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## **PRESENT AND FUTURE VENEZUELAN TECHNOLOGY POLICIES: IMPLEMENTATION AND IMPLICATIONS FOR TECHNOLOGY SUPPLIERS AND FOREIGN INVESTORS\***

JOHN R. PATE\*\*

**AUTHOR'S NOTE:** After this article had gone to press several important events concerning the Andean Group occurred. Among these events were the Andean Commission's approval of Decision 102, whereby Chile and the other members of the Andean Group terminated their mutual obligations, and Decision 103, in which several modifications were made to Decision 24. Although Decision 24 constitutes the foreign investment and technology transfer code of the Andean Group, the modifications thereto do not affect the substance or implementation of the technology policies which are the principle focus of this article. Further analysis of these events can be found at the end of the article in the section entitled "Recent Developments."

The purpose of this article is to summarize current Venezuelan technology transfer policies and their implications for foreign technology suppliers or direct foreign investors. However, the broader policies toward

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direct foreign investment (DFI) will be summarized as well since they are inseparable from the question of technology transfer; or "commercialization" as some would have it. Most readers will probably have a general familiarity with the current Venezuelan legislation in this area, which is basically the same as that for the other member countries of the Andean Group,<sup>1</sup> but there have been several important recent decrees and new proposals of which anyone contemplating a technology or investment transaction in Venezuela should be aware.<sup>2</sup> Furthermore, at the level of the Andean Group, serious discussions aimed at drafting a common set of regulations for the Group's common foreign investment code were initiated in the last months of 1975. If approved, these would quite probably include rather significant modifications from the point of view of foreign investors.<sup>3</sup> However, the principal focus here is on the technology policies and the governmental entities which have been established to implement them. In addition, focus will be on the results of the application of these policies and some of the present implications of this new national approach for technology suppliers and foreign investors in Venezuela.

In this article, technology is referred to in its broadest sense as encompassing both process and managerial technology. Obviously, in both the design and application of Venezuela's technology policies these distinctions take on fundamental importance, particularly as it is implicitly assumed that managerial technology is something less than real technology. Both an appreciation of this perception, as well as an awareness of the industrial and sectoral priorities for development, are necessary in order to understand the overall thrust of Venezuela's policies in this area.

## VENEZUELAN TECHNOLOGY TRANSFER LEGISLATION AND NATIONAL OBJECTIVES

### *Historical and Political Perspective*

The treatment of direct foreign investment (DFI) in Venezuela is governed by the several decisions covering DFI and technology transfer of the Commission of the Andean Group (Acuerdo de Cartagena). However, Venezuelan legislation has differed from the norms in some important respects. This is due to several factors: the decisions reserved some freedom of interpretation to the individual states; the decisions were the subject of disagreement in some cases; and not all the decisions have been fully ratified.

The basic foreign investment policy of the Andean Group was established by Decision 24<sup>4</sup> (as subsequently modified by Decisions 37, 37A, and 70) of December 1970, entitled the "Common Code for the Treatment of Foreign Capital and Trademarks, Patents, Licences and Royalties," which has received wide publicity in the last few years. When Venezuela formally joined the group, it was obliged to adopt all of the prior Decisions. Thus, Decision 24 entered into effect for Venezuela on January 1, 1974. This marked the initiation of a comprehensive and restrictive DFI policy in Venezuela. However, it should be noted that in the several years prior to its adherence to the Group, Venezuela had been studying the possibility of unilaterally implementing a policy of this nature, regardless of the outcome of its negotiations with the other five member countries. In fact, Decision 24 was considered by the government planners of the time to be one of the more attractive features of the Group for Venezuela.

The Christian Democratic government of President Rafael Caldera, recognizing the growing nationalist sentiments in the country, had created a mixed commission to study the possibility of adopting such legislation for Venezuela in 1971. This body, representing various political factions, was naturally influenced by the recently approved Decision 24, as was reflected in its proposal presented in 1972, and which would have been in some respects even more restrictive than the Andean Code. (Venezuela fully participated in all of the negotiations, which included the general stance to be adopted toward DFI, leading to the formation of the Andean Group in 1969. Except for strong internal political pressures exacted by powerful national economic groups on the new Caldera administration, Venezuela probably would have joined at that time.) However, the Caldera Administration, unlike the present regime of President Carlos Andrés Pérez, lacked a majority in Congress and was fearful of making an open political issue of the policy toward foreign investment (on which a great diversity of opinion still exists both within Venezuela and among the members of the Andean Pact). Hence, it appeared convenient for Venezuela to join the Group and thereby be "obliged" to accept not only Decision 24 but also a number of the other economic and commercial policy measures of the Group which appealed to the planners and which were seen to be necessary for the economic development and modernization of the country.

Before passing on to the subsequent Andean Group and national legislation affecting DFI and technology, it should be observed that in regard to the adoption of this general policy position in Venezuela there

was relatively little difference between the major political factions. As is now evident, the Pérez administration fully adopted and has continued to implement the prevailing philosophy. In fact, Pérez, with his strong electoral majority and greatly increased petroleum revenues, has implemented the policy more extensively and more rapidly than perhaps would otherwise have been possible. This is reflected in the nationalization of the iron and petroleum industries in 1974 and 1975, and in the reservation of various key sectors, for state and/or national companies, such as steel, petrochemicals, powdered milk, animal feed and possibly of food processing and pharmaceuticals. Additionally, this philosophy is reflected in general in a more restrictive or aggressive application of the Decision 24 principles, which the country feels it can afford financially.

#### *Andean and Venezuelan Legislation Affecting DFI*

Aside from Decision 24, as modified, the other two Decisions of the Group which bear heavily on this issue are Numbers 84 and 85, approved by the Commission in mid-1974, neither of which have been fully ratified as yet by all of the members. Decision 84<sup>5</sup> established the basis for a technology development policy in the Andean subregion grounded on a series of guidelines and cooperative efforts. Among these guidelines are several which relate directly to technology transfer which Venezuela has begun partially to implement, as will be shown below. The other Decision, Number 85,<sup>6</sup> is the Common Industrial Property Code of the Group which in some ways is more restrictive than previously accepted international practice. Nevertheless, it does not differ substantially from such practice. Thus far, Decision 85 has not been put into effect by any of the Andean countries. In Venezuela it must be approved by the Congress where it has been in committee for several months.<sup>7</sup>

With respect to Venezuelan national legislation establishing foreign investment policy, several points should be mentioned. The Congressional ratification of Venezuela's adherence to the Group was also an approval of Decision 24,<sup>8</sup> with its various modifications, and the potentially important Decision 46.<sup>9</sup> Decision 46 established the basis for the formation of subregional multinational companies in which foreign investors could hold up to 40% of the equity.<sup>10</sup> The Congress ratified the adherence in September of 1973. However, the formal adherence procedure was not completed until the end of December of that year, causing a delay in the implementation of Decision 24, which did not become effective until January 1, 1974.

With the change in governments from Caldera to Pérez occurring in March 1974, it was not until the end of April that the Pérez administration issued its two regulation Decrees, Numbers 62 and 63,<sup>11</sup> creating the governmental entity to administer the foreign investment policy and thus effectively putting it into force. This agency, formally within the Ministry of Development,<sup>12</sup> is the Superintendency of Foreign Investment (SIEX) which will be examined in more detail below. These two Decrees basically follow Decision 24, but there are a few noteworthy exceptions of great importance to the question of technology transfer.

During the intervening year and a half since the new foreign investment policy was implemented, three new important measures have been adopted broadening control over foreign investment, all of which are considered of doubtful constitutional validity. The first of these is Decree 746<sup>13</sup> of February 1975 which adds additional prohibited clauses to the list contained in Decision 24 and Decree 63 for technology contracts. In one respect, Decree 746 significantly modifies the country's Industrial Property Law of 1955, which otherwise, and until the approval of Decision 85, remains in force. The second is the Foreign Enterprise Transformation Law,<sup>14</sup> approved by Congress in August 1975, which gives the Superintendent of Foreign Investment broad authority to control the sale of foreign held stock to national investors. Lastly, in October 1975, the Cabinet approved Decree 1225<sup>15</sup> which transfers all foreign companies and investments in or related to, the petroleum industry from the jurisdiction of SIEX and the Ministry of Development to a newly created office within the Ministry of Mines and Hydrocarbons. This law is of particular interest because of its tendency to specialize, or "sectoralize," one type of industry, and because it requires that in cases where foreign companies are transformed to mixed or national companies, only the State or state companies may acquire the foreign stock.<sup>16</sup>

Finally, in the above context, the Superintendent has frequently referred to the preparation of two new decrees. One presumably would allow foreign companies currently engaging in internal commerce and therefore required to sell down to the category of national companies by May 1977, to become principally manufacturing companies. Consequently, such foreign companies could remain foreign owned by a majority of shareholders. The second proposed decree would attempt to legislate "true technology transfer" and would refer to training programs and the like; in other words, it would provide for the types of clauses to be included in technology contracts rather than listing clauses prohibited in such contracts as in the legislation to date. The former decree has already been proposed

to the President, but there have been certain legal disagreements within the executive branch regarding it; the latter decree is still said to be under study.

*Substantive Rules Affecting Technology Transfer and DFI in Venezuela*

The purpose of this section, and of the following section summarizing recent foreign investment legislation at the subregional level, is merely to highlight some of the more significant and newer features of the Andean and Venezuelan legislation mentioned above. This is necessary for an analysis of the implications for foreign technology suppliers and investors.

Although Decision 24 became law in Venezuela as of the beginning of 1974, the new policy was not made effective until the end of April of that year with the issuance of Decrees 62 and 63 establishing, by regulation, the legal procedures for implementation. In Venezuela, it was decided a separate decree would be issued covering Chapter III of Decision 24 (services and basic sectors), which is the subject of Decree 62. The reservation for national enterprises, and the prohibition of new DFI, in the areas of internal commerce and professional services (Art. 1) is of particular interest.

A foreign company is deemed to be engaged in internal commerce if more than 49% of the products it sells in the country are not directly produced by it or if the products are produced in part under contract by a national company. (The latter definition has not yet been clarified.) In addition, the products must have a minimum national value added of 30%,<sup>17</sup> however this point has not yet been officially stipulated. Professional services include consulting of any nature which is regulated by national law (e.g., law, accounting, engineering, economics, architecture). Venezuela was the first of the Andean countries to legislate the transformation of foreign companies in the commercial sector, though now Colombia and Ecuador are legislating such transformations to a limited degree. Moreover, Venezuela was one of the first to anticipate the guidelines of Decision 84 (technology development) in regard to professional services. In both of these sectors, namely the commercial and professional services sectors, Decree 62 provides that foreign companies, established as of the end of December 1973, must become national enterprises (minimum 80% Venezuelan) within three years or by May 1977.

