

Distr.
RESTRICTED
LC/R.422
31 December 1985
ENGLISH
ORIGINAL: SPANISH

E C L A C
Economic Commission for Latin America and the Caribbean



COMPARATIVE STUDY ON THE APPLICATION OF DECISION 24 IN THE ANDEAN
GROUP COUNTRIES: CURRENT SITUATION AND PROSPECTS */

*/ This document was prepared by Mr. Eugenio Lahera and Mr. Fernando Sánchez Albavera, consultants of the United Nations Centre on Transnational Corporations and the Joint ECLAC/CTC Unit. The views expressed in this document are the authors' own and do not necessarily reflect those of the Organization.

TABLE OF CONTENT

	<u>Page</u>
Summary -----	v
Part One: COMPETENT NATIONAL AGENCIES -----	1
Part Two: DIRECT FOREIGN INVESTMENT -----	6
I. AUTHORIZATION OF INVESTMENTS -----	6
1. Criteria, selection, restrictions and incentives -----	6
2. Nature, composition and financing of direct foreign investment -----	10
3. Evaluation of investment projects and negotiations with foreign investors -----	11
4. Reinvestment of profits -----	13
5. Conversion agreements -----	14
6. Sectors in which the Common Régime is not applied -----	15
7. Conclusions -----	16
II. REGISTRATION OF DIRECT FOREIGN INVESTMENT -----	18
1. Composition of investment -----	18
2. Registration modalities and procedures -----	18
3. Conclusions -----	22
III. MONITORING THE OPERATIONS OF FOREIGN INVESTORS --	23
1. General aspects -----	23
2. Use of domestic credit -----	23
3. External credit -----	24
4. Remittance of profits -----	25
5. Re-export of capital and liquidation of corporations -----	27
6. Application of specific agreements -----	28
7. Mixed and national firms -----	29
8. Conflicts and application of criteria of extraterritoriality -----	30
9. Conclusions -----	30

	<u>Page</u>
Part Three: TECHNOLOGY IMPORTS -----	32
I. THE THEORY -----	32
II. REGISTRATION OF CONTRACTS -----	33
III. EVALUATION OF CONTRACTS AND TECHNOLOGY -----	34
IV. PAYMENTS FOR TECHNOLOGY -----	35
V. MONITORING -----	37
Part Four: PROSPECTS FOR DECISION 24 -----	39
I. GENERAL CONSIDERATIONS -----	39
1. The regional economic situation and the role of the transnational corporations -----	39
2. Status of the Andean integration process ---	40
II. CHANGES IN RESPECT OF DECISION 24 -----	45
1. Changes in Decision 24 since its origin ----	45
2. Changes adopted unilaterally by the countries	46
3. Political aspects of the process -----	47
III. POLICY OPTIONS -----	48
1. Maintaining the current régime and its applications -----	48
2. Liberalization of the régime -----	49
Part Five: SUGGESTIONS FOR ACTION BY THE UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS -----	50
I. INFORMAL HIGH-LEVEL SEMINAR -----	50
II. TECHNICAL ADVISORY SERVICES TO ANDEAN GROUP COUNTRIES -----	51
Notes -----	52

Summary

The objective of this study is to make a comparative analysis of the application of Decision 24 in the Andean Group countries. We hope thus to throw some light on the discussion of this foreign investment policy.

The study is divided into five parts. In the first part, the structure and functions of the Competent National Agencies mentioned in Decision 24 are described; in the second, an analysis is made of the question of foreign investment, and in the third, the importation of technology is discussed. The prospects for Decision 24 are considered in the fourth section and in the fifth, some suggestions are made for action on the part of the United Nations Centre on Transnational Corporations.

The authors wish to express their special appreciation to the various authorities and officials of the Cartagena Agreement and of the Governments of Bolivia, Colombia, Ecuador, Perú and Venezuela, without whose co-operation this study would not have been possible.

Part One

COMPETENT NATIONAL AGENCIES

The competent national agencies (CNAs) established by the legislations of member countries and duly accredited to the Board of the Cartagena Agreement, are responsible for authorizing, registering and monitoring direct foreign investment (DFI) and approving contracts on transfer of technology and on brands and patents, as well as for signing and monitoring agreements on the conversion of foreign enterprises as provided for in the Common Régime for Foreign Capital and Technology (Decision 24 and related provisions and amendments).

In Bolivia, the National Investment Institute, established in 1974 under the supervision of the Ministry of Industry, Commerce and Integration, is the competent agency for all matters pertaining to the application of the Common Régime. The Institute was entrusted with these responsibilities in December 1981; prior to that date, these powers had mainly been entrusted to the Central Bank.

In Colombia, on the other hand, there are several competent national agencies. The National Planning Department is responsible for authorizing direct foreign investment and, in coordination with the Ministry of Mining and Energy, it authorizes investments pertaining to the exploration and exploitation of hydrocarbons. It is also responsible for signing conversion agreements.

The Exchange Office is responsible for registering direct foreign investment and for matters pertaining to the re-exportation of capital, the transfer of profits, reinvestments, external credit and contracts on the transfer of technology and on the use of brands and patents, as well as service and technical assistance contracts.

In addition, the Import Board -a unit of the National Foreign Trade Institute- is responsible for approving the importation of machinery and equipment to be used in connection with investment projects whose external supply requirements fall under the régime on global import licenses. Mining and petroleum operations, however, must first be approved by the Ministry of Mining and Energy.

The acquisition of technology is authorized by the Royalties Committee, which is made up of representatives of the Ministry of Economic Development, the National Planning Department, the Foreign Trade Institute (INCOMEX), the Office of the Superintendent of Exchange Controls and the Exchange Office. This Committee has a technical secretariat which operates in the Office of the Superintendent of Industry and Commerce and is responsible for preparing studies relating to the approval of contracts on the transfer of technology and on the use of brands and patents.

Finally, the Offices of the Superintendents of Corporations, of Banks, and of Exchange Controls are responsible for monitoring obligations undertaken by foreign investors.

In Ecuador, the Ministry of Industry, Commerce and Integration is responsible for granting the authorizations envisaged in the Common Régime and for signing conversion agreements with foreign corporations, while the Central Bank is responsible for authorizing transfers abroad in connection with the operations of foreign corporations and investors, and for keeping accounting and statistical records.

The Office of the Director of Foreign Investment and Technology in the Ministry of Industry, Commerce and Integration is mainly responsible for overseeing the application of the Common Régime, and the Office of the General Director of Patent Rights keeps a record of all matters pertaining to the transfer of technology and the utilization of brands and patents, which are also registered with the Central Bank. Finally, commitments undertaken by foreign investors and compliance with conversion contracts are monitored, by the Offices of the Superintendents of Corporations and of Banks, as the case may be.

In Peru, with the creation in May 1976 of the National Committee on Foreign Investment and Technology (CONITE), all matters pertaining to the application of the Common Régime were unified and centralized, except for the authorization, registration and monitoring of external credit, which remained with the Central Reserve Bank.

Finally, in Venezuela, the Office of the Superintendent of Foreign Investment is responsible for matters pertaining to the authorization, registration and monitoring of the Common Régime and related provisions and

amendments, except those pertaining to banking and insurance, which are monitored by the relevant Superintendents, and matters pertaining to the petrochemical sector and related branches of production, which are authorized and monitored by the Office for the Control of Foreign Corporations and Investments of the Ministry of Energy and Mines.

COMPETENT NATIONAL AGENCIES RESPONSIBLE FOR MATTERS PERTAINING TO THE APPLICATION OF THE COMMON REGIME FOR
FOREIGN CAPITAL AND TECHNOLOGY AND BRAND NAMES, PATENTS AND ROYALTIES

Country	Agency	Spheres of action	Powers
Bolivia	National Foreign Investment Institute	All matters pertaining to Decision 24, related provisions and amendments	Authorization, registration and monitoring
Colombia	National Planning Department	Direct foreign investment (DFI)	Authorization of DFI and approval of conversion agreements
Colombia	Exchange Office	Direct foreign investment (DFI), capital re-export; Transfer of profits; Reinvestment; External credit; Remittances pertaining to contracts on the transfer of technology and to the use of brands and patents; Service and technical assistance contracts.	Statistical and accounting records
Colombia	INCOMEX Import Board (Foreign Trade Institute)	Imports of machinery and equipment falling under the régime on global licenses.	Authorization; Co-ordination with the Ministry of Mining and Energy in the case of exploration and exploitation of mines and petroleum deposits.
Colombia	Royalties Committee	Acquisition and transfer of technology and agreements on the use of brands and patents.	Authorization and approval
Colombia	Office of the Superintendent of Corporations	Legal and administrative obligations undertaken by foreign investors and corporations.	Monitoring
Colombia	Office of the Superintendent of Banks	Obligations undertaken by foreign investors and foreign corporations in connections with banking activities	Monitoring
Colombia	Office of the Superintendent of Exchange Controls	Movements of freely convertible foreign currencies	Monitoring

Country	Agency	Spheres of action	Powers
Ecuador	Ministry of Industry, Commerce and Integration	Decision 24 and related decisions and amendments, as a whole	Authorization, approval and registration
Ecuador	Central Bank	Financial flows arising from operations of foreign investors and enterprises Contracts on transfer of technology and use of brands and patents	Registration and monitoring Registration
Ecuador	Office of the Superintendent of Corporations	Legal and administrative obligations contracted by foreign corporations and investors	Monitoring
Ecuador	Office of the Superintendent of Banks	Obligations contracted by foreign corporations and investors in banking activities	Monitoring
Peru	National Committee on Foreign Investment and Technology (CONITE)	Decision 24 and related decisions and amendments, as a whole	Authorization, registration and monitoring
Venezuela	Office of the Superintendent of Foreign Investment	Decision 24 and related decisions and amendments, as a whole	Authorization, registration and monitoring
Venezuela	Office for the Control of Foreign Corporations and Investments of the Ministry of Energy and Mines	Foreign investments in petrochemicals and related branches and by-products	Authorization, registration and monitoring
Venezuela	Office of the Superintendent of Banks	Legal and administrative obligations contracted by foreign corporations and investors in banking	Monitoring
Venezuela	Office of the Superintendent of Insurance	Legal and administrative obligations contracted by foreign corporations and investors in the field of insurance	Monitoring

Source: Based on official information.

