Law, the Controller General is to fix the amount of compensation but must deduct from it any "excess profits" of the copper industry as determined by the President of the Republic.

While the President's deduction is not subject to review, the Controller General's evaluation is appealable to a special tribunal composed of a Supreme Court Justice, a Judge of the Court of Appeals of Santiago, a Member of the Constitutional Court, the President of the Chilean Central Bank and the Director of Chile's Internal Revenue Services.

The Chilean Government has also "intervened" the Chilean Telephone Co.; a subsidiary of I.T.T. with an estimated book value in excess of U.S. $150 million; the Chilean branch of Ford Motor Co. (by Decree 538 of May 27, 1971, D.O. 27,957 of May 28, 1971); and several other important private enterprises including textile and public utilities companies.

The decrees of intervention typically cite alleged deficiencies in the operations of the seized firms to justify the takeover by the Government "in the national interest."

Whatever foreign investments remain in Chile are also subject to the foreign investment restrictions of the Andean Common Market of which Chile is a member.

**Colombia**

**Andean Common Market**

To the surprise of many observers, Colombia, one of the most industrialized countries of Latin America, became one of the principal supporters of the foreign investment restrictions under the Andean Common Market Code.

Efforts to declare Colombia's membership in the Andean Market unconstitutional for lack of legislative ratification failed both in the Council of State (by decision of June 5, 1971) and in the Colombian Supreme Court,
which in its decision of July 27, 1971 refrained from deciding the issue for "lack of jurisdiction over international acts."

**Commercial and Mining Codes**

Neither the new Commercial Code, enacted under Decrees 410 and 837 of March 27 and May 17, 1971, nor the new Mining Code, enacted by Decree 975 of July 29, 1970, contains much of specific interest to foreign investors.

Except for its provisions on sales agencies and bankruptcy procedures, which became effective on May 17, 1971, the Commercial Code will go into effect on January 1, 1977.

Arts. 469 through 497 supersede and tighten the requirements for operations of Colombian branches of foreign corporations previously set forth in Arts. 218 to 246 of Decree 2521 of 1950.

Such branches are now required to have some capital allocated to them which may be increased but not reduced without the prior approval of the Superintendent of Corporations (Arts. 472 and 487).

Under the new Mining Code, a foreign company wishing to obtain exploration or exploitation permits must establish a Colombian branch domiciled in Bogota. Such branch will be considered to be Colombian for domestic and international purposes.

**Patents and Copyright**

Under Arts. 534 to 582 of the Commercial Code, Colombian patents may be granted for an original eight-year term, which may be extended for four years if the goods covered by the patents are sold or used in the country.


**Free Zones**

Decrees 1082 and 1095 of June 7 and July 7, 1971 regulate the free zones of Barranquilla, Buenaventura and Balmaseca.

**Mexico**

Compared with other Latin American nations, Mexico has continued to take a middle of the road position in the treatment of foreign investments.

Some of Mexico's restrictions on foreign investments have been ex-
panded during the last two years. On the other hand, a degree of foreign participation in the development of the country’s border and coastal zones is now being encouraged by the Mexican authorities.

Foreign Investments in the Border Area

Under a Presidential decree ("acuerdo") of April 29, 1971, foreign investors may now rent or otherwise use (but not legally own), land located within a strip of about 60 miles (100 km) parallel to Mexico’s land border, and of about 30 miles (50 km) from its coastline (D.O. of April 30, 1971).

While the outright ownership of land by foreigners in this area continues to be prohibited under Art. 27/1 of the Mexican Constitution, they are now permitted to rent land for at least one term of ten years, or to purchase registered real estate participation certificates of Mexican credit institutions holding title to such land as fiduciaries.

The land may be used for industrial or tourist purposes and must be sold by these credit institutions to Mexicans after thirty years.