By proscribing foreign companies from the commercial sector, the country is attaching a low degree of importance to commercial technology (which includes such specialities as logistics, marketing, and

services). Although the responsible government officials are willing to recognize in theory the importance of such technology, in most cases they are not willing to admit the necessity of paying foreign middlemen to perform these services. Nevertheless, it is undeniable that a number of foreign commercial firms have had a substantial impact in terms of spreading new products important for development and in stimulating local production. In most cases the foreign commercial houses have been more dynamic and have outperformed their national counterparts when there has been direct competition.

Thus far, two major limitations to the prohibition of new DFI in internal commerce have become evident. The first limitation is in the area of advanced technology type products (computers in particular) especially where the world supplier or suppliers constitute a monopoly or tight oligopoly. In this case, the world suppliers have been consistently reluctant to diversify ownership. Additionally, it would be extremely difficult for Venezuela to attempt to effectively provide these services within the next few years. In the more obvious of these cases the important differences are recognized and exceptions will be made, probably under the guise of service or technical assistance agreements. However, in the many other areas where the complexity of the technology is less apparent or where there are more suppliers, it is likely to be much more difficult to convince the responsible authorities that exceptions should be allowed.

The second major limitation to prohibiting foreign activity in internal commerce is the desire to interest some, if not all, of the foreign suppliers to begin to manufacture in Venezuela. Unless concessions are made, many foreign enterprises which currently maintain sales and service subsidiaries in the country may fade out or sell out completely, and continue exporting to a national distributor only. Hence, as noted in the previous section, the Superintendent drafted a proposed decree which would allow foreign companies presently classified as commercial entities to become manufacturing enterprises within a period of years in which case they could probably remain 100% foreign owned indefinitely (assuming they did not wish to export to the Andean market). There are two basic conditions with which such companies would be required to comply. At least 51% of the products sold in Venezuela would have to be manufactured locally (though the rest could be imported and possibly some of the first 51% could be contracted out locally). Second, the products would have to have a minimum of 30% national value added (which apparently is to be calculated using a rather restricted formula, i.e., after deducting from the



final value anything which is produced by imported components). Furthermore, the Superintendent, in recent public statements, has referred to the possibility of including a third criterion which would require that the converting commercial company have a technology contract which would create a "real transfer" of the technology. However, it is not believed that this latter condition will be an absolute prerequisite for conversion if and when this decree is approved.<sup>18</sup>

The area of professional services remains a highly confused area of Venezuelan law and policy. The current practice seems to be somewhat *ad hoc*, for which reason the SIEX has promised a clarifying decree. The policy is to utilize Venezuelan professionals wherever possible, in accordance with Decision 84 (Arts. 10 and 12), but the problem has been to decide when foreign consultants are necessary. Given the role of SIEX in the approval of all technology transactions to and within Venezuela, it appears that the only legal recourse for foreign consultants who wish to remain in Venezuela and work in areas governed by national laws is to set up a national company which is limited to no more than a 20% foreign interest. However, if the foreign consultant intends to work on a specific and limited duration project, more flexibility has been permitted. The formation of consortia and the use of dual (often for tax purposes) or offshore contracts establishing a joint venture are allowed in these cases; however, Venezuelans must participate. In some cases, particularly in those involving work for the Government, SIEX has readily approved these types of contracts, though it is often necessary for the foreign company to establish domicile through the creation of a local branch.

It is worth noting that Venezuela, as well as its Andean partners and other countries in Latin America, is becoming more restrictive towards foreign investment in the finance and tourism sectors. In Venezuela, both sectors have been governed by separate legislation and both were specifically excluded from Decrees 62 and 63 (finance and insurance, Decree 62, Art. 4; tourism, Decree 63, Art. 1). The financial sector legislation was amended in May 1975 and now limits foreign equity participation to 20% for national companies and establishes a series of discriminatory restrictions for companies with a higher percentage of foreign participation (Decrees 869 and 870).<sup>20</sup> In tourism, new proposals of the Andean Group Junta (Secretariat) would require all tourism entities, including hotels, to become mixed, national or subregional multinational companies.<sup>21</sup>

Decree 63, aside from creating SIEX, implemented the rest of Decision 24. Chapter VII of Decision 63 refers specifically to the transfer

of technology and the utilization of patents and trademarks. In general, these provisions follow all of those contained in Decision 24, including the lists of prohibited clauses in contracts involving patents (Art. 20) and trademarks (Art. 25), as well as the prohibition of royalty payments between affiliates and the capitalization of technology contributions (Art. 21). However, this chapter of Decree 63 does go further than Decision 24 in several respects. One relatively minor provision specifically excludes occasional individual technical assistance services which do not exceed a certain amount (not yet defined) per year (Art. 59). On the other hand, the provision that technology contracts entered into after April 29, 1974 *in no case* may exceed a term of *five* years of major importance. The Superintendent, under the authority of Decree 746, declared that contracts which antedate the promulgation of Decree 63, and which now must be "reformed" in accordance with both Decrees 63 and 746, must be limited to five years.<sup>22</sup>

In no other Andean Group country have all such contracts arbitrarily and by law been limited to a set term.<sup>23</sup> The tendency has been to shorten the duration of such contracts, but at most, general guidelines have been established, usually by sector and subject to negotiation. In Mexico, a term of ten years has been fixed as the general rule, but it has been increasingly possible to include automatic renewal clauses which add considerable flexibility. Indeed, only in Argentina did such restrictive provisions exist regarding length of contracts and other restrictions of the Decree 746 type. Pressure reportedly is mounting there to relax this attitude.<sup>24</sup>

Finally, the other provision of Chapter VII of Decree 63 is the requirement that all contracts signed after April 29, 1974, "must contain the obligation of the supplier to train the required national personnel so as to obtain the maximum benefit from the contracted technology, and to promote technological research and development activities in the country." (Art. 58).<sup>25</sup> These provisions are in line with the overall intent of Decision 84 to stimulate the real transfer of foreign technology and know-how, and to generate as many local technologically related activities as possible. This is one of the priority areas in which the Superintendent has indicated a new decree specifying foreign supplier obligations is needed.

Decree 746 of February 1975 is directly related to the provisions of Decree 63. Decree 746 has two basic purposes. First, it establishes a list of ten additional prohibited clauses in technology contracts. Second, it prescribes the periods in which all preexisting technology contracts must be expunged of offensive provisions. It further prescribes the dates by

which the terms permitted by SIEX are to have effect on preexisting and proposed contracts. According to Decision 24 and Decree 63, with its extended time periods, technology contracts in existence as of January 1, 1974, had to be registered with SIEX by the end of December of that year. Under Decree 746, as subsequently extended by Decree 1285,<sup>26</sup> the previously registered contracts were to be renegotiated and resubmitted for registration by June 30, 1976, so as to conform to the provisions of Decrees 746 and 63, which meant the elimination of the proscribed clauses. In addition, the Superintendent has said that in the case of the contracts entered into after January 1, 1974, the maximum duration of five years will be enforced, presumably from the date of registration. Failure to conform previously registered contracts might result in the disregard of their legal effect for any purpose.

Due to the fact that Decree 746 is relatively recent and of national rather than subregional origin, it is useful to note the additional prohibited clauses (Art. 1). The ten proscriptions for contracts involving patents, trademarks or other forms of technology are clauses which:

- (a) prohibit the manufacture or sale of products made with the transferred technology once the contract is terminated;
- (b) prohibit the use of technical know-how acquired through the contracted technology once the contract is terminated;
- (c) prohibit the use of similar or like commercial trademarks once the contract is terminated;
- (d) impose upon the technology user a determined system of quality control;
- (e) establish an obligation to sell all or part of the resulting production to the technology supplier;
- (f) establish the obligation to pay royalties for technical assistance which is not transferred;
- (g) require the payment of royalties when the technology has been acquired outright by the user;
- (h) establish the obligation on the part of the user to pay the taxes which correspond to the supplier;
- (i) oblige the user to give an irrevocable authorization for the sale of the products to the supplier; or

- (j) oblige the user to grant a license for the use of the improvements or inventions which result from the process or products which are the object of the contract.

In all cases, the Superintendent is authorized to evaluate the effects of any of these types of clauses and to permit exceptions, if they are justified. Furthermore, the Superintendent may, by presidential decree, proscribe other clauses of similar effect.

If the new prohibitions are applied absolutely, then in addition to the possible negative consequences to the technology importer and to the country in general, at least two of the prohibitions would contradict current national policy or preexisting legislation. The prohibition of most questionable legal validity is "c" regarding the use of similar or like trademarks. Venezuela has followed prevailing international norms in the area of industrial property, though it has never signed the International Patent Convention. Additionally, the Industrial Property Law of 1955 includes both civil and criminal sanctions for trademark impingement, and Decision 85 recognizes the sanctity of trademarks. Further, under commonly accepted principles of constitutional law, a law approved by the Congress cannot be modified by a subsequent presidential decree without express authority; however, that is the justification claimed, in the adoption of proscribed clause "c".<sup>27</sup>

The other item on this list of prohibitions which seems somewhat incongruous is "d" which proscribes the imposition of a determined quality control system. Venezuela currently is studying the possibility of obligating all industries to institute high standard quality control systems. Furthermore, the Government has emphasized repeatedly the necessity of developing internationally competitive products, in terms of quality, in order to be able to export.

In terms of the prerequisites which the Superintendent may take into account or demand in regard to a proposed technology transfer, it is necessary to note the additions to Decision 24 contained in Chapter III of Decision 84. Decision 84 has not yet been implemented in Venezuela, however the Superintendent has the authority to implement many of its provisions and, in fact, is already doing so—some were explicitly or implicitly included in Decree 63. Thus, the SIEX, under Decision 84, would be directed to take into account in considering a proposed technology agreement, the following factors, among others (Art. 7):

- (a) effects on technological development, the demand for scientific and technological services in the subregion, use of local consultants and engineers, possible technological derivations;
- (b) effects of the technology on employment;
- (c) contribution to specific national or subregional development plans;
- (d) effects on the balance of payments and income generation; and
- (e) effects on environment.

