LATIN AMERICAN ECONOMIC INTERGRATION: AN OVERVIEW OF TRADE AND INVESTMENT DEVELOPMENTS IN ANCOM, CACM, AND LAFTA

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I. THE LATIN AMERICA FREE TRADE AREA (LAFTA)[1]

LAFTA was created in 1960 by Argentina, Brazil, Mexico, Chile, Peru, Paraguay, and Uruguay through the Treaty of Montevideo.[2] Columbia and Ecuador joined LAFTA in 1961. Venezuela and Bolivia entered in 1966 and 1967, respectively. LAFTA encompasses every Latin America Nation except Guyana, Surinam, and Honduras.[3]

LAFTA attempted to create a free trade area whose principal

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1. W. Agor and A. Suarez, *The Emerging Latin American Political Subsystem*, D.A. CHALMERS, CHANGING LATIN AMERICA: NEW INTERPRETATIONS OF ITS POLITICS AND SOCIETY, 155, 159-160, 162 (1972); INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, THE INTER-AMERICAN SYSTEM: ITS DEVELOPMENT AND STRENGTHENING, 282 (1966) [hereinafter cited as THE INTER-AMERICAN SYSTEM]; K. Simmons, *International Economic Organizations in Central and Latin America and the Caribbean: Regionalism and Sub-Regionalism in the Intergration Process*, 19 INT'L. & COMP. L. Q. 376, 381 (1970); G. Wixom, *Latin American Free Trade Associations: An Attempt At Economic Integration*, 1967 UTAH L. REV. 297 (1967); F. ORREGO-VICUNA, DEVELOPMENTS IN THE LATIN AMERICAN FREE TRADE ASSOCIATION, 1967; *Washington Panel: Institutional and Economic Perspectives on Latin American Integration*, 61 PROC. A. S. INT'L. LAW. 167 (1967).

2. Montevideo Treaty, *done* February 18, 1960, *reprinted in* THE INTER-AMERICAN SYSTEM, *supra* note 1, at 485.

3. *See* Lee, LAFTA Today, 44 MEXICAN REV. 24 (1976); LATIN AMERICA: THE STRUGGLE WITH DEPENDENCY AND BEYOND (Chilcot & Edelstein eds. 1974); THE CHANGING LEGAL ENVIRONMENTAL IN LATIN AMERICA: MANAGEMENT IMPLICATIONS (Holland & Ferrer eds., 1974).

mechanism for integration is an annual bilateral negotiation system for trade concessions on an item-by-item basis. Under LAFTA it was intended that member states eliminate duties and other economic duties and other economic barriers on intra-area movements of goods. The Montevideo Treaty set the annual rate of tariff reduction at eight percent of the weighted average of prevailing duties on imports for third-world countries.[4] There was a provision for triennial negotiations of a common schedule, or list of products, to be free from trade barriers, thus creating a free trade zone.[5] All parties, however, would have had to agree on the common schedule.[6]

The mechanisms for coordination were covenants between equal partner countries rather than a supranational authority. There were escape or "savings" clauses[7] for agricultural products and for balance of payment situations. Under the "savings" clauses each nation was given an opportunity to exercise a "public policy" exception to be used for the protection of morality, maintenance of security, and protection of national heritage.[8] Also, restrictions on free trade areas might be allowed in cases where untoward effects on the economy of a particular nation were produced.[9]

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4. Montevideo Treaty, *supra* note 2, at art. 5. A more detailed explanation of the calculations involved is found at Title I of Protocol No. 1.

5. Montevideo Treaty, *supra* note 2 at art. 7, art. 8. *See also* Montevideo Treaty, *supra* note 2 at Title VI of Protocolo No. 1.

6. URQUIDI, FREE TRADE AND ECONOMIC INTEGRATION IN LATIN AMERICA: TOWARD A COMMON MARKET (1968).

7. Montevideo Treaty, *supra* note 2, at Ch. VI, arts. 23-26, SAVINGS CLAUSE, Ch. VII, art. 27-31, SPECIAL PROVISIONS CONCERNING AGRICULTURE.

8. Montevideo Treaty, *supra* note 2, at art. 53. Article 53 provides:

> No provision of the present Treaty shall be so construed as to constitute an impediment to the adoption and execution of measures to:
> (a) The protection of public morality;
> (b) The application of security laws and regulations;
> (c) The control of imports or exports of arms, ammunition and other war equipment and, in exceptional circumstances, of all other military items, in so far as this is compatible with the terms of article 51 and of the treaties on the unrestricted freedom of transit in force among the Contracting Parties;
> (d) The protection of human, animal and plant life and health;
> (e) Imports and exports of gold and silver bullion;
> (f) The protection of the nation's heritage of artistic, historical and archaeological value; and
> (g) The export, use and consumption of nuclear materials, radioactive products or any other material that may be used in the development or exploitation of nuclear energy.

9. Wionczek, *The Rise and the Decline of Latin American Economic Integration*, IX J. COMM. MKT. STUD. 49 (1973) (hereinafter cited as Wioncezk).

LAFTA provided for special non-reciprocal trade concessions (protection provisions) for less developed countries. Certain industries were accorded similar special non-discriminatory trade protections.[10] There were also collective arrangements for financial and technical assistance.[11]

The principle of reciprocity of benefits was adopted in the initial agreement.[12] In theory, each member nation would reciprocate with equal trade concessions. The theory of "complementarity," or prior agreement as to the location of production facilities, recognizes that manufacturing tends to concentrate in countries where there is a large national market and greater industrial development.[13] Under complementarity, the member countries agreed to a program of industrial allocation which would create a "spread" effect rather than a "backwash effect."[14] Each participating country was theoretically assured of benefits through a fair geographical allocation of new industries among the member nations.

However, the Managua Treaty of December, 1960 abandoned the principle of reciprocity.[15] Priority was given to the formation of a free trade area. Economic concessions became temporary in nature and capable of being withdrawn whenever the domestic industry produced a surplus. This exacerbated LAFTA's problem with the propensity of new manufacturing enterprises to locate in more industrialized member countries. The abandonment of complementarity left the backwash tendencies unchecked. As a result, indigenous forces rather than regional planning influenced the location of new industrial activity.

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10. The Montevideo Treaty, *supra* note 2 at Chapter VIII. art. 32(a)-(f) "MEASURES IN FAVOR OF COUNTRIES AT A RELATIVELY LESS ADVANCED STAGE OF ECONOMIC DEVELOPMENT."

11. The Montevideo Treaty, *supra* note 2, at art. 32(e).

12. The Montevideo Treaty, *supra* note 2, at art. 8-13 (particularly Article 10).

13. *See* Wixom, *supra* note 1, at 314-315 regarding "complementarity," and at 304-305 regarding discussion of the problem of "center-periphery interaction" in the context of LAFTA.

14. The Montevideo Treaty, *supra* note 2, at art. 15-17 (generally). Article 16(b) provides:
". . . The Contracting Parties: . . . (b) May negotiate mutual agreements on complementary economies by industrial sectors."

15. The Managua Treaty, *done* December 13, 1960, T.I.A.S. No. 6543 (effective 1963). The official Spanish-language text is at pp. 4-67; the English-language translation appears at 68-200 (even-numbered pages only); and the French-language translation appears at pp. 69-201 (odd-numbered pages only).

In 1967, United States President Lyndon Johnson met with Latin American heads of state at Punta del Este. They agreed that 1985 would be the target date for converting LAFTA from a free trade association into a common market.[16] Thereafter there was a LAFTA meeting at Montevideo in 1968 to negotiate a second common list through the elimination of duties on wheat and petroleum. However, after four months of negotiation there was no agreement.[17]

The Caracas Protocol in December, 1969[18] recognized that the integration movement had slowed since the mid-1960's. The Caracas Protocol was an effort by Argentina, Brazil, and Mexico to postpone the deadline for complete tariff liberalization from 1973 to 1980. The Caracas Protocol in effect postponed the free trade area for an additional seven years beyond the target date set by the Montevideo Treaty. The proposal to convert LAFTA into a common market was delayed indefinitely. While the Montevideo Treaty set annual rates of tariff reduction at 8% of the weighted average of prevailing duties on imports for third-world countries,[19] the Caracas Protocol reduced this to 2.9% as of 1970.[20]

Many reasons have been advanced for LAFTA's lack of progress toward a common market. One reason is that LAFTA's scope was too broad.[21] LAFTA put less developed nations in the same category as intermediately developed nations and the "Big Three."[22] Additionally, although Latin America looks like one uniform piece of land on a map, it is divided by mountain ranges, rivers, and extended distances. There is also a system of previous-

16. Simmonds, *supra* note 1, at 385.

17. *Id.*, at 384.

18. *Id.*, at 396.