Part Two

DIRECT FOREIGN INVESTMENT

I. AUTHORIZATION OF INVESTMENTS

1. Criteria, selection, restrictions and incentives

In general, the member countries do not have specific criteria for restricting the flow of direct foreign investment other than those established by Decision 24 itself and its related provisions and amendments, although not all the countries completely follow these provisions.

The countries of the subregion have not established a clear scheme of priorities for authorizing foreign investment as set forth in the Common Régime, which states such authorization must follow the priorities established by the recipient countries' development policies. Within this general framework, which is to be defined by the member countries themselves, there are, however, some restrictions. Thus, for example, foreign investments may not be used for activities which are already "adequately served" by existing companies or for purchasing stocks, shares or property rights of national or subregional investors, except in cases of imminent bankruptcy or for the purpose of increasing capital without altering the mixed nature of an enterprise. Likewise, it establishes that foreign investments may not be used for products which are reserved for Bolivia and Ecuador.

These restrictive criteria have not been adequately regulated in the member countries and the one concerning the purchase of patrimony of national enterprises has been questioned by some countries which, like Ecuador, consider that it is advisable to authorize the participation of foreign investors in refloating enterprises which are faltering. Likewise, since the mechanisms for joint industrial programming are not fully operating, in practice the rights of the relatively less developed countries have not been respected.

Generally speaking, the countries of the subregion have attached special priority to the net foreign exchange contribution made by economic

operations carried out by foreign investors. This has been the case increasingly as their balance-of-payments difficulties have forced some countries to adopt tighter adjustment policies. In practice, however, this criterion has not been applied strictly enough nor has it been made specific enough to allow for an adequate appraisal to be made of investment projects and, especially, of the behaviour of foreign enterprises. Consequently, direct foreign investments cannot be authorized or rejected on the basis of considerations such as the proportion of imported inputs that are involved, the degree to which national inputs are used or the part that is played by exports in overall sales. As we shall see later on, however, such criteria are used in some countries to authorize remittances of profits higher than those established by the Common Régime or to suspend the application of conversion agreements.

It is important to stress, by way of information, that the criterion on "net foreign exchange balance" did play a major role in the granting of authorizations for investment and the negotiations with foreign corporations carried out by the National Planning Department of Colombia up to the mid-1970s. Around that time, negotiations with foreign investors were aimed at ensuring that they would commit themselves to export. At present, investors are not required to undertake such commitments, which are viewed as discouraging foreign capital.

Generally speaking, there are no major limitations on foreign investment in the manufacturing industry. Nevertheless, some countries have introduced restrictions on so-called basic or primary transformation industries. This is the case, for example, with the Bolivian Investment Act, under which the State is to develop through its enterprises, the metallurgical, steel and petrochemical industries. This law does provide, however, that if it is in the national interest, the participation of private, national or foreign capital shall be allowed, provided it is invested in enterprise in which the State has a majority capital share or which agree to gradually transfer their capital to the State until such time as it holds a majority share. Similar limitations were established in the Peruvian legislation which was in force during the 1970s. At present, however, there are no major limitations on investments in this type of industry and the situation is similar in the other countries of the subregion.

It is important to note that the limitations and restrictions established by the Common Régime for foreign capital either have not been enforced by the member countries or have been the subject of special regulations based on specific national criteria. Thus, for example, the Common Régime expressly states that member countries may authorize the participation of foreign enterprises in the exploitation of basic commodities under the system of concessions only during the first ten years of the Common Régime and only for periods not exceeding 20 years. Bolivia, without resorting to the provisions of article 44 of the Common Régime, which allows each member country to make exceptions to this restriction on the exploitation of basic commodities, merely applies the provisions of its national legislation concerning primary activities in mining operations and exploration, exploitation of forests and agriculture in general. The same is true of the exploration and exploitation of hydrocarbons.

Colombia, on the other hand, appealing to article 44 of the Common Régime, has made an exception for all primary activities. The same approach has also been taken by Ecuador, which grants facilities for the setting up of subsidiaries of foreign corporate to work in the area of basic commodities. Peru places no major limitations on the participation of foreign capital in mining and hydrocarbons, for which it has established specific contractual guidelines. Only Venezuela has adopted the criteria established in the Common Régime; its has reserved the iron ore, natural gas and hydrocarbon industries exclusively for State operation, and enforces the provisions of the Common Régime in respect of all other primary activities.

The Régime prohibits the establishment of foreign enterprises and new direct foreign investment in utilities. In Venezuela, Colombia and Peru, as well as in Bolivia, the State alone is allowed to provide these services. Nonetheless, a foreign enterprise which provides electrical power to some cities is still operating in Bolivia. Thus, only Ecuador has resorted to the exception set forth in article 44 of the Régime, and allows new foreign investment in this sector.

The Common Régime also prohibits new direct investment in financial, insurance and commercial banking institutions. All the member countries have applied the exception established in article 44 and authorized new foreign investment in this sector. It is important to note, however, that

the legislation of many countries has established limits to the participation of foreign capital in this type of activities. In Perú, foreign capital is allowed a share of no more than 20% of the capital stock of insurance companies and no more than 33% of the capital of commercial banks.

Most of the member countries restrict the participation of direct foreign investment in activities pertaining to domestic transport. Only Colombia and Ecuador apply the exception provided for in article 44 of the Common Régime and allow new investments.

The Common Régime also establishes that member countries may not allow new direct foreign investment in advertising, commercial radio broadcasting, television stations, newspapers and magazines, and requires foreign corporations to convert to national ownership. This rule has been fully enforced in all the member countries except Ecuador, which did not require the existing foreign enterprises to become national ones.

By the same token, the Common Régime stipulates that member countries may not allow new direct foreign investment in domestic marketing companies and requires that foreign corporations convert national ones. Bolivia, Colombia, Ecuador and Peru have not applied this provision and have exempted this activity from the provisions of the Common Régime. Venezuela has reaffirmed the aforementioned criterion in a national rule, but has authorized foreign companies already established in the country to market their products either directly or through marketing firms belonging to them.

Finally, it is important to note that some member countries have reserved certain activities exclusively for national or mixed enterprises. This is the case with the fishing industry, which in Ecuador may only be carried out by such enterprises. This approach has also been followed by Peru, which has prohibited direct foreign investment in the manufacture of fishmeal and fish oil.

Ecuador has reserved the construction and real state industries exclusively for national enterprises, while Venezuela has done this in the case of financial rental and professional consultant, advisory, design and project-analysis services. In exceptional cases, however, it allows

the establishment of mixed enterprises for this type of professional services; on the other hand, it has reserved the dried milk industry for national or mixed enterprises.

In brief, it appears, from the information available, that the rules established in the Common Régime are applied mostly in the manufacturing industry and that most of the countries have taken the view that they do not necessarily apply to other sectors of production. Some countries have complied with the formality of enacting specific provisions, in accordance with article 44, to remove other activities from the scope of the Régime. Others have not complied with this formality, as they have not considered it necessary to enact specific provisions spelling out the extent to which article 44 is actually applicable.

In addition, it is important to mention that there is no general framework of incentives has been set up by member countries to attract foreign capital to the manufacturing industry. Under the national legislation in force, incentive programmes are considered to be equally applicable to all investors. In this regard, no discriminatory measures as regards the source of capital have been adopted; this is particularly relevant to exchange and tax regulations.

2. Nature, composition and financing of direct foreign investment

All the member countries have uniformly adopted the concept of direct foreign investment set forth in the Common Régime.

Direct foreign investment is defined as any financing provided to a company from abroad by foreign individuals or companies, in the form of freely convertible currencies or of physical or tangible goods, i.e., industrial plants, new and reconditioned machinery, new and reconditioned equipment, spare parts, raw materials and intermediate products. It is clear, therefore, that intangible goods such as brands, patents or industrial models and other elements derived from technology are not considered to be capital contributions. 1/

Likewise, all the competent national agencies treat reinvestments of profits as new investments, thus requiring that they be authorized and registered with these institutions.

There are no major differences as regards the financing of investments. All the member countries have limited the use of long-term loans and those

designed to promote investments, although this standard has been relaxed recently in Ecuador; however, its application depends on decisions taken by the relevant credit and development institutions rather than on any special provision issued by the Government.

The provisions established by the competent national agencies allow foreign investors to capitalize external loans, both those provided by the parent company and those provided by other sources, as stipulated in Decision 24.

Finally, it is worth mentioning that CONITE, the competent national agency in Peru, has decided that the participation of foreign investors in the capitalization of surpluses from the revaluation of assets shall not be considered as direct foreign investment. It seems that this norm has not been specifically established in the other countries of the subregion, but the officials of competent national agencies who were interviewed expressed agreement with this approach.

3. Evaluation of investment projects and negotiations with foreign investors

As far as formalities are concerned, the competent national agencies are charged with evaluating investment projects submitted by foreign investors. To this end, investors must submit to these authorities information concerning the conception of and justification for the project and its significance within the line of production concerned, both as regards the opening up or expansion of installed capacity and as regards the technological contribution to be made. They must therefore include information on the size and location of the project and a description of the lines of production and products included and of the characteristics of the market and a projection of demand, taking into account, when appropriate, the prospects for external demand. They must also include information on the nature of investments to be made and how they are to be financed and general economic (cost and budget) and financial (sources and use of funds, profitability, investment recovery period, financial charges, etc.) aspects of the project in question.

With this information, the competent national agencies, in co-ordination with other units of the public administration, should be able to evaluate the economic and social aspects of the project and give an opinion regarding its impact on the structure of production which the country wishes to establish and on whether or not it is appropriate in the light of the country's global and sectoral development policies. In practice, however, only a very general evaluation, if any, is made, and it does not lead to any decision to reject the investment. Moreover, in most of the member countries, the competent agencies have been particularly anxious to streamline procedures for authorizing investment, and have significantly shortened the deadlines for deciding whether or not to authorize them. Hence, as long as formal requirements for documentation, information and procedure are met, authorization is granted almost automatically. Nevertheless, the competent national agencies have a large body of information which should be thoroughly examined with a view to undertaking detailed studies on the impact of direct foreign investment on the economies of the subregion.