In addition, the applicant may be obliged to provide information on alternative technologies, sources, conditions of acquisition and justifications for preferring the suggested technology (Art. 8). Finally, Decision 84 would require that the applicant disaggregate the proposed technology package to show among others, the characteristics and value of each component and whether it would have to be obtained abroad or could be supplied locally.

In point of fact, SIEX is already requiring that much of this information be provided in the new SIEX form 10 which must be filed for all technology contracts, including those which had to be reformed by year end 1975 and all new contracts. Thus far, SIEX is only requesting information, though quite detailed, about the technology contract being applied for, but the Superintendent has stated that he may require all applicants to suggest three complete alternatives with SIEX. Then, the Superintendent would indicate which alternative would most likely be approved.<sup>28</sup>

The Foreign Enterprise Transformation Law of August 1976, is the only law referred to in the preceding section which merits greater elaboration. This Law does not specifically refer to technology transfer, however, it does seek to regulate the sale of foreign shares to national investors. This regulation could affect a foreign company's appraisal of its investment in Venezuela, and consequently, its willingness or interest in transferring new technology through DFI. Nevertheless, the transformation law is as much based on the desire of the Government to "democratize" capital as it is to assure the fulfillment of the quasi-nationalization goals of the foreign investment policy.

Basically, the Transformation Law gives the Superintendent of Foreign Investment the mandatory and unrestricted authority to approve all future proposed sales of foreign shares to national investors as well as to

review all such prior sales or transfers which occurred after December 31, 1973, the date of entry into force of Decision 24. The Superintendent also has the legal authority to determine how and to whom a transforming foreign company must sell, and to investigate to the extent necessary, the presumed national purchasers. Furthermore, in deciding whether a proposed sale plan is in the "economic, social and technological development interests of the country," the Superintendent "must" take into account the following criteria:

- (a) the distribution of shares among national shareholders;
- (b) the right of the workers of the enterprise to participate in the transformation process;
- (c) the right to participate in the transformation process by related labor unions; workers associations, cooperatives, savings and credit unions, and pension and retirement funds; other types of professional or technical groups or associations; social service institutions of such associations; and in general any other entities of a like nature;
- (d) the number of new national shareholders who will participate;
- (e) the appropriateness of effectuating the sale through public offer, preferably by the formation of a SAICA (broadly held public companies) as defined in the Capital Markets Law; and
- (f) the opportunity to sell the shares on the open market.

In addition, the Superintendent may reject any proposed plan without, in some cases, indicating the reasons for such rejections;<sup>29</sup> the only legal recourse is a court action for abuse of authority (*ultra vires*). Lastly, the Superintendent is given full authority to investigate any and all books or archives of any company covered by Decision 24 and Decrees 62 and 63 as well as to demand "as many verbal or written reports" as may be deemed necessary on a company's "economic-financial situation or on any other of its operations." (Art. 6). It is this provision which has led many lawyers to believe that SIEX now has the authority to investigate the records of any company in the country, regardless of the company's classification as 100% national to 100% foreign, whether it is in a process of transformation or not, and whether it has any foreign contact whatsoever of the kind covered by Decision 24.

The Transformation Law has been questioned on several constitutional grounds. Among these are the constitutional prohibition against

retroactive legislation, the fact that Decision 24 established certain rights for the foreign investor which are herein compromised, and the excessive authority given to a public official who is not required to announce his decisions. The Law has been criticized for its failure to refer to a mechanism for establishing a fair price for foreign held shares, an alternative procedure if the stock cannot be sold, or as a means of avoiding excessive potential direct intervention by the State.

The present intentions of the Government do not appear to justify these worst-case fears. This was partially reconfirmed by SIEX on December 1, 1975, when it restated the prior non-intervention policy in the case of companies which are currently national or mixed, that is, foreign shareholders in these types of firms may sell their shares to national investors without the prior approval of SIEX. This law resulted from a minor public outrage at the purchase of a majority interest in Sears, a well-known retail chain by one of the relatively few large monied groups in the country in spite of the desires of one of the principal national labor unions to buy at least a portion of that company. Until this law, neither the Superintendent nor any other juridical entity had any authority over this kind of transaction. However, Government has continually stated its goal of enacting policies which will tend toward wealth and income distribution. At the same time, no responsible authorities in the Government have suggested that the goal is to turn over a very high percentage of private property in general to the workers or any labor associations. (There are exceptions however, particularly in the agroindustrial sector through cooperatives, which is the solution proposed for the to-be-nationalized powdered milk and animal feed industries.) Nevertheless, a bias in favor of seeing that the workers in a particular industry have a significant direct interest in their enterprise is known to exist. No figures have been mentioned, but the well-known Sears experience has often been referred to in informal conversation. Regardless of how desirable this sort of policy might be, the real fear, of course, is that policy instruments which attempt to be too ambitious could fall into hands which do not recognize the same constitutional or fundamental rights restraints.

#### *Venezuelan Policy on Technology Transfer and Development*

Before completing this review of current Venezuelan legislation on technology transfer and DFI, it is useful to summarize briefly the expressed policy in this area and to make a few observations regarding its implementation.

Present policy is grounded on two basic principles: acquisition, domination and creation of scientific-technological knowledge; and technological-economic independence. The first is related to technological education and the development of a certain degree of technological capability which is essential for the adaption and utilization of the appropriate technologies for the harmonious socioeconomic development of the country. The second refers to the objective of limiting the degree of *dependencia* by attempting to force greater "real" technology transfer, diversifying alternative technology sources and avoiding as much as possible the payment of technology based monopoly rents. Of course, by limiting the discussion to industrial technology, it is apparent that most of such technology is generated by the productive entities of the world, and that the usual channels for transfer are commercial links. Consequently, the practical distinctions between these two national policy objectives are greatly reduced.

Nevertheless, it is worth noting that in pursuit of the first objective, gaining scientific and technological capability, Venezuela is expanding great energies and sums to educate a new generation of young technologists and technocrats, and to fortify the country's relatively recently created and still fledgling research efforts. Rather massive use is being made of distinguished foreign consultants of all kinds. In areas where a shortage of local technicians exists, qualified immigrants have been sought who can help fill the widely recognized and reported human resources void which, in part, has become suddenly more critical as a result of the newly increased petroleum wealth. As might be expected, though, not all of these efforts have been as well planned, administered or received as possible.<sup>30</sup>

The second objective, greater technological independence and the cessation of excessive technology monopoly rents payments, is more germane to this discussion as it directly affects the terms and conditions under which industrial technology can be brought into the country, as well as the preferred sources of supply. In this area, current nationalistic sentiments against foreign investment and international economic politics are even more apparent.

In brief, the general policy dictates are to pay as little as possible for technology, either in terms of outright purchase, licensing or foreign equity ownership, and usually to obtain the best technology available. Hence, the Government, through SIEX, is acting as watchdog and negotiator and is scrutinizing with great care purchase or licensing agree-



ments. When the terms of such agreements appear to SIEX to be unjust for the country, counterproposals are being made. In the case of foreign equity investments, the Government is playing a similar part by reducing the foreign share to the lowest acceptable percentage at the outset and attempting to assure maximum technological benefits for the country.

In terms of technology sources, the overall policy is to diversify technology ties away from the United States, which is seen as all the more urgent with the exclusion of Venezuela and its other OPEC partners from the U.S. trade scheme of generalized preferences for the developing countries. This includes looking more towards Europe and Japan, as well as toward the Socialist countries (although to a minor degree thus far) for alternative technology suppliers. The overall policy also includes actual implementing the often voiced policy of creating greater economic independence in order to achieve political independence among the countries of Latin America, and now of OPEC and others of the Third World. Thus, Venezuela has turned to Mexico in search of petrochemical, steel and automotive technologies, to Brazil for advice in shipbuilding and steel, and to Argentina as a possible source of technology in the agroindustrial and machine tools-metals products sectors. This overall policy is in line with Venezuela's new foreign policy thrust in defense of the Latin American Economic System (SELA), OPEC and other OPEC-type cartels. The overall policy is also in line, in general, with Venezuela's policy of a less dependent course in development.

Tying these two objectives together is the fairly novel idea currently under consideration to create a Technology Bank. The proposed purpose of the Bank would be to finance, acquire and channel all forms of applied technology. The Bank would be able to finance the development of, and search for, new technologies by the productive sector, or the Bank could enter directly into the technology negotiation process seeking out needed technologies on its own for purchase or license in order to grant sub-leases to industrial users. Thus, depending on the degree of coordination with SIEX, the Bank could, if established, overlap and conflict with some of SIEX's current authority.

Venezuela's leaders are convinced that pouring more money and effort into the development of human, scientific and technological resources will result in progress toward developing such resources. They are convinced that forcing foreign suppliers into joint venture positions will result in progress toward the assimilation of technological knowledge and skills by the country's public and private sector entrepreneurs. Con-

sequently, more rapid progress will be achieved in terms of real socio-economic development in the broadest sense. This is in keeping with the President's pledge to strive for Latin American economic cooperation and integration before the developing countries of Latin America and the world are forced to allow the transnational enterprises to bring about the integration of their economies for them.<sup>31</sup> Thus, the policy also includes urging the rest of Latin America, possibly through SELA, to adopt a similar stance toward technology transfer and DFI. The Superintendent of Foreign Investment has stated on various occasions that had the country adopted its current technology policies ten years earlier, Venezuelans today would be generating and innovating much of their own technology, and national entrepreneurs would not need to be assisted by the Government to avoid paying too much and getting too little under the terms of any given technology contract. This, of course, may be too ambitious and some of the current policies, or their application, may later be seen as a mistake. However, there is no doubt that for the present, Venezuela has, and knows it has, the one resource best designed to help it achieve these objectives — money. As long as things continue to go smoothly, and prosperously, the country is likely to maintain another of the important ingredients which will keep technology suppliers interested into the foreseeable future: namely, a democratic, stable and primarily market oriented society.<sup>32</sup>

#### RECENT EVENTS REGARDING THE POSSIBLE MODIFICATION OF DECISION 24<sup>33</sup>

The recent discussions concerning a possible set of regulations, a euphemism for modifications, for Decision 24 are directly related to Venezuelan technology and foreign investment policies. Hence, a short digression of the discussions, which started in early 1975 and were held at the subregional level of the Andean group, is deemed appropriate.

