PERSPECTIVES

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How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise

On September 5, 1995, the presidents of the five countries that make up the Andean Pact (Bolivia, Colombia, Ecuador, Peru, and Venezuela) met in Quito, the Ecuadorean capital, and issued a plan of action to consolidate and further expand reform efforts within the Andean Pact that had been initiated at the start of the 1990s.[1] The Quito meeting was followed on March 9-10, 1996, by a presidential summit in Trujillo, Peru, attended by four Andean Pact presidents (Venezuelan President Rafael Caldera sent a representative instead because he was required to attend to an economic crisis at home), as well as the president of Panama. In addition to agreeing to change the name of the Andean Pact to the Andean Community, the Andean presidents also adopted a Protocol Modifying the Cartagena Agreement and left open the possibility of future accession by

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1. JUNTA DEL ACUERDO DE CARTAGENA, ACTA DE QUITO: NUEVO DISEÑO ESTRATÉGICO (1995).

Panama.[2] These reforms are intended to cleanse the Andean Pact of legal norms and an institutional framework premised on now-discredited import-substitution economic policies prevalent in Latin America during the Pact's founding in 1969. The reforms adopted over the past five years have already helped to transform the Andean Pact into one of the most innovative economic integration projects in South America today. In some respects, the Andean Pact is even ahead of MERCOSUR in providing communitarian norms for such things as the adequate protection of intellectual property rights.[3]

Before discussing the most recent proposals to reform the Andean Pact, it is important to review briefly the history of the Andean integration process and examine its current legal framework and institutions. Otherwise, it is impossible to comprehend fully the extent to which the Andean Pact has transformed itself from an integration project that was, at best, indifferent to foreign investment to one that now actively welcomes it.

I. The Andean Pact's Original Legal Framework

On May 26, 1969, Bolivia, Chile, Colombia, Ecuador, and Peru signed the Cartagena Agreement, which formally brought the Andean Pact into existence.[4] Venezuela joined later, in 1973. The Andean Pact was a direct response to the frustration felt by many of the Andean countries to the shortcomings of the Latin American Free Trade Area (ALALC), an economic integration program that began in 1960 and included all of the Spanish-speaking republics of South America plus Brazil and Mexico.[5] In particular, many believed that ALALC was benefiting only the bigger and more industrialized member states such as Argentina, Brazil, and Mexico to the detriment of the smaller, less-industrialized members.[6]

The goal of the Andean Pact countries, when they signed the Cartagena

2. Despite the exhortations of the Andean presidents that the Trujillo Protocol Modifying the Cartagena Agreement be ratified by mid-May of 1996, none of the legislatures in any of the five Andean Pact countries has yet done so.

3. MERCOSUR is the Spanish acronym for Common Market of the South, the customs union that officially came into existence on January 1, 1995, and whose membership consists of Argentina, Brazil, Paraguay, and Uruguay. An article on the MERCOSUR project by this author was published in 28 INT'L LAW. 439 (1994).

4. Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910 [hereinafter Cartagena Agreement].

5. *See* Treaty of Montevideo Establishing the Latin American Free Trade Association, Feb. 18, 1960, 2 M.I.G.O. 1575.The Latin American Free Trade Association or ALALC (as it was better known by its Spanish and Portuguese acronym) was later replaced by the current Latin American Integration Association (or ALADI) in 1980. *See* Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672 (1981).

6. For a more thorough analysis of the reasons that led to the creation of the Andean Pact and a detailed discussion of the Pact's early history, see A. PUYANA DE PALACIOS, ECONOMIC INTEGRATION AMONG UNEQUAL PARTNERS: THE CASE OF THE ANDEAN GROUP (1982).