As far as the authorization of investment in the manufacturing industry are concerned, negotiations with foreign investors are currently limited to mere formalities. Real negotiating takes place more in connection with the authorization of investment in the exploitation of basic commodities in connection with which -contrary to the case with industrial investment- specific contracts are signed with foreign investors. In these cases, aspects pertaining to the actual nature of the contracts (concession, risks, services, share in production) or to the possibility of establishing State association agreements are discussed. Once the foreign investor's operating modality has been defined, special attention is given to negotiations on matters such as the investment programme, the period required to recover investment, incentives for recovering invested capital, customs and tariff treatment, tax and exchange regulations, controls on the marketing of products and treatment of possible conflicts and disputes and State monitoring mechanisms. This is not done in the case of negotiations with foreign investors in the manufacturing industry, which usually do not envisage long maturation periods.

Nevertheless, although the competent national agencies are interested in maximizing the "value retained" in the national economy, they do not have the necessary infrastructure to effectively monitor the behaviour of the foreign corporations either as regards their net contributions in terms of foreign exchange or as regards their compliance with the goals and objectives of global and sectoral economic policies. In this regard, technical assistance programmes should be designed to strengthen the countries' bargaining capacity, firstly, by providing a means for systematizing existing information and, subsequently, by designing criteria for evaluating and measuring the impact of direct foreign investment on the national economy.

4. Reinvestment of profits

As mentioned above, the reinvestment of profits is treated as "new investment" under the terms of the Common Régime for foreign capital; thus, it must be authorized by and registered with the competent national agencies. In this connection, all the member countries have adopted the definition established in Decision 24, according to which the reinvestment of profits consists of the reinvestment into capital of all or part of the undistributed profits from a direct foreign investment in the same company which generated them.

In this regard, the Common Régime establishes that the reinvestment of profit is not subject to special authorization if it does not amount to more than 7% per year of the company's capital. Likewise, foreign corporations may apply undistributed profits to the purchase of development securities provided the total amount of such purchases plus the reinvested profits, as a whole, do not account for more than 5% of the company's capital, in which case special authorization is not required, although the registration requirement stands.

These rules have not been applied uniformly in the subregion, although the definition of concepts has remained standard. In Bolivia, according to information supplied by the Board of the Cartagena Agreement, the requirements for authorization and registration of reinvestments by foreign investors have hardly been applied at all, while Ecuador and Venezuela have exempted foreign corporations undergoing the conversion process from these requirements.

5. Conversion agreements

The Common Régime stipulates that only national or mixed enterprises and foreign enterprises which enter into conversion agreements may take advantage of the free trade programme envisaged in the Cartagena Agreement. Under this general rule, the Régime establishes that the requirement that stock in a company be transferred to national investors until it becomes a mixed or national enterprise only applies to foreign enterprises wishing to market their products within the Andean market and to any company established after the entry into force of the Common Régime, regardless or whether or not it wishes to take advantage of the free trade programme.

These rules have been interpreted and applied very differently in the different countries of the subregion, so much so that, at present, conversion agreements are not fully applied.

Bolivia and Peru have enacted provisions which are in violation of the provisions of the Common Régime. According to their interpretation, only foreign corporations wishing to take advantage of the free trade programme are required to become national or mixed enterprises. In 1985, Ecuador enacted a series of provisions which are contrary to the provisions of the Common Régime. Under these rules, foreign enterprises engaged in manufacturing, fishing, mining, forestry and agricultural activities are not required to enter into conversion agreements, or may leave them without effect, if they meet requirements such as the following: a) that more than 35% of the raw materials they use be of national origin; b) that they export more than 15% of their production to third countries. In this regard, the conversion agreements signed by corporations which met those requirements were automatically rescinded, while conversion agreements signed by companies which undertook to meet the requirements within three years were also rescinded. The Government of Ecuador also grants facilities for the setting up of subsidiaries of foreign corporations, which are not required to convert to national ones, provided they are assigned a given amount of capital, to be determined by the State (currently, 25 million sucres).

Colombia has also enacted provisions which allow for conversion agreements to be suspended; in a recent National Planning Department publication entitled "Principales aspectos de la legislación sobre inversión extranjera", which provides information for foreign investors, no mention is made of conversion agreements, which in practice are no longer required.

In brief, at this time only Venezuela has ratified the provisions of the Common Régime.

The exceptions envisaged in the Common Régime with respect to waiving the conversion requirement when a foreign corporation exports more than 80% of its production to third countries have also been interpreted in contradictory ways. Some member countries, such as Ecuador, consider that in such cases, the whole set of rules set forth in the Common Régime is inapplicable; this is not in keeping with the spirit in which these exceptions were established. Likewise, national provisions exempting tourism enterprises, have only been enacted in Colombia, Venezuela and Ecuador, whereas in practice the rule is generally applied to all activities relating to the exploitation of basic commodities and to the financial sector.

Thus, as far as conversion agreements are concerned, there are serious discrepancies among the member countries and in practice a consensus has arisen to the effect that they should be eliminated.

6. Sectors in which the Common Régime is not applied

Although not every country has enacted provisions relating to the exceptions envisaged in article 44 of the Common Régime, in practice these provisions are hardly ever applied to the exploitation of basic commodities, insurance, commercial banking, financial institutions, transport, tourism and mass communications media. These activities are governed by national legislation, which varies from one country to another as regards the treatment of foreign capital. The greatest differences may be noted in the treatment of the mining and petroleum industries, where the countries vie with one another in offering incentives, thus reducing their bargaining power.

Finally, it is worth mentioning that with Decision 103, concept of "neutral capital", was put forth. This refers to investments in governmental financing or co-operation entities, whatever their legal standing. These entities are exempt from the requirement to sell their stock, shares or rights, although they are allowed to transfer their stock to foreign investors, provided they are authorized to do so by the competent national agency and provided the enterprise maintains the same proportion of national capital. The entities which are eligible for this treatment include the Andean Development Corporation (CAF), the Inter-American Development Bank (IDB), the International Finance Corporation (IFC) and the German Economic Co-operation Society.

7. Conclusions

a) At this time, there are no criteria for restricting the flow of direct foreign investment other than those established by Decision 24 itself and its related provisions and amendments. The general atmosphere is one of openness to foreign capital and there is clearly a willingness to be flexible or, in some cases, to refrain from applying the rules set forth in the Common Régime.

b) The member countries have not established a clear set of priorities for authorizing foreign investment. The social and economic impact of a project or of a foreign enterprise is used as a point of reference or for purposes of information, but not as a standard for rejecting direct foreign investment. In this regard, there are no specific standards for restricting the setting up of foreign enterprises whose international operations show deficits, despite the fact that the goal is to replace import and promote exports.

c) Most of the member countries have exempted enterprises engaged in the exploitation of basic commodities, insurance, banking, financing, transport, tourism and mass communications media from the scope of the Common Régime. It should be noted, however, that, although article 44 of Decision 24 is applicable, this does not mean that the member countries need not apply to these activities the overall set of standards established in the régime for the authorization of such investments. In practice, the Régime is mainly applied to the manufacturing industry.

d) There is no discrimination as regards incentives to investment according to the source of the capital concerned. In all the member countries, foreign investors receive the same treatment as nationals, and when it comes to taxation and/or exchange arrangements, differences are taken into account.

e) All the national agencies have adopted common criteria for the concept of investment and reinvestment by foreign enterprises.

f) Technical assistance programmes should be designed in order to systematize the information currently available in the competent national agencies and to establish policy criteria for ensuring that the behaviour of foreign enterprises is in line with national economic policy objectives.

g) There is no uniform standard with respect to the application of agreements providing for the conversion of foreign enterprises; in practice, the mechanism is hardly ever used.

II. REGISTRATION OF DIRECT FOREIGN INVESTMENT

Registration of direct foreign investment is a prerequisite to the full exercise of the rights of foreign investors, particularly as regards the right to remit profits abroad.

1. Composition of investment

Under the terms of Decision 24, there are two investment modalities, i.e., financial resources in the form of foreign exchange or credit and tangible physical resources, which include industrial plants, new or reconditioned machinery, equipment, spare parts, raw materials or intermediate products. The competent national agencies determine whether foreign investments meet these standards, verify their value and register them. It should be noted that all the member countries also require registration of external loans. In addition, reinvestment and the capitalization of resources to be sent abroad are must also be registered.

2. Registration modalities and procedures

In Colombia, foreign capital is registered with the Exchange Office. In order to register, foreign investors must submit an application providing information such as the name of the investor or investors, the amount to be invested initially, and, as the case may be, the value of any additional investments and of reinvestment of profits; the amount, in foreign currency, of profits to be sent abroad and part of the capital to be reimbursed abroad. In addition, they must submit permits granted by the National Planning Department and by the Office of the Superintendent of Corporations, as well as an exchange certificate issued by the Bank of the Republic, and attesting to the entry of freely convertible currencies, a credit note for the national currency received and a voucher showing that the investment has been capitalized. Thus, what is registered is the amount of capital (in currency or tangible goods), its equivalent in United States dollars and, as the case may be, the amount of profits reinvested or the surplus which the investor expects to obtain above and beyond the amount authorized for remittance abroad, if he wishes to

capitalize it. Consequently, in authorizing remittances abroad, account is taken of the total net value of the direct foreign investment, which is equivalent to the sum of capital investments, reinvestments and capitalized profits. With respect to the amount invested in tangible goods, Colombia has instituted the Régime of non-reimbursable Licences, under which authorization may be granted to include imported assets which are not paid for outside the country but rather give rise to a stock issue. It is also worth mentioning that royalties and, in general, any amount which the investor is entitled to remit abroad, may be capitalized.