Without going into the history of the attempts to reexamine Decision 24 in the Andean Group, it is sufficient to note that in the latter half of 1975, the Commission called for the formation of a Consultative Committee made up of high level experts from the six countries. The Junta prepared a draft set of regulations for discussion, and the Committee held its first meeting in mid-November of that year. Thereafter, at the special insistence of Chile, agreement was reached in principle to push forward with the modification.

With a few exceptions, the Junta's draft closely follows the principles of Decision 24, as indeed was to be expected. In general, it attempts to define in more precise terms some of the nebulous concepts of Decision 24 and to close some of the loopholes contained therein. For example, the draft would expand the present definition of DFI to include used as well as new equipment or machinery, raw materials, intermediate and final products, and all parts and replacements. The definition of DFI would also include all monies in local currency: specifically, amortization and interest payments, proceeds from the sale of shares plus any capital gains, and royalty or other payments for technology. Foreign branches would be accepted for the first time, although they would still be treated like subsidiaries. The one year uninterrupted residence requirement for foreign individuals would be dropped in favor of a simple declaration not to repatriate capital or remit profits. The reinvestment limitation of an automatic 5% of the registered capital base would be maintained; however, the potential problem of "limbo" money, (earnings over the present 19% which could be remitted and reinvested) would be eliminated. The foreign investor who did not receive authorization for greater amounts of reinvestments would be forced to distribute such sums. Yet, there is no explanation of what will occur if this amount exceeds the profit remittance ceiling, but it is assumed that the ceiling will be raised or eliminated.

Foreign companies would still be entitled only to short-term internal credit, but an amount equivalent to one and a half times repatriable capital would be allowed. Furthermore, some flexibility would be possible to raise or lower this amount according to the sector. One interesting provision would prohibit the authorization of new DFI in foreign companies, established after July 1, 1971, which have not agreed to transform. Decision 24 obviated this possibility by requiring all foreign firms established after this date to enter into transformation agreements as a condition of entry, (Art. 30), although this could be intended to refer only to expansion. The only possible exception could be in the area covered by Chapter III (service and basic sectors). In that area, the countries have been freely able to choose to apply their own national legislation. Article 20 of Decision 24, which contains the prohibited clauses in patent licensing agreements, was reiterated in full, but Article 25 on trademark agreements was not. Finally, regarding the important question of the profit remittance ceiling, the Junta made no specific suggestion and left this area open for discussion by the member countries.

Turning to the Consultative Committee's reception and interpretation of these proposals, there was relatively little consensus among the coun-

tries. This does not mean, however, that the base of support for a common code has eroded, with the exception of Chile. Rather, only a low degree of dissension continues to divide the countries on specific points. Nonetheless, it was evident that a majority of countries is leaning toward a greater flexibility regarding DFI.

The majority suggested that mixed enterprises which invest in other mixed enterprises should be considered national investors, as long as national investors continued to predominate. More flexibility could be allowed when a foreign investor increased its percentage in a mixed enterprise provided it did not cease to be a mixed enterprise by virtue of the new investments. No solution was found to Chile's request that, due to its particular economic situation, it be allowed to sell firms which are presently national to foreign investors, although it did receive support for its position. This legal condition has ceased to exist with the Commission's April 1976 approval of such sale in the Chilean case.<sup>34</sup>

There was a diversity of opinion on the important transformation principle. Some countries suggested that certain types of investments be excluded from the transformation requirement or that the periods for transformation be extended. Others felt that the existing sanctions for noncompliance, that is, not being able to take advantage of the trade liberation program, should be strengthened. In addition, no agreement was reached regarding raising the profit remittance ceiling, though the tendency is clearly to choose a higher level or to eliminate the ceiling altogether. One country suggested that this decision be left open for each government to decide. Finally, both of the relatively less developed countries suggested that they be allowed greater flexibility on a number of points in order to provide more attractive conditions for DFI.

The specific question of technology transfer, out of the DFI context, was not discussed. However, this fact should not be taken as an indication that a general consensus exists in this area; rather, the meeting was only the beginning of a continuing process.

#### THE SUPERINTENDENCY OF FOREIGN INVESTMENT AND THE APPLICATION OF THE TECHNOLOGY RULES

As noted previously, Decree 63 of April 29, 1974 created the Superintendency for Foreign Investment (SIEX), an agency of the Ministry of Development. SIEX was designated the national authority

for all matters relating to the application of Decision 24. The only change in the authority of SIEX, as yet, is due to Decree 1225 of October 1975. As a result of that decree, the regulation of foreign companies and investments in the hydrocarbons or affiliated sectors is no longer handled by SIEX. It is now to be handled, for all purposes, by a special office in the Ministry of Mines and Hydrocarbons. As of November 1976, this office was only formally organized. Consequently, it is not yet clear how broad the mandate for this office will be nor whether there will be any difference in its approach from that of SIEX.<sup>35</sup>

Legally, SIEX is only an administrative agency and does not have the explicit independent authority to approve new investments, foreign company transformations or technology contracts. These investments, transformations, and contracts must be approved by the Advisory Committee created by Decree 63. The Committee is to be chaired by the Superintendent of Foreign Investment and is to include as members high level officials from the Central Bank, the Institute of Foreign Trade, and the Ministries of the Treasury and Development and Planning. This Committee is to meet regularly once a month or whenever convoked by the Minister of Development or the Superintendent. In practice, however, the Committee's meetings have been sporadic and more authority has devolved upon SIEX.<sup>36</sup> Supposedly, it is this Committee which is to set overall policy for foreign investment in the country.

SIEX began to function in July 1975 under the direction of the Superintendent and an Assistant Superintendent. It is endowed with a relatively small staff of approximately forty professionals, including various outside advisors. This has proven to be an inadequate number to deal with the nearly 4,000 foreign investment registrations and some 8,000 individual applications. The staff is relatively inexperienced in dealing with foreign investment evaluation. Furthermore, SIEX has been subject to certain budgetary limitations which have further hampered its ability to increase personnel and to carry out all of its various responsibilities. As a consequence, the several deadlines for registration and particularly for reforming all existing technology contracts have been continually pushed back.

Another important factor affecting the operational ability of SIEX during its first year was the degree of bureaucratic jealousy and infighting with at least two other governmental agencies which attempted to appropriate some of SIEX's responsibilities.<sup>37</sup> The general consensus, in spite of all these obstacles, is that SIEX has functioned relatively well

and that the personnel have attempted to be cooperative, and at the same time, remain faithful to a strict application of the national legislation and policies.

Among the major problem areas which have arisen, there are two in particular which are directly related to the foregoing factors. First, both foreign and national investors, who depend on foreign technology contracts or foreign equity contributions, have been frustrated by the bureaucratic delays in the approval of new projects, which average four to six months. Under current world and Venezuelan inflationary conditions, this delay adds a minimum of five to ten percent to the cost of a project. The delay is due to the shortage of trained personnel and continuing institutional and legal uncertainties. Second, as a new agency dealing with a new policy area for Venezuela and as an agency which is under jealous scrutiny by other government agencies, SIEEX has tended to move cautiously — both slowly and by following a strict interpretation of the rules. Ironically, a high level official of the previous administration involved in the discussions at that time and now an important figure in the private sector, recently was heard lamenting the costly bureaucratic delays and the strict interpretations which were frustrating projects he felt were in the interest of the country.

Perhaps the sources of greatest frustration, are the continued economic planning and legal uncertainties, both of which are endemic to societies newly attempting to implement major, massive socio-economic development plans.<sup>38</sup> The specific role foreign investment should play in the development plans or even the priorities sectors for such investment is not clear. This makes the job of applying a broad foreign investment policy far more difficult, especially in regard to the multitude of minute financial, legal and other problems which are the essence of modern business operations. In part, due to this overall imprecision, and in part due to the lack of adequate experience, SIEEX has found it difficult to decide upon specific interpretations for the many unforeseen (or unknown) daily business situations and problems which arise. Complicating this matter even further are the current subregional discussions on the regulations to Decision 24. In this kind of environment, many potential foreign investors or technology suppliers have been tempted to sit back and await a clarification of the rules. To its credit, SIEEX is aware of these problems. However, combined with a lack of independence at the national and subregional levels, a mere awareness has not been sufficient.

With respect to the specific application of the technology rules in Venezuela, there is still a great deal which is undefined. This is due in

large part, as noted, to the relatively brief experience to date. Decision 24 required the registration of all technology contracts within six months of the Decision's entry into force, which would have meant by July 1974. However, SIEX did not even begin to function until a few days prior to the statutory deadline. Since there were no defined procedures or registration forms at that time, the registration date was at first extended to the end of October 1974 (six months after the effective date of Decree 63), and then again extended to the end of 1974. With the promulgation of Decree 746 in February 1975, all of the previously registered, but thus far unchanged, technology contracts were required to be fully reformed by the end of December 1975. That entailed the deletion of all the offensive clauses as listed in Decision 24, and Decrees 63 and 746. The December 1975 deadline was extended to June 30, 1976, and may be extended again due to the lack of clarity, amount of detail and number of contracts involved. In many cases, the reformation requirement has meant the contracts have had to be completely renegotiated.

Originally for the purposes of registration, SIEX prepared a fairly lengthy and detailed form (SIEX-06) which elicited substantial information regarding the technology involved and which also required a series of other legal documents. In September of 1975, SIEX decided that even more detailed information on the legal, economic and technical aspects of the technology was needed. It issued the new and current form, SIEX-10, which requires that all preexisting, reformed and new technology contracts be submitted for appraisal on the basis of the new form. These contracts must be resubmitted for appraisal notwithstanding their previous reformation and resubmission under form SIEX-06. It was reported that the SIEX-10 form requirement was the principle reason for the December extension.

Since the enactment of Decree 746, registration and approval of technology contracts are now two distinct steps. Preexisting contracts were originally only required to be registered; the approval step was implied. Thus, a technology user could continue to pay royalties and abide by the other provisions of the contract, except as for contracts between affiliates which were proscribed by Decision 24. Following the mandate to reform these preexisting contracts, it became evident that SIEX intends to question the economic and technical aspects of these agreements as well, which are now to be limited to a maximum period of five years. SIEX has apparently considered these reformed contracts sufficiently new to allow SIEX to make an evaluation of their economic and technical terms, though Decree 746 refers only to the legal terms contained therein. Hence, even

with preexisting technology agreements, reregistration of the reformed documents does not necessarily assure continued approval, and it certainly will not assure approval in the case of new technology agreements. All such contracts are to be thoroughly evaluated in terms of the legal obligations established, their economic cost and value, and the importance of the technology involved. For the latter two categories, SIEX is being assisted by economic specialists from the Ministry of Development and other agencies, and by technologists from the National Scientific and Technological Research Council (CONICIT). In these cases, there is no doubt that SIEX can and is intervening to question the appropriateness of the terms of payment or the technology.