19. The Montevideo Treaty, *supra* note 2, at art. 5.

20. Noted in Simmonds, *supra* note 1, at 396.

21. BLASSA, DESARROLLO ECONOMICO Y LA INTEGRACION (1965) [hereinafter cited as Blassa].

22. *I.e.*, Argentina, Brazil and Mexico. *See* A.L. Valdez, The Andean Foreign Investment Code: Analysis, 7 J. INT'L L. & ECON. 1 (1972) [hereinafter cited as Valdez]. This problem of "sub-regionalism" has caused serious problems. *See* Simmonds, *supra* note 19, at 396, Agor & Suarez, *supra* note 19, at 159-160:

> The disparate size and level of development among LAFTA members . . . [has] been a constant obstacle to economic integration. The largest and most developed countries—Argentina, Brazil, and Mexico—appear to have benefitted disproportionately from intrazonal trade, and they have been reluctant to grant concessions to countries whose markets are "insufficient" . . . or "least developed. . . ."

ly established trade routes directed more toward traditional principal markets than toward neighboring nations.[23]

Another problem arose from the original premise upon which LAFTA was developed. The original theory propounded by Dr. Raul Prebisch and others to justify Latin American integration established the principle that planned national industrialization, could not continue to stimulate the growth of import substitution.[24] Greater levels of production were needed than those which would satisfy local markets.

The lesser developed nations risked becoming markets for the industrial surplus of the "Big Three." This market behavior is not reciprocal, however, since the dependence of the "Big Three" upon exports to the rest of LAFTA is not great enough for them to grant commercial concessions to poorer neighbors.

It must be recognized that a free trade area is not a panacea.[25] It will not suddenly convert slow-growth economies into highly industrialized nations. Economic growth will be held back by social factors such as a low literacy rate, poor health conditions, undernourishment, a trend toward urban migration, and a high birth rate.[26] Add to these factors a high rate of inflation, an unequal distribution of land, subsistence agriculture, and little technology and the difficulties begin to increase geometrically.

II. THE CENTRAL AMERICAN COMMON MARKET (CACM)[27]

The CACM was established by the General Treaty of Central

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23. *See* Blassa, *supra* note 21.

24. Rose, *Third World 'Commodity Power' Is a Costly Illusion*, FORTUNE (Nov., 1976); STRETEN & ALSON, DIVERSIFICATION AND DEVELOPMENT: THE CASE OF COFFEE (1971).

25. Blassa and Stoutjestijk, *Economic Integration Among Developing Countries*, XIV, J. COMM. MKT. STUD. 37, 82 (1975).

> Integration is not a panacea, however, by enlarging the market it can provide a suitable framework for economic growth but the results will greatly depend on the economic policies to be followed . . . . Increased investments are necessary which will not be forthcoming if foreign investment is discouraged and domestic savings are not generated. Also, changes in the social structure will often be called for . . . .

26. THE INTER-AMERICAN SYSTEM, *supra* note 1, at 283.

27. Gordon, *Developed, Developing and Dependent Nations: Central American Development in a New Economic Realignment*, 11 J. INT'L L. & ECON. 1 (1976); [hereinafter cited as Gordon]; URQUIDI, FREE TRADE AND ECONOMIC INTEGRATION IN LATIN AMERICA: TOWARD A COMMON MARKET (1968); WATKIN, TAXES AND TAX HARMONIZATION IN CENTRAL AMERICA (1967) [hereinafter cited as Watkins]; Lizano and Willmore, *SECOND THOUGHTS ON CENTRAL AMERICA: THE ROSENTHAL REPORT*, XIII J. COMM.

American Economic Integration of 1961.[28] Guatemala, El Salvador, Costa Rica, Honduras, and Nicaragua were signatories to the treaty. The goal of the Central American Common Market for economic development is to achieve intra-regional free trade of products originating in Central America. Integration is a means of diversifying production, developing import substitutes, and compensating for slow growth of exports. CACM also seeks to establish uniform tariffs for products imported from outside Central America.

CACM has its roots in the United Nations Economic Commission for Latin America (ECLA),[29] which was organized in Santiago in 1948. One constituent of the ECLA was the Committee on Economic Cooperation for the Isthmus of Central America or "Economic Cooperation Committee" (ECC).[30] In 1956 the ECC published the *Nomenclatura Arancelaria Uniforme Centroamericana*[31] which defined and classified all products subject to customs duty. The *Nomenclatura* was adopted by all Central American countries.

On October 14, 1951, Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica (the Five Nations) signed the Charter of San Salvador and formed a political union, the Organizacion de Estados Centroamericanos (ODECA).[32] A new ODECA charter, known as the Panama Charter, was signed on December 10, 1962.[33] Panama did not sign this charter, but on June 17, 1966, it subscrib-

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MKT. STUD. 280 (1975); Schmitter, *Central American Integration: Spill-Over, Spill-Around of Encapsulation?*, IX J. COMM. MKT. STUD. (1972).

28. Managua Treaty, *supra* note 150. The Treaty came into effect for El Salvador, Guatemala and Nicaragua in June 1961, for Honduras in March 1962, and for Costa Rica in November 1963; noted in Simmonds, *supra* note 1, at 376.

29. K.R. Simmonds, *The Central American Common Market: An Experiment in Regional Integration*, 16 INT'L & COMP. L. Q. 911, 912 (1967).

30. *Id.* at 915.

31. THE INTER-AMERICAN SYSTEM, *supra* note 11, at 284. The Central American Agreement on the Equalization of Import Duties and Charges (1959) applied more than 97 percent of the NUCA listings as the basis of that agreement.

32. Simmonds, *supra* note 29, at 914. "ODECA has been described as a regional organization within a regional organization" because of development out of the OAS. *Id.*

ODECA was rocked in February 1969 by a bitter election for the position of Secretary-General, an election which eventually was annulled. This occurred in the context of hostilities between Honduras and El Salvador. Simmonds, *supra* note 1 at 395 (and n. 70 therein).

33. Simmonds, *supra* note 29, at 914. An English-language translation of the text of the Charter appears at Appendice 22, pp. 480-486, in THE INTER-AMERICAN SYSTEM, *supra* note 1.

ed to some subsidiary non-economic integration organizations of ODECA.[34]

The Multilateral Treaty on Free Trade and Central American Economic Integration (Multilateral Treaty)[35] was signed June 10, 1958, by the Five Nations. The Multilateral Treaty set up an interim arrangement which established a free trade area for some goods. It was accompanied by the Agreement on the Regime for Central American Integration Industries and Treaty of Economic Association (Integration Industries Convention).[36]

The Integration Industries Convention had the goal of promoting industrial plants in an integrated context. The Convention provided for subsidiary agencies, such as the Commission Centroamericano de Integracion Industrial and the Instituto Centroamericano de Investigacion y Tecnologia Industrial (ICAITA).[37] The Convention also provided for a distribution of industries, but however, such distribution was confined to enterprises requiring access to the entire regional market. The convention did not apply to Costa Rica.[38]

The Central American Convention on the Equalization of Import Duties (Tariff Equalization Convention), which was signed by the "Five Nations" on September 1, 1959,[39] set up uniform regional import duties for products originating outside of the Five Nation area. The list of products originally totalled 270 products, but later 200 more were added. Tariff equalization was to be achieved through successive annual adjustments in national tariffs over two, three, or five years.

The Treaty of Economic Association (the Tripartite Treaty) was ratified on April 27, 1960, by El Salvador, Guatemala, and Honduras,[40] Nicaragua was not invited to participate. The Tripar-

34. The Charter itself entered into force in 1965. Provision for subsequent adherence (in part or total) was contemplated in the "Transitional Provisions" subsequent to Article 30 of the Charter.

35. Multilateral Treaty on Free Trade and Central American Economic Integration, *done* June 10, 1958, T.I.A.S. No. 6539, (effective 1963), Simmonds, *supra* note 29, at 915.

36. *Id.* The 2 agreements were ratified by all the signatory nations excepting only Costa Rica.

37. *See, id.*, at 915, THE INTER-AMERICAN SYSTEM, *supra* note 1, at 290.

38. Simmonds, *supra* note 29, at 915.

39. Central American Convention on the Equalization of Import Duties, *done* 1959, T.I.A.S. No. 6542 (effective 1963).

40. Treaty of Economic Association, *done* 1960 (El Salvador, Guatemala, Honduras), 383 U.NT.S., T.I.A.S. No. 5494 (effective 1961).

tite Treaty tried a approach different from a gradual establishment of free trade. The Tripartite Treaty declared free of import and export duties all products, labor, and capital originating in, and traded among, the three member states, except for a limited number of commodities on which duties would be gradually removed.[41] The labor and capital applications were never put into practice.[42]

The General Treaty of Central American Economic Integration (General Treaty)[43] which was signed in 1962 by the Five Nations took precedence over earlier instruments. Its goals were to establish a common market and a customs union though no details were given.[44] It accelerated the program for achieving free trade by five years and extended immediate free trade among the Five Nations by eliminating import and export duties on most intrazonal products with the exception of such important products as coffee, sugar, wheat, flour, alcohol, distilled spirits, and petroleum.[45]

The Managua Protocol to the Tariff Equalization Convention expanded the list of goods imported from outside of Central America which were subject to uniform duties.[46] Later protocols placed uniform duties on other imports from outside the zone.