Agreement in 1969, was to establish a customs union.[7] To achieve this goal, the Cartagena Agreement provided for, inter alia, the gradual elimination of all tariff barriers and quantitative restrictions on goods native to and traded within the Andean region so as to be completely eliminated by December 31, 1980.[8] Bolivia and Ecuador were given more time to eliminate their import restrictions in recognition of their lesser-developed status.[9] Special lists of goods exempt from the general tariff reduction schedule were also permitted for all five countries, but only until 1985.[10] The Cartagena Agreement further called for the establishment of a Common External Tariff (CET) by December 31, 1980, on all goods imported from all non-Andean countries that did not enjoy a preexisting preferential tariff treatment under ALALC.[11]

Articles 32 and 33 of the Cartagena Agreement called for the establishment of so-called sectoral industrial development programs. Under these programs, various member countries of the Andean Pact would be involved in the production of a component of a manufactured good not already produced within the Andean countries that, when fully completed, would then be traded among the Andean Pact states free of tariffs and import restrictions. Products not manufactured within the subregion and not reserved for the sectoral industrial development programs were to be produced in new factories to be set up in Bolivia and Ecuador and traded within the Andean Pact free of tariffs and import quotas.[12] Both of these industrial development programs had the overtly political aim of garnering more support for the integration process among the various Andean states by promoting balanced regional growth rather than permitting market forces (as had been the case with ALALC) to decide where the new industries would be located.[13]

In an attempt to control the perceived pernicious effects of foreign investment, article 27 of the Cartagena Agreement called for the creation of a common Andean Pact policy vis-à-vis foreign investment, trademarks, patents, and licenses. In response, the relevant Andean Pact institutional body adopted Decision No. 24 in 1976.[14] Decision 24 forbade foreign investment in activities already being

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7. In a customs union, all goods native to the participating countries are traded amongst them tariff-free while all goods imported from outside the union are charged a uniform duty by all the member states. A customs union is a more advanced form of economic integration than a free trade area (FTA) (in which all the member states exchange goods native to the FTA tariff-free but continue to charge their own particular tariff rates on goods imported from outside the FTA) but is less advanced than a common market (which adds to the customs union concept the free movement of labor, capital, and services among the member states).

8. *See* Cartagena Agreement, *supra* note 4, art. 45.

9. *See id.* art. 46.

10. *See id.* art. 55.

11. *See id.* art. 61.

12. *See id.*

13. Avery & Cochrane, *Innovation in Latin American Regionalism: The Andean Common Market*, 27 INT'L ORG. 181, 193 (Spring 1973).

14. Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, Nov. 30, 1976, 16 I.L.M. 138 (1977).

carried out by enterprises from the Andean countries and prohibited foreigners from buying stock in Andean firms. Absent a rule by an individual member state permitting a higher amount, Decision 24 set 20 percent as the maximum amount of annual profits a foreign corporation could repatriate abroad. Decision 24 also required any foreign company not already operating within the Andean subregion as of January 1, 1974, to sell at least 51 percent of its shares to Andean Pact nationals to be considered a "mixed company" and therefore eligible to take advantage of the Pact's intraregional free trade scheme. Finally, in an attempt to prevent foreign controlled monopolies and restrictions on technology transfer, Decision 24 prohibited member states from granting licensing contracts to foreign companies that contained restrictive noncompetition clauses.

II. The Institutions of the Andean Pact

The two original Andean Pact institutions created under the Cartagena Agreement were the Commission and the Junta. The Commission is the highest body of the Pact, and each member state is represented by one representative who is entitled to one vote.[15] The Commission, which usually meets in Lima, Peru, issues decisions furthering the Andean Pact's objectives; additionally, it appoints and removes Junta members and approves or rejects proposals made by the Junta.[16] In general, only a two-thirds affirmative vote is needed to approve most decisions (abstentions counting as affirmative votes).[17] The decisions of the Commission theoretically have direct applicability and do not require ratification by each member state's national legislature before they become the law of the land in that country.[18]

The Junta is the technical and administrative branch of the Andean Pact and is made up of three members chosen by the Commission for three-year terms.[19] The main function of the Junta, which is headquartered in Lima, is to ensure implementation of Commission decisions. For this purpose, the Junta is authorized to issue resolutions (which require a unanimous affirmative vote) that are theoretically binding upon all the member states. The Junta also presents proposals to the Commission that it feels, if adopted, would facilitate or accelerate the objectives of the Andean integration process.[20] Articles 19 through 22 of the

15. *See* Cartagena Agreement, *supra* note 4, art. 6.
16. *See id.* art. 7.
17. *See id.* art. 11.
18. *See, e.g.*, J.G. Andueza, *La Aplicación Directa del Ordenamiento Jurídico del Acuerdo de Cartagena, in* El Tribunal de Justicia del Acuerdo de Cartagena (1985). This concept of direct applicability is similar to the situation that exists with respect to regulations issued by the Council of the European Union. The major difference between the European Union and the Andean Pact is, however, that direct applicability has been widely accepted in the European Union while it has historically been honored more in the breach than in practice in the Andean context.
19. *See* Cartagena Agreement, *supra* note 4, art. 13.
20. *See id.* art. 15.