A review of the types of information required in the new form SIEX-10 may provide an indication of the means through which Venezuela is attempting to implement its technology policies as well as an indication of several of the problem areas foreign technology suppliers can expect to face in the future. First, the form requires detailed information in three areas: legal, economic and technical. (Legal refers to information about the parties and the contracts.) It has been this mass of required information which has forced the Government to extend the deadlines and which has caused the long delays in the approval of technology contracts. A high level SIEX official admitted in a public meeting the tremendous difficulties SIEX faces in making the economic and technical evaluations. The legal information, he noted, was easy to evaluate since that required only a quick review to guarantee that none of the prohibited clauses were included in the contract, whereas the economic and technical evaluations required clear national guidelines and highly specialized personnel, implying that neither are deemed adequate to meet the task.

SIEX Form 10 must be completed by the licensee or user of the technology. However, this often cannot be done without the full cooperation of the supplier. For this reason, the user must first apply to SIEX for its classification as a national, mixed or foreign company, thus subjecting even 100% Venezuelan companies to the scrutiny of SIEX. Detailed information concerning the Andean Group treatment of the final product is also elicited, i.e., whether the product is reserved for sectoral programming and, if so, whether an assignment has yet been made. Further, information is required regarding the other countries in which the technology is registered and contracted for. SIEX has suggested that it will be able to check with this information with the other countries regarding the use of the technology and the terms of the licensee.



The form requires detailed information on the disaggregated technology both by type and value as a percentage of the overall cost of the royalty being asked. This is in line with the Andean Group philosophy and has several purposes. Presumably, it will allow SIEX to determine which components can be supplied locally, thereby reducing the overall cost of the technology and, therefore, the royalty payment. And it will assist the country in determining whether it should place more effort on training local technicians or developing new peripheral or even modular technologies.

The licensee is required to state whether the technology might be acquired outright, possibly by the proposed Technology Bank for sublicense back to the user, or renegotiated either by the user or possibly with the help of SIEX or another agency of the Government. Both of these are important features of the overall policy and are indicative of the role SIEX sees for itself and other official entities. Finally, the legal information required for preexisting technology contracts includes detailed information regarding past royalty or other payments.

The economic information which must be supplied includes a number of factors important to the country, such as labor, national value added, expected production and anticipated export. The required information includes machinery replacement which might possibly burden Government sources of finance. The licensee is also required to list the principal competitors, in part to help SIEX determine if the sector is adequately served, especially by national producers. Complete price and distribution information is elicited, supposedly not for the purpose of price controls, but rather to help determine the cost of technology at each price level and to determine whether any of the intermediate stages between production and the final consumer might be eliminated. However, the applicant must provide complete income and profit information. Data is required regarding borrowing and other credit operations.

Lastly, under technical information, the form requires a description of alternative technologies available and a justification for the particular technology chosen. (The Superintendent has not yet attempted to implement his idea requiring that each applicant present at least three alternatives for review by SIEX.) Information is required on the type and terms of any equipment or machinery involved, including cost and depreciation. The Superintendent has suggested that if local entrepreneurs are not able to acquire such equipment on favorable terms, SIEX might step in to buy or renegotiate that which is needed. Data must be pro-

vided on the sources of any raw materials or intermediate goods. Despite the prohibition in Decree 746 against a determined system of quality control, information is required on the type of quality control system used by the licensee. In this regard, the Superintendent has stated that all products made with foreign technology will have to meet the standards to be exacted by the Venezuelan quality control authorities (COVENIN). Full information must be supplied on any research and development activities on the part of the applicant.

Thus far, there has been little experience upon which to judge the actual implementation of the many rules and criteria. This is, of course, due to the recent promulgation of the rules and requirements. However, there are several general principles which should guide potential technology suppliers. If the technology is to serve one of the high priority areas, such as petrochemicals, automotive parts, intermediate industrial goods of all kinds, or is a technology contract which fulfills any of the other national development goals, such as increasing non-traditional exports, augmenting employment, developing the undeveloped zones of the country, or strengthening the industrial infrastructure, the technology is likely to be viewed favorably. The "real" transfer of technology and know-how to the country, which include the willingness of the supplier to be generous in terms of the technology offered as well as in terms of training programs of all kinds and the employment of Venezuelans in high managerial and technical positions are also of key importance. Naturally, the Government is interested in paying as little as possible for its purchases. However, experience indicates that SIEX will allow a fairly reasonable price if it can be justified. Apparently, the general attitude has been that the money is available and the country will be better served by seeking the best, if the best can be obtained under conditions acceptable to the Government. Although there are a few exceptions, this has been the overall strategy in the key sectors currently being developed.

The Superintendent has voiced his views on several occasions regarding a few important criteria for royalty payments. However, it has not yet been established how these will be carried over into practice. Foreign technology suppliers are required to disaggregate their technology package and to itemize the cost for each component. These royalties, it is felt, should be calculated as a percentage of net sales, but with a fixed limit so that such payments do not exceed a defined percentage of net profits before tax. However, it is understood that SIEX has already approved several technology contracts providing for a set fee per unit produced. In the same regard, the Superintendent has suggested that royalties fixed on

a declining basis will be preferred, i.e., the royalty percentage would decline as the number of units produced or the volume of sales increased. The termination of royalty payments prior to the end of the five year period after a certain amount has been paid or a specified number of units produced would also be preferred.

In general, SIEX believes that the higher the percentage of the Venezuelan market, or the higher the profit return, attributable to the foreign technology, the greater the inducement to stay in the Venezuelan market. Therefore, the technology user will be in a stronger position to bargain for a lower royalty. On the other hand, the Superintendent has also expressed the view that if the technology user were to make a relatively low profit, then the royalty fee paid should be proportionately lowered. Finally, on a positive note, the Superintendent stated that the idea of paying a higher royalty on the portion of production which is exported, as an inducement to exports, is being contemplated. To date, and this should continue at least until the preexisting contract has been modified or rejected, SIEX has allowed technology users to continue to pay royalties, except between affiliates, even though the respective contracts have neither been registered nor approved. However, there is a restitution and fine provision for illegal payments.

One slight deviation from the general Decision 24 rules which has been mentioned is the possibility of approving a "grant-back" clause requiring the user to convey to the supplier improvements or innovations discovered by the user, but only if the supplier agrees to provide an equivalent additional technology to the licensee. The supplier presumably could try to include such a clause promising the payment of an adequate compensation.

On the matter of preexisting contracts, SIEX has announced that the contracts will be limited to a five year period, but there remains some confusion as to the date when this period commences. The Superintendent has said the period should commence from the date the contract was signed, or at the latest from the date of entry into effect of Decision 24 (January 1, 1974). On the other hand, if the contract is required to be completely reformed, the question arises as to whether it is a new contract. On this point it has been suggested that each case must be decided on its merits, but the general feeling is that all resubmitted contracts should contain a new date.<sup>39</sup> Presumably, then, the five year period would commence as of the date of approval; before that time the contract would have no legal effect even though royalty payments would be permitted.<sup>40</sup>

In regard to the five year rule, thus far no exceptions are known to have been granted. SIEX has offered as one possibility the inclusion of a renewal clause, but subject to full review by SIEX at the end of five years, which is not a guarantee of renewal. Another idea suggested was that a technology supplier who wanted a term longer than five years might at the outset write multiple contracts to commence when the technology covered was to be used. However, thus far the Superintendent has said he can approve only present contracts and that contracts to be signed in the future would have no validity.

In further exercise of the State's power, SIEX has announced that it will consult with its Andean partners as well as other countries, including Argentina, Brazil and Mexico, to discern which particular technology suppliers have been unwilling to comply with the national policies.<sup>41</sup> SIEX has acknowledged that if it forces national technology users to renegotiate their contracts or if SIEX is more exacting, this could cause some hardship should the suppliers not wish to renegotiate under the terms demanded by the country. In these cases, SIEX or possibly the Technology Bank could step in either to negotiate with the previous supplier or to assist the local entrepreneur in locating an alternative technology source or product source in the case of trademarks.

Finally, one matter which has been mentioned but which deserves further attention, although there appear to be no cases on the subject, is the existence of the various possibilities for transformation of foreign enterprises. It was noted earlier in regard to the Transformation Law that several substantive issues are not included therein, such as reference to a formula or measure for calculating the value of foreign shares or a possible mechanism which could be used should the shares not appear attractive to the market. With respect to the formula, it appears to be the presumption that a market value will exist or that a reasonable agreement can be reached. There have been exceptions; for example, the situation could be quite different for a relatively small foreign company which has comparatively more of its assets tied up in a Venezuelan subsidiary than for one of the petroleum giants.<sup>42</sup>

Where the foreign shareholder could not find a market for his stock at a just price from the point of view of the foreign company, and presumably of the country, or even if a preferred market were found, several possibilities have been mentioned as remedies. In the event there were no ready buyers, one proposal is that the Government, through the Venezuelan Investment Fund or other agencies, acquire the shares outright,

with the intention of later selling them to as wide a public market as possible. According to another proposal, the Government, through SIEX or some other entity, would acquire the stock in trust for the shareholders. The Government would have the right to vote the stock but would allow the shareholder to receive the dividends until a reasonable scheme for the stock's sale could be arranged.<sup>43</sup>

Another idea, which would be more appropriate for smaller companies would be for the foreign company to sell a certain percentage of shares to the workers individually or to the local union. However, the foreign company would maintain a first option to repurchase when the worker leaves the company in order to resell to the next worker or to others already employed. The goal would be to maintain a permanent stimulus and allegiance on the part of the workers. If this idea were to be accepted, as it might, it would be necessary to guarantee that the worker acquire full legal control and independence in the exercise of the rights incident to ownership of the stock. The option formula would have to be carefully worded so as not to violate the principle that national shares normally cannot pass back to foreign ownership. In theory, this idea would appear to appeal to SIEX. It accords with the new Transformation Law. Further, the notion of giving the employees of any company a significant, but reasonable (10-20%) share is popular. As suggested earlier, however, there is no thought at the moment, being given to anything approaching the Peruvian scheme whereby the workers of any private company were to acquire 50% ownership.<sup>44</sup> SIEX officials have, at least in this regard, expressed a sense of awareness and concern about the possible disruptive effects which a policy of this kind could have. Nevertheless, it is too early to predict the particular method of transformation which will be adopted. With the broad discretion given to the Government by the Transformation Law, this is an area ripe for pressures from many sides.

