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Argentine Jurisprudence: Deltec Update

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In the 1973 case of *Compañía Swift de La Plata, S.A. (Cía. Swift),* the Supreme Court of Argentina ruled that the bankruptcy estate should include not only the assets of Swift, but also the entire assets of what the Court referred to as the "Deltec Group."[1] The decision established a theory of the economic unit, or *unidad económica*.[2] The theory justifies the aggregation of a parent corporation and its subsidiaries based upon a finding of close economic relations. The theory does not require any proof of fraud or misuse of the corporate structure. The Supreme Court of Argentina rejected the more traditional acknowledgement of the separate liability of a parent and its subsidiaries as an overly "formalistic use of the legal structures constituting business associations," suggesting that such legal formalism was "foreign to the objectives sought or to the social realities which would legitimize such objectives."[3] The Court further indicated that "the legal structures which the laws of Argentina provide for lawful activities cannot legalize economic and financial policies contrary to the needs of our society, effectively recognized by the

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1. Compañia Swift de La Plata, S.A. Frigorífica s/ convocatoria de acreedores [1973-19] JURISPRUDENCIA ARGENTINA 579, 151 REVISTA JURIDICA ARGENTINA-LA LEY 516 (1973) [hereinafter *Cía. Swift*]. The decision is translated in Gordon, *Argentine Jurisprudence: The Parke Davis and Deltec Cases,* 6 LAW. AM. 320, 330 (1974) [hereinafter cited as *Parke Davis and Deltec Cases*]. Citations to the *Cía. Swift* decision refer to this translation. The Court defined the "Deltec Group" only as "the companies comprising the 'Deltec Group,' especially . . . Deltec International Limited and Deltec Argentina S.A.F. and M." 6 LAW. AM. 320, 339 (1974). This specific identification of only two members of the group was very important to the 1976 and 1977 decisions.

2. In this writer's review of the 1973 *Cía. Swift* decision, the economic unit was referred to as the *conjunto económico.* The Argentine courts use the term *unidad económica* rather than *conjunto económico,* the latter tending to refer to the necessary degree of affiliation between enterprises which would allow the filing of a consolidated tax return. This writer thanks Attorney Max A. Stolper for his comment on this terminology distinction.

3. *Parke Davis and Deltec Cases, supra* note 1, at 338.

judiciary of the country."[4] This decision of the Court has been critically analyzed,[5] and however one views the economic unit theory, the *Cía. Swift* decision was an extremely important pronouncement, stressing that economic expansion and social justice palliated a judicial rejection of previously accepted forms of economic association.

Two subsequent decisions of the Argentine Supreme Court involving units of the Deltec Group illustrate the development and at least partial demise of the economic unit theory. These decisions were handed down in September 1976 and December 1977. When these decisions are considered in the context of the 1976 military takeover in Argentina and the Foreign Investment Acts of 1974 and 1976, they illustrate the evolution of the executive, legislative, and judicial attitude toward foreign investment. More importantly, they offer a perceptive insight as to the parallel development of policy fluctuations toward foreign investment by the three constitutionally separate branches of Argentine government. This brief article will consider the 1976 and 1977 decisions in the context of political and economic developments in Argentina during this decade.

I. Background for Change

At the time of the 1973 *Cía. Swift* decision, foreign investments were governed principally by the Foreign Investment Act of August 5, 1971.[6] The 1971 Act did not contain any provision suggesting the liability of a parent for the commercial acts of its subsidiary. The law

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4. *Id.*

5. *See* Gordon, *Parke Davis and Deltec Cases, supra* note 1. The frustration of the Court in particular, and Third World nations in general, as to the elusive nature of the multinational, is illustrated by the Court's comments that:

> [T]he key factor to consider in deciding the issue presented is that the legal regime of the juridical personality cannot be used to prejudice the paramount interests of society, nor the rights of third parties. The means used by the State to prevent business associations from existing as mere corporate shells vary and have different names, but they all conform to economic and social realities and proclaim the supremacy of the law. It is obvious that the above acquires special relevance when the judges have to face the complex legal problems created by business associations in the modern world. Today these associations are characterized by their interdependence, linkages, and their multinational nature. These factors, together with the difficulties attendant upon their control, the increase in their influence and the interrelationships of their administrative organizations—through real or apparent affiliates—strengthens their power of concentration. *Id.* at 337-38.

6. Ley No. 19.551 of Ago. 5, 1971. [1972] Anales de Legislación Argentina 1847. Translated in 10 I.L.M. 1194 (1971). Citations to the law refer to this translation.

was comparatively brief and was not severely restrictive as to foreign investments. It provided for registration of new foreign investments and approval by the executive upon consideration of some fifteen criteria.[7] There were no provisions requiring joint ventures, nor was the law retroactive, with the exception that current investments had to be registered and had limited use of local credit in the future.[8] The basis of the 1973 Supreme Court decision, however, was not the 1971 Foreign Investment Act, nor had any other subsequent legislative decrees governing foreign investments created the economic unit theory.

The 1973 *Cía. Swift* decision illustrates the sense of frustration of Third World governments in understanding and regulating the multinational corporation. Lacking legislative support, or what might be accepted as customary law, the ruling of the Supreme Court created the concept of the economic unit in a decision which must be considered judge-made law. One might, perhaps, more accurately label the decision as "judge decreed executive policy." There was no doubt, at the time, that executive policy under the then recently reestablished Peronist administration was more restrictive toward foreign investment than the executive policy of the previous administration or the 1971 Foreign Investment Act. The March 1973 election of Hector Cámpora as President (personally chosen by former President Juan Perón to establish conditions for Perón's return to power), first suggested that there would be a new attitude toward foreign investment. Cámpora's party, Frente Justicialista de Liberación, announced that new foreign investment rules would be established. The promised legislative reforms included more extensive government control of meat exports and the adoption of restrictions on acquisitions of local firms by foreign enterprises. Although these reform issues were related to Swift's business, they did not directly affect Swift since its dispute was already before the Argentine courts, and, at the time, none of the companies owned by Deltec in Argentina had been acquired from Argentine investors.

As expected, the foreign investment draft law proposed in June 1973, resembled Decision 24 of the Andean Common Market,[9] and included parallel definitions of foreign, mixed, and local investors; fade-out provisions; a profit remittance limitation; and regulations on

7. *Id.* at art. 4.

8. *Id.* at art. 15.

9. Standard Regime for Treatment of Foreign Capital and for Treatment of Marks, Patents, Licenses, and Royalties, Andean Commission, Decision No. 24 of Dec. 31, 1970. *See* Oliver, *The Andean Foreign Investment Code: A New Phase in*

reinvestment and local borrowing. The draft law contained no reference to the economic unit theory, however, including only limitations on parent company loans to subsidiaries, which restricted the interest rates to two points over current bank rates in the country of origin.[10] This draft provision affirmed a continued acceptance of the separate parent-subsidiary status, as well as the right of the parent to be a creditor of its subsidiary, a position criticized by the lower court in *Cía. Swift*, and identified by the Supreme Court as evidence of the close economic relationship between the parent and subsidiary.[11]

Two months after the 1973 Supreme Court ruling, the new Foreign Investment Law was enacted; it included the above noted provisions similar to those of Decision 24. The most significant addition, however, was Article 31, apparently placed as an afterthought in a section entitled "Final Provisions." Article 31 stated that "Liability resulting from obligations undertaken by a local company receiving the foreign investment shall be jointly and severally assumed by the foreign investor."[12] Legislative sanction of the 1973 *Cía. Swift* decision's reliance on the economic unit theory was thus accomplished. The new Foreign Investment Law additionally affirmed the draft law's limitation on interest for foreign source loans to two percent above the current rate for first class securities in the country of origin. The provision, however, did not refer to parents and subsidiaries, but to "juridical persons domiciled in the country, and creditors domiciled abroad."[13] These provisions expressed executive concern regarding borrowing relationships between parents and subsidiaries, a concern which was also illustrated by Judge Lozada's lower court decision in *Cía. Swift*. Lozada thought it inappropriate for Deltec International Limited, as a principal creditor of the subsidiary in the bankruptcy proceedings, to claim "against a debtor that is also Deltec."[14]

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the Quest for Normative Order as to Direct Foreign Investment, 66 AM. J. INT'L L. 763 (1972). Decision No. 24 has since been amended and is translated in 16 I.L.M. 138 (1977).