Separate articles and other conventions established monetary institutions. While *the Banco Centroamericano de Integracion*

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41. *Id.*, at art. III.

42. Treaty of Economic Association, *supra* note 59, at art. VI.

43. General Treaty of Central American Economic Integration, *done* 1962, 455 U.N.T.S. [hereinafter cited General Treaty]. The dates of signature and adherence, respectively, for the Five Nations to the "General Treaty" of CACM were:

El Salvador	Dec. 1960 and June 1961
Guatemala	Dec. 1960 and June 1961
Honduras	Dec. 1960 and April 1962
Nicaragua	Dec. 1960 and June 1961
Costa Rica	Dec. 1962 and Sept. 1963

The delay in Costa Rica's signature and adherence resulted from the 1962 election in that country, causing major opponents of adherence to the Treaty to be "removed from political power." Simmonds, *supra* note 29, 917.

44. General Treaty, *supra* note 43, at art. I. However, most of the Treaty's provisions cover the free-trade area regime.

See Wixom, *supra* note 1, at 308 for a discussion of these terms in the general context, as well as that of "economic union." *See also* A. GOLBERT, *Customs Union Theory v. Practice*, 4 Sw. U.L.R. 250 (1972).

45. General Treaty *supra* note 62, at art. III.

46. Managua Protocol to the Tariff Equalization Convention, *done* December 13, 1960. 454 U.N.T.S., T.I.A.S. No. 6542.

Economica (BCIE)[47] was capitalized in U.S. dollars, the Central America Clearing House Agreement adopted the *peso centroamericano* as a multilateral monetary base.[48] However, the *peso centroamericano* is denominative to the U.S. dollar. Mexico joined this system in 1963. Additionally, a uniform customs administration system was attempted through the *Codigo Aduanero Uniforme Centroamericano* (CAUCA).[49]

All of the above mentioned administrative institutions are limited to Central America. The members of CACM are also members of the *Inter-American Development Bank* (IADB)[50] which was founded in 1969 by the United States and most Latin American nations with the notable exception of Cuba. IADB has a Fund for Special Operations which makes loans at local interest rates, and the loans are repayable in local currencies. The United States, Canada, Japan, eleven European nations, and twenty-two Latin American and Caribbean nations are members at the present time.

The unequal distribution of benefits and industries created an imbalance in regional development and trade such as in the problem of "final touch" industries[51] which are engaged in the bottling or packaging of a product. CACM lacks strong centralized regional institutions and there is no supranational enforcement agency.

The 1969 Soccer or Migration War[52] between El Salvador and Honduras created serious consensus and cooperation problems between the two nations. The issue in the conflict was free movement of largely illegal labor, mainly unemployed rural and urban labor, from densely populated El Salvador to less populated Honduras, Nicaragua, and Guatemala. Honduras implemented "land reform" specifically directed at the squatters from El Salvador. In July 1969, El Salvador attacked Honduras in retaliation. The attack stymied, but the war led to the suspension of trade in CACM between the belligerents.[53] After the conflict Honduras put an embargo on transit from El Salvardor, Nicaragua, and Costa Rica,

47. General Treaty, *supra* note 43, at art. XVIII; noted in Simmonds, *supra* note 29, at 911. *See also*, THE INTER-AMERICAN SYSTEM, *supra* note 1, at 290.

48. GRUNWALD AND SALAZAR-CARRILLO, ECONOMIC INTEGRATION: RATES OF EXCHANGE AND VALUE COMPARISONS IN LATIN AMERICA, (1972).

49. As provided by General Treaty, *supra* note 43, at art. XXIX.

50. *See* Nambeil, *Stronger Role Seen For the IDB*, J. COM. (May 26, 1976).

51. *See generally*, Simmonds, *supra* note 19, at 379.

52. Watkins, *supra* note 27.

53. *Id.*, at 395.

and temporarily dropped out of CACM.[54] Protocols attempted to work Honduras into the system by giving Honduras preferential treatment.

The greater industrialization of Guatemala and El Salvador led to Honduras and Nicaragua becoming markets for consumer goods. Nicaragua accumulated a deficit within the Five Nation zone, but was not able to increase intra-regional exports of its primarily agricultural commodities.[55] In 1969, Nicaragua, in contravention of CACM agreements, introduced barriers to intra-regional imports[56] which were lifted only after other members ratified protocols regarding equalization of fiscal incentives. Costa Rica, because of financial problems, imposed tariff surcharges on imports from extra-regional nations.[57] Costa Rica also established a consumption tax on a list of regionally produced luxury goods. This tax had adverse consequences for Guatemala.

III. THE ANDEAN PACT (ANCOM)[58]

In May of 1969, three years after the formation of LAFTA, the five Andean western nations of South America (Bolivia, Chile, Colombia, Ecuador, and Peru) signed the Cartegena Agreement,[59] and formed a customs union directed more toward the control of foreign direct investment than toward free trade within the group or harmonization of external tariffs.[60] Andean nations desired that foreign interests neither gain control over the economy nor maintain current levels of participation. Bolivia and Ecuador were

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54. *Id.*

55. BUSINESS INTERNATIONAL CORPORATION, THE CENTRAL AMERICAN COMMON MARKET: PROFITS AND PROBLEMS IN AN INTEGRATING ECONOMY [hereinafter cited as PROFITS AND PROBLEMS].

56. *See* BUSINESS LATIN AMERICA (1968), 209 and (1969), 70.

57. PROFITS AND PROBLEMS, *supra* note 55. *See also*, Simmonds, *supra* note 1, at 380 regarding these trade-deficit problems generally.

58. *See* BLUTH, THE ANDEAN PACT AND ITS MEMBER STATES—A STUDY IN CERTAIN FORMAL ASPECT OF SUBREGIONAL INTEGRATION, IN PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1975, 367 (1976); R. Tanino, *The Andean Code After Five Years*, 8 LAW. AMERICAS 635 (1976) [hereinafter cited as Tanino]. D. MORAWETZ, THE ANDEAN GROUP: A CASE STUDY IN ECONOMIC INTEGRATION AMONG DEVELOPING COUNTRIES (1974) [hereinafter cited as Morawetz]; Abbott, *Bargaining Power and Strategy in the Foreign Investment Process: A Current Andean Code Analysis*, 3 SYR. J. INT'L L. & COM. 319 (1976); Avery, *Subregional Integration in Latin America: The Andean Common Market*, XI J. COMM. MKT. STUD. 85 (1973); Wionczek, *supra* note 27.

59. AGREEMENT OF CARTAGENA, *done* May 26, 1969, 8 INT'L LEGAL MAT'S 910 (1969) (effective Oct. 16, 1969).

60. Gordon, *supra* note 27.

granted special treatment as less developed nations.[61] Venezuela did not join the agreement at first because it objected to the removal of protective barriers that shielded its industries and feared that imports from other Andean nations, which have low labor costs, would have an adverse effect on Venezuela's industry. Venezuela later joined the Andean Pact.[62] In September, 1976, Chile withdrew from ANCOM.[63]

Objectives of the Cartegena Agreement included the promotion of development of member states, the acceleration of economic growth rates, and the assurance of local benefits from a common market. From a free market standpoint the Andean Pact complemented LAFTA because ANCOM was based on a concept of facilitating participation of Andean nations in LAFTA. However, ANCOM went further than LAFTA in establishing harmonization and coordination conditions for converting the Andean Pact into a customs union and a common market.[64]

The Andean nations agreed to eliminate all tariffs among themselves.[65] The Cartegena Agreement of 1969 provided for automatic and irrevocable reduction of trade barriers by the end of 1978, the erection of a common external or outer tariff as to other nations, and the uniform treatment of foreign investment and capital.[66] Members are committed to a non-negotiable reduction of trade barriers as to all but a few products.[67] There are in theory no negotiated tariff reductions as to specific products as in LAFTA.

Under the sectoral program, industrial development would be allocated to individual countries. The program is a form of approved regional monopolies on the production of certain goods which

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61. Special provisions regarding Bolivia and Ecuador are noted in E. Ereli, *The Andean Common Market*, 8 HOUSTON L. REV. 487, (1971).

62. For the reasons behind Venezuela's delay in joining ANCOM, *see* Ereli, *supra* note 61, at 491; *see also*, 8 INT'L LEGAL MAT'LS 939 (1969) for the Protocol of Venezuela's adherence to the Agreement.

63. *See infra* note 144 and the accompanying text.

64. MORAWETZ, *supra* note 58. Colombia exported goods worth U.S. $247.8 million to other Andean nations in 1975; Peru was second with U.S. $130.1 million in sales; Gerardo Zegers de Landa, EL PACTO ANDINO Y LA INDUSTRIA SUBREGIONAL DE ARTEFACTOS DE LA LINEA BLANCA 8 CUADEROS DE ECONOMIA 111 (1971).

