THE LATIN AMERICAN DEVELOPMENT PROCESS AND THE NEW LEGISLATIVE TRENDS

Enrique E. Bledel*

I. INTRODUCTION

Legislation affecting all facets of economic activity has undergone drastic change in Latin America in the past twenty-five to thirty years. This change is not the result of a new wave of nationalism which suddenly blossomed in the region. Such a conclusion would be an oversimplification of a much deeper and complex problem. These nationalistic feelings have existed always and often have been expressed strongly at international forums, but the lack of specific and well-defined objectives and plans for realization apparently have kept them dormant. This change was prompted by the need to create the necessary legal infrastructure to implement new programs designed to promote more rapid economic development, to stimulate international trade and facilitate the transfer of science and technology from the developed countries and, in so doing, to cure the economies of Latin America of the lethargy which had beset them in the 1940's and 1950's.

II. THE PERIOD FROM THE 1940'S-1950'S: SLOWER DEVELOPMENT

It has been pointed out that in the 1930's the level of development of Canada and Australia was comparable with that of some Latin American countries, such as Argentina, Brazil and Mexico. Argentina, Australia and Canada had similar export earnings until the beginning of the post war period when Canada and Australia began to draw ahead rapidly. In 1973, the per capita income of Canada was three times that of Argentina, and Australia's per capita income was four times that of Mexico. Latin America's share of the international market declined from 11% in 1950 to less than 5% at the beginning of the 1970's. Along with decreased participation by Latin America in the world market during the 1940's and 1950's, serious political, economic and social problems which had plagued the region became even more acute:

*Member, Inter-American Bar Association.

2 Id. at 16, 17.
1. political instability;
2. increased rate of population growth;
3. migration from the country to the large cities;
4. inequitable distribution of income;
5. inadequate social organization; and
6. unemployment and under-employment.

It is clear that reduced participation in the world economy was extremely harmful to the region. In order to deal with these problems and other immediate needs, the Latin American countries in the majority of cases borrowed foreign capital without the backup of strong development programs which would, in turn, produce steadily increasing national income. While Latin America was increasing her dependence on developed countries in order to acquire the fundamentals for development (e.g., technology, "know how" in the management of business and credit, etc.), the industrialized countries were losing interest in the area and diverting their investments to the developed countries of Europe. The stagnation which characterized the development of Latin America during this period was the direct result of a lack of government strategies or policies, intelligently formulated and effectuated.

Instead of enforcing economic policies which would accelerate the development process and thereby create new sources of labor, promote larger investments of capital in productive industrial activities (rather than in loans amply secured with mortgage guarantees) and introduce new lines of business and new technologies, the Latin American governments of that period were more concerned with solutions that would alleviate immediately the economic hardships of the larger sector of the population. As a consequence of this approach, price controls were imposed, ultra-protective customs duties were put in force and labor and social benefits were granted beyond the economic potential, financial ability and degree of development of certain Latin American countries. Regulations covering the most diverse aspects and stages of the economic activity were adopted which brought the development process to a point of stagnation and resulted in larger dependence upon foreign aid.

III. THE 1960'S: RECOGNITION OF THE NEED FOR INTERNAL DEVELOPMENT

At the end of the 1950's and the beginning of the 1960's, Latin American, as well as the other developing countries, began to understand that the solution to the problem of increasing economic
depression was not to be found in external help but rather through improved and expanded agricultural and industrial production which would satisfy local needs and create more competitive exports essential for independent and continuing development. Latin America discovered that, in addition to the exportation of raw materials, she had to develop the export of manufactured and semi-manufactured goods and take advantage of the greater dimensions afforded by the international market. The increased attention given to the development process in Latin America dating from the early 1960's was not an isolated phenomenon; it was part of a much broader movement which included all of the developing countries of the world.

A. **International Development in the 1960's**

In December 1961, the General Assembly of the United Nations designated the decade of the 1960's as "The Decade of Development of the United Nations." The decade of the 1970's was subsequently named "The Second Decade of Development." Moreover, in December 1962, a world conference on commerce and development was held in order to lay the foundations for a new structure of international commerce capable of assuring the rapid, orderly and continuing growth of the developing countries. This meeting gave birth to UNCTAD (United Nations Conference on Trade and Development). In point 22 of the Preamble of the Final Act and Recommendations adopted by the first meeting of UNCTAD in Geneva in 1964, the following comment was made:

> In recent years, the developing countries have been turning increasingly to economic and social planning as the most effective means for accelerating their growth. Their plans, policies and institutions are designed to achieve the transformation of their economic and social structures and to provide for maximum saving, investment and output to a predetermined order of priorities for a targeted rate of growth.5

In addition to the economic and social planning adopted by the governments of developing countries, the role of private capital, both domestic and foreign, was recognized, provided that it co-

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3 Id. UNCTAD I, Final Act and Recommendations Adopted by the Conference (35th plenary mtg.) (June 15, 1964) 35.
operated with local initiative and capital, relied as much as possible on existing resources in developing countries, and worked within the framework and objectives of the development plans with a view to supplying domestic markets and, in particular, expanding exports. This provision also stated that the Conference expected foreign private investors to recognize the desirability of (1) reinvestment of profits, as much as possible, in the developing countries concerned; (2) making "know how" available to nationals of developing countries; (3) offering training and employment opportunities for nationals of host countries; and other corresponding measures.\(^6\)