10. *See* BUS. LATIN AM., June 28, 1973, at 201.

11. Gordon, *Parke Davis and Deltec Cases*, *supra* note 1, at 335-36. The Supreme Court has stated that, "These statements [that Deltec Group entity claims against Cía. Swift amounted to 37.66% of the total claims of creditors] by the Commercial Court of Appeals totally omit consideration by that Court of the true nature of the juridical personality . . . [*i.e.*, the economic unit]."

12. Ley No. 20.557 of Nov. 7, 1973, [1973] ANALES DE LEGISLACIÓN ARGENTINA [hereinafter cited as 1973 Foreign Investment Law]. Translated in 12 I.L.M. 1489 (1973). Citations to the law refer to this translation.

13. *Id.* at art. 26.

14. [1973-75] JURISPRUDENCIA ARGENTINA 350, 351; 146 REVISTA JURIDICA ARGENTINA-LA LEY 601, 602 (1973).

The 1973 Foreign Investment Law was certainly not welcomed by the foreign investment community. Many of its provisions were nevertheless similar to restrictions in foreign investment laws of other Latin American nations, where the same multinationals were conducting business. Such laws included the Mexican Investment Law of 1973,[15] the Mexican Transfer of Technology Law of 1972,[16] and Decision 24 of the Andean Common Market of 1970.[17] None of those laws, however, nor any other investment legislation in the hemisphere, included any provision stipulating that a parent and a subsidiary consist of a single economic unit. The Argentine legislation embodying the economic unit theory reinforced its judicial adoption, and gave some post-mortem support to the *Cía Swift* ruling. There appears, however, to have been no application of the economic unit theory other than to the Deltec group, unless one includes the 1973 *Parke Davis* case, where there was a questionable need for using the economic unit theory.[18] Not all foreign investors will view the economic unit provisions with the same concern. A foreign parent with only one subsidiary in Argentina may have some assurance that the economic unit theory, as announced by the Argentine Supreme Court, will not be accepted by foreign courts.

Although the 1973 Foreign Investment Law of Argentina was generally no more restrictive than the laws of the Andean Common Market and of Mexico, foreign investors are usually sensitive to the *degree* of restrictiveness in current and proposed legislation, and how that legislation relates to executive and judicial attitudes toward foreign investment. One might well try to quantify the degree of restrictiveness of various provisions that regulate foreign investment. Such provisions include mandatory joint venture requirements, foreign technology registration, retroactive applications, short-term credit limitations, repatriation of profit restrictions, economic unit theories, and fade-out provisions. The degree of flexibility permitted the government by foreign investment legislation is critically important, though difficult to measure. Was the executive permitted to

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15. Ley Para Promover la Inversión Mexicana y Regular la Inversión Extranjera Feb. 7, 1973, D.O., Mar. 9, 1973. *See generally* Gordon, *The Contemporary Mexican Approach to Growth with Foreign Investment: Controlled But Participatory Independence*, 10 CAL. WEST. L. REV. 1 (1973).

16. Ley Sobre el Registro de la Transferencia de Technología y el Uso y Explotación de Patentes y Marcas, Dec. 28, 1972, D.O., Dec. 30, 1972.

17. *See* Decision No. 24, *supra* note 9.

18. Parke Davis v. Cía de Argentina S.A.I.C. s/ recurso de apelación. Corte Suprema de Justicia de la Nación, Buenas Aires, 31 Julio 1973, C-705-XVI. Discussed at Gordon, *Parke Davis and Deltec Cases, supra* note 1.

moderate the restrictions when economic needs so dictated? The Argentine law appeared no less capable of executive interpretation than the laws of Mexico or the Andean Common Market. Certain provisions specifically allowed the executive to proceed at its own pace, and granted the executive the power to take necessary measures to reconvert to Argentine ownership any company which had been transferred to foreign investors through a previous denationalization process.[19]

The experience of foreign investors in Argentina with regard to parallel executive and legislative policy is not atypical. Even a cursory study of the changing governments in Latin American nations will illustrate either the adoption of new foreign investment laws, or the alteration of the manner of interpreting existing laws to meet new executive policies which are more or less restrictive toward foreign investment. What is suggested from the Deltec experience in Argentina, although not proven solely by this enterprise's history, is the association of the judicial branch with the executive and legislative branches, forming a three-tiered parallel structure with a common approach toward foreign investment, but without the benefit of any check and balance on the abuse of executive power. Even without the merging of the judiciary, there is sound reason to believe in the existence of a common executive-legislative policy toward foreign investment; this does not mean, however, that the executive-legislative association itself is easily identifiable as either coherent or other than transitory. Foreign investors' perception of such policy may also be at variance. What appears to be a formulated policy may actually be indecision and a tendency to "live and let live" rather than to make the hard decisions which constitute policy.

The 1973 law remained in effect until 1976, during the period of power of Perón and, subsequently, his widow. The military leadership which assumed power through a coup in 1976 soon presented a new investment law which, as expected, was less restrictive than the 1973 law. It was particularly designed to renew foreign interest in investing in Argentina which had diminished markedly during the Perón administration.

The Foreign Investment Law enacted in August 1976, did not eliminate the economic unit theory.[20] It did, however, significantly

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19. 1973 Foreign Investment Law, *supra* note 12, at art. 33.

20. Ley No. 21.382 of Ago. 13, 1976. [1976] ANALES DE LEGISLACIÓN ARGENTINA [hereinafter cited as 1976 Foreign Investment Law]. Translated in 15 I.L.M. 1364 (1976). Citations to the law refer to this translation.

modify the theory, presumably as a result of very negative reaction by multinational corporations to the 1973 *Cía. Swift* decision. The principal provision of the 1976 investment law directed to the economic unit theory stipulates that:

> [T]ransactions carried out between a domestic enterprise of foreign capital and the enterprise by which it is directly and nationally controlled and any subsidiary thereof, shall be considered for all purposes, as transactions between independent parties, when the performances rendered and the conditions of such transaction are in accordance with normal business practices between independent entities. . . .[21]

There are two exceptions. The first applies to loans, and allows the Central Bank of the Argentine Republic to review all proposed loans to determine whether parent-subsidiary loans shall be treated as loans between separate entities.[22] The second exception is for contracts which are governed by the law of transfers of technology.[23] That law governs the contractual technology relationship of the parent and subsidiary and is principally concerned with the way in which technology is compensated. Argentina treats royalty payments as dividends; they are not deductible prior to taxation.

Because of these exceptions dealing with technology and credit, the 1976 Foreign Investment Law did not fully reverse the economic unit theory of the *Parke Davis* and *Cía. Swift* cases. The manner of payment for technology was the crucial issue in the *Parke Davis* case. In the *Cía. Swift* litigation, the status of Deltec International Limited, although an ancillary question, was nonetheless of signal importance. The transfer of technology law, in existence at the time of the enactment of the 1976 Foreign Investment Law, treated technology payments between a subsidiary and parent as profit remittance, although there was some thought that a proposed new technology law might change this attitude.

Nevertheless, the restrictive approach toward foreign investment was substantially lessened by the 1976 Foreign Investment Law. Principal criticisms of the new law focused on the approval requirements for new foreign investments and on the excess profit taxes. Also of significance was the elimination of the mixed enterprise classification, which had paralleled the form utilized in Decision 24 of the

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21. *Id.* at art. 20.
22. *Id.* at art. 20(1).
23. *Id.* at art. 20(2).

Andean Common Market, designating as mixed companies those in which foreign capital varied between twenty percent and forty-nine percent.

II. A Step Forward: the 1976 *La Esperanza* Decision

The first of the two more recent decisions involving the Deltec group was decided by the Argentine Supreme Court five weeks after the enactment of the 1976 Foreign Investment Law.[24] The Court's treatment of the economic unit theory was consistent with the 1976 law,[25] although the 1977 decision appears to have revived the 1973 *Cía. Swift* decision.