Peru takes a similar approach to the registration of direct foreign investment. The investor is asked to submit, among other things, the book-keeping entry showing the amount invested or capitalized and an affidavit, signed by the legal representative of the corporation, attesting to the date and amount of the entry. In addition, the investor must submit a copy of the document establishing the corporation and, when there is an increase in capital, the notary's receipt showing this; in both cases, the transaction must also be recorded in the Public Registries. When the capital contribution is made in a foreign currency, the investor must submit a receipt showing the entry of foreign currency and the documents issued by the commercial bank and, if physical or tangible goods are involved, the commercial invoice showing the value of the goods and the import licence issued by the Customs Office. In such cases, however, a report by an independent external auditor certifying the veracity of the information provided by the foreign investor may be submitted instead of these documents.

A 20-day deadline has been set for registration of direct foreign investment. If the relevant resolution is not issued within that time, the investment is automatically registered for all legal purposes pertaining to the investor's rights. As in Colombia, registration in Peru covers capital from abroad, capitalization of external loans, investments in national currency made with resources eligible for remittance abroad and reinvestment. All these items taken together, as the case may be, constitute the reference amount for transfers abroad.

It is interesting to note that CONITE has defined criteria for establishing the exchange rate, both for purpose of setting the value of tangible goods and for purposes of reinvestment or application of resources for remittance abroad. Thus, in the case of tangible goods, the exchange rate for registration is the buying rate prevailing on the date of the note concerning the transactions issued by a local bank or to the order of the corporation, or the date of the import licence issued by the Customs Office. In the second case, the exchange rate for registration is the rate prevailing on the date the capitalization is entered in the company's books.

Finally, it is important to note that in Peru, the competent agency does not consider as direct foreign investment the participation of foreign investors in the capitalization of surpluses from the revaluation of assets.

Once the registration process has been completed, CONITE grants a direct foreign investment certificate, which is a document attesting to the investment registered with the competent agency. The amount shown on each certificate includes the original capital contributions and any variations resulting from new capitalizations, reductions of capital or transfers of stocks. Without this certificate, no remittance of profits and dividends or re-export of capital is allowed.

In Ecuador, the same criteria are used to define the nature of the investment (capital contributions, reinvestment of profits and capitalization of resources eligible for remittance abroad). To register investments in foreign currency, the enterprise must submit a copy of the authorization granted by the Ministry of Industry, Commerce and Integration, a copy of the voucher pertaining to the foreign exchange transaction, a certificate of book-keeping records and a copy of the document establishing the enterprise.

In general, direct foreign investment is registered in freely convertible currencies up to the amount paid by the foreign investor. When a direct foreign investment is made through compensation of external credit, including the principal plus interest, the Central Bank proceeds to liquidate the taxes applying to the external credit.

In order to register an investment in national currency made with the profit obtained from a foreign investment, the corporation must submit the authorization of the Ministry of Industry, Commerce and Integration, a copy of the income tax return and a copy of the document establishing the enterprise.

Investments in tangible goods are registered in the foreign currency for which the importation was authorized up to an amount stipulated by the Office of the Superintendent of Corporations in the certificate of appraisal of the goods. In the case of foreign investments in machinery and used or reconditioned equipment, their rating and value must be approved by the Ministry of Industries.

For the registration of non-monetary investments, in general, the competent agency requires a copy of the investment authorization issued by the Ministry of Industry, a copy of the Central Bank's authorization for the withdrawal of merchandise from Customs and the appraisal certificate issued by the Office of the Superintendent of Corporations, as well as a copy of the public document establishing the enterprise.

Reinvestments are registered in the foreign currency in which the initial investment was registered. In such cases, the corporation must submit a certified copy of the document showing the increase in capital and a copy of the reinvestment authorization if the reinvestment is more than 7% of the direct foreign investment previously registered.

Venezuela and Bolivia apply similar registration and documentation requirements, although in Bolivia there have been some irregularities in the application of the Common Régime because of the lack of domestic legislation to provide guidelines for registration of direct foreign investment. These procedures have been better organized since 1980, when the National Investment Institute began operating as the competent agency.

In Venezuela, for purposes of registration, the value of a direct foreign investment is determined by computing, for each economic period after December 1973, those items which were actually part of the paid-up capital plus accumulated reserves plus reinvestments. In addition, foreign

investors must provide the Office of the Superintendent of Foreign Investment information on the proportion of unpaid capital and, when payments are made, they must notify this agency in order that it may register the payments.

Direct foreign investments, reinvestments and capital increases are authorized and registered, in each case, by the Office of the Superintendent of Foreign Investments, and are expressed in freely convertible currencies. Calculations are based on the exchange rate fixed by the Central Bank when it approves the corresponding capital contributions or, in the case of tangible goods or reinvestments, the rate prevailing at the time of registration.

For registration, the credit note issued by the banking institution through which the foreign exchange entered the country must be presented, in the case of tangible goods, the import bill of lading and the declaration of their value are also required.

3. Conclusions

a) There are no major differences among member countries as regards the criteria they apply for registration of direct foreign investment. All the countries allow the remittance abroad of capital investments in foreign or national currency, capitalization of loans, valuation of tangible goods, reinvestments and capitalization of resources in general.

b) Except in Bolivia, the competent national agencies have issued explicit regulations concerning procedures for registration of direct foreign investment. These list in detail the documentation which is required for this purpose. In general terms, all the procedures are very similar.

III. MONITORING THE OPERATIONS OF FOREIGN INVESTORS

1. General aspects

In general, the operations of foreign investors are monitored by the Central Banks and the Superintendents of Corporations, Financial Institutions or Foreign Investments, when these exist, as they do in Venezuela. The sectoral ministries also perform some specific tasks in connection with the monitoring of production operations.

The central banks monitor the remittance of financial flows abroad, while the Superintendents see to it that foreign corporations do not extend their operations beyond the purposes for which they are authorized and that the legal conditions for their establishment are not changed. Thus, the Superintendents enforce the provisions established in the corporations' by-laws and oversee all matters relating to their establishment, liquidation or amendments to the by-laws. They are also empowered to control the assignment, sale or transfer of stocks, shares or rights of foreign investors and to enforce conversion agreements. Some superintendents also control access to domestic credit.

2. Use of domestic credit

Under the Common Régime, foreign enterprises are not allowed to obtain long-term credit, and any short- or medium-term credit operation is subject to relevant national legislation. A medium term is considered to be no more than 3 years.

This provision is applied very unevenly at present. In Bolivia, there is no limitation on access to long-term credit, which is granted without considering the nationality of the enterprise: this violates the terms of the Common Régime. The situation is similar in Ecuador, where the banking authorities have been quite flexible in the way they apply this rule. In Peru, CONITE has not issued any explicit rule on the terms under which foreign corporations may have access to domestic credit; therefore, we have no information on this matter. Only Colombia and Venezuela have issued

specific provisions; in Colombia, the Superintendent of Corporations and Banks and in Venezuela, the Central Bank establish the requirements for obtaining access to domestic credit.

Nevertheless, a detailed study is needed in order to determine to what degree this rule is applied.

3. External Credit

Under the terms of the Common Régime, external credit contracted by foreign corporations must be authorized and registered with the competent agency designated for this purpose; only registration is required when the member countries authorized overall ceilings for private external indebtedness for certain periods. Transfers abroad which give rise to such obligations, i.e., amortization and interest, are controlled by the competent national agencies. This control is particularly important in the case of credit arrangements between a parent company and its subsidiary, for which, under article 16 of Decision 24, the interest rate may not be more than three points above the prime interest rate prevailing on the financial market in which the transaction was arranged. The interest rate for loans from sources other than the foreign corporation must be approved by the competent agency.

In Bolivia, under the free exchange system which prevailed prior to November 1982, external credit contracted by foreign enterprises was not subject to any controls whatsoever. The exchange control system established at that time provided a basis for the regulation of external credit.

In Colombia, registration of external credit with the Exchange Office entitles foreign enterprises to service their obligations with financial resources from abroad. These arrangements are monitored through the exchange system, under which the creditor is required to obtain the foreign exchange he needs to meet these obligations from the Banco de la República, which must certify that the interest rate is the rate prevailing on the capital market in which the transaction was arranged.

In Ecuador, the Central Bank is responsible for authorizing, registering and monitoring external credit, and it is expressly stipulated that the interest rate may not be more than two points over LIBOR and/or the prime rate.

The same mechanism is used in Peru, where the Central Bank is also responsible for authorizing, registering and monitoring external credit operations, and fully applies the rules on interest rates established by Decision 24. These transactions, which must first be authorized by the Central Bank, are carried out through the national banking system; the bank or banks concerned report to the competent agency on the foreign corporations' performance in meeting its obligations. Finally, in Venezuela, the Superintendent of Foreign Investments is responsible for monitoring the terms and conditions under which external credit is contracted. The interest rate is approved by this competent agency in keeping with the criteria established in Decision 24. Nevertheless, external credit consisting of obligations with suppliers or raw materials or capital goods are not considered to fall within the scope of this rule and the maximum term allowed for loans between a parent company and/or a subsidiary is two years.

In general terms, it may be said that at present all the member countries have mechanisms for regulating and monitoring external credit operations, although there is no way of finding out whether or not the national regulations are actually complied with.

4. Remittance of profits

Under the Common Régime, foreign investors are entitled to remit profits up to the equivalent of 20% of a direct foreign investment which has been duly authorized and registered with the competent national agencies. In exceptional cases, the countries may authorize remittances higher than this amount.

As has been noted in another section, Bolivia had virtually no mechanism for monitoring remittances of profits, because of the lack of rules specifically designed for enforcing the provisions of Decision 24, and, especially, because of the free exchange system which prevailed. Mechanisms for monitoring the application of the Common Régime were only recently set up, with the establishment, in November 1982, of an exchange control system.

In Colombia, the remittance of profits has been monitored, since the beginning, in accordance with the provisions of the Common Régime; this task

has also been facilitated by the exchange control system. Foreign investors are entitled to remit an amount equivalent to 20% of the capital invested, after payment of taxes. This entitlement is calculated not only on the basis of the capital invested initially but also on any subsequent increases resulting from the capitalization of profits, re-investment or new investments. The regulations also provide that investments made after 19 August 1983 in activities such as non-coastal highland fishing, canning and preservation of fruits and vegetables, manufacture of fishery products, tanneries and leather manufactures, chemicals, basic iron and steel industries, fertilizers, machinery and special industrial equipment, office machines, manufacture of vehicles and shipbuilding are entitled to remit abroad an amount equivalent to the annual average New York prime rate plus 20 points. Certain changes have also been made to take into consideration regional priorities. Thus, foreign investors carrying out activities in Popayán and the surrounding areas are entitled to remit the equivalent of the average prime rate plus 25 points, while those investing in industrial and agro-industrial activities in frontier areas are entitled to 4 points above the general rate of 20%.