B. *Latin American Influence on the Recognition of International Development*

1. *The New International Economic Order*

It was also in the middle 1960's when twenty-eight developing countries achieved independence and were admitted to membership in the United Nations, leading to the formation of the Group of 77, which today numbers more than 116. This group, which includes twenty-one Latin American countries, has become a principal vehicle within the United Nations system for expressing views on various issues and for formulating specific objectives and programs of action designed to achieve the goal of bringing about a new international economic order. This new economic order, from their standpoint, would be more beneficial to these countries in the areas of international trade and economic development.\(^7\)

On May 1, 1974, during the Sixth Special Session of the United Nations, Resolution 3201 (S-VI) was adopted, entitled "Declaration on the Establishment of a New International Economic Order." In this declaration, the members of the United Nations

Solemnly proclaimed their united determination to work urgently for THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER based on equity, sovereign equality, interdependence, common interest and cooperation among all States irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed

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\(^6\) *Id.* UNCTAD I, Third Part, America's Annex A IV 12, Promotion of Private Foreign Investment in Developing Countries (1964) 74.

\(^7\) *Yearbook of International Organizations* at B-0747 (17th ed. 1978).
and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations.

2. The Belgrade Declaration of Non-Aligned Countries

In Belgrade on September 6, 1961, the Heads of State or Government of Non-Aligned Countries issued a declaration which included—among its objectives—the acceleration of economic, industrial and agricultural development and the application of the fruits of the scientific and technological revolution to all fields of economic development. In the same declaration it was stated that the people of Latin America were continuing to make an increasingly effective contribution to the improvement of international relations. It is a well known fact that the Latin American countries have reached a larger degree of development in the 1960's and 1970's than those of Africa and Asia and, consequently, are now called the “advanced” developing countries. Among the non-aligned countries of Latin America we have, on the one hand, Cuba with a declared socialistic government and, on the other, Argentina and Brazil which follow an open and free economic policy. Bolivia and Ecuador also are members of the non-aligned countries group. The last conference, which took place in Havana, showed the continuing importance of Latin America to this group.

3. The United States and the Alliance for Progress

In 1960, President Kennedy, concerned about the economic and social repercussions which would result from a lack of economic development in Latin America, launched a program of technological and financial assistance known as the Alliance for Progress. The three main objectives of the Alliance were: (1) to promote an increase of economic growth; (2) to modify the traditional infrastructures of Latin American societies; and (3) to accelerate the process of democratization of political practices. As Mr. Arthur Schlesinger has pointed out, in its ideas the Alliance was essentially a Latin American product. . . . It drew from Raul Prebisch of Argentina and the United Nations Economic Commission on Latin America, from Juscelino Kubitschek of Brazil and Operation Pan America, from the ten eminent Latin American economists, among them Prebisch, Jose Antonio Mayobre of Venezuela and Felipe Herrera

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8 2 UNITAR Document Service 891.
9 1 UNITAR Document Service 8.
from Chile who summed up the Latin American view in a trenchant memorandum delivered to Kennedy.\(^\text{10}\)

As far as the reaction of the Latin American people is concerned, it could be said that the upper classes detested it while the man in the street saw it as a force for change in their favor. Many accepted the Alliance inasmuch as it fostered a development consciousness regarding the promotion of economic growth. However, the Latin American people did not accept its intervention in what, in their opinion, were sensitive matters of structural change and political democratization. Mr. Schlesinger, answering the question as to whether the Alliance for Progress was a failure, makes the following statement: "The Alliance was never really tried. It lasted about a thousand days, not a sufficient test, and thereafter only the name remained." In spite of much well-deserved criticism and the varied controversies which it provoked, there is no doubt that the Alliance, along with the 94 objectives of the Charter of Punta del Este (1961), served to fix the basic guidelines for the formulation of a development policy in Latin America and to create an awareness of the necessity to put it into practice as soon as possible.

4. *The Charter of Punta del Este*

The Charter of Punta del Este recommended, among other things, the following:

- the development of natural resources;
- the utilization of local raw materials;
- the promotion and expansion of non-traditional exports of manufactured or semi-manufactured products;
- the restriction of imports;
- the development of local technology and scientific research;
- closer cooperation between Latin American countries, inter-American institutions, and the various organizations of the United Nations.\(^\text{11}\)

5. *Emerging Inter-American Organizations*

In addition to the Economic Commission for Latin America (ECLA), many inter-American organizations were established in


the early 1960's for the purpose of analyzing and solving the diverse problems which plagued the economies of the developing nations of the hemisphere. The first steps also were taken toward the gradual and progressive integration of the economies of the region through the Latin American Free Trade Association (LAFTA) (1960),\(^{12}\) the Central American Common Market (CACM) (1960),\(^{13}\) the Caribbean Common Market (CARICOM) (1965)\(^{14}\) and, later, the Andean Pact (ANCOM) (1969).\(^{15}\) The Latin American Economic System (SELA) (1975)\(^{16}\) also should be mentioned as another attempt by the Latin American countries to coordinate their development strategies and policies. The aim of these organizations is to facilitate trade expansion and economic integration among a group of developing countries.