#### RESULTS AND IMPLICATIONS FOR THE FOREIGN INVESTOR OR TECHNOLOGY SUPPLIER

If all the data were available on foreign investment and technology flows occurring since Decision 24 went into effect in the Andean sub-region, it, nevertheless, would be impossible to make a thorough evaluation of the Decision's impact. Neither the evils of DFI nor the supposed benefits of greater control are readily quantifiable. In addition, the broad Decision 24 policy toward DFI is only one of the factors taken into ac-

count by foreign investors or technology suppliers, and in some of the Andean countries the great shifts in the politico-economic conditions have weighed much more heavily. With the exception of Ecuador, none of the Andean countries has received greater direct foreign capital or technology inflows after 1970 than previously in the manufacturing and agroindustrial sectors. In fact, several countries received reduced amounts. (The manufacturing and agroindustrial sectors are practically the only sectors governed by Decision 24 due to the permitted application of national laws in the mining, finance, service and other sectors.)

In the case of Ecuador, aside from the tardy implementation of Decision 24 in practical terms and the added inducement of a free exchange system with few controls, much of the increase in foreign capital was due to the petroleum boom of the early 1970's and came from other Latin American countries from which there has been substantial capital flight in recent years. Other countries, such as Colombia, have continued to report normal or increased amounts of new capital investment, apparently proving that Decision 24 has not frightened away foreign capital, and that foreign investors are learning to live with the new rules. However, upon close inspection it may be observed that in the vast majority of cases these investments are either special arrangements with the host governments (as in the minerals and other sectors) or are actually loans. The investments may also be the cause of the expansion of existing DFI to meet the increasing demand of growing economies or may be used to fill voids created in many instances by deliberate import substitution policies. Relatively few of these supposed investments are actually new investments in the nonpublic sector. Another important factor which must be taken into account, and which is extremely difficult to measure, is the number of these new investments which may be only expressions of a future, but not a present intent to invest. For example, under the pressures of the import substitution policies and in some cases of Andean Group programming, it has appeared advisable to register new investment projects so as to foreclose the possibility that a competitor might take advantage by making the actual investment at a later date depending upon conditions at that time.

In the case of Venezuela, the figures for 1975 show a rather meager \$52 million in new registered investment of which \$11 million were reinvestments in existing enterprises. This amount is even less than that reported in Colombia in 1974. These figures compare to a registered base of roughly \$1.2 billion, though the official report states that this is not an accurate reflection of the total DFI in Venezuela (almost an equal amount

was refused or is still pending registration, and all of these figures exclude the petroleum, mining and tourism sectors). Reportedly, 116 new technology contracts were submitted for approval, but only 15 were approved during 1975.<sup>45</sup>

The lack of increase in inflows after 1970 was in part the expressed intent of the Decision 24 planners. There was an implicit assumption that enough DFI had already been absorbed, and an explicit determination that only DFI through joint ventures should be accepted. It is interesting to observe, however, that the country experts and responsible officials appeared to express doubt as to the wisdom of this view at their meeting in November of 1975 to discuss a set of regulations for Decision 24.

It has already been speculated why matters have moved so slowly in Venezuela. Undoubtedly it is due, in part, to the limited number of personnel in SIEX and to the bureaucratic and political difficulties of initiating activities in a new policy area. However, there are a number of other factors which must be considered in order to understand the functions of SIEX and the strategies being adopted by foreign investors and technology suppliers.

First, it must be realized that in regard to new DFI or technology contract applications, SIEX plays a direct role in the negotiations. In effect, SIEX becomes either the national representative in the case of a new DFI venture in which there is no local partner, which is becoming extremely rare, or in the alternative, a third party between the national and foreign partners. In the case of new proposals, it is no longer possible to simply register a project. It is equally impossible to avoid negotiating with SIEX on the project, though the negotiation may take different forms. SIEX has often hinted that it would prefer informal consultation with the prospective investor or supplier. However, if the investor or supplier chooses to avoid the informal route, the result would be the same with the formal document presentation. SIEX takes the position that the documents represent a mere proposal to be examined and questioned. Local lawyers, economists, auditors and consultants who bear the brunt of the work between prospective investors and SIEX are divided in their opinions as to whether it is wise to anticipate too much of the probable negotiation with SIEX through preliminary informal discussion. Of course, the specific strategy adopted on behalf of the client may depend upon the type of investment or technology involved since the ratio between the desire of the Government to obtain a particular technology and its availability in the world is always a decisive factor.

The willingness of the foreign investor or technology owner to accept the new rules has varied. Several major projects of great importance to the country have been stymied thus far due to the unwillingness or inability of either side to make concessions on the critical issue of technology. The Government has stood fast on its five year rule. At the same time, it has offered lowered compensation or continued confidentiality, both of which are unacceptable to the foreign companies. Partially as a result of this experience, potential investors have preferred to keep a careful watch on the situation, rather than to informally approach the Government, until the policies the Government decides on are clear. This kind of strategy may include the occasionally long and arduous task of looking or waiting for the right kind of local partner. This method will probably be the prevalent form of DFI in the future, although its incidence cannot yet be determined. It may depend, in part, on whether commercial companies are allowed and choose to convert into manufacturing operations.

However, having found a local partner may provide little guarantee that all will go smoothly, for at least two reasons. First, although the foreign and local investors or the foreign technology suppliers may have worked out an arrangement to the satisfaction of both, SIEX may object for whatever reason and suggest that if the project is to be registered certain changes will have to be made. This initiative could come independently of SIEX or it could originate from the local partner who suggests it to SIEX or a higher level within the Government. As another possibility, the local partner, initially acting in good faith, may suddenly decide that, justified or not, he may get a better deal by tacitly or expressly siding with SIEX. This is in part just the role SIEX seeks to perform. In all cases SIEX will attempt to reduce the costs, from the point of view of the country, to a minimum. In many ways, this situation is a relatively standard bargaining situation in joint venture operations. However, in many countries of Latin America, the foreign investor will find that a third party has been added to the equation in the form of the Government and that often the game will be played two against one. If the potential investor or technology supplier is in a monopoly or tight oligopoly position, his bargaining strength may be reduced only slightly. In most cases, the outcome will depend on the uniqueness of the technology, or the case will involve limited technology suppliers who are willing to make special concessions. However, if the potential investor or technology supplier is not in such a situation, the competition among the interested parties may become analogous to bidding on an attractive public works project. This type of competition may not be so bad considering the many



sizeable engineering and consulting firms abroad; on the other hand, the firms risk limited quantities of capital and monopoly technology with each participation.<sup>46</sup>

The second reason why a local partner may provide little guarantee is the attitude which SIEX has thus far appeared to adopt regarding what it intends to negotiate or rather, the nature of its function. For example, in one instance an important company prepared what it thought to be a generous offer to Venezuela which included the supply of a new and valuable technology for which it offered to accept no royalties or other payments. The company would initiate the venture as a broader joint venture than legally required and sell down to a mixed company position at a fairly modest preset price in less time than required by Decision 24. SIEX turned down the proposal and suggested that a shorter transformation period would be more appropriate. (Transformation periods not exceeding 15 years are listed in Decree 63 as one of the criteria which SIEX takes into account in approving foreign investment — Art. 27.) The company then agreed that it could sell down in the shorter period suggested, but it would have to increase the sale price of its ownership to compensate for the loss in anticipated earnings. This was rejected as well on the grounds that although the Government could suggest modifications in the proposal, once the interested foreign investor made the offer, he was bound by it. In other words, the Government does not negotiate. This does not occur in all cases, but the apparent lesson is do not make an offer *until* you negotiate. If that is not possible, ask for more in the offer than is expected and hope to come out with a reasonable deal if suggested reductions are made. The latter strategy may be termed the law of the market place, but it is not the best method to follow in order to obtain the most rational and beneficial arrangement for both parties; it would be better to negotiate. However, in order to negotiate advantageously, one must have knowledge of what one is negotiating about, and knowledge is not a free good, at least not in a commercial setting.

A particular Venezuelan technology transfer provision, contained within Decree 63 (Art. 27), which limits new technology transfer contracts to maximum terms of five years, deserves special mention. The provision has been extended, by interpretation and practice, to cover preexisting contracts as well. As noted earlier, this provision is more restrictive in Venezuela than in any other country in Latin America (with the possible exceptions of Argentina, Brazil and Colombia) or the world, including the socialist countries where contracts of fifteen years or more are not uncommon. In Venezuela, it is beginning to be recognized that

this rule could be quite costly for the country in cases where the technology is still fairly rare and therefore expensive, or where the technology is part of a new industrial activity which requires several years or more just to install and begin. Where this rule has not succeeded in dampening interest altogether, technology suppliers are disaggregating their technology offers, where the technology is still rare, to select what they feel would be reasonable to sell in the first five year period rather than what they can sell in the second five year period. This does not apply to licensing since there can be no industrial property protection after the term of the contract.

Where the technology is part of a new industrial activity, the whole transaction may take on the characteristics of a turnkey operation (about which derogatory remarks are constantly being made in Venezuela because of a couple of monumentally bad experiences). The technology supplier will be tempted, if not forced, to charge a high fee for the installation since there will be only a year or two in which to recover the value of the technology sold. From the point of view of the national investor, this could be the worse rather than the better of both alternatives. The national investor will have to pay out a large sum before production begins, and once begun, he will have no continuing guarantee that the technology supplier will maintain a sufficient interest in maximizing the efficiency and profitability of the production as would be the case if royalties or adequate dividends were based thereon. In defense of Venezuela, it may be noted that Venezuela reportedly has been one of the stronger advocates for substantially raising or eliminating altogether the 14% profit remittance ceiling. However this would not help if the foreigner holds no equity as might be the case in a number of the Government's key projects. It is somewhat ironic in this regard that the Government entered into two year renewable management, technology and supply contracts in both the nationalized iron and petroleum industries. An analogy could be drawn between these situations and the quasi-turnkey hypothesis above if one assumes that the prior concessions are comparable to the latter. Thus, the Government would be allowing itself the security of continuing technology for royalty and service fees, which is now denied to the non-public sector, but governments have never felt necessarily bound by the same rules intended to govern others.