65. It was agreed that this would be done in stages by listing all products into four categories, to which different provisions would apply: (a) sectorial development; (b) common list; (c) products not produced subregionally; and (d) nonscheduled products. Agreement of Cartagena, *supra* note 59, at art. 45. *See also* Ereli, *supra* note 61, at 492.

66. Agreement of Cartegena, *supra* note 59, at art. 26-27, 45, 61-68, and 89-90.

67. *See* Agreement of Cartagena, *supra* note 59, at art. 46.

avoids the backwash effect of industrial coagulation which plagued LAFTA and CACM. The sectoral development program is limited to a complementarity type of agreement with respect to petrochemicals.

The Declaration of Bogota of August, 1966[68] expressed dissatisfaction with LAFTA. The nations agreed that the costs of laissez-faire treatment of private foreign capital were high and the benefits derived therefrom were limited. The Mixed Commission was established.[69] It prepared two documents, the Constitutive Agreement of the Andean Development Corporation[70] (signed in 1968 by Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela) and the Andean Subregional Integration Agreement[71] (The Cartegena Agreement), signed in 1969 by Bolivia, Chile, Colombia, Ecuador, and Peru.

The Andean Pact has an administrative framework composed of the Mixed Commission, the Junta, the Consultative Committee, the Economic and Social Advisory Committee, and the Andean Development Corporation.[72] The Mixed Commission is an intergovernmental body, a permanent diplomatic conference with one representative from each member government which oversees the "integrative process."[73] The Mixed Commission can act only with a two-third majority vote with no negative votes.[74] The effect of this procedure is to write a veto into the provisions of the Pact.

The Junta is like a board or a secretariat. It has three members who are citizens of any Andean Latin American country. The Junta makes technical decisions, and prepares plans. Any decision of the Junta requires a unanimous vote.

Provision is also made for a liaison between the public and the private sectors through bodies such as the Advisory Committee and the Economic and Social Advisory Committee.[75] The Advisory Committee consists of government representatives and advisors

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68. Ereli, *supra* note 61, at 491. The Declaration of Bogota, as one of the motivating factors leading to ANCOM, is noted in the Preamble to the Cartagana Agreement, *supra* note 59.

69. Ereli, *supra* note 61, at 491.

70. *Id.* at 491.

71. *See* Agreement of Cartegena, *supra* note 59.

72. Tanino, *supra* note 58.

73. Agreement of Cartagena, *supra* note 59, at art. 7.

74. *See Ereli*, *supra* note 61, at 492.

75. Agreement of Cartagena, *supra* note 59, at art. 19-21.

from the private sector. It acts as a liaison between the respective national governments, the Junta, and the Mixed Commission. The Economic and Social Advisory Committee is the successor body to the *Comite de Empresarios Industriales del Grupo Andino,*[76] which proposed the views of the private sector. The Advisory Committee provides a forum for consultation with the private sector and is composed of three business representatives and three labor representatives from each of the member countries.

The *Corporation Andina Fomento*, known as the Andean Development Corporation, was formed in 1968.[77] Venezuela has been a member from the Corporation's inception. The Corporation is headquartered in Caracas with capitalization of 100 million U.S. dollars. The purpose of the Corporation is to promote and finance projects for Andean integration. It is both a lending institution and a center for study and recommendation as to mechanisms for coordination of credit and investment agencies.

The most important provisions of ANCOM regulate foreign investment. Shortly after its formation, ANCOM created the "Common Regime of Treatment of Foreign Capital, and of Trademarks, Patents, Licenses, and Royalties," more commonly known as Decision No. 24, or the ANCOM Foreign Investment Code.[78] At the time of the treaty signing, American interests held approximately 5 billion U.S. dollars of foreign owned investments in the ANCOM nations.[79] Foreign owned or foreign controlled enterprises are gradually required to divest majority ownership and control over a 15- to 20-year period.[80] In order to accomplish

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76. *See* Agreement of Cartagena, *supra* note 59, at art. 22 regarding the Economic-Social Advisory Committee.

77. Ereli, *supra* note 61, at 495.

78. Adopted December 31, 1970 with subsequent amendments adopted on June 24, 1971, July 17, 1971, October 30, 1976, and November 30, 1979 via Decisions 37, 37a, 103, 109 and 110, respectively. The text of Decision 24 is reprinted in 11 INT'L LEGAL MAT'LS 152 (1971). *See also* Valdez, *supra* note 22.

Article 27 of the Cartagena Agreement provides that "the Member Countries commit themselves to adopt the provisions that may be necessary in order to put this system into practice within six months following its approval by the Commission."

See also COUNCIL OF THE AMERICAS, ANDEAN PACT: DEFINITION, DESIGN AND ANALYSIS, (1973); Zamora, *Andean Common Market—Regulations of Foreign Investment: Blueprint for the Future*, 10 INT'L LAW. 153 (1976) [hereinafter cited as Zamora]. Schliesser, *Recent Developments in Latin-American Foreign Investment Law*, 7 INT'L LAW. 357 (1973) and 6 INT'L LAW. 64 (1972).

79. Lisocki, *Andean Investment Code*, 49 NOTRE DAME LAW., 319 (1973).

80. Valdez, *supra* note 22, at 8.

this nationalization of resources, the enterprises must register the value of their capital investment.[81] The Treaty is not self-executing, and it provides only the agreed upon *minimum* standards governing continued or new foreign investment in the member states.[82] Stricter regulations, therefore, may be instituted in any member state by means of appropriate national legislation.[83]

The goal of Decision No. 24 is to transfer to local majority ownership and majority control all foreign investment within a member states's borders. The period of time within which this is to be accomplished varies with the nation and with the type of industry involved. This underscores the link between the treatment of foreign investment and the development goals of subregional integration.[84] The incentive to participate in a wider free market will theoretically outweigh the disincentives of regulation. Decision No. 24 requires existing foreign investors to divest to minority levels which may be enforced as a result of denied benefits of free movement of goods and services within a common market.[85] Decision No. 24 regulates repatriation of capital (except liquidation proceeds, defined as the value of the original investment plus additions, less net realized losses) and the remittance of profits (generally not to exceed 20 percent per year of registered direct

81. Agreement of Cartagena, *supra* note 59, at art. 5, 6; Valdez, *supra* note 22, at 8. *See also* Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763, 771 (1972) regarding discussion of the impact of the application of different treatment based upon the percentage of foreign ownership.

82. Valdez, *supra* note 22, at 2. *See also*, Zamora, *supra* note 78, for a comparative analysis showing great variations in the approaches of Chile and Venezuela (Decree No. 62) and contrasting briefly the approaches of other countries. The disparity became so great with the passage of Chile's Foreign Investment Statute, promulgated in 1974, that Chile was specially requested to live up to its obligations under the Agreement Chile withdrew from the Cartagena Agreement, with a few exceptions not related to foreign investment, by Decision 102 of the Commission of the Cartagena Agreement on October 30, 1976. The Chilean statute provides that foreign capital may be used for "activities productive of goods or services of exceptional interest to the economic or social development of the country;" that no discrimination will be permitted to the detriment of the foreign investment, its products or manner of operation. It provides for direct access to relief from such discrimination if it is alleged and shown to exist, the failure of which relief gives recourse to the procedure of compensation by judicial proceedings. *See* articles 1, 5, and 6, Decree Law dated July 13, 1974, as set forth at 13 INT'L LEGAL MAT'LS 1176 (1974).

83. Generally, Ecuador's position as to foreign investment is as liberal as possible within the limitations of Decision 24. A. ANDERSON, TAX AND TRADE GUIDE 25 (1976).

84. Oliver, *supra* note 81, at 780.

85. Oliver, *supra* note 81, at 777.

foreign investment).[86] The Decision also reserves to national ownership certain key investment sectors, including utilities, media, and the financial and transportation industries.[87]

Enforcement is provided through the requirement that all new direct foreign investment and all contracts and transfers of foreigners for investment be submitted to and approved by an appropriate national body.[88] Freedom of contract with respect to intellectual property is thereby limited.[89] The use of such property cannot be tied to a sale of raw materials, and the foreign investor must limit exports of products manufactured under a license.[90] The Investment Code makes illegal any payments of royalties to a foreign investor for the use of "intangible technology," which is not defined, but may include know-how.[91]

The Investment Code places restrictions on foreign investors' access to local credit.[92] Contracts for external credit must be authorized and registered by local authorities and the amount of interest paid on an intra-company loan between a foreign parent and an Andean subsidiary cannot be more than three percent above the going rate of interest on first-class loans in the country from which the loan is made.[93] Foreign enterprise is denied access to other than short-term local credit.[94]

Concessions to foreign companies are allowed regarding resources until 1981[95] but not as to depletion allowances. Any such concessions are limited to a twenty-year maximum time period.[96] Establishment of new foreign-owned companies is prohibited in the sectors of public services, insurance, banking, and finance.[97] Prohibited sectors include radio, television, newspapers, and in-

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86. *Id.*, at 779-780; Valdez, *supra* note 22 at 11.
87. Valdez, *supra* note 22, at 11; Oliver, *supra* note 81.
88. Articles 2 through 4 of the Investment Code as noted in Oliver, *supra* note 81, at 772.
89. Valdez, *supra* note 22, at 10.
90. Lisocki, *supra* note 79, at 320-323, 324.
91. A. Alessandri, *The Andean Approach to the Transfer of Technology* 67-68 (May, 1975) (unpublished manuscript).
92. Lisocki, *supra* note 79, at 320.
93. *See* Valdez, *supra* note 22, at art. 40.
94. *Id.*, at 13.
95. *See* Valdez, *supra* note 22, at art. 40.
96. *Id. See also* Lisocki, *supra* note 79, at 324; Oliver, *supra* note 81, at 775.
97. *Foreign Firms Get Cold Shoulder From Proposed ANCOM Investment Regulations*, BUSINESS LATIN AMERICA 353, 354 (Nov. 5, 1970) [hereinafter cited as Foreign Firms].