The Latin American Free Trade Association was established in June 1961 by the ratification of the Montevideo Treaty (signed in February 1960) and now numbers eleven members: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Perú, Uruguay and Venezuela. Its aim is to eliminate gradually, through reciprocal trade among members, all types of duties and restrictions that affect the importation of goods produced by other members.\(^{17}\)

The Central American Common Market was established in 1960 by the Treaty of Managua and comprises Costa Rica, Guatemala, El Salvador, Honduras and Nicaragua. Its objectives include the elimination of all tariffs and trade barriers between members and the establishment of a common external tariff for the rest of the world.\(^{18}\)

The Caribbean Common Market was founded in January 1967 by Antigua, Barbados, and Guyana; membership has since expanded with the admission of Grenada, Jamaica, Montserrat, St. Christopher-Nevis-Anguilla, St. Lucia, St. Vincent, Belize and Trinidad and Tobago. It had its origin in the early 1960's with the attempted formation of the West Indies Federation, which did not succeed. By 1972-73, a unified Caribbean Community was established, with a Common Market headquartered in Georgetown, Guyana. Provision was made for the immediate removal of all

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\(^{12}\) *Yearbook of International Organizations*, *supra* note 7, at A-2879.

\(^{13}\) Id. at A0230.

\(^{14}\) Id. at A-4579.

\(^{15}\) Id. at A-0055.

\(^{16}\) Id. at A-4530.

\(^{17}\) *Kriegervasena & Pazos*, *supra* note 1, at 199.

\(^{18}\) Id. at 196.
tariffs on trade among members and for incentives to establish industry and encourage inter-island trade, in order to achieve its goals of promotion, expansion and diversification of trade within the area and of encouraging and promoting the economic and commercial development of its members.\(^{19}\)

The Andean Group was set up in 1969 by Bolivia, Chile, Colombia, Ecuador and Peru. Venezuela joined in 1973. Chile withdrew from the group due to the overly restrictive provisions which the agreement contained regarding foreign investments.\(^{20}\) This Andean sub-regional agreement was approved by the LAFTA Executive Committee. It aims to assist the development of member countries through economic integration to establish favorable conditions for the development of the LAFTA common market, to eliminate internal tariff barriers, to introduce a common external tariff by 1980, to establish within the group common rules governing the activities of foreign investors and the licensing of trademarks and patents. It actually came about due to the inability of its member countries to negotiate reciprocal arrangements with the three larger Latin American countries, Argentina, Brazil and Mexico.

On October 17, 1975, twenty-five countries, some from Latin America and some from the Caribbean, signed the Charter which established the Latin American Economic System currently known as SELA. The countries that subscribed the Charter were the following: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela.\(^{21}\) Article 2 defines SELA as a permanent regional body for consultation, coordination, cooperation and joint economic and social promotion. It has its own international juridical identity. However, the Caribbean Islands, strictly speaking, cannot be included within the general expression that identifies the Latin American conglomerate.

The fundamental purposes of SELA, according to Article 3 of the Charter, are:

(a) To promote intraregional cooperation in order to accelerate the economic and social development of its members; and

\(^{19}\) Id.

\(^{20}\) Id. at 195.

To provide a permanent system of consultation and coordination for the adoption of common positions and strategies on economic and social matters in international bodies and forums as well as before third countries and groups of countries.

Several meetings of SELA have taken place but its progress so far has been relatively slow.

In March 1964, at the first meeting of the Special Committee for Latin American Coordination (CECLA), held in Alta Gracia, Argentina, the Latin American countries issued a joint declaration designed to initiate the search for the formulae for a pacific expansion and more equitable structural reform of international trade. One statement made in the joint declaration was that, notwithstanding the efforts to increase the volume of its exports, Latin American countries are being displaced from international trade. In order to check their declining growth rates, they have had to resort to external financial aid on terms that have caused the servicing of the debt to become an excessively heavy burden in relation to their capacity for payment. Therefore, the declaration concludes, there is an evident contradiction between the loan policies and trade policies applied by developed countries to the developing world. The joint resolution also mentioned that developing countries should share increasingly in the benefits of technological progress; consumer countries should cooperate with producer countries; regional economic integration of the developing countries should be promoted; and industrialized countries should recognize their responsibility to help provide the international funds to accelerate the capital formation process.

At another meeting of CECLA in 1969, the document known as the Accord of Viña del Mar, Chile, was drawn up. This document, which was presented to the United States government by all of the Latin American countries except Cuba, established the basis for cooperation between Latin America and the United States. It was virtually the first document which emphasized the importance of trade vis-a-vis foreign aid and drew attention to barriers against trade in manufactured and semi-manufactured goods as distinct from those restricting primary goods. It also has been pointed out that since 1969, CECLA has been responsible for much of the activity in economic affairs in the Organization of American

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22 Yearbook of International Organizations, supra note 7, at B-4965.

States (OAS). It was also the prime mover in the establishment of the Special Committee for Consultation and Negotiation (CECON).

IV. LATIN AMERICAN LEGISLATION IN THE 1960'S AND EARLY 1970'S: DEFINING ECONOMIC POLICIES AND REGULATING FOREIGN INVESTMENT

As a direct consequence of the new development policies which were being put into practice within the region and worldwide, a period of new and revised legislation affecting business began in Latin America. The laws supervised by pragmatic and well-trained technocrats. As a matter of fact, most Latin American countries have made an effort to improve the education of their people. More youngsters are inclined to attend technical schools and study economics now, departing from the traditional professions such as medicine and law. The "Good Neighbor Policy" founded by President Franklin Delano Roosevelt gave the opportunity to many Latin American professionals to take post-graduate studies in the United States. Some of them are today in leading positions in their respective countries. It is regrettable that such a program has not been followed up with the same intensity as it was launched.