It is important to note that surplus profits above and beyond the amounts mentioned above may be capitalized, provided the investor earmarks 50% of the amount capitalized to the purchase of bonds of the Industrial Development Institute and that they be used for exports of which 80% must be sent to markets outside the subregion; in these projects, external financing (capital or credit) must be no less than 40% of the total cost of the project.

In Peru, as a general rule, the ceiling is 20% of registered capital, but the investor is allowed to opt for an alternative ceiling equivalent to 10 points above the London Interbank offer Rate (LIBOR). As in Colombia, remittances above these optional limits are sometimes authorized to promote certain activities, encourage investment in less developed zones or to foster the substitution of imported inputs. Thus, for every 10% of the total sales of a foreign corporation which are used for exports, an additional amount, ranging between 1% and 7%, is authorized. Likewise, when 50% of the inputs used by the foreign enterprise are of national origin, an

additional 1% is authorized; when they are equivalent to 65%, an additional 3% is authorized, and when they are more than 80%, an additional 5% is authorized. To encourage investment in less developed zones, six "regional strata" have been developed, for which additional remittances of profits are allowed. Thus, if an investment is made in Greater Lima, there is no bonus, but if it is made in other strata, a premium of between 8% and 1% is granted.

It is important to note, however, that any remittance above 30% of the registered investment must be authorized by the Board of Directors of CONITE, the competent national agency.

Ecuador applies very flexible criteria the spirit, of which runs counter to the rational for the ceilings on remittances of profits established in the Common Régime. In practice, corporations are allowed to remit up to 30% of the registered investment, and sometimes even larger amounts are authorized, depending on how willing the foreign corporation is to export its production. Thus, if it exports up to 40% of its sales, it is allowed to remit up to 40% of its registered capital and, if it exports more than 80%, it is not subject to any ceiling on remittances.

Finally, Venezuela fully enforces the provisions of the Common Régime. Amounts above 20% may be authorized by the Superintendent of Foreign Investment, but the general rule is that remittances should not be above this ceiling. If this does happen and the Superintendent does not authorize the remittance, the foreign investor may apply the funds to the purchase of development bonds or to automatic investment, provided they do not exceed 7% of the duly registered investment.

In general, it is clear that, although statistics show that foreign corporations have been remitting amounts lower than 20% of their registered investment, there is a general consensus that no ceiling should be placed on the remittance of profits and that their regulation should be left to the discretion of the individual member countries.2/

5. Re-export of capital and liquidation of corporations

Under the Common Régime, foreign investors are entitled to re-export 100% of the capital invested when they sell their stock, shares or rights to national investors or when their interests are liquidated. In such cases, the Régime also authorizes the transfer abroad of capital gains.3/

From the information available, it appears that these matters have not been specifically regulated in Bolivia; hence, the general terms of Decision 24 apply. These same criteria apply in Colombia, except that, since there is an exchange control system, investors are required to go through the Banco de la República, which requires a licence issued by the Exchange Office in order to authorize the remittance of capital. Ecuador follows a similar practice, with the Central Bank exercising control over all operations pertaining to the re-export of capital. In Peru, the re-export of capital is authorized by CONITE and there are no specific provisions other than those pertaining to the regulation of exchange transactions, while in Venezuela, control is exercised by the Superintendent of Foreign Investments. Under the regulations on direct foreign investment enacted in June 1985 (Decree 656) by the Government of Venezuela, foreign investors are entitled to re-export the amount originally registered plus capital gains, increases in capital, reinvestments, investments in development bonds and, in general, undistributed profits. Obviously, in order to exercise this right, investors must have previously registered their investment with the Superintendent of Foreign Investment. This agency also authorizes and monitors any reductions of capital made by foreign investors for purposes of transferring it abroad.

In brief, although the different countries of the subregion may follow different procedures in applying this entitlement of investors, due to the fact that some of the countries have exchange control systems, it may be said that all the member countries follows the criterion established in the Common Régime.

6. Application of specific agreements

At present, there are no specific agreements with foreign enterprises in connection with specific goals of industrial and/or economic policy. Nevertheless, it should be noted that Bolivia has a national industrial integration régime, which provides for the regulation of assembly industries and establishes general criteria for placing a higher value added on industrial production. This régime, which applies to both foreign and national investors, stipulates that in order to enjoy the industrial incentives it provides,

a corporation may enter into an agreement with the government to set up programmes for the substitution of imported components. Along the same line, the Superintendent of Foreign Investment of Venezuela is empowered to require a minimum value added from investors. No specific agreement has been signed in either cases however, since these requirements are discussed in negotiations with foreign investors without their being the subject of a specific contractual instrument. Peru is studying the possibility of establishing a systematic planning régime under which production agreements could be signed with non-public enterprises, both national and foreign. Likewise, an anti-trust consumer-protection bill currently awaiting legislative action would regulate certain practices considered harmful to commercial interests and provide for the signing of price regulation agreements. Finally, it is worth recalling that about ten years ago, foreign investors in Colombia were required to sign export commitments.

Strictu sensu, it may be said that the practice of entering into contracts with foreign enterprises is followed mostly in connection with the primary processing of natural resources rather than in the manufacturing industry as such. It is also worth mentioning that many countries have signed "turnkey" contracts for the construction of industrial plants pertaining to major public works; however, these agreements do not fall within the scope of Decision 24, a fact which points to a significant shortcoming in the treatment of foreign capital.

7. Mixed and national firms

Under Decision 24, in order to be considered a national or mixed firm, a corporation must not only meet the requirements concerning ownership of capital by national investors, but it must also guarantee that national investors do indeed control the management, production, marketing and financing of the firm.

The different ways in which the provisions concerning conversion agreements have been applied have, in some cases, led to distortions of the criteria established by Decision 24 or to their becoming virtually inoperative; moreover, no effective mechanisms have been set up for ensuring that the management of national or mixed enterprises is indeed in the hands of national investors. The competent national agencies limit merely request management

charts, but this information is not enough to allow for effective enforcement of the requirements established in the Common Régime.

8. Conflicts and application of criteria of extraterritoriality

The Common Régime establishes that no instrument relating to direct foreign investment may include clauses which would place any possible conflict or dispute under the jurisdiction of the State of origin of the capital. Nevertheless, both Ecuador and Colombia have signed agreements with the Overseas Private Investment Corporation (OPIC), which has been conducting an intensive campaign against the provisions of the Common Régime, which is backed by the so-called Calvo Doctrine and by resolutions of the United Nations General Assembly (Charter on the Economic Rights and Duties of States). Finally, article 41 of Bolivia's Investment Act leaves open the possibility of removing from national jurisdiction the settlement of disputes with foreign corporations in cases when the investment in question calls for guarantees and investment insurance which are subject to agreements with foreign government.

9. Conclusions

a) The member countries have not regularly applied restrictions on the granting of medium- and long-term credit to foreign enterprises, and there is a tendency to eliminate the restrictions established in the Common Régime.

b) All the countries of the region apply criteria and mechanisms for regulating the arrangement by foreign corporations of loans from financing agencies or parent companies and/or subsidiaries and for monitoring the service of these obligations.

c) Although, historically, transfers of profits of foreign corporations they have not reached the ceiling of 20% above the amount of investment registered with the competent national agencies, there is a general tendency among the member countries to leave the regulation of this aspect up to national legislation.

d) The member countries have been fully enforcing the criteria established with regard to authorization and monitoring of the right to re-export capital.

e) At present, there are no specific agreements with foreign enterprises in connection with the purposes, objectives or programmes of global and sectoral policies, although some member countries have legal mechanisms for implementing such policies.

f) There are no common mechanisms for regulating new types of contracts with foreign enterprises ("turn-key" contracts, for example). It would be advisable to draw up an inventory of the modalities currently being applied and to study the possibility of including rules on this matter in the Common Régime for Foreign Capital.

g) Some member countries have signed document which violate the provisions of the Common Régime with respect to the application of criteria of extraterritoriality in the settlement of possible conflicts or disputes with foreign corporations.

h) There are no specific criteria for monitoring the majority participation of national investors in national or mixed enterprises and ensuring that this participation is reflected in the management of production, administration, marketing and finances of these firms.

Part Three

TECHNOLOGY IMPORTS

Both Decision 24 and Decision 84 deal with various aspects of the question of technology, not all of which have to do with direct foreign investment or transnational corporations; they also include provisions concerning the promotion of subregional technology and the identification of technology available on the world market. In fact, the area of science and technology has proved to be quite dynamic, and includes several aspects which go beyond the scope of this study.^{4/} In this paper, we shall limit ourselves to discussing the question of contracts for the importation of technology and the use of brands.

I. THE THEORY

Decision 24 stipulates that all contracts on the importation of technology and on patents and brands -whether or not they involve payment- must be examined and submitted to the competent national authority for approval. This agency is responsible for evaluating the real contribution of the imported technology by estimating its potential profitability and, the price of goods which incorporate it or establishing some other specific quantification of the impact of the imported technology (article 18).

Decision 84 adds some criteria for evaluating applications for the importation of technology (article 7), including the following:

- its impact on local technological development;
- its impact on technology in employment;
- its contribution to national or subregional development plans;
- its impact on the balance of payments and on the generation of income;
- its impact on the environment.

Under Decision 24, clauses providing the following information must be included:

- identification of modalities of transfer of technology;
- contractual value of each element involved;
- determination of the period during which it shall be in force.