Another Presidential decree authorizes assembly plants located within about 17 miles (20 km) from Mexico’s border or coastline to import and re-export, free of duty, goods assembled, processed or finished by such plants. The decree regulates Art. 321/3 of the Mexican Customs Code (D.O. of March 17, 1971).

Export Promotion

On the same date, other Presidential decrees were issued, authorizing similar import/re-export arrangements for the rest of the country, and granting drawback rights for indirect taxes and import duties to Mexican exporters (D.O. of March 17, 1971).

Foreign Investment Restrictions

In 1970 the Government expanded the scope of its "Mexicanization" rules to the iron, steel, aluminum, cement, glass, fertilizer and cellulose industries. Pursuant to a decree, published in the Diario Oficial of July 2, 1970, foreign ownership or control of companies in these industries is limited to a 49% equity interest. Companies which were foreign-owned or controlled when the decree was published do not have to be Mexicanized.

Effective July 1, 1971, Mexico amended its banking law, the General Law of Credit Institutions and Auxiliary organizations, authorizing the Finance Ministry to impose borrowing limits on companies controlled by foreigners and to limit the percentage of securities of such companies held by Mexican financial institutions.
**Latin American Foreign Investment Laws**

**Labor Law**

A voluminous Federal Labor Law, which went into effect on April 1, 1970, grants Mexico's workers, among other benefits, the right to share in the profits of their companies. The percentage of such profit participation is to be established by a special commission (D.O. of April 1, 1970).

**Panama**

Panama has remained one of the few Latin American countries which keeps its doors wide open to foreign investments.

**Industrial Promotion Law**

Generous tax and duty reductions, as well as temporary tariff protection for new manufacturing enterprises, are available to domestic as well as foreign investors under Panama's Industrial Promotion Law. (Cabinet Decree 1413 of December 30, 1970, as amended by Cabinet Decree 172 of August 24, 1971, G.O.s 16767 and 16929 of January 8, and August 31, 1971).

Incentives are highest if the investment generates exports and the plants are located in some of the less developed areas of the country.

To obtain such incentives, companies must enter into investment incentive contracts with the Government.

**Banking, Securities and Sales Agency Regulations**

To strengthen Panama's growing importance as one of the world's financial and commercial centers, the government has taken steps to regulate the bank securities and mutual fund business as well as to protect the interest of local distributors and sales agents.

The National Banking Commission was created to supervise the activities of domestic and foreign banks in that country, to establish reserve and liquidity requirements and to regulate bank interest rates (Cabinet Decree 238 of July 2, 1970, G.O. 16640 of July 6, 1970).

The National Security Commission was established to regulate the sale of securities and the licensing of stockbrokers in Panama (Cabinet Decree 247 of July 16, 1970, G.O. 16652 of July 22, 1970).

Domestic and foreign mutual funds must obtain the approval of the National Securities Commission, prior to commencing operations in Panama, and are required to invest a minimum of 25 percent of their capital in the country (Cabinet Decree 248 of July 16, 1970, G.O. 16653 of July 23, 1970).

In 1969, Panama introduced a tough law for the protection of its sales
agents, distributors and other commercial representatives. The law requires that any domestic or foreign company pay severance compensation, ranging up to five years average gross profits, received by such personnel if their services are terminated without their fault. Disputes are resolved by the Ministry of Commerce. If the Ministry finds that the termination was unlawful, it may suspend imports of goods by the company which is found guilty and order such company to buy the inventory of its products from its former Panamanian sales representative at cost plus expenses (Cabinet Decree 344 of October 31, 1971, G.O.s of November 5 and 18, 1969).

Peru

Since the ouster of President Belaunde on October 3, 1968, the revolutionary junta under General Velasco has been drastically revamping the country’s economy along statist, socialist and nationalistic lines, and reducing the scope of foreign investment.

Through numerous decrees, the new military government has instituted tight government controls and planning for the Peruvian economy. After the confiscation of the Peruvian assets of the International Petroleum Company, a subsidiary of Standard Oil of New Jersey, on October 10, 1968, government ownership of industry has also been greatly expanded. Under a new Industrial Law, the country’s entire basic industry will become state-owned.