In the 1976 decision, the Supreme Court first outlined prior proceedings which had instigated the appeal of La Esperanza, one of the Deltec Group members.[26] The Court cited in its entirety the four paragraphs of the *Cía. Swift* decision which (1) extended the Court's decree to the assets of the companies "comprising the Deltec Group," especially to assets of Deltec International Limited and Deltec Argentina; (2) mandated a proceeding to define the composition of the Deltec Group and thus the economic unit; (3) required that the execution be conducted with respect to all of the identified assets of *Cía. Swift*; and (4) allowed the Deltec Group to exercise any rights to which they were entitled in the proceedings in *exclusión* or restitution.[27]

The Court noted that two days after the 1973 *Cía. Swift* decision, the lower court judge declared the bankruptcy of various enterprises and corporations in the Deltec Group including La Esperanza. The Court additionally noted that La Esperanza, having been included as one of the Deltec Group, had appealed, alleging that it had not been notified of the process leading to the *Cía. Swift* ruling, and

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24. Compañía Swift de La Plata s/ quiebra—incidente art. 250 C. Proc [1976] [hereinafter cited as *La Esperanza*]. The decision is translated *infra* at Appendix I. Citations to the decision refer to this translation.

25. *La Esperanza* properly does not cite the 1976 Foreign Investment Law as a source of its ruling. The law was not applicable to the Swift litigation, the facts of which had occurred prior even to the 1973 Foreign Investment Law, with which *Cía. Swift* was in accord. The 1976 Foreign Investment Law was an important policy expression, however, and illustrates the parallelism of legislative, judicial, and political thought, without regard to what are believed at a given date to be the correct sources of law.

26. Ingenio La Esperanza was indirectly owned by Deltec International Limited, and directly owned by Deltec Argentina, which was a wholly owned subsidiary of the Bahama-based Deltec International Limited.

27. *Cía. Swift*, Gordon, *Parke Davis and Deltec Cases*, *supra* note 1, at 339.

thus had not been able to respond to charges in that decision. This theory of appeal might in itself be a challenge to the economic unit theory. The recognition of standing to appeal by any unit of the Deltec Group would constitute recognition of separate legal status, a position contrary to the view that the entire Deltec Group was an economic unit and effective jurisdiction over one unit constituted jurisdiction over the whole group.[28]

The National Commercial Court of Appeals, to which La Esperanza had then brought its appeal, confirmed the 1973 Supreme Court *Cía. Swift* decision, interpreting the proper procedure as consisting only of the "simple verification of the Judge of the bankruptcy of their condition as such . . . to pretend that in said procedure that the subject entities be allowed to participate as parties, would be equivalent to recognition of their character as separate third parties."[29] Thus the Appellate Court did not challenge the economic unit theory, but accepted that theory as announced in *Cía. Swift*, further indicating that no individual units of the Deltec Group could have separate standing to participate as parties, and that any recognition of separate standing would be equivalent to admission of their character as separate third parties and thus contravene the economic unit theory.

Following the rejection by the National Commercial Court of Appeals, an extraordinary appeal was presented by La Esperanza to the Argentine Supreme Court. The appeal attacked the lack of any proceeding intended to verify any fraud which, La Esperanza claimed, "must necessarily exist to make possible the extension of the bankruptcy to all the related corporations." This was in itself a rejection of the economic unit theory, suggesting that any aggregation of Deltec Group members could *only* result from fraudulent conduct. It is a view even stricter than the piercing of the corporate veil approach generally accepted in the United States, where something less than fraud, often termed misuse, may be satisfactory for piercing the corporate veil.

La Esperanza also argued that there had to be a showing that La Esperanza was part of an economic unit with Cía. Swift, and that in the absence of such a showing, the "autonomous juridical personality

28. One would expect that La Esperanza, or any other alleged member of the Deltec Group, should be able to challenge its status as a member of the economic unit, separate from a challenge to the theory of the economic unit itself. Jurisdiction might have been challenged, nevertheless, had the original service on Swift been ineffective as service on an economic unit.

29. *See* Appendix I, section 1, para. g.

of the corporation cannot be altered."[30] La Esperanza argued that, without such a showing, they must be considered as separate third parties vis-à-vis the bankrupt entity, Cía. Swift. The appellant also suggested that the 1973 *Cía. Swift* Supreme Court decision should be held invalid because the scope of its ruling violated the limits of the original appeal. It had been the Supreme Court which had raised, or "created," the economic unit theory; there had been no ruling in the lower court on the issue of an economic unit.

The Supreme Court first ruled that the extraordinary appeal was in order, indicating that interpretations of the earlier decision of the Court and the mandatory nature of the decision were at issue, thus involving a federal question. The Court stated that the *Cía. Swift* decision mandated that a proper procedure be followed in determining which enterprises or corporations comprised the Deltec Group as identified broadly by paragraph II of the 1973 *Cía. Swift* ruling of the Court. The Court indicated that "[s]uch a procedure evidently involved the adoption of various measures tending to give credit to the 'economic unit' of the enterprises referred to, with a proper hearing for them because as the [record] demonstrates, not all cases are exactly alike . . . ."[31] The Court further stated that the composition of the economic unit involved questions of fact which had to be proven in proceedings which allowed alleged members of the economic unit to present their defenses. The Court thus recognized the distinction of an appeal on the grounds that one was not a *member* of the economic unit from an appeal *challenging* the economic unit.

The Court next rejected the decision of the judge of the lower court. That decision followed the 1973 *Cía. Swift* ruling by two days, and declared the bankruptcy of several enterprises presumably forming the Deltec Group. The Court held the latter decision had not constituted a valid procedure with respect to the appellant, La Esperanza. The Court stated that the economic unity of Deltec International and Swift might emerge from those proceedings, but not that of La Esperanza with Swift. Furthermore, the Court indicated that the proceeding had involved a unilateral administrative act without record of any participation or possibility of defense by La Esperanza. The Court rejected the decision of the lower court on appeal, and ruled that the bankruptcy procedure did not correctly interpret the decision of the Supreme Court in 1973, which required a determination of the

30. *Id.* at section 2.
31. *Id.* at section 4.

"other persons or companies making up the group previously mentioned insofar as the economic unit exists with the corporation declared bankrupt."[32] The Court noted that the latter statement would be contradicted by first declaring the bankruptcy of various corporations and then "implicitly extending it to an imprecise group of enterprises."[33] To avoid such a contradiction, a determinative proceeding had to be conducted to identify the composition of the group. This was a fundamental proceeding, apart from any procedural due process required at that subsequent proceeding.

The Supreme Court next stated that there should have been a proper proceeding, accompanied by a record, and conducted in a "precise and concrete manner," to determine whether La Esperanza "acted in the interests of and as a representative of 'Swift' or 'Deltec.'" The Court also stated that it must be determined whether "the property was disposed of in fraud of the creditors, since by the mere fact of being linked to the group one cannot presume the performance of fraudulent maneuvers tending to prejudice its proprietary equity situation."[34] Finally, the Court ruled that, in the alternative, it must be determined whether La Esperanza had engaged in commercial conduct directly or indirectly affecting the state of bankruptcy of Swift.

The Court thus ruled that piercing the corporate veil in Argentina must depend on a finding of one of the above three situations. The situation which is clearly recognized in most nations is the existence of fraud. Fraud would quite obviously require a specific designation of the fraudulent party and an opportunity to defend the charge.

The Court suggested a second situation. If a party acts "in the interest of and as a representative of" the parent, there may be justification for piercing the veil.[35] Unfortunately, the Court failed to clarify what actions might qualify. A parent undoubtedly is capable of and, indeed, responsible for determining the corporate policies of its subsidiary through its selection of the board of directors, in much the same manner as individual shareholders have the right and the responsibility to elect directors who will act in their best interests. The choice of terminology of the Court is indicative of the instrumentality, alter-ego, and agency concepts of corporate veil theory in the United

32. *Id.* at section 6.
33. *Id.*
34. *Id.* at section 7.
35. *Id.*

States, terminology which has been used, at best, with confusing consistency. While one may challenge *per se* applications of the concepts of instrumentality, alter-ego, and agency, the Supreme Court of Argentina at least suggested that they may constitute alternative prerequisites to liability, and therefore presumably demand greater attention to proof of conduct than was evidenced by the 1973 *Cía. Swift* decision.