Finally, the temptation to comment on the provision in Decree 746 to the effect that a trademark licensor cannot prevent the licensee from using a similar or like trademark after the contract expires cannot be resisted. In Latin America, and undoubtedly in many other parts of the

world, well-known trademarks often elicit double emotions: on the one hand, there is resentment that brand X is dominant and foreign; whereas on the other, that same brand X carries prestige and is of recognized and appreciated quality. Because of the resentment, the first several drafts of the Andean Group's Common Industrial Property Code, now Decision 85, included a provision which would have prohibited the use of foreign trademarks by subregional producers beginning in 1977. However this provision was later stricken.

Nonetheless, of all the various technology provisions in the Venezuelan legislation, the provision in Decree 746 seems the most radical in terms of conventional practice. Of course, many trademarks are related to the transfer (commercialization) of sophisticated technologies which, if ended, would pose little threat that the product could be copied. However, how many food, beverage and pharmaceutical products, for example, could be affected by this provision? The Superintendent has attempted to reassure foreign trademark registrants by observing that only long-time licensees could possibly be allowed to avail themselves of the new privilege and that some protection against sublicensing abroad may be permitted. But it may be asked under what legal authority is the Superintendent making or, more importantly, providing the legal guarantee in his reassuring statements. If the interpretation is correct that Decree 746 has now supplanted the old Industrial Property Law, which does (or did?) protect trademarks, then one will search in vain for legal support for the Superintendent's position. It is this kind of attitude which could most dampen any enthusiasm for transferring many types of consumer technologies to Venezuela.

Except for the hard kinds of cases where there is a struggle involving the interest of the country in having a particular technology and a sound financial interest on the part of the potential supplier to get a fair return for giving it up, many attractive opportunities for a modest foreign participation in Venezuela's current economic boom would appear to be available. Both public and private entrepreneurs are becoming more skillful and aggressive in going abroad to seek the special technological ingredients needed for any specific project. Often they insist that the foreign party take an equity position which it is felt will guarantee a stronger, continued interest. Furthermore, the Government is becoming more adept in international trade, investment and economic negotiations which, in some cases, have helped the foreign investor secure a position, albeit minority, in markets other than that in Venezuela. In this sense, Venezuela has begun to act like a budding capitalist (some of its closer

neighbors have begun to say "imperialist") for which it will need foreign help. By no means will this be limited to Latin American or other Third World countries, as long as the appropriate bargains within the context of the expressed principles can be reached. This is not to suggest that any particular foreign investor or technology supplier or class or nationality thereof should make the kinds of concessions demanded. Rather, Argentines, Mexicans, Europeans, and perhaps others who have less at stake, may be more able and willing to take the risk. They may even be more successful than traditional suppliers for reasons of affinity, and in some areas, they may eventually be just as good.

What conclusions, then, can be drawn by the interested foreign investor or technology vendor? First, there is a new set of conditions in Venezuela, positive in terms of the economy and perhaps restrictive in terms of the law. Each investor or supplier, when approached by a Venezuelan or vice versa, will have to decide whether the costs and benefits offered or available, within the context of the particular business, are favorable or not. In the last section of this article, several different approaches have been suggested which range from waiting and doing nothing, to attempting to negotiate a final agreement before committing one's position to paper. In any event, SIEX is not the only government agency involved, although it has been the only one mentioned. There is a growing number of governmental entities which will have to be consulted, and whose approval will be required before reaching SIEX. It should be recalled that SIEX is only a dependency of a ministry with limited rank in the official hierarchy. Invariably, there are conflicting interests when broad and major policies are implemented. Consequently, SIEX may not always make its judgment prevail.

There are other strategies that firms can and do adopt. One which is not uncommon is for firms to fill out all the required forms and write the contracts as the governments demand. The firms either know beforehand that some of their claims can never be filled or hope that the governments will create, by virtue of their sound leadership and administration, the conditions necessary to allow the companies to realize their ambitions. In some cases, there is no choice; for example, one country in which a particular technology is licensed may prohibit imports as an official policy, whereas another country registering a new license for the same technology may dictate that exports cannot be restricted. In other situations, the economic conditions may be so uncertain, even in the immediate future, that an investor cannot possibly know whether he will be able to export or not, how much he will pro-

duce, at what price, and with how much employment. Can one believe that the Andean Group integration program will be fulfilled — the law says it will be — or that some other promised trade negotiation will be successfully concluded? One cannot admire a company which would knowingly exaggerate its claims. However, the questions can become very fine when it comes to actually knowing what to claim as the prowess of one's investment benefits or technology.

If there is little that is certain in the foreign investment context in Latin America, perhaps solace can be taken from the following. Both Governmental and foreign investors or suppliers should continue to adhere to their basic principles; no one will be served if inexpensive, outmoded and inappropriate technologies are transferred to Latin America. World market prices or the true development or commercial value should be charged. At the same time, greater efforts should be made to train the recipients and to help serve the aspirations of the recipient countries. Investors and suppliers should attempt to better understand the legitimate development goals of Latin America and to realize that rapid progress can be made, but in small steps. On the other side, the problems are plentiful and diverse. Nonetheless, it would help if a beginning could be made in defining more precisely the kinds, qualities and end purposes of the technologies which are needed for the priority sectors, who has them, and how they might be transferred. This does not mean abandoning principles, it only means being more pragmatic. For better or for worse, the defining and organizing may result in greater internal centralization of the economy. In some ways, this is ironic. Venezuela is increasingly in a position to be more capitalistic in its external affairs. It may as a result of this irony that Venezuela will reach a satisfactory level of development more rapidly, which appears to be the only real solution.

#### RECENT DEVELOPMENTS

As mentioned in the author's note, several events concerning the Andean Group and Venezuela have taken place since the article went to press. These events are discussed below and should be compared with the section of the article entitled "Recent Events Regarding the Possible Modification of Decision 24."

The most significant of the recent events was the approval of Decision 103 by the Commission of the Andean Group on October 30, 1976. Decision 103 modifies Decision 24 as follows:

1) Art. 1, containing the definitions used in Decision 24, has been rearranged for purposes of clarity, but the only real addition is the equating of subregional investment ("the investments of property of subregional investors") with national investment when certain conditions are met.

2) Art. 4, of Decision 24, was modified to permit the participation of foreign capital in national or mixed companies if the purpose is to increase capital and the company continues to be at least a mixed company. Previously, the percentage of foreign versus national ownership had to remain unchanged.

3) The percentage of the registered capital base which the foreign investor may reinvest without prior authorization was raised from 5% to 7% in Art. 13.

4) Art. 17, regarding access to internal credit, was liberalized so that now foreign investors may have access to short and medium-term local credit which is defined as up to three years.

5) On the matter of transformation, the new operative date is now January 1, 1974 for beginning the transformation period (15 or 20 years) and for defining those foreign companies which were pre-existing within the terms of Art. 28. As this does not modify Art. 30 regarding the obligation of new foreign enterprises (those established after July 1, 1971) to transform, it must be understood that a foreign company established in the subregion between July 1, 1971 and January 1, 1974, which entered into a transformation agreement as a prior condition, is still bound thereby. Likewise, there is no change in the date of decision for preexisting foreign companies not obligated to transform, but which decide to do so to take advantage of the liberation program. That date remained unchanged for three years following the entry into effect of Decision 24. This is somewhat academic though, as the Commission by interpretation, has declared that if such a company wishes to transform after the three year period has passed, it may still do so, but that the transformation period would be accordingly shortened. Now, with this harmonization of the date for transformation, the allowable period has been extended slightly even for these companies; that is, they could now make this decision by the end of this year (1976) and not be prejudiced by a shorter transformation period. Of course, this will not affect Venezuela at all as its entry into the Group only took effect on this new date.

To implement this change, for foreign companies which voluntarily entered into a transformation agreement, Transitory Article A of Decision 103 provides that such foreign companies "may" now agree with the administrative body that the period agreed upon is to commence as of this date.

Also related to transformation, Art. 31 was modified to permit the transformation to occur through an increase in capital subscribed by national or subregional shareholders, instead of limiting the process to the sale of foreign shares as was previously implied.

6) Art. 34 was modified to permit foreign investments engaged in tourism under the same conditions as foreign companies which export 80% or more of their production to third country markets.

7) One of the most significant modifications to Decision 24 is to Art. 37 which raises the profit remittance limitation from 14% to 20% and allows the countries to raise it even higher, communicating such decision to the Commission.

8) A new article to Decision 24 allows the investments made by international governmental entities to be counted as "neutral" investments which are not included in the calculation to determine the classification of the particular company. Finally, an article providing that the Group may accord special treatment for non-member Latin American investments was added.

On December 1, 1976, the Commission of the Andean Group concluded its XXIst Period of Ordinary Sessions. During that period, it approved Decisions 109 and 110, again modifying Decision 24. Decision 109 modifies Decision 24 by (1) further clarifying the neutral character of investments made by public international institutions, (2) allowing each country individually to waive the one year residency requirement for foreign residents who wish to have national investor status by renouncing their right to repatriate capital and remit earnings, and (3) allowing Bolivia and Ecuador to apply a more liberal treatment than provided in Decision 24 to foreign investments made in primarily agricultural activities. Decision 110 permits investments made by mixed companies (those with a maximum of 49% foreign equity) under Decision 24 to be calculated as national or foreign in the same percentage as is their respective equity in the investing company.

All of the modifications approved by the Andean Group Commission must now be implemented by the appropriate national legislation in each

country. Though this will not be complete until sometime in 1977, it might be expected that each country will begin to apply these modifications as soon as they become part of its national law.

In addition to the Andean Group developments, Venezuela has been studying possible modifications to its internal regulations which implement Decision 24. First, a way apparently is being sought to exempt foreign companies which deal in high technology product lines from the obligation which requires, according to Decree 62, their transformation into national companies. Second, the maximum term of duration of transfer of technology or technical assistance contracts, as established under Decree 63, may be extended from five to ten years. Since several competing proposals have been made, however, the exact nature of these modifications will not be known until they are issued by presidential decree.

#### NOTES

<sup>1</sup>The Andean Group is a subregional customs union formed in May 1969 by Bolivia, Chile, Colombia, Ecuador and Peru. Venezuela adhered to the Group, or Pact (the formal name is the Acuerdo de Cartagena) in February 1973, though its entry did not become effective until December 31, 1973. One of the Group's principal features is a nationalistic policy toward foreign investment and technology transfer which is commonly known as Decision 24 of the Andean Group Commission. This legislation was adopted in Venezuela by Decrees 62 and 63 of April 1974. These laws will be discussed in greater detail below.