Cartagena Agreement established various consultative committees to advise the Junta in matters such as monetary and exchange policy, finance, fiscal policy, foreign trade, and tourism.

In May of 1979 a treaty creating the Tribunal of Justice of the Cartagena Agreement was signed and Quito was designated to be the permanent seat of the court.[21] The court, which did not actually begin to function until 1984, is made up of five judges (one from each of the five Andean Pact countries). The court has the authority to: (1) nullify decisions made by the Commission or resolutions issued by the Junta because they are not in keeping with the general legal norms established under the Cartagena Agreement; (2) determine whether a member state is in compliance with its Andean Pact obligations; and (3) offer advisory opinions to the courts of the individual member states to ensure the uniform application of the Andean Pact in all the member states.[22] Individuals affected by a decision or resolution that runs contrary to the norms of the Treaty of Cartagena may, in theory, bring an action in the Tribunal on their own (although, currently, only a State Party or the Junta may bring an action against a member state for noncompliance with Andean Pact norms). Judgments of the Tribunal of Justice are legally binding on the member states and a refusal to adhere to the court's holdings permits the complaining member states to take appropriate retaliatory measures, such as restricting or suspending the preferential tariff treatment granted to the noncooperative state under the Cartagena Agreement.

In order to facilitate intraregional trade, investment, and fund development projects within the Andean subregion, the Andean Development Corporation (CAF), headquartered in Caracas, Venezuela, was formed in 1970. The Sistema Andino de Financiamiento al Comercio (SAFICO), which operates under the CAF, extends loans to both exporters and importers operating within the Andean Pact countries.[23] A connected institution, the Mechanism for the Confirmation of Letters of Credit and Import Financing, was subsequently established to confirm letters of credit and finance the importation of primary, intermediate, or capital goods imported from outside the Andean Pact but intended for industries within

21. *See* Andean Group: Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979, 18 I.L.M. 1203; Andean Group: Commission Decision on the Statute of the Court of Justice of the Cartagena Agreement, May 19, 1983, 23 I.L.M. 422 (1984). An Andean Parliament was also established at about this time made up of representatives from each of the national legislatures of the member states, but its role, to date, has been consultative and almost negligible with respect to its impact on actual decision making within the Andean Pact.

22. For a more detailed discussion of the Tribunal's powers and how it has actually functioned over the years, see F. Uribe Restrepo, El Derecho de la Integración en el Grupo Andino (1990).

23. In addition to the five Andean countries, Chile, Mexico, Trinidad, and Tobago are also currently members of the CAF and, therefore, are eligible for SAFICO financing. In addition, because all five Andean Pact countries remain members of ALADI, they may also participate in the central clearing house mechanism run through the Central Reserve Bank of Peru whereby member states need use hard currency on intra-ALADI trade only to cancel outstanding debits existing at the end of each four-month period.

the Pact. In 1976 the Andean Reserve Fund, headquartered in Bogotá, Colombia, was formed to extend credit and guarantee loans to member states with balance of payment problems and contribute to the harmonization of monetary, exchange, and finance policies among the member states. The Andean Reserve Fund was replaced by the Latin American Reserve Fund in 1991 when access was opened up to all ALADI member countries.