A. Laws on Foreign Investments

Regarding the investment of foreign capital, the "Open Door Policy" was abandoned in favor of more "selective" criteria. Prohibitions and priorities were established for certain industrial sectors in the foreign investment laws. The percentages of profits to be remitted also were regulated in detail by some foreign investment laws.

1. The Mexican Foreign Investment Law

The Mexican law on foreign investments, in Article 3, reserves exclusively for the State the following activities:

(a) Petroleum and other hydrocarbons,
(b) Basic petrochemicals,
(c) Exploitation of radioactive minerals and generation of nuclear energy,
(d) Mining in the cases referred therein in the law on the subject,

24 Published in the Diario Oficial of March 9, 1973.
(e) Electricity,
(f) Railroads,
(g) Telegraphic and radiotelegraphic communications, and
(h) Other activities which will be fixed by specific laws.

Also listed in the same article are those activities which are reserved exclusively for Mexicans or for Mexican companies:

(a) Radio and television,
(b) Urban, interurban automotive transportation and on Federal highways,
(c) National air and maritime transportation,
(d) Forestal exploitation,
(e) Gas distribution and
(f) Other activities to be fixed by specific laws on the regulatory provisions which may be issued by the Federal Executive Power.

Different percentages are fixed for the participation of foreign capital, which may not in any case exceed 49% of the company's total capital, and then only so long as it does not have, for any reason, the power to control the company's management.

Article 13 provides that in determining whether to authorize foreign investment and in establishing the percentages and conditions according to which it shall be governed, the Commission on Foreign Investments shall consider the following criteria and characteristics of the investment:

(I) It shall supplement national investment;
(II) It shall not displace national companies which are operating satisfactorily nor enter fields that are adequately covered by them;
(III) Its positive effects on the balance of payments and, in particular, on the increase of exports;
(IV) Its effects on employment, considering the level of employment generated and the compensation paid to labor;
(V) The employment and training of Mexican technicians and administrative personnel;
(VI) The use of national input and components in the manufacture of its products;
(VII) The extent to which its operations are financed with foreign resources;
(VIII) The diversification of the sources of investment and the need to promote regional and subregional integration in Latin America;
(IX) Its contribution to the development of relatively less economically developed zones or regions;
(X) It shall not occupy a monopolistic position in the national market;
(XI) The capital structure of the economic type of activity involved;
(XII) The supply of technology and its contribution to the research and development of technology in the country;
(XIII) Its effects on price levels and the quality of its productions;
(XIV) It shall preserve the social and cultural values of the country;
(XV) The importance of the activity involved within the national economy;
(XVI) The identification of the foreign investor with the interests of the country and his ties with economic decision-making centers abroad; and
(XVII) In general, the extent to which it contributes to the attainment of, and conforms with, the national development policy objectives.

The above listing illustrates the new selective approach prevailing in most Latin American countries towards foreign investments.

2. *The Argentine Foreign Investment Law*

The Argentine law on foreign investments as it reads today after several amendments requires the approval of the Executive Power before a foreign company can make an investment in the following sectors:

(a) Defense and national security;
(b) The rendering of health, postal, electricity, gas, transport and telecommunication services;
(c) Radio and television stations, newspapers, magazines and publishing houses;
(d) Energy;
(e) Education;
(f) Banking, insurance and financial entities.

The Executive is empowered to include other sectors in addition to those mentioned above.

25 Law No. 21382 and Regulations, Decree No. 283/77 (published in English by the Ministry of Economy of the Argentine Republic).
The law contemplates other approvals by the Executive Power which are too numerous to quote in detail in this article. However, it is worth mentioning that any investment in excess of $20,000,000 U.S. requires approval. An investment of between $5,000,000 and $20,000,000 U.S. requires approval by the government agency entrusted with enforcement of the law which, at present, is the Undersecretary of External Investments Office. Investments of up to $5,000,000 U.S. do not require any approval.

Argentine law on the subject authorizes registered foreign capital to remit their investments. For up to 12% of the capital registered, the remittance of profits is free of a special tax which is levied according to the following table:

<table>
<thead>
<tr>
<th>Percentage Range</th>
<th>Tax Rate</th>
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<tbody>
<tr>
<td>From 12% to 15%</td>
<td>15%</td>
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<tr>
<td>From 15% to 20%</td>
<td>20%</td>
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<tr>
<td>Above 20%</td>
<td>25%</td>
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3. The Chilean Foreign Investment Law

Decree Law No. 600, promulgated upon Chile's withdrawal from the Cartagena Agreement, states in Article 16 that the Foreign Investment Committee's approval is required for the following foreign investments:

(a) Those with a total value exceeding US $5,000,000 (five million U.S. dollars) or its equivalent in other currencies;
(b) Those relating to sectors or activities normally performed by the State and those carried out by public services;
(c) Those carried out through communication media; and
(d) Those performed by a foreign State or a foreign public institution.