<sup>2</sup>In addition to Decrees 62 and 63, Venezuela has approved the following: Decree 746 (February 1975) containing significant new restrictions regarding technology contracts, the Foreign Enterprise Transformation Law (August 1975) which governs the sale of foreign held shares to national investors, and Decree 1225 (October 1975) which governs foreign investment related to the petroleum industry. Besides these measures enacted as decrees or laws there are a number of other ministerial rulings of implementation or interpretation. Also, several new measures have been proposed covering such areas as the conversion of foreign companies engaged primarily in commercial activities but which desire to convert into manufacturing enterprises, obligatory actions intended to encourage technology transfer, and at the subregional level the discussions being held to regulate Decision 24. All of these measures, or proposals, are discussed in this article.

<sup>3</sup>At the close of the Commission meeting held in early April 1976, such modification appeared more likely. It was decided to allow Chile to resell to foreign investors those companies nationalized by the Allende administration and still under government control (Decision 97). Also, agreement was reached in principle to push forward with the prompt modification of some of the Decision 24 provisions to bring the code more in line with current "international economic realities."

<sup>4</sup>For an English translation of Decision 24, see 11 I.L.M. 126 (1972). For Decision 70, Arts. 33 and 34, which modify Decision 24, see 12 *id.* 349 (1973).

<sup>5</sup>For an English translation of Decision 84, see 13 *id.* at 1478 (1974).



<sup>6</sup>For an English translation of Decision 85, see *id.* at 1489.

<sup>7</sup>The Minister of Development, José Ignacio Casal, who has direct jurisdiction over foreign investment and technology transfer, stated in an interview on March 29, 1976, that the necessary studies were being completed, that Decision 85 would soon be approved by the Congress and that it would change significantly existing Venezuelan legislation in this area (*El Nacional*, March 30, 1976). Decision 85 as it is written would modify the current Venezuelan Industrial Property Law of 1955, but how "significantly" will be known only when the new legislation is approved by the Congress.

<sup>8</sup>GACETA OFICIAL, Nov. 1, 1976, No. 1620 Extraordinario.

<sup>9</sup>For an English translation of Decision 46, see 11 I.L.M. 357 (1972).

<sup>10</sup>This Decision established the norms for the formation of Andean multinational companies formed by investors of at least two Andean countries in which neither could hold less than 9% of the equity, but which could allow up to a 40% foreign (non-Andean) participation.

<sup>11</sup>GACETA OFICIAL, Apr. 29, 1974, No. 1650 Extraordinario.

<sup>12</sup>Reportedly, the decision has now been made to transfer SIEX from the Ministry of Development to the Ministry of Finance, presumably on the grounds that foreign investment is more appropriately a foreign exchange matter, and that the national policy in this regard is set at the presidential and congressional levels and not at that of a particular ministry. Though the necessary decree to effectuate this change has not been issued, it is supposed to occur on January 1, 1977, and is reportedly already being carried out in practice.

<sup>13</sup>*Id.*, Mar. 1, 1975, No. 30635.

<sup>14</sup>*Id.*, Aug. 21, 1975, No. 30774.

<sup>15</sup>*Id.*, Oct. 21, 1975, No. 30827.

<sup>16</sup>It is this provision (Art. 11) which in particular has been questioned on constitutional grounds.

<sup>17</sup>This definition has been continually reiterated by SIEX, both formally and informally, and may be considered as "quasi-law" though it never has been embodied in a decree or otherwise issued in any other form which has been published.

<sup>18</sup>It is more likely that this requisite would be demanded in order for toll manufacturing to qualify within the 51% gross sales of nationally produced goods.

<sup>19</sup>Domiciliation is required by the Venezuelan Constitution (Art. 126) for work performed by foreign companies for ministries and many government owned entities.

<sup>20</sup>Decree 869, GACETA OFICIAL, May 22, 1975, No. 1742; Decree 870, *id.* in No. 1743.

<sup>21</sup>Proposal No. 59, Arts. 34 and 35, Dec. 27, 1974.

<sup>22</sup>Decree 63 specifically refers to "new" technology contracts. Hence there appears to be little legal authority for extending this rule to cover prior contracts.

<sup>23</sup>However, Colombia, by internal regulation of its Royalties Committee, has established a three year rule, though assurances regarding renovation have been easier to obtain.

<sup>24</sup>Brazil has been limiting technology contracts in some cases to five years and in general has been tending toward a more restrictive policy. Now, in Argentina following the anti-Peronist coup greater flexibility will again be allowed.

<sup>25</sup>Translations are by the author.

<sup>26</sup>GACETA OFICIAL, Dec. 2, 1975, No. 30861.

<sup>27</sup>Equally of interest on this point is the contradiction, at least in policy, between the five year provision of Decree 63, and Decision 85 and the Industrial Property Law of 1955, neither of which imply such a short time period (Decision 85 would permit the granting of patents for up to ten years and unlimited periods in the case of trademarks).

<sup>28</sup>At best it will probably be some time before SIEEX or any other governmental agency attempts to implement this, but of course there may be other forms of pressure regarding choice of technology.

<sup>29</sup>This may occur specifically when a foreign resident wishes to be treated like a national investor by accepting the same conditions for removing foreign exchange from the country (Art. 1 of Decision 24; Art. 21 of Decree 63). As Venezuela has no exchange controls, and abundant foreign exchange, for the present this implies no sacrifice as it would in Chile, Colombia or Peru, all of which have strict exchange control.

<sup>30</sup>A few examples will suffice to illustrate this point. In the country's new automotive plan, under which national value added is to reach 90% by 1985, motor blocks are required to produce even before the forging and founding facilities are to be installed (supposedly the unfinished blocks will be imported and machined in the country). In the few basic research centers in the country there has been a tendency to finance research on processes or final products which already exist and could be acquired, including the inherent learning, at much more modest costs. Finally, when a world prestigious research institute offered to the Government a proposed study on technology policy alternatives the reply was that "there is nothing wrong with the policies, all that is lacking is the technology."

<sup>31</sup>This concept had been used before, significantly by the current Minister of Foreign Affairs, Ramón Excovar Salom. See, e.g., R. SALOM, AMERICA LATINA: JUEGO SIN FRONTERAS, 70 (1973).

<sup>32</sup>Since the nationalization of the petroleum industry on January 1, 1976, some of this confidence has begun to fade. First, the ex-petroleum concessionaires agreed to purchase only three-fourths of what they had been exporting and as petroleum exports account for over 90% of the country's foreign exchange and over 80% of government revenues, this caused an embarrassing budget squeeze. Second, it was becoming more apparent that the many major capital investment projects were too ambitious in terms of public administration, human resources, financial capital and technology, and that there would not be the rapid transformation which had been expected. Next, the country continues to suffer from an inflation which is relatively mild (roughly 15%) in world terms, but which has caused adjustment shockwaves and dangerous speculation in some sectors. Finally, though one could mention other danger signals, the sometimes arbitrary, drastic measures adopted by the Government in the area of economic decisions, such as price controls and the expropriation of Owens-Illinois in April 1976, do not help to generate feelings of political or investor security.

<sup>33</sup>As indicated in the preface to this article, Decision 24 has been partially modified, incorporating, or rejecting, some of the points noted in this section. However, the Secretariat, at least, continues to urge a common set of regulations to Decision 24 and therefore some of these proposed changes may still be relevant. This description is also thought to provide a useful indication of the differences of opinion among the member countries on this important question.

<sup>34</sup>This was contained in Decision 97, which now with the withdrawal of Chile has become superfluous.

<sup>35</sup>This office has been designated the Office of Control of Foreign Enterprises and Investments. *El Universal*, Nov. 2, 1976.

<sup>36</sup>This judgment, like many in this area, is subject to political shifts which are sometimes hard to foresee. Thus, while what is stated in the text is usually the case, the Committee on several occasions has overruled the Superintendent. On such occasions, the Committee's rulings have usually been on the restrictive side.

<sup>37</sup>These were especially the Foreign Trade Institute (ICE), nominally under the Ministry of Foreign Affairs, and the National Scientific and Technological Research Council (CONICIT), directly ascribed to the President.

<sup>38</sup>The Government finally approved the current Five-Year Plan, which should have been adopted near the start of the present administration which took office in March 1974, though this was delayed until February 1976. However, as in the case of most such plans, it provides few guidelines in this area for the Superintendency.

<sup>39</sup>On the other hand, if the original contract date is not unreasonably beyond an additional five years, and there is little question about the value of the technology, the original date could probably be left intact.

<sup>40</sup>By December 1976 roughly half of these preexisting contracts had been approved and registered with many having been given a new beginning date of June 30, 1976. While this was the final date for presentation of these reformed contracts, no explanation has been given for choosing this date as opposed to the actual date of registration, which in most cases is several months later.

<sup>41</sup>In several cases such consultations, particularly on the amount of the royalty requested, are known to have taken place.

<sup>42</sup>This is not to suggest that the oil or iron ore concessionaires, or other foreign companies which have been nationalized, were satisfied with the compensation paid. On the contrary, the policy of the government appears to be to offer compensation very near the book value, but then to offer additional inducements and compensation to maintain managerial or technological inputs from the foreign company. This allows the government to appear to have negotiated a favorable financial settlement while at the same time establishing a new contractual relationship between the country and the foreign company.

<sup>43</sup>These two possibilities are actively under study with the Venezuelan Development Corporation which has announced that it intends to perform just such an intermediary function. Likewise, the private sector banks are readying their trust departments to participate in the transformation process, if and when they are allowed by the government to do so.

<sup>44</sup>It now appears that this legislation will soon be modified in Peru. The workers may still be entitled to receive a direct ownership share, but this will probably be reduced to no more than 33%.

<sup>45</sup>*See, Memoria Anual* of the Ministry of Development for 1975, report of SIEEX.

<sup>46</sup>A related problem has arisen in some cases of preexisting technology contracts with a local partner where the local partner has refused, overtly or covertly, to register the technology contract and even in some instances has stopped paying the royalties due. This obviously puts the supplier in a difficult position as eventually (supposedly after June 30, 1976), if the contract is not duly registered, it will not be legally valid and, therefore, no payments can be demanded. The Superintendent has said that he would take a very dim view of permitting his countrymen to take unfair advantage of this legislation to avoid their legally valid responsibilities. However, at the same time, no contract is valid until approved and registered, which means that the Superintendent also has to approve of that particular technology transfer under the terms expressed in the contract.