

Decision 291—Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties*

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The Commission of the Cartagena Agreement,

Having Seen: Articles 7, 26, and 27 of the Cartagena Agreement, Decision 220 of the Commission, and Proposal 228 of the Board;

Whereas:

The Presidents of the Member Countries of the Cartagena Agreement, meeting in the city of La Paz, Bolivia on November 29 and 30, 1990, expressed their pleasure at the “growing alignment of the economic policies of the Andean Countries in an effort to attain more efficient and competitive economies through liberalization and the opening to trade and international investment, along the lines of our countries interest, and the institution of economic rationality grounded in private initiative, fiscal discipline and a rescaled and effective State”;

Furthermore, at that same meeting the Andean Presidents agreed to remove the obstacles to foreign investment and to encourage free circulation of Subregional capital;

The new foreign investment policies prevailing in the Subregion make it essential to review and update Community rules and regulations approved through Decision 220 of the Commission, in order to stimulate and promote the flow of foreign capital and technology to the Andean economies;

Decides:

To replace Decision 220 with the following Decision:

Chapter I

Definitions

1. For purposes of the present Regime, the following definitions shall apply:

Direct Foreign Investment: contributions from abroad owned by foreign individuals or legal entities, to the capital of an enterprise, in freely convertible currency or in physical or tangible assets, such as industrial plants, new and overhauled machinery, and equipment new and overhauled equipment, spare parts, parts and pieces, raw materials and intermediate products.

Also considered as direct foreign investments are investments made in local currency from resources that are entitled to be remitted abroad and such reinvestments as may be made in accordance with this Regime.

Member Countries, in keeping with their national legislation, may consider as capital contributions, such intangible technological contributions like trademarks, industrial models, technical assistance and patented or non-patented know-how, that take the form of physical goods and technical documents and instructions.

National Investor: the State, individuals and legal entities that are defined as nationals in the legislation of the Member Countries.

Also considered national investors are foreign individuals who have resided in the recipient country for not less than one year without interruption and who waive before the competent national agency the right to reexport capital and to transfer profits abroad. The competent national agency of the recipient country may exempt such persons from the requirement of not less than one year of uninterrupted residence.

Each Member Country may exempt from the waiver requirement stipulated in the previous clause, foreign individuals whose investments were generated within the country.

The investments belonging to Subregional investors shall also be considered as investments made by national investors under the terms established in this Decision.

Subregional Investor: a national investor from any Member Country other than the recipient country.

Foreign Investor: the owner of a direct foreign investment.

National Enterprise: an enterprise established in the recipient country, more than eighty percent of whose equity capital belongs to national investors, provided that, in the judgment of the competent national agency, that share is reflected in the technical, financial, administrative and commercial management of the company.

Mixed Enterprise: an enterprise established in the recipient country, between fifty-one and eighty percent of whose capital belongs to national investors, provided that, in the judgment of the competent national agency, that share is reflected in the technical, financial, administrative and commercial management of the company.

Also considered mixed enterprises are those in which the State, semi-public companies or State-owned companies of the recipient country own no less than thirty percent of the equity capital, provided that, in the judgment of the competent national agency, the State, semi-public company or State-owned company has the decision-making authority in the enterprise.

Decision-making authority is understood to mean the obligation for State representatives to give their consent to decisions that are fundamental for the operation of the enterprise.

For purposes of this Decision, a semi-public company or State-owned company is that established in the recipient country, and in which more than eighty percent of the capital belongs to the State, provided that the State has the decision-making authority in the enterprise.

Foreign Enterprise: an enterprise incorporated or established in the recipient country, in which national investors own less than fifty-one percent of the equity capital or, if more than that, in the judgment of the competent national agency that percentage is not reflected in the technical, financial, administrative and commercial management of the enterprise.

Neutral Capital: the investments of public international financial institutions to which all Member Countries of the Cartagena Agreement belong and which are listed in the Annex to this Regime. Those investments shall not be computed as either national or foreign in the enterprises in which they have an equity investment.

In order to determine whether the enterprise in which these equity investments are made is national, mixed or foreign, the neutral capital investment shall be excluded from the calculation and only the shares of the national and foreign investors in the remaining equity capital shall be taken into account.

Reinvestment: the investment of all or part of the retained earnings and of other equity resources from a direct foreign investment, if permitted by national legislation, in the same enterprise in which they were produced.

Recipient Country: the country in which the direct foreign investment is made.

Commission: the Commission of the Cartagena Agreement.

Board: the Board of the Cartagena Agreement.

Member Country: one of the Member Countries of the Cartagena Agreement.

Chapter II

Rights and Obligations of Foreign Investors

2. Foreign investors shall have the same rights and obligations as those to which national investors are subject, except as provided for in the national legislation of each Member Country.

3. All direct foreign investments or Subregional investments that comply with the conditions established in this Regime and in the respective national legislation of the Member Countries, shall be registered with the competent national agency in freely convertible currency.

4. The owners of a direct foreign investment and Subregional investors shall have the right to transfer abroad, in freely convertible currency, and in the terms provided for in the legislation of each Member Country, the proven net profits from their direct foreign investment.

The competent national agency may also register in freely convertible currency the investment of the distributed earnings surplus.

5. The foreign investor and the Subregional investor shall have the right to reexport the proceeds, after payment of the corresponding taxes, from the sale of their shares, equity or rights in the recipient country or when the capital is reduced or the enterprise is liquidated.