In addition, the nation’s private wealth is being forcibly redistributed. As a result of this process, which started with the Agrarian Reform Law of 1969, was extended under the Industrial Law of 1970 and the Fisheries and Mining Laws of 1971, and is to be completed under a Commercial Law to be issued in 1972, ownership and control of 50% of the country’s private economy is gradually to be turned over to Peru’s workers.

Lastly, foreign participation in Peruvian firms is eventually to be reduced to a minority position under the so-called “fade-out” system. That system, also known as the “Velasco Doctrine,” has served as a model for the Code of Foreign Investment Restrictions for the entire Andean Common Market in which Peru is a member.

1. The Industrial Law

Accelerated economic development through government planning, in-
creased efficiency through state ownership of the basic industry, economic independence through reduction of foreign control and social welfare through the participation of labor in the ownership and management of the country’s industry, are the avowed purposes of Peru’s new Industrial Law.

The Law, which will be briefly described here, also contains a complete industrial-property statute, with novel compulsory licensing provisions. In addition, it includes detailed import regulations and quality controls for Peruvian goods.

Among the most important features of the Law are the following:

a) PERUVIANIZATION

All foreign-owned or controlled industrial enterprises\(^{10}\) must apply for “fade-out” agreements with the Government (L 16, 17, IX/3/1). These agreements will stipulate the terms under which the foreign participation must be reduced and the date by which the prescribed divestiture must be completed. No time limit is indicated in the law for entering into these agreements.

Nor does the Law provide for a maximum divestiture period. [The Andean Foreign Investment Code (“ANCOM Code”) which partially superseded the Law as of July 1, 1971, limits this period to 15 years].

There is no statutory formula for fixing the price for foreign-owned shares. The Law merely states that foreign investors be permitted “to recover their original investment and a reasonable return thereon” [L 16].

Foreign as well as local investors will have to “fade out” completely from the country’s basic industry,\(^{11}\) which the Law reserves for the public sector [L 7].

The general rule for industries allowed to remain in private hands is the gradual divestiture of foreign equity and control to not more than: (i) 85% by July 1, 1974; (ii) 55% by July 1, 1981; and (iii) 49% by July 1, 1986.

A foreign investor may meet the divestiture requirements of the Law in four possible ways:

a) by selling his shares to Peruvian nationals\(^{12}\) (In the case of investments in the basic industry which the government allows to continue, the

---

\(^{10}\)The Law defines industrial enterprises as those engaged in the processing of raw materials and/or manufacture of economic goods [L Part IV, D]. The cottage industry will be governed by a separate statute [R 218]. An analogous law governing commercial enterprises is in preparation. Other sectors classified as non-industrial such as agriculture, fishing, mining and transportation are subject to special statutes [R 283]. If a firm is involved in both commercial and industrial activities it will have to keep a set of books for each activity [R 284]. Firms which are engaged in industrial and non-industrial activities, other than purely commercial pursuits, will be subject to the law governing the preponderant activity [R 283].

\(^{11}\)This includes metal refining and casting, basic chemicals, capital goods, fertilizer, cement, pulp and paper industries [L 4, Part V].

\(^{12}\)Peruvians who spend more than six months of a year abroad ordinarily do not qualify as nationals for purposes of the Law [L IX/4/C].
price may be based on the quotation of the stock at the Lima Stock Exchange or its valuation by the National Securities Commission.) [L 8; R 11, 217];

b) by waiving rights to repatriate capital and profits [L IX/4/C; R 217, 230];

c) by advancing shares of his firm to the so-called Industrial Community representing the firm’s employees. The advance is repayable out of the 15% profit participation to which the Community is entitled under the Law. Interest will be equivalent to the dividends on these shares [R 229];

d) by having the Industrial Community subscribe to an increase in his firm’s capital and pay for 25% of the newly issued shares with Community funds or credits from the company and amortizing the 75% balance out of the aforementioned yearly profit participation of 15% [R 228].