The third noted ground postulates that the entity is engaging in conduct directly or indirectly affecting the state of bankruptcy, presumably acts which in some way are unlawful and have a damaging effect on the enterprise in the state of bankruptcy. One might narrowly equate this concept with the "misuse" alternative found in United States decisions, where courts suggest that piercing the corporate veil must be grounded on fraud "or other misuse" of the corporate entity. This listing, by the Court, of alternatives for piercing the corporate veil was an essential part of the decision for the later appeal of Deltec Argentina and Deltec International Limited.

The favorable ruling for La Esperanza resolved one of two matters pending before the Argentine Supreme Court involving the Deltec Group. The second matter was a petition by Deltec International Limited and Deltec Argentina, the latter being the immediate parent of La Esperanza and itself a direct subsidiary of Deltec International Limited. The petition requested that the Court annul its 1973 decision on jurisdictional grounds. The resolution of La Esperanza's appeal, as discussed above, resulted in the Court deeming it unnecessary to deal with this second issue.

The *La Esperanza* decision, however, did not fully resolve the complex Deltec Group issues. The decision had no effect on the retention by the government of the assets of Deltec International Limited and Deltec Argentina. The principal holding in the 1976 decision was that La Esperanza was not specifically named in paragraph I of the 1973 ruling. The 1973 ruling had stated that the "inclusion of the assets of Swift de la Plata S.A.F. in the bankruptcy estate should also include the assets of the companies comprising the 'Deltec Group,' especially those of Deltec International Limited and Deltec Argentina S.A.F. and M."[36] The 1976 ruling thus involved an enterprise not *specifically* identified in paragraph I, although it was unquestionably one of the Deltec Group.

For various reasons, other enterprises within the Deltec Group were no longer involved in the proceedings; the principal interests

36. Gordon, *Parke Davis and Deltec Cases, supra* note 1, at 339.

remaining to be resolved were those of La Esperanza, adjudicated in the 1976 decision, and, quite importantly, the remaining interests in Argentina of Deltec Argentina, as well as the liability of the foreign, Bahama-based, Deltec International Limited. The question of the liability of Deltec International Limited was important because of a possible attempt to enforce the judgment outside of Argentina.[37] If the Argentine government were to commence a suit on a foreign judgment in the Bahamas, where Deltec International Limited was based, or in other nations where the company had additional assets, the question of enforcement of the Argentine judgment in a foreign jurisdiction would have been raised. The issues in such a case would include both the acceptability of the economic unit theory, and the question of procedural due process in the Argentine *Cía Swift* decision.

III. Regression: The 1977 Decision

In early 1977, as part of an Argentine executive interest in decreasing state participation in the traditionally private sector, the bankruptcy court offered to sell the Swift assets, including the two meat packing plants which it had intervened more than six years earlier.[38] The offer to sell the Swift assets was part of a general plan to encourage foreign investment, and included the settlement of compensation issues for other nationalized foreign properties, including those of ITT, Siemens, and several international banks.[39]

The bankruptcy court accepted bids for the Swift plant, setting a minimum price of the Argentine equivalent of $39.6 million, and ultimately sold the plant in August 1977 to an Argentine-owned meat packing company for approximately $42 million.[40] As a result of further exchange depreciation, by the time of the January 1, 1978 closing, the $42 million was reduced to approximately $36,782,000.[41]

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37. Although Deltec obviously had to be concerned with the possibility of extraterritorial enforcement of the Argentine decree, there is a sparsity of such enforcement experience on which to base a serious concern. A reading of the Argentine decisions does not leave one with the impression that the courts were attempting to establish the form of record which would stand up to foreign scrutiny in an enforcement proceeding. This may be attributable both because of the absence of a very careful fact-finding process, and because of the general tone of the opinions.

38. The company first had been taken over by the government in 1971, under a company plan for financial reorganization.

39. *See* Bus. Latin Am., April 20, 1977, at 122.

40. Wall St. J., Aug. 5, 1977, at 7, col. 1.

41. Undated memorandum on the position of the companies of Deltec International, courtesy of Max A. Stolper, copy in author's files.

On November 8, 1971, the date on which Swift was adjudicated bankrupt, the admitted claims of creditors totalled slightly over $18 million. This figure did not include non-admitted claims, a major portion of which were held by Deltec International Limited. It might thus have been expected that the sale would have resulted in a satisfaction of creditors and a distribution of the remaining proceeds to Deltec International Limited, thereby terminating the lengthy Deltec controversy. Such was not to be the case; the Argentine government proved to be as adept at expanding claims against the assets as had the governments of Peru and Chile regarding claims against the interests of the International Petroleum Company and the various United States copper companies, respectively.[42]

The prospect of receiving a substantial sum after the payment of creditors was diminished by an indexing statute enacted by Argentina in December 1976.[43] The law requires the indexing of a bankrupt company's debts from the date of bankruptcy to the date of payment, in accordance with the wholesale price index, and additionally adds interest at the rate of six percent per year. The indexing process, plus interest, and a further estimated administration cost, increased the Swift debt obligation as of January 1, 1978, to $49,771,000. Since the sale of assets was expected to bring $36,782,000, the proceeds were deficient by some thirteen million dollars. Although the contemplation of a 257% increase in the value of filed claims, amounting to approximately seventeen percent compounded interest, must have appeared prospectively encouraging to the Argentine creditors, the Argentine government pre-empted the fund by filing in court a priority claim for an additional $23 million, for advances made by the Argentine government to Swift during its period of intervention. Allowance of the government's claim would diminish the claims of the admitted creditors by approximately two-thirds. The lower court has rejected the government's claim of priority and the matter is now pending on appeal.

Aware that the indexing and interest calculations would eliminate any possible receipt of a balance, Deltec International Limited pursued its previously filed appeal with the Argentine Supreme Court, requesting that it overrule the 1973 decision as it applied to Deltec International Limited and Deltec Argentina. The most recent of the

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42. *See generally*, THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW (3 vols., R. Lillich ed. & contrib. 1975).

43. Ley No. 21.488 of Nov. 1976. [1976] ANALES DE LEGISLACIÓN ARGENTINA.

Supreme Court decisions involving the Deltec Group was announced in December 1977, when the Argentine Supreme Court denied the appeal, essentially on the ground that Deltec International Limited and Deltec Argentina had been given their days in court.

The composition of the Argentine Supreme Court which decided the *La Esperanza* case was entirely altered from that of the 1973 Court. There were four new judges of the chamber for the 1976 decision. Two of those judges subsequently participated in Deltec's 1977 appeal.[44]

In deciding the final appeal of Deltec, the Supreme Court first reviewed the earlier proceedings and then indicated its intention to strictly interpret the *La Esperanza* decision of the prior year. Subsequent to the 1973 *Cía. Swift* decision and the lower court judge's decree placing in bankruptcy companies believed to be in the Deltec Group, the companies concerned appealed that decision. The four enterprises which appealed, Deltec International Limited, Deltec Argentina, Swift, and the Deltec Banking Corporation Limited, all objected to the manner in which the lower court carried out the ruling of the Supreme Court. Those four appellants interpreted the Supreme Court's 1973 ruling as requiring the assets of three of the companies (not including the principal enterprise, Swift) to serve *only* as collateral security for the bankruptcy of Swift, but that these companies were not to be placed in actual bankruptcy. Such an interpretation would allow access to the assets of the Deltec Group for the payment of claims of creditors of Swift, if necessary, but would not result in complete bankruptcy proceedings against each member of the group. Once the creditors of Swift had been paid, using assets of other members of the group if necessary, those enterprises would be restored to full operating status. This interpretation of the 1973 decision appeared reasonable if the intent of the ruling was not to cause a total liquidation of what the court considered to be the economic unit. The Court did state, nevertheless, in paragraph III of its 1973 decision, that the collective execution should be levied against *all* of the assets of the group *without* first exhausting those of Swift, a provision in conflict with the position of the appellants. If the economic unit theory is to be interpreted literally, it necessarily results in the bankruptcy of the entire economic unit, since bankruptcy could not apply only to a separate portion or division of the unit. The appellants argued as though the economic unit theory were inapplicable.