The sale of shares, equity or rights by a foreign or Subregional investor to another foreign or Subregional investor must be registered with the competent national agency if so stipulated by national law and shall not be considered reexported capital.

6. The registered capital shall consist of the amount of the initial direct foreign investment plus any subsequent increases and reinvestments that are registered and effectively made, as provided for in this Regime, minus any net losses, if there are any.

7. Reinvestment, according to the definition included in Article 1, in national, mixed or foreign enterprises, shall be considered a foreign investment and shall be made subject to such rules and regulations as each Member Country may establish. In any case, it must still be registered with the competent national agency.

8. Products produced by national, mixed or foreign enterprises that comply with the special rules and regulations or specific requirements of origin established by the Commission and the Board as stipulated in Chapter X of the Agreement, shall enjoy the benefits of the Cartagena Agreement Tariff Reduction Program.

9. The equity capital of joint stock companies must be represented by registered shares.

10. In settling disagreements or disputes arising from direct foreign investments or investments by Subregional investors or transfers of foreign technology, the Member Countries shall abide by the provisions of their domestic legislation.

Chapter III **Competent National Agencies**

11. The Member Countries shall designate the competent national agency or agencies that shall be responsible for ensuring compliance by foreign individuals or legal entities with the obligations that are referred to in this Regime.

Chapter IV

Importation of Technology

12. Technology licensing, technical assistance, technical service, basic and detail engineering and all other technological contracts shall, in accordance with the respective national legislation of the Member Countries, be registered with the competent national agency of the respective Member Country. The latter must evaluate the effective contribution of the imported technology by estimating the probable profits or the price of the goods that incorporate technology, or through other specific methods of quantifying the effect of the imported technology.

13. Contracts for the importation of technology must contain clauses about at least the following matters:

- (a) Identification of the parties and express indication of their nationality and residence;
- (b) Identification of the methods used to transfer the imported technology;
- (c) Contract prices of each of the elements involved in the transfer of technology;
- (d) Determination of the effective period of the contracts.

14. In order to register transfer of technology, trademark or patent contracts, Member Countries may bear in mind that those contracts not contain the following:

(a) Clauses by virtue of which the supply of technology or the use of a trademark bears with it the obligation of the recipient country or enterprise to acquire, from a given source, capital equipment, intermediate products, raw materials or other technologies, or to use on a permanent basis personnel indicated by the enterprise supplying the technology;

(b) Clauses by virtue of which the enterprise selling the technology or enterprise granting use of a trademark reserves the right to set sale or resale prices for the products that are manufactured using that technology;

(c) Clauses that contain restrictions on the volume and structure of production;

(d) Clauses that prohibit use of competing technologies;

(e) Clauses that establish a total or partial purchase option in favor of the technology supplier;

(f) Clauses that compel the technology buyer to transfer to the supplier all such inventions or improvements as may be obtained through use of that technology;

(g) Clauses that require the payment of royalties to the holders of patents or trademarks for patents or trademarks that are not used or have expired; and

(h) Other Clauses having an equivalent effect.

Except in special cases that have been duly judged by the competent national agency of the recipient country, clauses prohibiting or limiting in any way the export of the products manufactured using the respective technology, shall not be accepted.

In no case shall clauses of this kind be allowed with respect to Subregional trade or to the export of similar products to third countries.

15. In the degree to which intangible technological contributions do not constitute capital investments, they shall grant the right to receive royalties, in keeping with Member Countries legislation.

The accrued royalties may be capitalized, pursuant to the terms of this Regime, after payment of the taxes due.

When these contributions are supplied to a foreign enterprise by its parent corporation or by another branch of the same parent corporation, the payment of royalties may be authorized in cases judged beforehand by the competent national agency of the recipient country.

Chapter V

Treatment of Investments by the Andean Development Corporation and by Institutions with the Option to be Treated as Neutral Capital

16. Without detriment to the provisions of its Charter, the direct investments of the Andean Development Corporation shall be considered national investments in each Member Country of the Cartagena Agreement.

17. Governmental international financial institutions to which the Member Countries of the Cartagena Agreement do not belong, and foreign governmental development cooperation institutions, whatever their legal nature, may request that the Commission consider their investments as neutral capital and may ask to be included on the list Annexed to this Regime. The Commission shall decide upon the requests submitted to it at the first meeting following their presentation.

18. Together with their request, the institutions cited in the previous article should present a copy of their charter or of the by-laws that govern them, together with as much information as possible about their investment policy, operating rules and investments made, broken down by countries and by sectors.

Transitory Provisions

First Transitory Provision. Foreign enterprises that have a conversion agreement in effect, in the terms of Decision 220, Chapter II, may ask the respective competent national agencies to set aside that agreement.

Second Transitory Provision. In the case of projects that concern products exclusively reserved for or allocated to Ecuador, the four remaining countries bind themselves not to register any direct foreign investment in their territories.

Signed in the city of Lima, Peru, on the twenty-first of March nineteen ninety-one.

ANNEX

**List of Institutions with the Option to have
their Investments Treated as Neutral Capital**

- Inter-American Development Bank (IDB)
- International Finance Corporation (IFC)
- German Corporation for Economic Cooperation (DEG)
- Danish Industrialization Fund for Developing Countries (IFU)
- Inter-American Investment Corporation (IIC)

* *Note:* English translation furnished by the Andean Community.