See generally S. Fouts, *The Andean Foreign Investment Code*, 10 TEX. INT'L L. J. 537 (1975).

ternal transportation in domestic markets.[98] Foreign banking institutions must sell eighty-percent of their capital to domestic (Andean) sources within three years in order to continue receiving local deposits.[99]

The Investment Code prohibits agreement clauses that oust the host nation from jurisdiction over investment disputes.[100] It similarly prohibits subrogation of foreign states to rights of national investors in investment disputes.[101] Thus, the benefits of the U.S. Overseas Private Investment Corporation (OPIC) are unobtainable in Andean nations because OPIC must succeed to the rights of a national investor after payment of a claim in order to permit diplomatic intervention.[102]

It is unclear whether the Code clashes with the supposed minimum international standard of treatment of foreign property. The paramount question is whether the Code provides for compensation if the foreign investor, through no fault of its own, is unable to find an acceptable buyer for its majority interest.[103] Furthermore, the Code does not specifically take into account earnings retained because of repatriation and reinvestment limitations. The limit of permitted reinvestment is generally five to seven percent of profits per year.[104] In the case of limbo capital, an orderly sale of

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98. Note Venezuela's designation of restricted investment sectors. *See* Zamora, *supra* note 78. The Venezuelan Regulations are published in *Gaceta Oficial de la Republica de Venezuela*, Nos. 1,620 and 1,650 (Nov. 1, 1973 and April 29, 1974, respectively) as noted in the Zamora article.

99. Foreign Firms, *supra* note 97, at 354; *see also*, Fouts, *supra* note 97.

100. MORAWETZ, *supra* note 58.

101. *See* Article 51 of the Investment Code as discussed in Valdez, *supra* note 22, at 15.

102. As an initial result of Article 51's adoption, OPIC operations in the Andean nations were suspended in 1972. *See* the Address by OPIC's President, Bradford Mills, at Johns Hopkins University (March 16, 1972); noted in Valdez, *supra* note 22, at 15. As Valdez points out, the impact of the Calvo Clause philosophy may have been behind the intent of Article 51.

OPIC's authorization is codified at 22 U.S.C. §§ 2191-2200a. Congress, in the 1978 Amendments to OPIC, observed that, "After OPIC pays a claim and thereby becomes the legal claimant it may negotiate directly with the host government for settlement." H. Rep. No. 95-670, 95th Cong., 2d Sess. (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 618.

103. Valdez, *supra* note 22, at 9, 17 regarding Articles 3(c) and 35.

104. With the clarification of the definition of direct foreign investment (to include "reinvestments made in conformity with the Regime, along with the right of resources in national currency to be remitted abroad), if automatic reinvestments up to the 7 percent are honored, and investments above such percentage are authorized, then the . . . frozen fund problem will disappear."

ownership overage to a governmental or private market is envisaged as well as an increased authorization for reinvestment that does not upset the majority control or ownership.[105] With respect to limbo cash, the corporation presumably must retain these excess earnings in trust for the direct foreign investor until a time when they can permissibly be distributed to the alien. If the excess earnings are not held in trust, the question of "creeping expropriation" arises with respect to uncompensated earnings.[106] The question then arises whether the state has any responsibility to insure adequate compensation to the alien investor for the required divestment of its majority ownership and rights of repatriation. The alien investor's dilemma is the choice between divestment at a loss (if no buyers can be found at a suitable price) or staying in business at a loss (in the face of the competitors' advantage of access to the common market).

A problem exists not only as to whether the Code effects actual expropriation, but whether the expropriation is legal as well. The Code simply provides that member countries shall not grant to foreign investors any treatment more favorable than that granted to national investors, thus, the Code inferentially negates the idea of any substantive minimum international standard.[107]

S. Rose, The Andean Pact: Decision 24 Revised as Chile Leaves 5 (1976) [hereinafter cited as Rose]. These same comments apply to the increases in the profit repatriation limits. Both the reinvestment and profit remittance limit increases will be illusory unless the foreign investors are permitted to establish reasonable direct foreign investment bases either through reinvestments in their own companies or new investments in other sectors or in companies in their same sector.

> 105. Upon authorization by the competent national agency, the owners of a direct foreign investment shall have the right to transfer abroad, in freely convertible currency, the verified net profits resulting from their direct foreign investment, up to 20 percent thereof per year.
>
> However, each Member Country may authorize higher percentages, reporting to the Commission the provisions or determinations taken in this respect.
>
> The competent national agency may also authorize the investment of surplus distributed profits, in which case the latter shall be considered to be direct foreign investment.

Rose, *supra* note 104.

106. Due to the importance placed upon the ultimate divestiture of the investment to local interests, there is only one possible legal vehicle to avoid divestiture under the Investment Code. This is Decision 47 of ANCOM applicable to any member state having ratified it. Under Decision 47, the foreign investor is allowed to maintain up to a seventy percent interest in the local investment in order to avoid divestiture. However, the benefits under this decision are granted solely on a case by case basis by the local government.

107. Regarding the "minimum international standards" concept and "state responsibility," Castel observes:

Thus, the Code presumably prohibits granting any transfer of direct foreign investment under terms restricting a foreign investor to a lesser degree than in the case of a national in similar circumstances.

The question becomes what standard will apply for the protection of foreign owned property. As the Code by definition acts on the interests of foreign investors only, then if an alien claims that the Code effectively confiscates its investment without compensation, the contention that the alien is only entitled to the treatment accorded to nationals will work against the ANCOM member.[108] No nationals are therefore affected by the law. The right and duty of the alien's government, under customary international law, to protect its nationals, must be re-examined. The principle of just compensation should compel the alien's government to demand that the recipient country permitting the alien's

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> The standard of conduct which a State is expected to pursue in its dealings with aliens has been the subject of considerable controversy. The Latin American States, against which large numbers of international claims have been presented, have often maintained that no violation of international law is committed so long as there is no discrimination against the alien. It is thus a perfect defense to a claim, according to this view, to assert that nationals of the respondent State are treated in the same fashion as was the alien. International tribunals have generally taken the view that, although a State must as a minimum not discriminate against aliens, its conduct must ultimately be judged by international standards, and that a State may not be heard in its defense to allege that its nationals are treated in exactly the same way as aliens. It may be said in defense of the position of the Latin American States that there may be some reason to apply local standards in the case of a natural or juristic person maintaining a permanent residence in a given State. Under such circumstances, the argument might run, the individual or corporation must be considered to have assumed the risk of residence in that country. . . . But when we turn from the protection of property to the protection of the person and of fundamental rights of the individual, it is difficult to maintain that the alien should have no protection under international law because all nationals of the country concerned are subjected to the same injustices. The international responsibility of States is a vast, complex, and ill-defined subject. It involves more than the responsibility of a State for injuries to the property or person of aliens.

J. CASTEL, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 1070 (1976).

Oliver, *supra* note 81, at 768 makes this point:

> Article 50, in a sense, approaches the "equality of treatment" viewpoint by the back door, providing that:
>
> > "Member countries shall not grant to foreign investors any treatment more favorable than that granted to national investors."
>
> Foreign investors are not guaranteed national treatment. Under Article 50 they cannot have *more than* national treatment, which seems inferentially to negate the notion of a substantive international minimum standard.

108. Oliver, *supra* note 81, at 784.

entry recognize its obligation under international law to afford an alien protection both for human and property rights. In reality, equality of treatment may be logically consistent with a definition of the alien's rights which hold the state liable for violation of the rights of its own nationals as well as those of aliens.[109] Yet, disagreement still persists as to exactly what such rights would entail.

The European Economic Commission controls over direct foreign investment appear to have a different tenor from ANCOM.[110] ANCOM permits subregional investors (investors of one of the member nations) to make the same investments as a nation, subject to certain reporting requirements and product limitations.[111] ANCOM ownership limitations, however, will prevent any majority foreign-owned interest from becoming a national investor in any member state. The ECC envisions not only the free flow of capital, goods, and services between member states, but also specifically extends the right of establishment[112] to

109. W. Bishop, International Law Cases and Materials, 744-45 (1971) *citing* 5 Hackworth, Digest of International Law 471 (1943).