In addition, article 20 prohibits the authorization of certain types of clauses, including those which would entail an obligation to purchase capital goods, intermediate products, raw materials or other technologies from a given source; those which would reserve for sellers the right to fix prices; those which would restrict the volume or structure of production; those which would prohibit the use of competing technologies; those which would establish an option to buy -total or partial- in favour of the supplier or the technology, which would require the buyer of technology to transfer to the supplier any inventions or improvements resulting from the use of such technology; those which would make it obligatory to pay royalties for unused patents; and those which would prohibit or limit the export of products made with the technology concerned, except in exceptional cases, excluding those falling within the sphere of subregional trade or the export of similar products to third countries.

A transfer of technology may not be considered a capital contribution and, in an intra-firm transaction, it does not give rise to a right to receive royalties or tax deductions (article 21).

Decision 24 provides that contracts for the licensing of brands may not include any restrictive clauses which would for example, prohibit or limit the export or sale in certain countries of products made with the brand name; require the use of raw materials, intermediate goods and equipment supplied by the owner of the brand or its affiliates; fix sale or re-sale prices; require the payment of royalties for unused brands, or require the use, on a permanent basis, of personnel supplied by or designated by the owner of the brand (article 25).

II. REGISTRATION OF CONTRACTS

In the first part of this study, we discussed the matter of the competent agencies responsible for analysing and registering contracts. In this regard, institutional arrangements are quite different from country to another. In Venezuela, SIEEX acts as the central agency overseeing most contracts. In Colombia, licensing contracts are approved by the Royalties Committee; occasional technical assistance and engineering contracts must be approved by the Exchange Office of the Banco de la República; technology incorporated

in complete or semi-complete plants is incorporated through the Division of Global Licenses of the Foreign Trade Institute; and technology tied to direct foreign investment is approved by the Division of Private Investment of the National Planning Department.5/

The requirement that technology contracts be registered is not met in all the Andean Group countries. The clearest case is that of Bolivia; up to 1980, very few contracts had been registered, and the situation is still somewhat irregular. Indeed, this country has not yet enacted regulations for dealing with this aspect of Decision 24.

Not all contracts on the importation of technology are registered. In several countries, public sector contracts are either not registered or only partially registered, despite the large number involved. In Colombia, for example, the Royalties Committee evaluated a total of 1 002 contracts between 1967 and 1981, while the Exchange Office, which does register contracts of public enterprises, approved 2 997 contracts between 1970 and 1979.6/

The acquisition of technology incorporated into capital goods is not systematically registered, evaluated or controlled in any country of the Andean Group. This type of transfer of technology undoubtedly accounts for the bulk of payments for technology made by these countries.

In Venezuela the terms of technology contracts have recently been extended from 5 years to a maximum of 15 years. The latter period is undoubtedly much too long.

III. EVALUATION OF CONTRACTS AND TECHNOLOGY

Countries which do register contracts systematically tend to focus their attention on formal aspects, while they only consider the actual purpose of the contract in vague general terms. Up to now, the emphasis of policies on technology has been more quantitative than qualitative in all the countries which do apply registration. Contracts are normally analysed in terms of their cost in foreign exchange, while their actual technological content, in connection with which Decisions 24 and 84 establish clear and explicit evaluation guidelines is not analysed in detail, often because the necessary technical means are not available.

In general, it may be said that clauses which are expressly prohibited by Decision 24 have been eliminated from contracts, although there are some exceptions. This is the case with Ecuador, for example, where clauses prohibiting or limiting markets, requiring the hiring of foreign personnel or requiring the purchase of inputs and capital goods from the supplier of technology still exist.

As regards intra-firm payments, there are no uniform criteria in the subregion for establishing the existence of a dependency relationship between a parent company and a subsidiary. The criteria used generally refer to the holding by the parent company of stock in the subsidiary, and this varies from country to country. In the case of Colombia, for example, parent-company participation is 50%, and payment is also allowed in the case of mixed enterprises.

There are very few cases in which technology contracts have been rejected. Perhaps the most significant one is that of Colombia, where 268 contracts were rejected between 1962 and 1977.

Several countries provide for a domestic recourse vis-a-vis the authority which is responsible for registering contracts. In the case of Colombia, recourse may also be had to the Council of State, whose decision is final. This alternative has been used only on two occasions.

The concept of a properly conducted activity should be extended to the area of technology. This is a shortcoming of Decision 24, which does not take this aspect into account.

IV. PAYMENTS FOR TECHNOLOGY

The modalities and magnitudes of payments made abroad for technology contracts vary considerably from country to country. The practice of basing payments on a percentage of net sales accounts for more than half of all cases in Peru and almost two-thirds in Colombia; in Venezuela, it only represents 12%. A second option is that of paying a fixed amount; this has been adopted to varying degrees in the different countries and accounts for one-third of all cases in Venezuela, 19% in Peru and only 4% in Colombia (see table 2).

Table 2

PAYMENT MODALITIES PROVIDED FOR IN TECHNOLOGY CONTRACTS

Payment modality	Bolivia		Colombia		Ecuador		Perú		Venezuela		Andean Group	
	No.	%	No.	%	No.	%	No.	%	No.	%	Total	Participation
<u>Percentage of net sales:</u>	9	52.9	140	64.8			217	52.0	120	12.4	486	28.5
Up to 3%	4	23.5	84	38.9			158	37.9	53	5.5	299	17.6
From over 3% to 5%	2	11.8	38	17.6			47	11.3	43	4.5	130	7.6
From over 5% to 8%	1	5.8	15	6.9			11	2.6	12	1.2	39	2.3
From over 8% to 10%	2	11.8	1	0.5			1	0.2	5	0.5	9	0.5
Over 10%			2	0.9					7	0.7	9	0.5
Fixed amount	2	11.8	9	4.2			78	18.7	311	32.2	400	23.5
Other forms of payments	6	35.3	3	1.4			23	5.5	342	35.4	374	21.9
No payments made			47	21.7			99	23.8	139	14.4	285	16.7
Not specified			17	7.9	89	100.0			54	5.6	160	9.4
Total	17	100.0	216	100.0	89	100.0	417	100.0	966	100.0	1 705	100.0

Source: Information provided by the competent national agencies of the member countries of the Andean Group.

In 1981, such payments represented only 0.0002% of Colombia's exports 0.3% of Peru's exports. In Venezuela, on the other hand, payments for technology amounted to 449 million bolivares in 1982, representing 0.6% of total exports. This difference may be explained by the different degrees to which the process is centralized in the various countries.

Intra-firm payments for technology imports were not interrupted with Decision 24, although they were prohibited. The publications of the United States Department of Commerce attest to this.

With respect to brands, payments are usually low. Colombia does not allow such payments and Venezuela tends to follow the same approach.

There are no subregional criteria concerning the range of payments allowed in connection with the various economic sectors. In the case of Colombia, for example, it amounts to between 2% and 3% for the engineering and metal products sector and 2% for the pharmaceutical sector, whereas payments usually are not authorized for the food sector.

In some cases, larger payments are authorized as a means of promoting exports, as in Colombia. There is no technological justification for this criterion.

V. MONITORING

There is no evidence of regular and systematic monitoring, in any of the countries, of the performance of obligations. This is particularly true in the case of the actual transfer of the technology concerned. This does not mean that some countries do not closely follow the development of a given number of contracts each year, as in Colombia, for example. In general, no fines have been imposed for non-compliance with contracts.

Extensions of contracts show a certain tendency to reduce their duration, although there are a large number of long-term contracts (see table 3).

None of the Andean Group countries have conducted long-term evaluations of the effectiveness of the Andean régime for the transfer of technology.

Table 3

ANDEAN GROUP: DURATION OF TECHNOLOGY CONTRACTS, ACCORDING TO MODALITY

Duration-months Modality of contracts	0-12	13-36	37-59	50	Over 60	n.s.	Total	Participation
First contract between the parties	76	187	46	717	73	42	1 141	66.9
Extension of the current contract	20	111	13	73	8	1	226	13.3
Modification of the current contract	5	27	20	37	6	2	97	5.7
Replacement of previous contract	-	17	4	36	5	-	62	3.6
Not specified	12	52	4	79	9	23	179	10.5
Total	<u>113</u>	<u>394</u>	<u>87</u>	<u>942</u>	<u>101</u>	<u>68</u>	<u>1 705</u>	<u>100.0</u>
Participation	<u>6.6</u>	<u>23.1</u>	<u>5.1</u>	<u>55.3</u>	<u>5.9</u>	<u>4.0</u>	<u>100.0</u>	

Source: Information provide by the competent national agencies of the member countries of the Andean Group.

Part four

PROSPECTS FOR DECISION 24

I. GENERAL CONSIDERATIONS

1. The regional economic situation and the role of the transnational corporations

The Latin American economy is going through a very difficult stage, both as regards the domestic sector and as regards the external sector. Thirty-five percent of the foreign exchange received from exports of goods and services goes to pay interest on the external debt. While the current-account balance has dropped significantly, it remains negative, as does real available net financing. The latter has been negative since 1982: this has meant that Latin America has put US\$77 billion into the international financial system over the last few years.^{7/} Capital flight from the region has reached an unprecedented level: it is estimated to have reached US\$60 billion between 1978 and 1982.^{8/}

The terms of trade in goods fell by 22% between 1981 and 1984; imports were sharply reduced between those dates, and in 1984 exports were only equivalent to the figure for 1981.^{9/}

The per capita GDP fell by almost 9% between 1981 and 1984, and the per capita gross national income also fell. Inflation, on the other hand, has risen -to 175% in 1984-, as has unemployment.^{10/} The net investment rate has fallen dangerously, to almost 6% in 1983.^{11/}

To the critical situation of the external sector is added the fact that the prospects for external financing and international trade are very discouraging. As a result, several Latin American governments -including those of the Andean Group- have pointed to the need to assign a new role to direct foreign investment.

In this regard, it is argued that direct foreign investment could at least partially make up for the shortage of external financing and improve the trade balance of the countries of the region. Thus, the transnational corporation could help overcome the current crisis. To obtain this direct foreign investment -continues the argument- it is necessary to eliminate

the restrictions currently places on it. This is the gist of the various criticisms of Decision 24.