Foreign investors are assured of repatriation of capital and profits, including profits, if any, from the sale of their shares, at the rate of exchange prevailing at the time of remittance [R 218–219].

In addition, the Law, modified by Art. 17 of the ANCOM Code, limits local short term borrowings. No domestic loans, other than suppliers’ credits, will be granted to firms wholly-owned by foreigners. Firms with local participation will be able to borrow locally only in proportion to their Peruvian equity ownership. For example, if a Peruvian firm which is 60% owned by foreigners wants a credit of $1,000,000 soles from a Peruvian bank, its foreign shareholders will first have to obtain 600,000 soles from foreign sources, before the Peruvian bank will be allowed to lend the balance of 400,000 soles [R 222 and D.L. 18858 published in El Peruano of May 19, 1971].

b) PRIORITIES AND INCENTIVES

The Law ranks industries by order of priority to national economic development goals, into four categories and provides for corresponding incentives [L 4]:

First Priority: Basic industry. As stated above, this category is reserved for the public sector, though private enterprise may continue to be active in this area under special concession contracts with the government [L 8].

Second Priority: Essential consumer and industrial support industries [R Part V/2].

Third Priority: Non-essential consumer and industrial support industries [R Part V/3].

No Priority: Luxury and superfluous goods [R Part V/4].

The last three of these four categories are to remain in private hands. But the Government, alone or in conjunction with private interests, may take over industries in these categories if it finds this to be in the interest of the nation’s "permanent self-sustaining industrial development" [L 7].

Depending on the priority of the enterprise in question, special in-
centives in the form of reduced import duties, tax-free reinvestments of
profits, reduced capital, merger and transfer taxes, low-interest government
loans and accelerated depreciation benefits will be granted. Special tax
benefits will also be available for the five leading enterprises in each
industrial category and for firms that are established or relocated outside of
Lima and Callao [L 9-11].\(^{13}\)

Variations in the percentages of regular import duties payable by indus-
trial firms under the Law illustrate the grading of incentives by indus-
trial category [L 9]:

<table>
<thead>
<tr>
<th>1st Priority</th>
<th>2nd Priority</th>
<th>3rd Priority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Essential</td>
<td>Non-Essential</td>
<td>Luxury</td>
</tr>
<tr>
<td>Industries</td>
<td>Industries</td>
<td>Industries</td>
</tr>
<tr>
<td>Capital</td>
<td>Capital</td>
<td>Capital</td>
</tr>
<tr>
<td>Goods</td>
<td>Goods</td>
<td>Goods</td>
</tr>
<tr>
<td>Duties on</td>
<td>Duties on</td>
<td>Duties on</td>
</tr>
<tr>
<td>Imported</td>
<td>Imported</td>
<td>Imported</td>
</tr>
<tr>
<td>Capital</td>
<td>Capital</td>
<td>Capital</td>
</tr>
<tr>
<td>Goods</td>
<td>Goods</td>
<td>Goods</td>
</tr>
<tr>
<td>Duties on</td>
<td>Duties on</td>
<td>Duties on</td>
</tr>
<tr>
<td>Raw</td>
<td>Raw</td>
<td>Raw</td>
</tr>
<tr>
<td>Materials</td>
<td>Materials</td>
<td>Materials</td>
</tr>
<tr>
<td>Import</td>
<td>Import</td>
<td>Import</td>
</tr>
<tr>
<td>Surcharges</td>
<td>Surcharges</td>
<td>Surcharges</td>
</tr>
<tr>
<td>(ocean</td>
<td>(ocean</td>
<td>(ocean</td>
</tr>
<tr>
<td>freight)</td>
<td>freight)</td>
<td>freight)</td>
</tr>
<tr>
<td>10%</td>
<td>30%</td>
<td>60%</td>
</tr>
<tr>
<td>20%</td>
<td>50%</td>
<td>80%</td>
</tr>
<tr>
<td>4%</td>
<td>4%</td>
<td>4%</td>
</tr>
</tbody>
</table>

Further reductions of import duties are available for industries outside of
the Lima-Callao metropolitan area [L 9.4, 33; R 15].