44. These changes were to prove important to the decision, illustrated by the final comments in the 1977 decision. The alterations in the judiciary suggest that the Court may be as transitory as the executive.

The lower court judge had denied a rehearing of the issue and the National Commercial Court of Appeals next considered the appeal. After the law officer of the appellate court had submitted his opinion, but while the opinion was pending final decision, Deltec International Limited and Deltec Argentina added new arguments to their appeal: the 1973 decision was not effective because of an unlawful exercise of jurisdictional power and a violation of the right of defense in the judicial proceeding. These arguments were designed to take advantage of the *La Esperanza* decision. Appellants argued that the Supreme Court, in the 1973 decision, had judicially increased the severity of the lower court's decision by eliminating the requirement of the prior exhaustion of Swift's assets before reaching the assets of the members of the Deltec Group. Deltec International Limited and Deltec Argentina argued that the court erred in extending the disposition to those enterprises, both specifically named in the Supreme Court's 1973 opinion. The latter two appellants had also argued in their initial appeal that the Court's ruling should not be effective because they were foreign enterprises. The appellants further suggested that the 1973 decision should be considered a nullity because it was necessary to wait to appeal that decision until the members of that Supreme Court had been replaced. This final argument curiously suggested that decisions of the judiciary serving under Perón should not be valid, an argument which, as expected, was strongly objected to by the subsequent Supreme Court. This rejection indicated that the Supreme Court would not corroborate the nonexistence of the judicial branch of government during the Perón era.

The National Commercial Court of Appeals concluded that in the 1976 *La Esperanza* decision, the Supreme Court had *recognized* the existence of the 1973 decision and had analyzed and applied that decision to the issues in the *La Esperanza* appeal. The appellate court stated that the Supreme Court obviously could not have done so if it had considered the decision nonexistent. The concession of the Supreme Court in the *La Esperanza* decision was the reason the National Commercial Court of Appeals denied this argument of Deltec International Limited and Deltec Argentina.

Deltec International Limited and Deltec Argentina, thus, finally reached the Supreme Court with their appeal and requested rejection of the appellate court holding concerning the validity of the 1973 decision. The appeal was based on an interpretation of the *La Esperanza* case, on the question of the *existence* of the 1973 decision, and on the constitutional protection discussed in *La Esperanza*. Appellants argued that the appellate court had not considered funda-

mental questions such as lack of jurisdiction and denial of due process.

The Supreme Court stated that Deltec had acquiesced in the 1973 decision by challenging the lower court's action in carrying out that decision by a declaration of bankruptcy as to the companies comprising the Deltec Group.[45] Deltec had alleged that the lower court unconstitutionally exceeded the decree of the Supreme Court declaring the bankruptcy of the companies constituting the Deltec Group. Deltec had further argued that a judge cannot ignore the bounds of a Supreme Court decision; rather it "must be faithfully followed both by the parties and by judicial organs that participate in controversies."[46] The Supreme Court considered this challenge to have implicitly recognized the existence of the 1973 decision.

The Supreme Court also effectively prevented Deltec from raising an alternative argument: even if the 1973 Supreme Court decision was not a nullity, its requirements were nonetheless incorrectly followed by the lower court in decreeing the bankruptcy of the Deltec Group. One might well view this argument as not being alternative in nature. Instead, it could be argued that there was: (1) a challenge to the 1973 Supreme Court decision, claiming the decision was a nullity; and (2) a challenge to the lower court's bankruptcy decision arguing that the lower court's decision must follow any decision of the Supreme Court which it is executing. The second challenge does not necessarily admit that the particular decision of the Supreme Court was correct; it is essentially against the *lower court* procedure and not against the Supreme Court decision. The Argentine Supreme Court nevertheless stated that it was a settled judicial principle that without an express reservation, a voluntary submission to a judicial decision, or to the jurisdiction of the Court or a particular legal regime, constitutes "an unequivocal adherence thereto which rules out a subsequent constitutional challenge thereof by way of extraordinary appeal."[47] One must thus inquire into the procedure dictated by Argentine jurisprudence as to the "express reservation" argument. It appears that the Court was suggesting that there is a condition precedent to the filing of an appeal, a condition which requires one to challenge the effectiveness of the decision which raised the grounds

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45. Compañía Swift de La Plata S.A. s/ incd. de incompetencia y reposición del acto de quiebra [1977]. The decision is translated *infra* at Appendix II. Citations to the decision refer to the translation.

46. *See* Appendix II, section 9.

47. *Id.* at section 10.

for the appeal. One might well assume that filing a timely appeal is adequate to constitute an express reservation, since the substance of the appeal is to challenge the particular decision.

The Supreme Court reviewed the reasons given by the appellant for raising its challenge at such a late date after the 1973 decision; it rejected those reasons because of the need for stability of judicial decisions dictated by public policy. One might question whether public policy has a greater interest in rigidity of decisions than in just resolutions of controversies. The Court made clear its significant concern that the judiciary not be viewed as merely an arm of oscillating political structures in Argentina, by suggesting that any acceptance of the appellant's argument would "imply an admission of [the] nonexistence of the judicial branch of government during a period such as that of the political situation to which reference has been made."[48] This is a clear indication that one may criticize the substance of decisions of the Court, but should not criticize the substance of the *composition* of the Court or its alliance with oscillating political structures.[49]

IV. Conclusion

Although Deltec has directly appealed to the President of the Argentine Republic, it is likely that the judicial participation in the Deltec controversy has been concluded. Whatever may be the outcome of further negotiations by Deltec with the Argentine government, the three Supreme Court decisions have made noteworthy contributions to Argentine jurisprudence. Of considerable importance for foreign investment, these decisions also add to the otherwise sparse aggregate of precedent in Latin America—a quality which is inherent in civil law systems.

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48. *Id.* at section 11.

49. A distinction should be made between a judiciary which possesses a philosophical identity with the executive, from one which responds to either the latter's directives or to what the judiciary may believe would be the most accepted decision in view of executive policy toward foreign investment. A shared political philosophy is to be expected in most judicial appointments; one has only to look at the appointments in the last decade to the Supreme Court of the United States. "Court stacking" is a more severe problem in a nation such as Argentina, where an executive may replace the entire Supreme Court, as contrasted with appointing persons of similar or controlled philosophies to vacancies which may arise during the presidential term of office. Where the entire Supreme Court is replaced by each executive, it may not be particularly important whether the court members share a common philosophy with the executive or whether they respond to executive dictate, the parallelism suggested above will likely be reflected in judicial decisions.

The members of the Court demonstrated a predictable sensitivity toward criticism of the viability of the Supreme Court as a judicial institution during the Perón administration. If it seemed to Deltec representatives and to some outside observers that the Supreme Court members during the Perón era comprised less of a separate and independent institution than a judicial arm of the administration, then the same might well be said, from a different political perspective, of the composition of the Court under the current executive. It is, consequently, not surprising that members of the Court took issue with Deltec's claims challenging the validity of Supreme Court decisions under Perón. It is impossible to calculate the extent to which the displeasure with such an uncourtly argument, politically, as well as judicially, affected the Court and resulted in its refusal to respond more fully to the important issues affecting Deltec which had evolved from the *La Esperanza* decision.