> If the alien receives the benefits of the same laws, protection, and means of redress for injuries which the state accords to its own nationals, there is no justifiable ground for complaint unless it be shown that the system of law or its administration falls below the standard generally recognized as essential by the community of nations.
>
> When the treatment accorded an alien falls below the standard required by international law, the receiving state is culpable of violating an international legal interest of the state of which the alien is a national.

See also W. Bishop, *supra* at 752:

> In his capacity as Special Reporter on State Responsibility for the International Law Commission, Garcia Anador of Cuba proposed that the standard should be that of equality with nationals, provided this should not be less than the international standard of 'human rights' and fundamental freedoms. . . .
>
> For the purpose of the application of the provision of this draft, aliens enjoy the same rights and the same legal guarantees as nationals, but these rights and guarantees shall in no case be less than the "human rights and fundamental freedoms" recognized and defined in contemporary international instruments.

110. It is suggested that the increase of U.S. investment in the EEC may be due in fact to economic integration. L. Krause, Direct Foreign Investment, EEC Integration and the U.S. (1968).

111. As per Article 30, the general policy attitude toward "sub-regional" affairs is stated in §§ 1-3 and 5-6 of the preliminary declaration.

112. *See* J. Lang, Freedom of Establishment in the EEC, The Common Market and Common Law 139 (1966); A. Campbell and D. Thompson, Common Market Law. 47 (1962).

Article 67 of the Rome Treaty provides:

> Member states shall, in the course of the transitional period and to the extent necessary for the proper functioning of the Common Market, progressively abolish as between themselves restrictions on the movement of capital belonging to per-

a national of a member state which has its registered office, central management, or main establishment within the community. No further investigation into the ties between the national and its member state is required, and the corporate law of the member state is dispositive beyond the specified requirements. Thus, if no foreign ownership limitations exist in a member state, the access of foreigners to the free market is uninhibited on the grounds of residence.

A savings clause, "in the event of movements of capital leading to disturbances in the functioning of the capital market,"[113] allows the Commission to authorize particular protective measures. Significant limitations on harmful acts by foreign investors are also contained in the anti-trust provisions (Articles 85 and 86) of the EEC.[114] But the EEC provisions, with their substantially different orientations towards direct foreign investment and illicit market activities, provide no justification for the ANCOM approach which, without true flexibility in administration, clearly raises expropriation issues, if only in a more organized fashion than other expropriative acts in Latin American economic history.

Decisions 84 and 86 of the Andean Commission provide for the creation of a regional technological infrastructure and for the treatment of patents, licenses, and trademarks.[115] The goal in the technological area is to acquire necessary but inexpensive foreign technology with few strings attached and to simultaneously build up local research and development capabilities. The policy is to prevent a form of double profit from technological transfer. An-

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> sons resident in Member States and also any discriminatory treatment based on the nationality or place of residence of the parties or on the place in which such capital is invested.

Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 5 (No. 4301). *See also* Nottebohn Case (Liechtenstein v. Guatemala) [1955] I.C.J. 4, for the "minimum contacts" test under international law.

113. The Rome Treaty, *supra* note 112, at art. 73.

114. *See* 2 H. SMIT. & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY, § 85.06 (1976), regarding "incompatible" business practices in the EEC, and §§ 86.13-86.20 regarding "abuse" of market position in the EEC. *See also* Joelson & Griffin, *International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis*, 11 INT'L LAW. 5, (1977) regarding Articles 85 and 86 of the Treaty of Rome, and *id.* at 14 regarding the OECD's 1976 GUIDELINES FOR MULTINATIONAL ENTERPRISES.

115. Promulgated at the Thirteenth Period of the Extraordinary Sessions of the Commission (May 27-June 5, 1974, at Lima, Peru), 13 INT'L LEGAL MAT'LS 1478, 1489 (1974). Note that patents, licenses and trademarks were previously regulated by Articles 18-21 and 24-26 of Decision 24.

dean nations see foreign investors profiting once from technology as a fixed cost of the initial sale of a product and then profiting again from the foreign parent company sale of technology to the Andean subsidiary. Therefore, technological agreements may not be capitalized as direct foreign investments.[116] Parent companies cannot receive royalty payments from subsidiaries incorporated in ANCOM for use of patents, trademarks, or licenses.[117] More importantly, parent companies cannot receive payments for the technical assistance of trained personnel.

Article 44 of Decision 24 states in part, "When, in the opinion of the recipient country, special circumstances exist, that country may apply other regulations than those provided in Articles 40 to 43, inclusive (prohibiting enterprises in public services, banking, insurance, media, and transportation)."[118]

Some observers hoped that Article 24 would provide a savings clause for the internal conflict over ANCOM's foreign investment restrictions. In an attempt to keep Chile in the Andean Pact, Decision 100, predicated on the powers of Article 44, was drafted to modify some of the foreign investment restrictions.[119] However, this decision again provided too little. Chile not only desired an easing of the restrictions with respect to foreign investment in Decision 24 but also opposed all limits on profit remittances because "such limits scare off foreign capital."[120] Instead, Chile favored unrestricted foreign investment and low tariff barriers. During negotiations, sources indicated that the other five countries agreed to a reduction of the common external tariff to 26 percent while Chile held out for a 12 percent maximum.[121] Chile maintained that the value of indigenous manufacturers and not the

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116. *See supra* at note 78, Decision, 24, art. 21. Note also that the Andean nations, through the Andean Development Corporation, pledged themselves to promote sel COMMENTARY § 85.06 (1976), regarding "incompatible" business practices in the EEC, and §§

117. *Id.* at art. 21.

118. Ecuador and Peru in 1971 also took advantage of Article 44's "option" to apply special regulations to certain industries, Perenzin, *Multi-National Companies Under the Andean Pact—A Sweetner for Foreign Investors?*, 7 INT'L LAW. 396, 397 (1973).

119. For a review and analysis of the impact of Chile's decision to leave ANCOM because of the dispute concerning Decision 100, *see* BUSINESS LATIN AMERICA, CHILEAN DISSENSION TO HAVE MINIMAL EFFECTS ON ANCOM TRADE PROSPECTS, 257 (1976); CHILE AND ANCOM: WHAT ARE THE ISSUES AND WHAT CAN RESULT, 29 (1976); CHILE'S TIES TO ANCOM CONTINUE STRONG THROUGH CAF [CORPORACION ANDINO DE FOMENTO] AND ANDEAN MNC'S.

120. IV LATIN AMERICA ECONOMIC REPORT 35 (1976).

121. IV LATIN AMERICA ECONOMIC REPORT 37 (1976).

ownership of shares should determine the nationality of companies, and that the external tariff should not give excessive protection to local industries. Colombia agreed with Chile, while Ecuador and Venezuela held a hard line. Thus, Chile refused to sign Decision 100, the protocol modifying the Cartagena Agreement, and announced its retirement from the Andean Pact.[122]

In the latest modifications to Decision 24, Decision 109[123] declared agriculture a basic activity for Ecuador and Bolivia, thereby exempting foreign investments in this field from the provisions of Decision 24.[124] Individual foreign residents in member countries will now be allowed to remit profits and repatriate capital from investments by using locally generated funds.[125] Capital from international lending agencies and economic cooperation agencies is considered neutral and exempt from the fade-out requirements of Decision 24.[126] The Commission has also raised the limit on profit remittances by foreign companies from 14 percent to 20 percent.[127] In earlier negotiations with Chile, the five countries remaining in ANCOM had offered to allow foreign companies to increase the annual reinvestment of profits from 5 percent to 7 percent.[128]

ANCOM still has some internal strains over the question of restrictions on foreign investment. Bolivia, like Chile, was drawn into the economic orbit of the "southern cone" and signed certain new economic agreements with Argentina.[129] Peru and Chile

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122. *See Chile Withdraws from the Andean Group*, 15 INT'L LEGAL MAT'LS 1446 (1976); *Latin American Economic Integration: Chile Withdraws from Andean Pact*, 9 LAW OF THE AMERICAS 179 (1977).

123. The modifications brought about by Decision 109 (Nov. 30, 1976) are integrated, in an English-language translation, with those of Decisions 37 (June 24, 1971), 37-A (July 17, 1971), 70 (Feb. 13, 1973), and 103 (Oct. 30, 1976) to the codified text of Decision 24; *See*, 16 INT'L LEGAL MAT'LS 138 (1977).

124. *Id.* at art. 40, para. 2.

125. *Id.* at art. 7. *See also*, Article 6(d) regarding the ability to repatriate funds in "freely convertible currency."

126. V LATIN AMERICA ECONOMIC REPORT 3, (1977); *Andean Bloc Eases Investment Curbs*, Wall Street Journal, May 24, 1976, at 6.