Except for local borrowings noted above, foreign-owned firms seem to
qualify for all of the incentives provided for under the law.

c) GOVERNMENT CONTROLS

Peru's industries are coming under increasingly tight control of the
Government. Industrial enterprises, even if wholly-owned by Peruvians,
may be established only upon Government approval and in locations au-
thorized by the Ministry of Industry and Commerce in accordance with the
National Industrial Development Plan [R 183, 187 and 189].

\(^{13}\) Under Art. 28/2 of the Cartagena Agreement, regulations harmonizing the industrial
incentives systems of the member countries of the Andean Common Market are to be issued
by the Market's governing body by December 31, 1971. Incentives for the non-industrial
sector are to be harmonized by November 30, 1972, pursuant to Art. H of the ANCOM
Code.

*International Lawyer, Vol. 6, No. 1*
Government approval is also required for mergers, capital increases, reductions and liquidations of industrial firms [R 198, 208 and 214].

The unauthorized installation or operation of an industrial plant will result in its immediate shutdown, forfeiture of inventory and fines [R 197].

d) WORKERS' PARTICIPATION

The Law provides for an elaborate profit-sharing system under which Peru's workers are to obtain eventual ownership of 50% of the shares of all private industrial firms [L 21-29].

Under this system each firm must allocate 25% of its annual net profits as follows:

a) 10% are to be distributed directly to its workers—5% to be distributed pro rata to each worker and 5% to be distributed among all workers in proportion to their respective base salaries [L 21, R 232]; and

b) 15% either (i) to be capitalized and reinvested automatically in fixed assets of the business; or (ii) if, in the opinion of the shareholders or the Ministry of Industry and Commerce, such reinvestment is not practical, to be used to purchase shares of the company from its shareholders, at the price quoted for such shares on the Lima Stock Exchange, or set by the National Securities Commission [L 24, R 238, 239].

The shares resulting from this capitalization or purchase will be transferred to the so-called Industrial Community of the company in question. The Community, a legal entity representing that company's workers, will hold these shares until they represent 50% of the company's capital, and then turn them over to the workers [R 236-239]. (Until such time, the shares may not be transferred or encumbered, except in favor of the State Development Bank [241]).

With respect to public sector enterprises, the 15% will be issued in the form of bonds or, in exceptional cases, used to buy shares in other enterprises pursuant to investment plans approved by the government [L 26].

Representatives of the Industrial Communities will serve on the boards of the firms in whose profits they participate. The number of such board representatives will increase in proportion to the equity held by the communities in question [R 243].

2. Fisheries and Mining Laws

Except for profit-sharing arrangements analogous to those under the Industrial Law, the Fisheries and Mining Laws enacted in 1971 leave existing foreign investments in these sectors largely undisturbed. But new foreign fisheries investments, whose equity participation exceeds 49%, must eventually be reduced to that percentage, and no new foreign participation will be permitted in the fishmeal or fish oil industry (D.L. 18810, Arts. 57-60, El Peruano of March 26, 1971).

The New Mining Law (D.L. 18880, El Peruano of June 9, 1971) does
Latin American Foreign Investment Laws

not specifically refer to foreign investigation; but an earlier statute (D.L. 18225 of April 16, 1970) which continues in effect, limits tax incentives to enterprises having a required minimum of 25% Peruvian participation in new mining projects. Under the new Mining Law, the pricing and marketing of ore and metals as well as copper refining (Art. 32-39) are reserved to the State.