La Esperanza illustrated the willingness of the Court to respond directly to legal issues, although one must realize that it found itself able to avoid ruling on the validity of the 1973 *Cía. Swift* decision. Nevertheless, the Court quite emphatically rejected the lower courts' implementation of the 1973 decision's stipulation that a determination be made of the economic unit. *La Esperanza* clearly suggested that apart from any challenge to the validity of the economic unit theory, reasonable procedures were necessary to determine the scope of any such unit, and alleged participants must have their day in court to refute their inclusion as part of the economic unit. La Esperanza's good fortune primarily resulted from its not being specifically mentioned in the 1973 *Cía. Swift* decision. Moreover, it may have been aided by the fact that the assets of Swift appeared substantially adequate to satisfy the claims of creditors, depending on the extent of the government's indexing and demands for administrative costs. Finally, the absence of any challenge to the integrity of the judiciary under Perón may also have been important.

What is of substantial concern, nevertheless, is that the incidental naming Deltec International Limited and Deltec Argentina in paragraph I of the 1973 *Cía. Swift* decision (where the Court referred to the Deltec Group as "especially" including assets of Deltec International Limited and Deltec Argentina), ultimately served to foreclose those two enterprises from a ruling on the same issues on which La Esperanza succeeded. The Supreme Court, in the 1977 decision, never adequately separated the rights of the enterprises specifically identified in the 1973 *Cía. Swift* decision—Deltec International Limited and Deltec Argentina—from those not so identified, including La

Esperanza. This failure to make any inquiry into the composition of the Deltec Group in the 1977 decision compounded the fact-finding shortcomings of the 1973 decision. Since the 1973 litigation did not involve the participation of Deltec International Limited and Deltec Argentina, but only of Swift, one cannot argue that it was proper for the Court to suggest that the former companies had the benefit of their day in court. While Deltec International Limited and Deltec Argentina ultimately did have their day in court, the Supreme Court made it clear in the 1977 decision that they were upset with Deltec's postponement of that day until a purportedly more sympathetic judicial tribunal had come into existence.

The final judicial outcome was obviously disappointing to Deltec, although it welcomed with considerable relief the *La Esperanza* ruling. It appeared that the assets of Swift would be adequate to pay creditors, even with the indexing process adopted by the administration. An executive-imposed delay in seeking a final determination, however, could have resulted in an increasing erosion of other valuable Deltec International entities, particularly La Esperanza.

In viewing the three decisions of the Supreme Court and the Argentine foreign investment legislation, one initially finds the 1973 *Cía. Swift* decision to have been harsh, arbitrary, and unsupported by legislation. The 1976 *La Esperanza* decision may be viewed as moderating the harshness of the economic unit theory by modifying the arbitrary procedures adopted in response to the *Cía. Swift* ruling. On closer inspection, it was the lower court's response to the 1973 Supreme Court decision rather than the Supreme Court decision itself which was harsh and arbitrary, a point not fully recognized in the final appeal by Deltec.

The final 1977 decision adds comparatively little to the context of the economic unit theory, or even to the question of the arbitrariness of the judicial resolution of these controversies. Rather, the decision is more important for its response to the direct attack upon the allegedly doubtful viability of the Argentine judiciary as an independent arm of the government during the Perón administration, with its obvious underlying implications as to the Argentine judicial structure in general. The sensitivity of the Court in the 1977 decision to any challenge aimed at the viability of the judiciary is very significant, and suggests a certain parallelism in executive, legislative and judicial pronouncements in Argentina. The response of the Supreme Court in the 1977 decision was to refuse to consider the merits of the idea that the judiciary might not have always been an independent part of the

government. Indeed, the Court took umbrage with the suggestion that it was not independent.

The complexities of the Deltec plight and the lack of access to adequate facts leaves much uncertain. In brief, the cases involved the economic unit theory, the concept of indexing, and foreign investment legislation. Although foreign investment legislation appears to be of indirect importance, it nonetheless reflects the changing Argentine executive policy toward foreign investment.

The intricate web of a half dozen years of Deltec's difficulties in Argentina, involving a perplexing and somewhat irrational series of political, legislative, and judicial fluctations, should be sufficient to allow an observer to formulate an opinion as to the role of the judiciary in developing foreign investment law in Argentina. If any one lesson is to be learned from the Deltec experience, it would seem that however subservient to administrative policy one deems the judiciary of a given nation, the viability of one period of a court's history is not a successful issue to raise before that court. While the donning of judicial robes in some nations may be, in reality, a little more than political patronage with expected obedience, there is often a mystique about the wearing of those robes which may nonetheless give rise to an unexpected assertion of judicial independence. This mystique has occurred in many eras and many cultures not only with judges, but with others, such as the clergy; it is not a phenomenon restricted to Third World nations. It is best to concentrate on legal issues in legal tribunals and, where challenges to the viability of the court itself are to be made, if they are to be at all successful, it is best to recognize the need to be far more subtle than was the challenge in the Deltec experience.

The following case translations have been modified by the author, principally to conform with the translations of the 1973 *Cia. Swift* decision. The translation of the 1973 decision, prepared by Rafael C. Benitez, Professor of Law, University of Miami Law School, may be found at page 330, volume 6, *Lawyer of the Americas*.

APPENDIX I

THE 1976 LA ESPERANZA DECISION

C-154-LVII. Compañía Swift de La Plata Bankruptcy
Proceeding under article 250 of the Code of Civil and Commercial Procedure

Supreme Court of the Nation

Buenos Aires, September 21, 1976.

Having reviewed the records, to wit: "Bankruptcy proceeding of Compañía Swift de La Plata under article 250 of the Code of Civil Commercial Procedure by authority of Ingenio Lae Esperanza, S.A."

Whereas:

1. For a better understanding of the problem which must be resolved, it is necessary to outline the development of the proceeding in reference to the specific questions being studied.

a. The judge of the first instance—at the time of the presentation of Mr. Jose R. Zurdo [creditor] to the effect that the dispositive portion of the writ that declared the bankruptcy of Compañía Swift de La Plata, S.A., be clarified in the sense that it be understood to cover the entire Deltec group—determined that "the previous discussion of the assets of the bankrupt corporation, relates to the extension of liability to all the enterprises of the group" (judicial act dated November 16, 1971).

b. Swift and various unconfirmed creditors appealed without questioning the requisite of the previous *discussion* [seizure and sale of assets to satisfy a demand].

c. The National Commercial Court of Appeals, Chamber "C", annulled the resolution extending liability (judicial act at page 10.613,

June 6, 1972). Against said decision, Mr. Zurdo presented an extraordinary appeal, decided by this Court, September 4, 1973 [the earlier *Cía. Swift* decision].

d. The Court stated, *inter alia*, on the basis of article 16 of Law 48:

I. That the inclusion of the assets of Swift de La Plata Sociedad Anonima Frigorífica should also include the assets of the companies comprising the "Deltec group," especially those of Deltec International Limited and Deltec Argentina S.A.F. y M. (arts. 1, 3, 6, and 104 of Law 11.719; report of the Referee pages 3161-63, 3981-86, 4113-24; report of the National Meat Board pages 10.033 and 10.123-5).

II. That in the proper proceeding, there should be determined what other persons or companies comprise the mentioned group [Deltec group] to the extent that the latter comprises an economic unit with the bankrupt company.

III. That the joint execution should be carried out with respect to all the named assets without prior discussion (exclusion) of the assets of Swift de La Plata S.A. Frigorífica (art. 73 *et al.* and 104 of Law 11.719 and arg. art. 170, so-called Law 19.151).

IV. That the natural or legal persons mentioned in Sections I and II above, once having been designated as therein decreed, may exercise those rights to which they are entitled through proceedings in *exclusion* or restitution of assets (arg. arts. 81 *et al.* of the so-called Law 19.551).

e. Two days after this decision, the Judge of First Instance, taking into account the reports of the National Board of Meat and the Section of Tax Violations of the General Tax Division and the decision of the Court summarized above in "d.," declared the bankruptcy of various enterprises and corporations, including the one appealing herein.

f. That Ingenio La Esperanza, S.A., appealed alleging that it had not been notified, and that it had not been able to carry out any declarations.

g. That the National Commercial Court of Appeals, Chamber "C," confirmed, in pages 327-329, the questions previously resolved; having understood that the "procedure" to which the dispossession of the assets of the "Deltec group" is subject to "can only consist of the

simple verification by the Judge of the bankruptcy of their condition as such . . . to pretend that in said procedure that the subject entities be allowed to participate as parties, would be equivalent to recognition of their character as separate third parties" (page 327).