127. IV LATIN AMERICA ECONOMIC REPORT 33, (1976) [hereinafter cited as REP. NO. 33]; *id.* at 12.

128. *Id.*

129. *See* BUSINESS LATIN AMERICA, *Argentine-Bolivian Accord Offers Opportunities on Several Levels* 318 (1976). The Agreement covers trade, agriculture, transportation and industrialization. Earlier in 1976, an agreement was reached in which Bolivia obtained a "free zone" at the Argentinian port of Rosario, while Bolivia agreed to increase the sale of natural gas to Argentina. Among other major projects, a $10 million petrochemical plant to jointly

welcome foreign investment, and Peru is increasing its emphasis on private enterprise. Apparently restrictions and controls on foreign investment are diminishing.

Two recent ANCOM developments should be noted. In 1976, the five remaining nations agreed to create an Andean Reserve Fund.[130] The purpose of the Fund is to "provide balance of payments support for the member countries . . . [through a] . . . joint administration of a fund formed from part of the international monetary reserves of the member countries . . . [and] . . . orienting [these] financial resources toward placements which contribute to the development of commerce in the subregion. . . ."[131]

The Reserve Fund Agreement, which entered into force in 1978,[132] was provided with $240 million as capital,[133] and is run by an Assembly, a Board of Directors, and an Executive Presidency.[134] The Reserve Fund may undertake both debt and credit operations in furtherance of the goals of the treaty.[135]

In 1977, the ANCOM member-states agreed to create a Court of Justice within the Cartagena Agreement.[136] The purpose of the Court is

> to guarantee the strict fulfillment of the commitments directly and indirectly deriving from the Cartagena Agreement . . . [because it is essential that] . . . both the stability of the Cartagena Agreement and the rights and obligations deriving from it must be safe-guarded by a juridical entity at the highest level, independent of the governments of the member countries and from the other bodies of the Cartagena Agreement, with the authority to define communitarian law, resolve the controversies which arise under it, and to interpret it uniformly.[137]

The Court, which is intended to sit *in quito* when constituted, will have five justices serving six-year terms and elected at three-year

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produce pesticides, already under construction, was speeded up in its construction schedule (under the authority of both States' petroleum entity).

130. *See Andean Group: Treaty for the Creation of the Andean Reserve Fund*, 17 INT'L LEGAL MAT'LS 1191 (1979).

131. *Id.* at 1191.

132. *Id.* at 1191.

133. *Id.* at art 5.

134. *Id.* at art. 13.

135. *Id.* at arts. 8, 9.

136. *See Andean Group: Treaty Creating the Court of Justice of the Cartagena Agreement*, 17 INT'L LEGAL MAT'LS 1203 (1979) [hereinafter cited as Court of Justice Treaty].

137. *Id.* at 1203.

rotating intervals. Provision was also made for the creation of the position of Attorney General subject to ANCOM agreement at a later date.[138] The Court would have the power to consider acts of nullification and acts of noncompliance and to issue advisory opinions to the ANCOM Commission.[139]

The preceding measures operate on theories having little relevance to many of the exigencies of developing countries in the modern world. Tariff barriers and quantitative restrictions do not address the issue of what development must take place in order for a less developed nation, or group of nations, to participate in the global economic system. Such measures miss the point because they provide too little.

At a time when the major economic problem facing Latin America is the shortage of capital,[140] the ANCOM nations and certain other Latin American countries have imposed restrictions upon investment of foreign capital in their nations. An alternative course of action would be to liberalize licensing and business formation requirements for foreign business and to offer incentives to foreign investors. The integrating nations, however, have been anxious about the ability of multinational or large foreign firms to maximize profits at the expense of those nations.[141] This fear was especially felt in commodities for which correct transfer prices were difficult to establish. The correct transfer price is the price at which the commodity should be transferred to the related subsidiaries of the investing multinationals in another country. Transfers of the benefits of technological advances in the form of

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138. Court of Justice Treaty, *supra* note 136, at art. 6; *id.* at art. 7, para. 1, 3; *id.* at art. 9.

139. Court of Justice Treaty, *supra* note 136, at ch. III; *id.* at arts. 17-22, 23-27, 28-31.

140. *What's in the Future? New Approaches to New Realities*, WORLDWIDE P&I PLANNING 1 (Jan.-Feb. 1972); Cahn, *The Potential Exposure Problem: An Overlooked Invesetment Decision*, WORLDWIDE P&I PLANNING, (May-June 1972); Hendershott, *THE CAPITAL SHORTAGE: HERE TODAY, GONE TOMORROW*, 28 U. MICH. BUS. REV. 1 (1976) ("insuffient growth in the capital stock since 1969"); *Latin American Economic Growth*, 44 MEX. AM. REV. 31 (1976); *Economic Outlook for Latin America*, 44 MEX. AM. REV. 30 (1976); Higson, *Latin-U.S. Trade— A Bicentennial Appraisal*, 44 MEX. AM. REV. 24 (1976); Juttner, *Legal Safeguards for Direct Investment in LDCs*, 9 INTER ECON. 259 (1976); Ereli, *Private Investment Aspect of the Andean Common Market*, XIV J. COM. MKT. STUD. 333 (1975); The IMF Wields Sudden New Power, BUS. WEEK, March 28, 1977 at 86; Stoneman, *Foreign Capital and Economic Growth*, 3 WORLD DEV. 11 (1975).

141. Hague, *Integration, Worldwide, Regional and Sectorial*, 9 J. WORLD TRADE L. 103 (1975) [hereinafter cited as Hague]; MORAN, MULTINATIONAL CORPORATIONS AND THE POLITICS OF DEPENDENCE (1974).

royalties and salaries to key personnel were at the heart of the abuses by the companies.[142]

IV. THE LATIN AMERICAN ECONOMIC SYSTEM (SELA)

Following the Sixth Special Session of the United Nations General Assembly during which the Declaration and Program of Action on the Establishment of a New International Economic Rights and Duties of States was adopted,[143] twenty-five Latin American nations meeting at Panama City in 1975 adopted a convention creating the *Sistema Economica Latinamericano* (SELA).[144] SELA is intended to be, "a permanent regional body for consultation, coordination, cooperation and joint economic and social promotion . . . ."[145] In addition to the promotion of these activities within the hemisphere, SELA is intended "to provide a permanent system of consultation and coordination for the adoption of common positions and strategies on economic and social matters in international bodies and forums as well as before third countries and groups of countries."[146] A lengthy list of more specific objectives covers Latin American-based multinational corporations, agriculture, processing of raw materials for export, commodity price supports, acquisition of capital and high-level technology, regional financial growth, exchange of technological, scientific, educational, and cultural information, transportation and communications development, tourist growth and environmental protection, and emergency assistance to member states.[147] Other integration efforts are also promoted.[148]

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142. Note that some of the "abuses" involving payment of compensation to alien-executives of multinational corporations resident in the "host" countries have actually been "encouraged" by the laws regarding taxation of, as well as the transfer and termination of, executive personnel. This practice is often in sharp contrast to practices under American law. *See* E. KOLDE, THE MULTINATIONAL COMPANY: BEHAVIORAL AND MANAGERIAL ANALYSIS 176 (1974).

143. Text of resolutions along with reservations of five industrial nations (the United States, West Germany, France, Japan and the United Kingdom) as well as the draft resolutions referred to ECOSOC *reprinted in* 13 INT'L LEGAL MAT'LS 715 (1974).

144. *See Latin American States: Convention Establishing the Latin American-Economic System (SELA), 15 INT'L LEGAL MAT'LS, 1081 (1976) [hereinafter cited as SELA]. The twenty-five signatories were Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Chile, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, and Venezuela, id.* at 1081.

145. *Id.* at art. 2.

146. *Id.* at art. 3(b).

147. *Id.* at art. 5(1).

148. *Id.* at art. 5(2-5).

SELA is governed by a Latin American Council, various Action Committees, and a Permanent Secretariat[149] whose powers and duties are fully detailed.[150] Within the first nine months after the adoption of the Convention, fifteen of the twenty-five states had ratified the Convention and had become member states of SELA.[151]

One of the concerns with the establishment of SELA has been that SELA would either replace other regional agencies or weaken them, presumably because of duplicative efforts.[152] Venezuelan President Carlos Perez saw SELA as beneficial because it would free "itself from the more inflexible structures of traditional movements [which would] contribute[s] to more dynamic, more human and much more effective integration."[153] In addition, SELA would be useful because it "will serve to demonstrate that our nationalism is not to be governed by the law of the strongest."[154] Not all observers agree with the lack of concern over the duplication of efforts. While there have been "dozens of declarations and agreements . . . towards this objective (i.e., economic integration) . . . there is no justification for the unnecessary duplication of activities of organs such as SELA and CECLA."[155]

One interesting area that SELA has been pursuing is the development of Latin American based multinational corporations whose goals would not be limited to "the maximization of profit and the more intensive use of capital and technology,"[156] but would be more oriented toward "the basic necessities of the peoples of

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149. *Id.* at art. 8.

150. *Id.* at arts. 9-19, 20-26, 27-31 (respectively).