All other investments only require the authorization by the Executive Secretary of the Foreign Investment Committee, with its President's prior approval. The Chilean Law, as can be observed, only gives some broad guidelines regarding those activities for which the prior approval of foreign investments by the Foreign Investment Committee is required. It does not go into a detailed enumeration of activities subject to such approval.

- Decree Law No. 600, as amended by Decree Law No. 1.748 on March 18, 1977.
Another feature which is interesting in the Chilean law is the tax stability clauses which appear in Articles 7 and 8. Article 7 provides that the holders of foreign investments made under the terms of Decree Law 600 are entitled to have included in their respective contracts a clause to the effect that, for a period of ten years running from the start-up of operations, foreign investors will be subject to a fixed overall income tax at the rate of 49.5% on taxable income, which includes taxes assessed under the Income Tax and Housing Tax laws applicable under legislation in force at the time the contract is executed. Article 8 provides that notwithstanding the fact that foreign investors and the entities in which they may participate are subject to the general indirect taxation and custom regulations affecting national investment, the foreign investors may include in their contracts a clause to the effect that, insofar as it is applied to foreign investors, during the period in which the agreed investment is being affected there will be no change in the sales and services tax and the custom regulations which were in force at the time of signing the contract, as they relate to the import of machinery and equipment not produced in the country.

Finally, foreign investors, according to Article 4, may transfer abroad both their capital and net income arising therefrom. There will be no time limit for the exercise of this right. However, the capital may not be remitted until three years have elapsed from the time the capital was brought in. There is no tax assessed on profit remittances above a ceiling percentage.

4. The Uruguayan Foreign Investment Law

The Uruguayan law on foreign investments provides in Article 3 that foreign investments in all areas of economic and social development will be authorized if compatible with the national interest. However, foreign investments intended for the following activities will require express authorization of the Executive Power: electricity, hydrocarbons, basic petrochemicals, atomic energy, exploitation of strategic minerals, finance, agriculture, meat packing, railroads, telecommunications, radio, press, television and those which, by law, are to be carried out by government agencies. The Executive Power may extend, by means of a resolution supported by corroborative evidence, the activities previ-

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ously enumerated when the circumstances make such action advisable.

Article 6 guarantees the remittance of capital and annual profit transfers. When the profits exceed 20% of the capital with transfer rights, an additional tax of 40% will be applied to those profits that exceed the said 20%. Article 8, dealing with the repatriation of capital, provides that the invested capital cannot be repatriated before the end of the third year after the date of the execution of the investment contract.

The Foreign Investment Act in Article 9 provides that the rights granted by the Act are in addition to those established in Act No. 14178 dated March 28, 1974 (Industrial Promotion Law). The Industrial Promotion Law contemplates the possibility that the investors will apply for a declaration stating that their investment is in the “national interest,” which includes those industrial activities which comply with the objectives established or to be established in the Economic and Social Development Plans of the country. Those activities which may be declared to be of “national interest” may receive preferential and long-term loans, foreign currency loans or guarantees and tax exemptions.

5. **Brazilian Regulations on Remittance of Profits**

Brazilian law also has in force a *de facto* percentage limitation upon remittances of earnings which exceed an average of 12% per annum registered investment and reinvestment, as averaged over a three-year period. Excess remittances are subject to a significant supplemental income tax of 40% in the category of 12 to 15% upon capital and reinvestment, 50% in the category of 15 to 25% and 60% upon the excess. The United States Treasury Department has ruled this supplemental tax to be an income tax for purposes of foreign tax credit; thus, depending upon one's overall foreign tax credit situation, it might make sense for a given United States investor to accept this cost.

B. **Laws on Transfer of Technology**

New laws were issued on the transfer of technology during the 1960's and early 1970's, and industrialized countries were urged to encourage and promote the transfer of knowledge and technology

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to the developing countries and to eliminate restrictive practices. The transfer of technology laws of Argentina and Mexico and the provisions of Decision 24 of the Cartagena Agreement can be cited as indicative of this new legislative trend in Latin America. They make compulsory the registration of any contract concerning the exploitation of trademarks, patents, technical know how, detailed engineering, etc. Article 10 of the Argentine transfer of technology law and Article 7 of the Mexican law specify which clauses in a contract may render it unacceptable for registration. They include:

1. When the technology is freely available or of public knowledge;
2. When they forbid or limit exports by the recipient;
3. When they impose the obligation to acquire raw materials; intermediate products or capital goods from a specified origin or source of supply;
4. When they impose sale or resale prices to the recipient;
5. When the acquirer is required to employ personnel designated by the supplier;
6. When the supplier is authorized to intervene in the management of the recipient; and
7. When the disputes arising from the interpretation of enforcement of the law are subjected to foreign courts.

As a consequence of the issuance of these new laws, government agencies proceeded to revise and approve contracts for technology transfer which were signed by a foreign licensor and a local licensee. No authorities become involved directly in the discussion of the text of the agreements with the licensor of the trademark, patent, know how, etc., proposing all kinds of amendments, deletions and additions which they consider necessary to adapt it to the laws and regulations in force on transfer of technology. Once the agreement has been approved, the licensee has no other function to perform than to sign the contract. Although most of the laws on this subject follow the same principles and trends, experience tells that in each Latin American country a different text has to be negotiated and agreed upon with the authorities.