Following the pattern of the Industry Law, fishery and mine workers and the communities representing them, will be entitled to the following profit and equity participation under the new laws: fisheries—8% in cash, 12% in equity and mining—4% in cash, 6% in equity.

In both industries, workers will now be represented, not only by their local industrial communities, but also by nationwide compensation communities, which will also receive a portion of their profit and equity participation. This portion will be used for compensating basic inequalities in the profitability of enterprises in the same industry.

3. Agrarian Reform

On June 24, 1969, the Junta enacted a sweeping Agrarian Reform Law (Decree Law 17716 implemented by Supreme Decree 163-69-AP) providing for the expropriation of all major estates, including two large sugar estates and refineries owned by W. R. Grace & Co.

Compensation for the properties expropriated under the law, except for token cash payments not exceeding the equivalent of $6,000 per annum for any single estate, is to be paid by the Peruvian Government in 20- and 25-year local currency bonds, earning interest at 6% and 5% per annum respectively. The law permits the use of these bonds for investment in new industries if matching funds are provided. (However, the new Industrial Law described above limits the scope and profitability of such investments.) It should be noted that the value set by the Government on the expropriated estates may be appealed only to a special Agrarian Court. The Government contends that there is no further recourse to the ordinary tribunals or to the Supreme Court of Peru from a decision of the Agrarian Court.

Venezuela

Venezuela's foreign investment climate, long considered as among the best in Latin America, suddenly deteriorated in 1971.

The growing economic nationalism of the region is evident in the drastic curbs imposed on foreign investments in Venezuela's extractive industries, as well as in its banking community. Further restrictions of a more general nature will probably be issued in the form of a comprehensive foreign
investment code, which is now being drafted by a Presidential Commission (G.O. 29448 of February 5, 1971).

Extractive Industries

Predictably, the most important legal developments for foreign investors in Venezuela affected the extractive industries. In December 1970, the Venezuelan Income Tax Law was amended by replacing the progressive tax on the income of the country's largely foreign-owned petroleum and mining industries, with a flat 60% rate (G.O.E. 1448 of December 18, 1970).

Under subsequent amendments of the Tax Law, the Government was authorized to fix unilaterally the tax base of oil and gas mineral exports by means of setting minimum “tax reference values.” (G.O. 29457 of March 8, 1971; G.O. 29501 of May 6, 1971; and G.O. 29583 of August 13, 1971.)

A sweeping Hydrocarbon’s Reversion Law\(^\text{14}\) was enacted in July 1971, under which installation equipment and machinery used by the oil companies in operating the concessions revert to the Government when their concessions expire in 1984. Until then, concessionaires must maintain a reserve of 10% of the value of such assets, with the Venezuelan Central Bank, as security for the proper maintenance of such assets. Concessionaires may use equipment owned by third parties on their concessions, only with prior Government permission, and such equipment may in no event exceed 10% of the value of the concessionaires’ local fixed assets. Unexplored concession areas must be explored within three years of the effective date of the law, and concessions which are not being properly developed may be cancelled by the Government (G.O. 29571 of July 30, 1971; G.O. 29577 of August 6, 1971).

Also in 1971, the development and marketing of the country's natural gas resources were reserved to the State represented by the Government's oil company, Corporacion Venezolana del Petroleo. Under this new law, gas produced by oil concessionaires in connection with their operations may have to be turned over to the Government and must, in any event, not be used or sold without prior Government approval (G.O. 29594 of August 26, 1971).

Banking

A new banking law restricts the activities of foreign-owned banks and finance companies in Venezuela, by subjecting them to severe deposit,
lending and foreign exchange restrictions, until at least 80% of their capital in the case of banks and 60% of the capital in the case of finance companies, is owned by Venezuelans. Under Art. 29 of the new Banking Law, credit restrictions may be imposed on companies 40% or more of whose equity is owned by foreigners (G.O.E. 1454 of December 30, 1970).