151. Barbados, Bolivia, Brazil, Cuba, the Dominican Republic, Ecuador, El Salvador, Guyana, Honduras, Jamaica, Mexico, Panama, Peru, Trinidad and Tobago, and Venezuela were included. *See* SELA *supra* note 61, at 1081.

152. *See* Lorts & Schmitz, *Latin American Economic Integration*, 9 LAW. AMERICAS 651, 655 (1977) [hereinafter cited as Lorts & Schmitz].

153. *Comercio Exterior de Mexico*, 188; (May 1977), *reprinted in* Lorts & Schmitz, *supra* note 152.

154. *Id.* The United States is not a signatory to the convention, nor a member of SELA.

155. Vargas-Hidalgo, *Economic Integration, Development Planning and Sovereignty: A Latin American View*, 9 LAW. AMERICAS 318, 321 (1977).

156. Remarks of Jamie Moncayo, Permanent Secretary of SELA, in *Comercio Exterior de Mexico*, 451 (No. 1977) *reprinted in* Lott, *Latin American Economic Integration*, 10 LAW. AMERICAS 549, 561 (1978) [hereinafter cited as Lott].

Latin America."[157] A major area of effort by SELA has been in the agriculture-nutrition sector.[158] In 1977, SELA member-states announced ther intention to organize several Latin American multinational corporations who would devote their activities to the agriculture effort.[159] One of the first activities is designed to increase fertilizer production thereby elminating the region's heavy dependence upon imported fertilizers or fertilizer raw material.[160]

Another major effort is that of organizing a Latin American network for technological information (*Red de Informacion Tecnologica* (RITLA), which is designed to "reduce the area's reliance upon technology brought in by transnational corporations."[161] By the fall of 1978, consultation efforts among member state governments had begun on this project.[162] SELA is also becoming involved in a number of international forums in order to provide a more powerful voice of its views.[163] Efforts in 1978 and 1979 included participation in UNCTAD, the International Monetary Fund, and the North-South dialogue.[164]

V. THE TREATY FOR AMAZONIAN COOPERATION

One of the more recent regional efforts came about with the 1978 signing of the Treaty for Amazonian Cooperation,[165] by the eight nations who share the river basin of the Amazon.[166] The purpose of the treaty is "to promote the harmonious development of the Amazon region . . . to raise the standard of living of their peoples . . . so as to achieve total incorproation of their Amazonian territories into their respective national economies . . . ."[167] This general cooperative effort is to be coordinated by an Amazonian

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157. *Id.*

158. *Id.* at 562-63.

159. *See* R. Benitez, *Inter-American Legal Developments*, 9 LAW. AMERICAS 340, 370 (1977).

160. *See* L. Fernandez, *Latin American Economic Integration*, 11 LAW. AMERICAS 151, 158 (1979) [hereinafter cited as Fernandez].

161. *See* Lott, *supra* note 156, at 1008.

162. *See* Fernandez, *supra* note 160, at 158-159.

163. *See* S. Rose, *Latin American Economic Integration*, 11 LAW. AMERICAS 521, 525 (1979) [hereinafter cited as Rose].

164. *Id.*

165. *See* Treaty for Amazonian Cooperation, July 3, 1978, 17 INT'L LEGAL MAT'LS 1045 (1978) [hereinafter cited as Amazonian Treaty].

166. *Id.* The eight nations are Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Surinam, and Venezuela.

167. Amazonian Treaty, *supra* note 165, at 1045.

Cooperation Council compromised of "top level diplomatic Representatives" of the parties to the treaty as well as a Secretariat.[168]

The regional effort was intended to begin "on a relatively small scale, limited initially to the development of joint activities in such areas as hydrology, viability studies relating to economic projects, irrigation, reforestation, agricultural exploration, livestock production, fishing, road building, combined river, highway and railroad transport systems, social welfare projects and medical care."[169] The potential development of the Amazon region is enormous because it is the "largest and richest basin in the world."[170] Unfortunately, since the signing of the treaty, there has been almost no progress in the region.[171] Indeed, there is some evidence to suggest that development and rational planning in the basin have actually retrogressed as evidenced by the rapacious activities of large corporations in land clearing operations and bureaucratic mismanagement of ecological concerns in the Brazilian portion of the basin. The result could be "disastrous consequences to the region, as brush invasion and soil erosion take over what was once a fertile area."[172]

One of the problems is that there is some suspicion among Brazil's neighbors that Brazil's strong effort to promote the Treaty for Amazonian Cooperation[173] involved more than an interest in the development of the river basin. Others suspect that Brazil, not a member of ANCOM, would like to use the Amazonian Pact as a means of obtaining a voice in greater regional policies in order to expand its influence in the Pacific and Caribbean.[174] A number of statements by Ecuadorian, Venezuelan, and Brazilian officials in 1977 and 1978 lend credence to these suspicions.[175]

168. *Id.* at arts. XXI, XXII.

169. *See* Lott, *supra* note 156, at 569. The background of the meetings which led to the Pact is also discussed *id.* at 569.

170. *Id.* at 569.

171. *See* Rose, *supra* note 163, at 525.

172. *See* Fernando, *supra* note 160, at 161, 162.

173. The "Amazon Pact," was signed by the foreign ministers of Bolivia, Brazil, Columbia, Ecuador, Guyana, Peru, Surinam and Venezuela (July 3, 1978), after an unusually short period of negotiations among the member-states (fifteen months). *See* Lott, *supra* note 156 at 1011. For a review of the negotiations leading to the agreement, *see*, Lott, *supra* note 156, at 569-571.

174. *See* Lott, *supra* note 156, at 570-71.

175. *Id.* at 1012.

In 1980, as this article was going to press, several developments took place which may substantially affect the integration movement in Latin America.

By 1980, the exceedingly slow progress made by LAFTA towards a free trade area caused such widespread dissatisfaction among the member-states that it was believed impossible to reform LAFTA solely from within. Instead, an entirely new successor organization, the *Associacion Latinoamericano de Integracion* (LAIA) was created with the goal of coming into existence by the end of 1980. Given that the nations which signed the Treaty of Montevideo in August, 1980 would have to renegotiate more than 12,000 national list concessions, 7,000 non-extensive concessions, and 25 complementation pacts, it was not surprising that the goal of having LAIA's structure in place had fallen behind its timetable. It is now comtemplated for sometime in 1981.

LAIA's purpose is not to create a customs union or free trade area. It is intended that the goals of the new organization be less ambitious than those of LAFTA, which may have failed because its objectives were out of touch with the realities of the individual needs of the member-states and their economic and social structures. LAIA will create a preferential treatment area through three mechanisms: Partial Agreements; Differential Treatments; and Preferential Margins. The first will permit bilateral agreements on selected items, although the agreements in question will remain open for other member-states' adherence at a later date, a process described as "convergency." The second will permit agreements between member-states based upon the classification of the member-states' overall economic situation. The third will establish general rules for reciprocal treatment among the member-states.

The CACM integration treaty, which is due to expire in June, 1981, is facing serious problems because of differences among the member-states over the extent to which the proposed reforms should be carried out. This stems from the differing economic situation in each of the member-states generally, as well as from the fact that some nations have received greater benefits from the treaty than others.

The following problems within the region, as well as external relations with other nations, have at the end of 1980 left the prospects for CACM after June, 1981 unclear.

a. Following its 1979 revolution, Nicaragua has demanded major changes which would expand the economic orientation of the convention to include espousal of the social and political positions of the region.
b. El Salvador supports the major changes proposed in 1976 by CACM's secretariat, Sieca, which call for major lowering of barriers to the movement of people, goods, and capital as well as a significantly closer coordination of sector policies.
c. Costa Rica, historically with little enthusiasm for regional integration, seeks little more than reductions in tariffs.
d. Honduras, wishing to return to CACM for the first time since its withdrawal at the time of the 1969 "soccer war," wants to obtain preferential treatment because its economic situation is less advanced than its neighbors.
e. Guatemala, the only member which has benefited from the current CACM arrangements, not surprisingly wants no major changes (it has consistently had trade surpluses within its regional trade).

Problems of a political nature in late 1980 caused deep divisions within ANCOM. Subsequent to the latest Bolivian coup d'etat (July, 1980), ANCOM issues an Andean Code of Conduct declaring the member-states' strong stand for human, political and social rights among their citizens and openly denouncing the latest Bolivian military regime. A month later, Bolivian delegates walked out of an ANCOM sectoral meeting, and Colombia refused to invite Bolivian to attend a December meeting of the Andean heads of state on the grounds that only "legitimately elected heads of state "should attend. No solution to this rift is in sight, and it is possible that Bolivia will withdraw from ANCOM.

For reports on these matters, *see* BUSINESS LATIN AMERICA, *New Integration Treaty Revises Ground Rules and Dismantles LAFTA* 217 (July 9, 1980); *id.* at 307 (Sept. 24, 1980); *id.* at 329 (Oct. 15, 1980); *id.* at 379, 381 (Nov. 26, 1980).