31 Law on the registration of the transfer of technology, published in the Official Gazette of December 30, 1972.
C. Labor Participation in the Ownership of Companies

Gradual and progressive participation in company ownership was granted to employees and laborers in Perú through the so-called Industrial Community. The Industrial Community was created initially for the manufacturing sector. Afterwards it was extended to companies belonging to the following sectors: fishing, telecommunications, mining, electricity and oil. It was never implemented in the commercial and banking sector, however. Peruvian law requires all companies in the manufacturing sector which had six workers or more or a yearly income greater than $25,000 U.S. to organize an industrial community. The assets of the industrial community accrued by deducting 15% from the net income of the corporations before the payment of the income tax. Those funds would be used to acquire stock in the corporation until 50% of its registered capital was reached. The law forbade the industrial community or the workers from transferring or pledging the shares. The industrial community would have one representative of the workers on the Board of Directors even in the case where the industrial community would not have enough shares to elect a representative.

This participation system failed for various reasons, namely, the attitude of some industrial community representatives, who confused their role on the board by acting more as union leaders than as shareholders, and the prohibition against free transfer of shares. In view of this, the industrial community system was revised. Although at present the 15% deduction is still kept in force, it is distributed now in a different way: 13.5% goes to the workers and 1.5% belongs to the industrial community. The 13.5% will be deducted from the net income of the corporation until the labor participation in the property reaches 50% of the registered capital. The 1.5% always will be deducted from the net income of the corporation. The 13.5% which the workers receive directly is limited in time and remains in force until the workers reach the 50% limit. Once this percentage is reached, the deduction stops and it will resume only when necessary to reestablish the 50% ceiling.

Under the new law, the labor shares have no voting rights; however, these shares give the shareholders the following rights: (1) preferred dividends up to 5% of the value of the stock; and (2)
preferred distribution of assets, after paying the creditors of the corporation, in the liquidation process of the corporation. Also, under this new system the worker can transfer his shares freely, subject to some mild limitations provided in the law. The revised legislation ensures the control of ownership by the entrepreneur. The workers will have the right to elect at most one-third of the Board of Directors as compared to the old system in which they could elect one-half of it.

D. Control of Royalties

Concerning royalties, strict controls were established with regard to the rate agreed upon by the parties and the term of duration of the contract. In those countries where specific laws on transfer of technology have been promulgated, the control of the amount of the royalty to be paid by the licensee as well as provisions regarding the duration of the contract are established the moment the contract is submitted for registration. The authorities may not accept the agreement if the royalty is too high and the term too long. The authorities charged with controlling royalties varies with each country; for example, in Brazil such control is exercised by the Central Bank.

E. Restrictions on the Use of Foreign Trademarks

The use of foreign trademarks was also regulated in the 1960’s and early 1970’s. In some countries, e.g., Mexico, an attempt was made to require the linkage of the use of a foreign trademark with a mark originally registered within the country. Article 127 of the law reads as follows: “Every trademark of foreign origin or the rights of which correspond to a foreign or physical person, which is designed to protect articles manufactured or produced in national territory must be used jointly with a trademark originally registered in Mexico.” Both trademarks must be used in an equally visible manner. Although the law actually was issued in 1976, its application already has been postponed three times. Law suits questioning the legality of its enforcement have been filed, as have legal proceedings alleging that the linking of trademarks violates not only the Mexican Constitution but also the Convention of Paris. The Paris Convention states that the holder of a


foreign trademark enjoys the same rights as the holder of a national trademark. Moreover, the Mexican law would appear to contradict the basic principles of trademark law, which specify that a trademark identifies a product, a place of origin and a quality.

Brazil issued Normative Act 15 in 1975, which contained new guidelines for recording agreements which involve the transfer of technology, trademarks, patents, etc. It has been pointed out that although Normative Act 15 often will be referred to as "the Act," it must not be thought that "the Act" is an Act of Congress or has the nature of a law. The correct word to apply to it probably would be "Directive," since it is really "an authoritative instrument" that promulgates a program of regulation or directs or prohibits certain acts and is issued by a high-level official body or competent official as a broad policy statement to be developed by technicians or as an explicit instruction with details. It was issued not by the Congress or by the President of Brazil or by the Minister of Industry and Commerce, but by the President of the National Institute of Industrial Property.

Among the basic conditions that a trademark license agreement should contain, the following is mentioned in 3.5.1-e of the Normative Act:

Give the licensee the option, if he so desires, of using his own mark or advertising expression or device "accompanied with" (in combination with or together with) the licensed mark or advertising expression or device, or of using his own mark or advertising expression per se, when he manufactures or commercializes other products or when he renders other services in addition to those which are specifically identified by the mark or by the advertising expression or device to which the license refers.

This provision does not go as far as the Mexican trademark linking requirement and thus far no case has been known in which the licensee has exercised such option. However, it is difficult to understand how such a "Directive," which does not have the force of a law, can modify established and recognized trademark law privileges.

Legislation designed to discourage the use of foreign trademarks also was attempted in some countries. An example of this trend is Article 9 of the transfer of technology law issued in

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35 Normative Act 15 was published in the Brazilian Official Gazette on September 11, 1975 and took effect on the same date.
Argentina in 1974, which stated that the local licensee had to develop his own trademark within five years to replace the foreign trademark and that no license agreement granting the use of a foreign trademark would be extended beyond December 31, 1979. This provision has been eliminated from the new law on transfer of technology. In other countries, tax laws have been issued fixing discriminatory rates against trademarks of foreign origin. The Andean Pact promoted this type of legislation.