Nevertheless, a closer look brings out certain problems with these arguments. Between 1970 and 1980, during every year except 1975, the outflow of capital for payment of profits was higher than the inflow of direct foreign investment. The inflow of direct foreign investment was equivalent to only 37% of the outflow of profits to the exterior. The impact of the transnational corporations on the capital account in this connection was clearly negative (see table 4).

As regards external trade, although detailed information is not available for every country of the Andean Group, it is worth noting that in the late 1970s the direct contribution 12/ of the transnational corporations to the Latin American trade balance was negative; except in a few countries, exports did not generate sufficient foreign exchange income to finance imports. As regards the payment of royalties by transnational corporations in the region, the balance is also negative.13/

It does not seem unreasonable to hold that, in the absence of special conditions or policies, the impact of direct foreign investment on the balance of payments has usually been negative. This was the case in Colombia, for example, during the period 1979-1982. As may be seen in table 4, the impact of direct foreign investment on Colombia's balance of payments has been more and more negative every year. It would be advisable to conduct a study of the situation in the other Andean Group countries.

2. Status of the Andean integration process

The Andean integration process, which constitutes the frame of reference for Decision 24, is going through a critical stage; this makes it all the more difficult to revise Decision 24.14/

The Andean Group is faced with problems in five areas, namely: a) the liberalization of subregional trade, which is regressing; b) industrial development programmes, which have hardly operated at all; c) the common external tariff, which has not been adopted; d) the process of harmonizing policies, which has not progressed; and e) the large number of cases of non-compliance, by the countries, with previous agreements.

Between 1981 and 1984, the per capita GDP of the Andean Group countries fell, while unemployment and inflation rose and the terms of trade deteriorated,

Table 4

ANDEAN GROUP: IMPACT OF DIRECT FOREIGN INVESTMENT ON THE BALANCE
OF PAYMENTS

(Millions of US\$)

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	Total 1970/1980
1. Inflow of DFI												
Bolivia	- 76.0	2.0	-10.9	4.8	26.5	53.4	-8.1	-1.2	11.3	18.1	41.6	61.5
Ecuador	89.0	162.5	80.3	52.5	77.0	95.9	-19.6	35.0	48.8	65.9	80.7	768.0
Colombia	43.0	43.1	18.5	23.8	40.9	40.1	25.4	64.2	105.2	121.9	243.4	755.5
Peru	- 14.0	-3.2	45.1	95.6	480.9	327.1	159.7	48.1	66.3	325.7	101.1	1 632.4
Venezuela	54.0	-36.7	-21.3	-109.9	-206.7	284.9	-359.0	287.6	187.4	133.7	113.9	327.9
Total Andean Group	<u>96.0</u>	<u>167.7</u>	<u>111.7</u>	<u>66.8</u>	<u>418.6</u>	<u>801.4</u>	<u>-201.6</u>	<u>433.7</u>	<u>419.0</u>	<u>671.3</u>	<u>580.7</u>	<u>3 565.3</u>
2. Outflow for payment of profit												
Bolivia	15.0	7.0	3.3	2.4	3.6	6.1	6.9	9.3	16.3	24.5	15.6	-110.0
Ecuador	12.0	15.0	18.5	103.7	178.0	20.6	38.1	32.7	45.1	130.5	139.3	773.5
Colombia	94.0	73.2	71.7	72.7	57.7	74.1	114.3	92.2	129.0	65.9	75.5	920.3
Peru	68.0	45.1	35.8	79.9	42.1	14.6	28.9	39.7	66.4	365.0	60.0	845.5
Venezuela	565.0	671.0	485.3	737.9	927.2	582.8	339.4	400.5	499.5	635.7	804.3	6 648.6
Total Andean Group	<u>754.0</u>	<u>811.3</u>	<u>614.6</u>	<u>996.6</u>	<u>1 208.6</u>	<u>698.2</u>	<u>527.6</u>	<u>574.4</u>	<u>756.3</u>	<u>1 221.6</u>	<u>1 094.7</u>	<u>9 557.9</u>
3. Net flow in balance of payments												
Total Andean Group	<u>-658.0</u>	<u>-643.6</u>	<u>-502.9</u>	<u>-929.8</u>	<u>-790.0</u>	<u>+103.2</u>	<u>-729.2</u>	<u>-140.7</u>	<u>-337.3</u>	<u>-550.3</u>	<u>-514.0</u>	<u>-5 692.6</u>

Source: Country reports on Decision 24 of the Cartagena Agreement.

causing the purchasing power of exports to fall as well (see table 5). The external debt of the Andean Group countries amounted to US\$70 billion and its service sharply restricted the balance of payment.

The crisis has weakened integration efforts in two different ways. On the one hand, adjustment programmes have restricted imports and have led to sudden and unexpected modifications in exchange rates which, in turn, have caused relative prices on the international market to change. On the other hand, short-term solutions to bottlenecks or sectoral maladjustments have often worked against efforts to strengthen integration and co-operation among the Andean Group countries. This has also happened with regard to the various non-tariff restrictions imposed by the countries.

Exports of the Andean Group countries have fallen sharply, from US\$1 179 billion in 1982 to US\$ 760 million in 1983; when petroleum exports are excluded, the decline is even sharper, from US\$ 860 million to US\$ 460 million.

From another standpoint, there are also important domestic reasons for the current difficulties in the integration process. The Andean Group is suffering from an identity crisis, since the principles which gave it life -substitute industrialization and a guiding role for the State in the economy- have lost the significance they had during the late 1960s. These principles are no longer considered to be beyond discussion. The new political consensus which has been arising leans less towards industrialism and statism than the previous one. Harmonization of policies has decreased instead of increasing.

All these problems affect the Group's joint policy with respect to direct foreign investment. The main motivation for it, this policy, which was to prevent the benefits of integration from going exclusively to the transnational Corporations, has been weakened as the process has experienced setbacks.

Table 5

COLOMBIA: IMPACT OF FOREIGN INVESTMENT ON THE BALANCE OF PAYMENTS

(1975-1982 values in millions of dollars)

	1975	1976	1977	1978	1979	1980	1981	1982	Total
A. <u>Positive effects</u>	<u>193</u>	<u>236</u>	<u>263</u>	<u>269</u>	<u>377</u>	<u>430</u>	<u>681</u>	<u>636</u>	<u>3 085</u>
1. Foreign investment	36	32	42	29	78	98	191	242	748
2. External loans	5	29	28	40	81	63	202	146	594
3. Import substitution	-	-	-	-	-	-	-	-	-
4. Exports	152	175	193	200	218	269	288	248	1 743
B. <u>Negative effects</u>	<u>621</u>	<u>651</u>	<u>778</u>	<u>964</u>	<u>1 158</u>	<u>1 503</u>	<u>1 749</u>	<u>1 816</u>	<u>9 230</u>
1. Remittance of profits	37	44	48	54	55	53	72	76	439
2. Repatriation of capital and other outlays	21	17	25	9	11	14	4	4	109
3. Interests on loans	59	64	51	58	88	162	239	260	981
4. Amortization of loans	-	-	-	-	-	-	-	-	-
5. Royalty payments	8	8	9	5	6	9	10	10	65
6. Imports	496	518	645	838	998	1 265	1 414	1 462	7 636
C. <u>Net effect</u>	<u>-428</u>	<u>-415</u>	<u>-515</u>	<u>-695</u>	<u>-781</u>	<u>-1 073</u>	<u>-1 066</u>	<u>-1 180</u>	<u>-6 145</u>

Source: INCOMEX: Capital extranjero, balanza de pagos y exportaciones, June 1983, mimeo, Bogotá, Colombia.

Table 6

ANDEAN GROUP AND LATIN AMERICAN COUNTRIES: ECONOMIC INDICATORS

(Percentages)

	Per capita GDP 1981-1984	Urban unemployment 1984	Terms of trade in goods	Inflation 1984	Purchasing power of exports of goods (1981-1984)	Interest payments/ exports 1984
Bolivia	-24.6	13.3	- 0.6	1 682.3	-25.5	n.d.
Colombia	-1.5	13.5	- 3.9	16.4	-22.8	21.5
Ecuador	-6.9	n.d.	-21.3	19.1	-6.0	31.5
Peru	-13.3	10.9	-37.1	105.8	-35.0	35.5
Venezuela	-16.2	13.9	-8.0	15.7	-16.4	25.0
Latin America	-8.9	8.2	-21.7	175.4	6.3	35.0

Source: ECLAC, The Latin American Economy in 1984.

II. CHANGES IN RESPECT OF DECISION 24

1. Changes in Decision 24 since its origin

From its inception Decision 24 has undergone several changes as a result of decisions taken by the Commission of the Cartagena Agreement. The most significant changes were made in 1976, as the five other signatories tried to prevent Chile from withdrawing from the Andean Group. By Decision 97, the Government of Chile was authorized to sell stock in State enterprises belonging to CORFO to foreign investors. The most important modifications were made by means of Decisions 103, 109 and 110, as follows:

- Creation of special categories of capital: subregional capital is to be considered as national capital when certain specific requirements are met, and neutral capital, in the case of international public financing agencies or governmental agencies concerned with co-operation for economic development. This category of capital is not to be taken into account in determining the nature of the firm.

- Conversion agreements: the date on which the conversion of foreign firms was to begin was postponed from 30 June 1971 to 1 January 1974. Authorization was also given for the incorporation of new direct foreign investment to national or mixed enterprises provided the enterprise remained at least a mixed one.

- Remittance of profits: the ceiling for transfers was raised from 14% to 20% of registered direct foreign investment. Undistributed gains may be invested as direct foreign investment.

- Reinvestment of capital: the rate of reinvestment permitted was increased from 5% to 7%.

- Access to domestic credit: foreign enterprises were allowed access to long- and medium-term credit on the local financial market. The provision concerning the regulation of short-term credit by each country was eliminated.