2. That an extraordinary appeal was presented challenging this decision (pages 333-343), granted at page 344. In that appeal, it was argued, in essence, that there was an erroneous interpretation of the judgment of September 4, 1973, in the records "Appeal of fact presented by Jose R. Zurdo in the civil process of Cía. Swift de La Plata, S.A.F., in the meeting of creditors [convocatoria] (currently the bankruptcy proceeding), file C.665" and an evident waiver of the decision of the Court, since no proceeding took place to verify the fraud—which must necessarily have existed to make possible the extension of the bankruptcy to all the related corporations—having been resolved with giving the accused an opportunity to defend itself. It [the appeal] concludes by asserting that without a demonstration that the appellant formed an economic unit with the bankrupt party, "the autonomus juridical personality of the corporations cannot be altered, and as long as they are not convicted of the violation of art. 165 of Law Decree 19.551, they shall be considered as separate third parties vis-à-vis the bankrupt entity, in respect to their defense in a trial in the relevant proceeding." Consequently, in the opinion of the appellant, said constitutional guarantee would be violated and the appealed sentence would be a clear example of an arbitrary sentence.

Later (pages 370-381), the appellant presented a petition in order that the resolution dictated by this Court (in its prior decision of September 4, 1973, in the records previously mentioned) be declared invalid. It bases its request on the Court's lack of jurisdiction and on a violation of the limits of the appeal, citing numerous doctrinal opinions and restating the aforementioned reasons.

3. That the extraordinary appeal is in order, since the interpretation of the decision of the Court and its mandatory character are at issue, which involves a federal question in accordance with art. 18 of Statute 48, since, when interpreting its decisions, the only cases authorizing the granting of the appeal are those in which the decisions of the lower courts disclaim the previous pronouncement (sentence of past June 22nd *in re* "National Treasury v. Roca de Schroder, Agustina and others regarding the expropriation," and its citations).

4. That, in that sense, it is necessary to state that once the judicial decision of September 4, 1973 was dictated, it was imperative to

follow the proper "procedure" to determine which enterprises or corporations make up the "Deltec group" insofar as an economic unit exists with the bankrupt corporation. Such a procedure evidently involved the adoption of various measures tending to give credit to the "economic unit" of the enterprises referred to, with a proper hearing for them because as the transcript demonstrates, not all cases are exactly alike, since we are dealing with a typical question of fact which must be proved in a proceeding which asks to allow the presentation of a fair defense.

5. That the decision of the Judge of the first instance declaring the bankruptcy of several enterprises that are presumably part of the "group," supported by the opinions mentioned above and the reports of the National Board of Meat and the Section of Tax Violations of the General Tax Division, does not constitute a valid procedure with respect to the appellant, since from it would emerge the economic unity of "Deltec International" with "Swift" but not that of the "Ingenio La Esperanza S.A." with "Swift," and insofar as it refers to unilateral administrative acts without records of any participation or possibility of defense by the appellant.

6. That the lower court, in holding that the procedure followed by the judge to extend the bankruptcy to the linked enterprises was correct, has not interpreted the distinction made by the Court on September 4, 1973, which requires a determination of the "other persons or companies making up the group previously mentioned insofar as an economic unit exists with the corporation declared bankrupt." In fact, if such a distinction were not accepted, this sentence would be contradictory in itself, in expressly declaring the bankruptcy of various corporations, and implicitly extending it to an imprecise group of enterprises. Thus, the determinative procedure which includes a preliminary and essential character would suffer a loss of meaning.

7. That it is then necessary to demonstrate in records, in a precise and concrete manner, with a proper participation of the interested party, whether the latter acted in the interest of, and as a representative of, "Swift" or "Deltec"; whether property was disposed of in fraud of the creditors, since by the mere fact of being linked to the group one cannot presume the performance of fraudulent maneuvers tending to prejudice its proprietary equity situation; or whether it had engaged in a commercial conduct affecting directly or indirectly "Swift's" state of bankruptcy.

8. That the guarantee of the defense at trial requires, above all, that no one be arbitrarily denied an adequate and appropriate protection of any existing rights (Decisions: 267:228 and sentence of September 9, 1975, *in re* Q.11 "Quenon N. v. Directors of the Popular Financial Bank regarding an ordinary claim"), equally insuring all the litigants right to obtain a well supported decision, after a trial in proper legal form, whether in a civil or criminal proceeding (Decisions: 268-266), requiring an indispensable observance of the substantial forms relative to the indictment, defense, evidence, and sentence (Decisions: 272:168).

9. That in the case, as noted, the appellant did not have an opportunity to verify its statements in the sense that it is not tied "in an economic unit" with either "Swift" or "Deltec Argentina, S.A." because, on the contrary, it carries out its commercial policy in an independent fashion, reinvesting its profits, etc.

10. That, therefore, this last statement is essential to the defense of the appellant not only to fulfill merely formal requirements, but also to avoid the violation of express constitutional rights, regardless of who is protected by them, much more so when, if such extreme were proven, the bankruptcy declaration would be contrary to the law.

11. That, for the reasons stated above, the extraordinary appeal based on the arbitrariness doctrine is in order, and due to prejudice to the defense at trial, it is necessary to set aside the judgment appealed, which, in erroneously interpreting a ruling of this Court, dismissed the offenses relative to the necessary intervention by the appellant in the proceedings determining its presumptive economic unity with the bankrupt entity, when considering it unnecessary to the latter. (Doctrine of the judgment of November 4, 1975, *in re* "Gatto H. v. Formata Argentina S.R.L.").

12. That in this line of thinking, one can emphasize the statement made by the appellant, that a long time after the bankruptcy declaration, the proceedings have not been continued, and the process of liquidation of the property has not begun; this being an uncertain situation that should be solved so as to protect the rights of the creditors and to facilitate the normal development of enterprises that are not involved in objectionable maneuvers, guaranteeing, if necessary, the subsistence and evolution of important sources of employment, having taken into account the essentially dynamic character of the former.

13. That the way of resolving the problem makes it unnecessary to decide in this case whether the previous decision by the Court is valid or not, with respect to the point the appellant alleges has exceeded the limits of the appeal.

Therefore, having been decided by the Hon. Attorney General, the judgment appealed shall be set aside. Let the records be forwarded to the court of origin so that a new decision can be issued by the proper authorities in accordance with the present one. Notify and remand.

HORACIO H. HEREDIA - ADOLFO R. GABRIELLE, ALEJANDRO R. CARIDE - FEDERICO VIDELA ESCALADA.

APPENDIX II

THE 1977 DECISION

C-503-LVII. Compañía Swift de La Plata S.A. Bankruptcy Proceeding

Supreme Court of the Nation

Buenos Aires, December 27, 1977

Having reviewed the records, to wit: "Bankruptcy proceeding of Compañía Swift de La Plata regarding jurisdiction and review."

Whereas:

1. The lower court having refused judicial approval of the arrangement plan proposed by Swift de La Plata S.A.F., based on its affiliation, in ownership and management, with the group of enterprises known as "Deltec," this affiliation being considered the determinative cause of the economic imbalance in which Swift found itself, apart from other circumstances which rendered it unworthy of such benefit [i.e., an arrangement with its creditors], the insolvent debtor appealed to the National Commercial Court of Appeals, Chamber "C", which affirmed the contested order insofar as it denied judicial approval [to the plan] and declared the bankruptcy of the company.

2. There having been requested a clarification of the lower court's judgment as to whether the state of insolvency which had been adjudicated "includes and extends to the Deltec group as the real owner of the unified structure," the court responded that, subject to the exhaustion of the assets of the insolvent debtor company, it would be appropriate "to extend liability to all of the enterprises of the group."