F. Regulations Concerning Advertising

On the subject of advertising, laws also have been enacted which impose restrictions on the use of advertising slogans. For instance, in Peru it would not be acceptable for a slogan to be preceded by the words “buy,” “eat” or “drink” a certain product, as it would have a mandatory or compulsory connotation for the consumer.

G. Selection of Corporate Structure

Freedom of choice has been limited regarding the legal structure to be adopted by foreign companies in setting up business in Latin America. Registration of a new branch in a country which is a member of the Andean Pact is now impossible and the only ones that remain are those which were already established and functioning before the issuance of Decision 24 of the Cartagena Accord.\(^{36}\)

The fade-out formula, or, in other words, the gradual takeover of the majority interest by locals, as contemplated in Decision 24,\(^{37}\) can be implemented only by a subsidiary through the transfer of the share certificates to the new owners. In the case of a branch, this would be impossible because it only has a registered capital, usually rather small. This has discouraged new investments and the expansion of previously established business, especially where trade secret rights are at stake.

In some countries, the existence of a local majority is mandatory for the establishment of a company of the type termed “joint ven-


\(^{37}\) Confederación Nacional de Comerciantes del Perú—Régimen Común de Tratamiento de los Capitales Extranjeros y sobre Marcas, Patentes, Licencias y Regalías—Acuerdo de Cartagena, Articles 30 and 31.
ture." The Mexican foreign investment law offers a good example where domestic majority ownership is compulsory in any joint venture with participation of foreign capital. The general rule is that foreign participation cannot exceed 49% of the capital. For some activities, such as special concessions granted for the exploitation of national mineral reserves, the law permits foreign capital participation of 34% and for activities concerning secondary products of the petrochemical industry and manufacture of automotive vehicles 40% capital participation is allowed. The National Commission on Foreign Investments may decide within its discretion to increase or reduce these percentages when, in its judgment, the foreign investment can be beneficial to the economy of the country. A somewhat different approach is taken by the Andean Pact. The aim of Decision 24 is to gradually permit local investors to take over the majority position. In other words, a company can be controlled in its initial stage by foreign investors, provided that it enters into a scheme to divest itself gradually of such control in favor of domestic shareholders.

H. Bearer Shares vis-à-vis Nominative Shares

Bearer shares are being replaced with nominative shares in many countries in order to facilitate identification of the actual amounts contributed by the foreign and the local investor. Multiple-vote shares also are disappearing from commercial codes and laws; this is seen as a means to avoid possible control of a business by a minority group of shareholders.

I. Price Controls

It becomes very difficult to operate at a profit in those countries where price controls are in force since authorizations to readjust prices usually involve long and cumbersome proceedings. Moreover, as this practice has been adopted in countries with rampant inflation, by the time the new authorization to increase prices is obtained, the prices are again out of line with the new production costs. In addition, when an industry has to continue selling at a price which is not profitable, increased sales result in increased losses. Price control legislation usually carries severe penalties for infringement of its provisions. Some Latin American governments have departed from the price control practice lately

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38 Decision 24, supra note 36, at Art. 45.
as it has not proven effective in stopping inflation. Instead, such practice has discouraged new investments and the improvement of already adopted manufacturing processes, thus giving rise to a more competitive market.

V. LEGISLATION FROM THE MID-1970'S ON: RETENTION OF NATIONAL DEVELOPMENT POLICIES BUT WITH MORE PRAGMATIC REGULATION

As fundamental political changes began to take place in the governments of various Latin American countries affected by such conditions, the new leaders quickly realized that—in many cases—the new restrictive laws made it more difficult to put efficient development programs into practice. As a result, a new era began, characterized by attempts to moderate the restrictions imposed during the 1960's and early 1970's. Argentina, for example, issued a new law dealing with the investment of foreign capital which contained terms more attractive than the previous law. A new law on transfer of technology, which put an end to the threat of invalidation of all licenses for the use of foreign trademarks within a period of five years, also was passed. More liberal policies replaced those from the period of intervention and strict controls. Similarly, a new policy of reduction of customs duties on imports was put into practice, allegedly to make some local industries more competitive and, thereby, reduce the rate of inflation.

Other countries began to modify their laws. Bolivia applied, in part, the provisions of the Cartagena Accord. Chile introduced a new law offering incentives to foreign investors and withdrew from the Andean Pact. The member countries of the Andean Pact raised the maximum percentage of profits which could be remitted from 14% to 20%. Ecuadorean officials have indicated that the provisions of the Andean Pact would be applied more flexibly. In Mexico, at least temporarily, the enforcement of the new trademark law, which demands the linking of a foreign trademark with one originally registered locally, is still pending. Perú has moderated its industrial community law and, in general, has


40 See note 26 supra, and accompanying text.


42 Conversation with Ecuadorian officials of the public and private sectors.
adopted a less restrictive policy toward foreign companies.\textsuperscript{43} Uruguay has issued a law intended to attract and provide incentives for foreign investment.\textsuperscript{44} We could continue with many other examples demonstrating that Latin America indeed has gained greater self-confidence and entered a new era of good sense regarding the policies needed for continued implementation of efficient and far reaching development tactics.