Subsequently, other minor changes or amendments to regulations were introduced.^{15/}

The Board of the Cartagena Agreement has not proposed any amendments to Decision 24. In 1983 the Commission, for its part, approved a plan for the reorientation of the Andean integration process, in which eight areas were selected for priority action, with a sectoral strategy being formulated for each area. Several of these have to do with direct foreign investment and the transfer of technology, but Decision 24 is not mentioned nor is its current sphere of application affected, even indirectly. In the strategy for the area of financing, investment and payments, it is proposed that efforts should be made to attract external investment "within the framework of Andean legislation" and on terms that are suited to the needs and development priorities of the member countries.16/

As regards the strategy on science and technology, two policies are included which are relevant to the case of direct foreign investment. On the one hand, reference is made to the need to exercise a joint bargaining capacity and, to this end, to develop evaluation and selection methodologies, including "new techniques for the analysis of technology contracts". On the other hand, reference is made to the need to update regulations regarding patent rights currently in force in the subregion.17/

2. Changes adopted unilaterally by the countries

As mentioned in the first part of this study, there are significant differences in the way member countries of the Andean Group conceive and apply Decision 24. Several of these differences actually entailed ad hoc amendments to Decision 24.

Conversion agreements are being applied less and less and some countries have stopped signing them and enforcing them. The countries have been more and more willing to accept the idea -even though it is contrary of Decision 24- that these contracts are to be applied solely to those firms which wish to benefit from the expanded Andean market.

As regards national jurisdiction over disputes relating to direct foreign investment, two countries have signed agreements with OPIC which, in practice, go beyond this principle established in Article 51 of Decision 24.

The ceilings on the remittance of profits established by Article 37 have been overlooked in several countries, either as a general rule or in specific cases.

The principle of not authorizing direct foreign investment in activities for which the demand is already sufficiently covered (Article 3) has not been generally applied.

As regards the existence of sectors to which the access of direct foreign investment is restricted (Articles 40 - 44), there have been significant exceptions.

The least controversial areas are the registration of direct foreign investment and the transfer of technology, although there are significant differences in the way the relevant rules are applied from one country to another.

3. Political aspects of the process

As is to be expected with a subject as sensitive as that foreign investment policy, discussions on Decision 24 have been coloured by sharp political overtones.

On the one hand, there has been a tendency to emphasize the political decision to "offer greater security" for direct foreign investment, thus insinuating that the way to do this would be to change Decision 24. Nevertheless, the discretionary application of Decision 24 by the various countries of the Andean Group and their application of ad hoc measures whenever they have considered it necessary weakens the argument about the restrictive nature of the régime. Amending it, therefore, would hardly bring about any substantial change in the real "atmosphere" for investment. Hence, the problem has to do with the image that is projected. Any alteration of Decision 24 would convey the message that policies concerning direct foreign investment should not be restrictive.

From another standpoint, many of the defenders of Decision 24 still speak of a policy which has already been superseded in practice. Indeed, its defenders convey the message that policies concerning direct foreign investment should not be liberalized.

The values of Decision 24 as a symbol has thus been enhanced by both sides, and this makes it difficult to find a common ground for discussion of any possible amendments to it.

III. POLICY OPTIONS

1. Maintaining the current régime and its applications

As one may infer from the preceding section, Decision 24 is clearly in a state of deterioration. Nevertheless, one might maintain the inertia of its current application, especially in view of the weakening of the restrictions it initially entailed; this might satisfy those who seek to amend it so as to liberlize its content.

In this case, the breakdown of the common régime of the Andean Group would be accentuated and could give rise to a race towards liberalization among the signatory countries.

It has been suggested in some circles that regulations should be drawn up to implement Decision 24, in order to avoid the contradictory interpretations which have arisen. Some of the aspects that might be covered by specific stipulations are the following:

- The existence, in each country, of policies concerning direct foreign investment other than Decision 24;
- Conversion agreements;
- Jurisdiction in respect of disputed concerning direct foreign investment;
- Rates for the remittance of profits and repatriation of capital;
- Composition of registered direct foreign investment;
- Mechanisms for monitoring direct foreign investment;
- Access to domestic credit;
- The overall process of transferring technology;
- Purchase of national or mixed firms by transnational corporations;
- Sectors restricted to direct foreign investment.

It would not be very realistic to presume that agreement could be reached on details regarding Decision 24 which have in practice been applied differently, sometimes contradictorily, or on the strict application of which there is no consensus. This means that the only aspects of Decision 24 which could be regulated are those which are of a basically formal nature or those which have not been developed to any great extent by the Andean Group as a whole and on which some of the member countries might have acquired considerable practical experience.

2. Liberalization of the régime

Some proposals for changing Decision 24 have been circulated unofficially in various countries. The main aspects with which they deal are the following:

- Conversion agreements: It has been pointed out that conversion agreements are applied less and less frequently and that more and more countries have declared them to be obligatory only for enterprises which wish to benefit from the Andean Group's free-trade programme. From another standpoint, emphasis is placed on the practical problems which have arisen as result of the current economic crisis, e.g., corporations have very low losses or gains and nobody can or will buy them. Securities markets are not adequately developed in some countries and alternative mechanisms -such as trust funds- also pose difficulties of their own. It has been proposed that conversion agreements should be eliminated.

- Purchase of stock or participation in national firms: It has been proposed that there should be no strict ceiling on the purchase of local assets by foreign firms, even if this changes the national or mixed nature of the firm receiving direct foreign investment.

- Access to long-term domestic credit: It has been suggested that, with certain limitations, the restrictions placed on access to long-term credit by foreign firms should be eliminated. It has been pointed out that in some countries, this provision is not enforced or, if it is, it is only partially enforced and not monitored.

- National jurisdiction over disputes: It has been suggested that international arbitration should be accepted as a second recourse in cases of disputes relating to direct foreign investment. In this regard, it has been noted that two countries have already done this in practice.

- Increase in participation in mixed enterprises: It has been suggested that such participation should be increased to as much as 66%.

The question arises as to what would be left of the common régime for direct foreign investment if these modifications were approved and no other changes were introduced to provide balance.

Part Five

SUGGESTIONS FOR ACTION BY THE UNITED NATIONS CENTRE ON
TRANSNATIONAL CORPORATIONS

I. INFORMAL HIGH-LEVEL SEMINAR

A high-level informal seminar on the subject, sponsored by ECLAC and the UNCTC, could be very helpful in furthering the process of discussing possible amendments to Decision 24. Since participants in the seminar would attend in their personal capacity, such a meeting would allow for an in-depth discussion of certain key aspects of foreign investment policy within a context other than that of official negotiations. Attendance at the seminar should be restricted to persons who are thoroughly familiar with the issues and whose opinions are truly influential in national decision-making on the subject.

The high-level informal seminar on Decision 24 should have before it a set of country reports which would give an unofficial vision of the problem. In addition to these reports, a paper should be submitted by the organizers of the meeting which should highlight the similarities and differences of the country reports and possibly put forth proposals on the subject.

It is worth mentioning that the idea of holding this seminar has been warmly welcomed by the various officials responsible for designing and applying policies concerning direct foreign investment in the Andean Group countries.

II. TECHNICAL ADVISORY SERVICES TO ANDEAN GROUP COUNTRIES

There are two areas in which the United Nations Centre on Transnational Corporations could provide technical advisory services to the Andean Group countries in connection with Decision 24 and within the framework of the Technical Co-operation Programme. 18/ The first area is that of information and the second is that of the strengthening of the countries' bargaining capacity.

The availability of reliable, complete and accessible statistical information is usually a prerequisite to the design, application and evolution of public policies. The application of Decision 24 has generated a significant mass of statistics on direct foreign investment in the Andean Group countries. Nevertheless, these statistics present several problems. On the one hand, the different countries of the Andean Group have different criteria as regards definitions, coverage and gathering of statistics. On the other hand, these statistics are not always expressed in adequate economic variables and they are often difficult to interpret. The United Nations Centre on Transnational Corporations could provide the necessary assistance to the SAIT of the Andean Group in order to solve these problems.

There is an obvious need to strengthen the bargaining capacity of the Andean Group countries vis-à-vis the transnational corporations, and the different authorities responsible for negotiations have realized this. The United Nations Centre on Transnational Corporations might consider the possibility of holding a seminar on this matter in collaboration with the Cartagena Agreement.

Notes

1/ Bolivia's Investment Act establishes that capital goods which are produced locally shall be considered as cash contributions to the national production capacity when they are new and are not being used.

2/ In Ecuador, the average amounts allowed for remittance of profits have recently been equivalent to 14% of the registered investment. In Colombia, the proportion has fluctuated between 6% and 7%, while in Peru, it varies between 1.5% and 2.5%.

3/ Capital gains are defined as the difference between the actual value of net assets and the capital that is eligible for re-export after payment of relevant taxes.

4/ In this respect, see Informe de la Junta del Acuerdo de Cartagena sobre las actividades desarrolladas en el área de ciencia y tecnología durante 1983 y 1984, C.CT/II/dt3, 25 October 1984.

5/ Félix Moreno, "La política de importación tecnológica en Colombia", Ciencia, tecnología y desarrollo, Vol. 3, N° 4, 1979, p. 547.

6/ Evolución del comercio de tecnología en el Grupo Andino entre 1979 y 1982, Workshop on foreign investment in the Andean Group, July 1984, p. 12.

7/ ECLAC, The Latin American Economy in 1984.

8/ BIS, Annual Report 1984.

9/ ECLAC, op. cit.

10/ Ibid.

11/ World Bank, World Development Report 1983, p. 49.

12/ The total contribution of corporations -both national and transnational- to the trade balance should include their indirect impact on the demand for imports and on total exports. Up to now, this has not been dealt with from the methodological standpoint.

13/ Eugenio Lahera, "Las empresas transnacionales y la crisis del sector externo de la economía latinoamericana: Situación y alternativas", Economía de América Latina, December 1985.

14/ In this respect, see Edgar Moncayo "Nuevo estilo de integración andina", Economía Colombiana, January 1985.

15/ See Decisions 109, 110, 124, 125, 144, 180, 213 and 214.

16/ Acuerdo de Cartagena, Plan de Reorientación del Proceso Andino de Integración, COM/XXXV-E/St.3/Rev.2, 9 July 1983, p. 33.

17/ Op. cit., pp. 37 and 38.

18/ Described in Technical Cooperation: Review of the Programme of Technical Cooperation, E/C.10/1985/14, 8 February 1985.