3. The decision was reversed by the Commercial Chamber on the grounds that it went beyond the "scope and nature of a clarification order;" that it lacked "the most elementary requrements regarding the identification of the parties to be affected by it" (enterprises of the "Deltec" group); and that there had not been complied with "the most elementary requirements of due process."

4. The movant who had raised the challenge to the claims which the "Deltec" companies had attempted to file in the Swift insolvency proceedings—that is, Mr. Jose R. Zurdo—submitted against this judgment an extraordinary appeal which, while rejected by the Chamber, was accepted by the Supreme Court which decided, on September 4, 1973, "to reverse said judgment insofar as it did not extend to Deltec International Limited and to Deltec Argentina S.A. the responsibility for the bankruptcy decree for Cía. Swift de La Plata S.A.F. (art. 165 of Law 19.551)."

In the same opinion, the Court, relying on the authority conferred on it by Law 48, Art. 16, second part, declared:

I. That the inclusion of the assets of Swift de La Plata Sociedad Anonima Frigorífica should also include the assets of the companies comprising the "Deltec group," especially those of Deltec International Limited and Deltec Argentina S.A.F. y M. (arts. 1, 3, 6 and 104 of Law 11.719; report of the Referee pages 3161-63, 3981-86, 4111-24; report of the National Meat Board pages 10.033 and 10.123-5).

II. That in the proper proceeding, there should be determined what other persons or companies comprise the mentioned group [Deltec group] to the extent that the latter comprises an economic unit with the bankrupt company.

III. That the joint execution should be carried out with respect to all the named assets without prior discussion (exclusion) of the assets of Swift de La Plata S.A. Frigorífica (art. 73 *et al.* and 104 of Law 11.719 and arg. art. 170, so-called Law 19.151).

IV. That the natural or legal persons mentioned in Sections I and II above, once having been designated as therein decreed, may exercise those rights to which they are entitled through proceedings in *exclusion* or restitution of assets (arg. arts. 81 *et al.* of the so-called Law 19.551).

5. As appears in the record, once the September 4, 1973 decision had been handed down, the Judge of the First Instance decreed the bankruptcy of those companies thought to belong to the so-called "Deltec group." Of these, Deltec International Limited, Deltec Argentina S.A., Compañía Swift de La Plata S.A., and Deltec Banking Corporation Limited, apart from the appeal that the first and last of these took against the extension of the bankruptcy on the basis of their being foreign corporations, the three [four?] questioned that action in a proceeding pursuant to art. 38 of Law 19.551. They based

their objection on the very words of the Supreme Court's opinion, out of which, as interpreted by the appellants, there might arise only "the dispossession of assets so that these might serve as collateral security for the creditors with respect to the bankruptcy of Swift, but not the bankruptcies of the companies," and concluded by asserting, after other arguments to the same effect, "that the obligatory nature of decisions reached by the Supreme Court in the exercise of its jurisdiction implies beyond discussion that they provide the guideposts for compliance with them (pages 264 and 444, among many others)." Finally, appellants asserted that the judgment being appealed from, "by changing the very nature of the Supreme Court's decision," has ignored "not only what the Supreme Court has decided" but also "the authority of *res judicata* as determinative of constitutionally vested rights" (pages 24 and 36 Swift de La Plata S.A.F. Proceeding regarding jurisdiction and review of bankruptcy C.583-1976).

6. The Judge of First Instance denied rehearing and transmitted the record to the Chamber by reason of the appeals that had been filed in the proceedings.

After the Appeal Chamber's law officer had submitted his opinion, and while the matter was pending decision, Deltec International Limited and Deltec Argentina S.A. raised as a previous question the non-existence, as a judicial decision, of the Supreme Court's September 4, 1973 decision by reason of the fundamental defects, in appellants' opinion, which it contains.

These defects are supposed to be two: excess in the exercise of jurisdictional power and violation of the right of defense in judicial proceedings.

In this regard, appellants argue that the Court, despite the limits imposed on it by the scope of the extraordinary appeal, substantially increased the severity of the lower court's decision by eliminating the requirement of exhaustion of Swift's assets, which in the lower court's judgment was a condition on the liability imposed on the "Deltec group" companies, and by extending to them the dispossession of assets of the insolvent debtor—and in particular to Deltec International Limited and Deltec Argentina S.A., when these had not been originally identified as such. Appellants emphasize the violation of constitutional protections which this decision implies and insist that they could present their impeachment of the September 4, 1973 decision only after the members of the Court who had signed it had been replaced.

7. To the National Commercial Court of Appeals, in passing on this contention, it appeared that the Supreme Court, in its new composition, had conceded, in its decision of September 21, 1976, on the appeal of Ingenio La Esperanza S.A. in records of Swift de La Plata S.A. Bankruptcy proceeding under article 350 of the Code of Civil and Commercial Procedure, the "existence," as valid judicial action, of the September 4, 1973 decision, in that the Court analyzed and applied the latter decision to the issues in the La Esperanza appeal, which it would not have done if it had considered that decision "non-existent."

8. That against that sentence of the National Commercial Court of Appeals, the enterprises Deltec International Limited and Deltec Argentina S.A. have filed with us extraordinary appeals, complaining of that tribunal's holding concerning the existence of the September 4, 1973 decision. They base their appeal entirely on their interpretation of what this Court held in the above-cited "Ingenio La Esperanza S.A." case. Apart from that, and the Constitutional protections which are said to be involved, the appellants attack as arbitrary the decision from which they appeal in that the Appeals Court failed to consider fundamental questions, such as those of lack of jurisdiction and deprivation of due process, which bear on the alleged inexistence of the challenged judgment.

9. From our recitals in paragraph 5 it appears that Deltec International Limited and Deltec Argentina, S.A., before repudiating this Court's September 4, 1973 decision, based upon it their disagreement with the action of the lower court in declaring the bankruptcy of the companies constituting the so-called "Deltec group."

In that context, the attorney for Deltec Argentina, S.A. took the position that there "applies the repeated doctrine of the Supreme Court to the effect that it is unconstitutional for a decision to go outside the bounds of a Supreme Court holding which, rendered in the same controversy and on the same issue, has the authority of *res judicata.*" He further contended, along the same lines, that "to change the very nature of the Supreme Court decision is to ignore the authority of *res judicata* which, according to the principles laid down in the Supreme Court's decisions, determines vested constitutional rights" (page 24 of records).

The same may be said as to the position taken by Deltec International Limited in this proceeding. Referring to the decision of the lower court, Deltec's attorney states: "It is a violation of constitutional

protections and rights (art. 18 of the Constitution) for a judge to ignore the bounds of a decision by the Supreme Court of the Nation," and recalled that, according to the decisions of this Court, its holdings "must be faithfully followed both by the parties and by judicial organs that participate in controversies" (page 36). Beyond question, statements such as these disclose an acquiescence in the decision which is now under attack.

10. In similar situations this Court has settled, through repeated and uniform decisions, the proposition that the voluntary submission, without any express reservation, to a particular legal regime, or a judicial decision, or to the jurisdiction of a particular tribunal, implies an unequivocal adherence thereto which rules out a subsequent constitutional challenge thereof by way of extraordinary appeal (pages 184,361; 186,523; 187,444; 245,137; 246,172; 248,371; 252,72; 269,533; 271,183; 274,153 and many more).

11. The reasons advanced by appellants to justify the timeliness of their challenge to the existence of the September 4, 1973 decision, have been considered and rejected by the Court in similar situations on the ground that the stability of judicial decisions, in that it constitutes an inescapable prerequisite of legal security, is a requirement of public policy that is possessed of constitutional stature (page 250,676; Costellano, Tristan Paul amparo proceeding), sentence of Oct. 19, 1976). Moreover, to hold otherwise would imply an admission of the non-existence of the judicial branch of government during periods such as that of the political situation to which reference has been made (pages 259,69; 269,51; contra in 279,36).

NOW THEREFORE, having heard the Solicitor General, we dismiss the extraordinary appeals heretofore allowed. With costs. Let the parties be notified and the cause remanded.

HORACIO H. HEREDIA - ADOLFO R. GABRIELLE - PEDRO J. FRIAS - EMILIO M. DAIREAUX.