In summary, we can say that the countries of Latin America have come to understand that they cannot continue to operate in isolated spheres and that they should organize and plan the development of the region through the expansion and integration of their economies. They also have realized that the generally restrictive legislation which characterized the first part of the development decade of the 1960's would in no way contribute to the acceleration of the process. During the mid-1970's, intelligent revision of this legislation was made by the governments of the various Latin American countries. This does not mean, however, that all of the new legislation which was issued in order to create and guide the development process will disappear. The new "rules of the game" will remain in force, with the necessary adaptations which the Latin American governments consider appropriate to create incentives for foreign investment and promote the absorption of knowledge and experience from more advanced regions.

VI. THE CURRENT STATUS OF ECONOMIC DEVELOPMENT IN LATIN AMERICA

During the hearings which took place in October 1978 before the Senate Subcommittee on Western Hemisphere Affairs, C. Fred Bergsten, Assistant Secretary for International Affairs of the Department of the Treasury, made some comments about the development effort in Latin America which are quoted at length below because they spell out precisely what the outcome of that effort has been:

Our economic relation with Latin America is based on one cardinal fact—that Latin America has now become a central factor in the world economy. It has experienced dramatic development over the past two decades which, while leaving many problems unsolved, has thrust it into the forefront of the entire developing world. . . .

\textsuperscript{43} See note 32 supra, and accompanying text.
\textsuperscript{44} See note 27 supra, and accompanying text.
The first point I wish to make is to explain how Latin America has dramatically outpaced all other developing regions in its rate of economic progress.

Between 1965 and 1977, the gross domestic product of the region more than doubled in real terms to nearly $400 billion. This represents an annual growth rate of 6.1%—compared with 5.1% for all developing countries, and about 3.9% for the developed countries. So they have grown half as fast again as we in the industrial world.

During 1973-77 the region grew at an average annual rate of nearly 5%, compared with only 2% for the OECD (Organization for Economic Cooperation and Development) countries. Latin America grew 2-1/2 times as fast as we did. It maintained impressive growth even through the world recession, cushioning the impact of the recession on the industrialized countries—particularly the United States.

As a result of that impressive growth real per capita gross national product in the region has increased by more than half since 1965. It now stands at $1,100, as compared with a per capita gross national product of $450 for the rest of the developing countries. In other words, Latin America is about 2-1/2 times better off than the rest of the developing world in terms of per capita income.45

VII. CONCLUSIONS

The new business environment prevailing now in Latin America is the result of the substitution of the "Open Door Policy" of the past by a "selective" approach which tends to channel the foreign capital contributions towards the attainment and consolidation of a faster economic and social development. Some of the legislation issued to reach such development have established restrictions or conditioned the entry of foreign capital on certain limitations or on compliance with some legal and administrative procedures completely unknown in the past. To some extent, the above restrictions and procedures in some countries curtailed the freedom:

1. to freely select the corporate structure;
2. to register branches;

45 Hearings Before the Subcomm. on Western Hemisphere Affairs of the Senate Comm. on Foreign Relations on Major Trends and Issues in the United States Relations with the Nations of Latin America and the Caribbean, 95th Cong., 2d Sess. 120-22 (1978) (statement of C. Fred Bergsten).
3. to independently decide on the percentage of foreign and national capital;
4. to repatriate capital or remit profits without limitations;
5. to issue bearer shares;
6. to negotiate license agreements with the local licensees without prior government intervention and approval;
7. to use trademarks according to traditionally adopted and internationally accepted practices;
8. to word advertising slogans and prepare the advertising campaigns without taking into consideration its local connotations or the character features of the native population;
9. to price the products without government control or approval;
10. to locate plants overlooking the industry decentralization plans of the government;
11. to overlook the government development plans, industrial programming and sectoral and regional priorities; and
12. to overstaff the local company with foreign employees.

As mentioned before, there is today in Latin American countries a trend towards easing some of these constraints. In some countries government officials lately have referred to the fact that all these rules and regulations are being enforced with a larger degree of “flexibility.” Some countries have taken the necessary steps to amend those provisions which were too harsh. It is obvious that more than mere flexibility in enforcement will be required in order to attract foreign investments to the area. More flexible legal provisions are necessary. However, flexibility of enforcement does not give the foreign investor the assurance that clear and precise legal provisions provide. Moreover, enforcement flexibility depends on the interpretation of the person who at that moment is in charge of enforcing the legal provision. Officials come and go and the degree of flexibility therefore may vary from person to person. In brief, we can say, then, that although more flexible interpretation is most welcome by those who are planning to make investments in Latin America, the best course of action for the countries of the area to follow is to amend those harsh pro-
visions which are a deterrent rather than an incentive to foreign investment.

Another conclusion which we can reach regarding incentives is that most of the legislation passed in the last two decades contemplate some incentives not based on the origin of the investment, national or foreign, but on the purpose or object of the investment. Incentives have been created by some Latin American countries for investments in industrial activities which comply with the priorities and development plans of the governments. The rapid increase in Latin American population, forecast to reach 600 million by the year 2000, the improved economic conditions of the area and the issuance of more regulations affecting foreign investments offer a great opportunity to those willing to participate in activities addressed to foster the development effort of the Latin American countries. These comments demonstrate the fruits of Latin America's experiment; the steps forward and backward have been part of an exercise which has yielded useful lessons in the areas of economics and politics and has led to the enactment of new laws intended to stimulate effectively the development of their economies.