III. The Unraveling of the Andean Pact

The first years of the Andean Pact's existence saw intraregional trade increase from $143 million in 1969 to $213 million by 1974, with the regional trade favoring mostly manufactured products.[24] The Andean countries also succeeded in drafting three sectoral industrial development projects in metal working, steel, petrochemicals, and automobile manufacturing, although only portions of the metal working and petrochemical projects were actually ever implemented.[25] A minimal CET was also instituted by Colombia, Peru, and Venezuela by December 31, 1975.[26] In 1976 the Andean Pact experienced its first visible crisis when Chile withdrew over continued opposition to Decision 24 and the Pinochet dictatorship's decision to pursue aggressive free market style economic policies that clashed with the generally protectionist, state-led industrial development philosophy of the Andean Pact scheme. More problems soon followed when the remaining member states, bowing to domestic pressure groups unhappy with the differences in short-term costs and benefits flowing from the integration process, failed to observe or incorporate into national law all the provisions of the Cartagena Agreement.[27] Furthermore, unresolved political and territorial disputes between the member states, particularly the armed conflict between Peru and Ecuador in 1977, compounded the difficulty of getting the member states to cooperate in coordinating agricultural and industrial development policies and harmonizing their asymmetrical domestic legal norms.[28] The final blow to the Andean Pact

24. Mace, *Regional Integration in Latin America:A Long and Winding Road*, 43 INT'L J. 404, 417 (Summer 1988).

25. CEPAL (Unidad de Comercio Internacional), DESENVOLVIMIENTO DE LOS PROCESOS DE INTEGRACIÓN EN AMÉRICA LATINA 49 (1995).

26. JUNTA DEL ACUERDO, MECANISMOS DE LA INTEGRACIÓN ANDINA 38 (1985). This Minimal Common External Tariff had an average duty of 27.1% and a spread of 36.2%. Garay, *The Prospects for Andean Integration*, in PROSPECTS FOR THE PROCESSES OF SUB-REGIONAL INTEGRATION IN CENTRAL AND SOUTH AMERICA 69 (1992).

27. Vargas-Hidalgo, *The Crisis of the Andean Pact: Lessons for Integration Among Developing Countries*, 17 J. COMMON MKT. STUD. 213, 219 (1979).

28. Salgado Peñaherrera, *The Andean Pact: Problems and Perspectives, in* REGIONAL INTEGRATION: THE LATIN AMERICAN EXPERIENCE 175 (1985). Ironically, the problem of unresolved territorial disputes surfaced again on January 27, 1995, when Peru and Ecuador went to war over territory each claims as its own in the Amazon jungle. This war seriously disrupted trade flows among the Andean countries for several months and threatened to undermine the entire Andean integration process. *See, e.g.*, Patti Lane, *Peru-Ecuador Conflict Slows Andean Pact Trade Reforms*, J. COM., Apr. 12, 1995, at IA.

that caused the whole process to begin unraveling was the oil shock of 1979, which affected members differently and led them to pursue conflicting macroeconomic policies.[29] In particular, the sharp rise in oil prices caused some of the Andean countries to face severe balance of payments problems. These problems developed as more money went out to pay for petroleum and less money came in from commodity exports, the prices of which also dropped due to a prolonged recession that began affecting the industrialized countries in 1980. In an attempt to increase exports and therefore expand their foreign currency exchanges, these Andean countries sharply devalued their currencies. In doing so, they made imports from oil-producing Ecuador and Venezuela, who were enjoying minibooms from the sharp hike in oil prices (which, in turn, contributed to an overvaluation of their currencies), more expensive and reimposed an indirect tariff barrier on Ecuadorean and Venezuelan goods. For their part, Venezuela and Ecuador became swamped with the cheap manufactured goods of their Andean neighbors, and industrialists in both countries quickly put pressure on their respective governments to impose safeguard clauses to halt the import tide that threatened to bankrupt them. The sharp rise in international interest rates in 1982, which set off the infamous Latin American debt crisis and resulted in a subsequent halt in international lending to Latin America, only exacerbated the problem by making it impossible to "fund" the trade imbalances and drained the Andean institutional bodies (the CAF and the Andean Reserve Fund) of the capital that had been intended to alleviate trade imbalance problems. Consequently, whereas during the first ten years of the Andean Pact's existence intraregional trade had grown at an average annual rate of 28.2 percent, after 1979 there was virtually no increase, and by 1983 trade within the Andean subregion was actually showing signs of severe contraction.[30]

IV. The First Attempts at Reform

By the early 1980s it had become apparent that the Andean Pact integration process was dead as new, export-led policies were adopted by many of the member states. The intent of these policies was to escape the limitations on state-directed economic growth posed by the Latin American debt crisis that had seriously disrupted intraregional trade flows and caused the deadlines for establishing a subregional free trade area and a CET to go unmet. In an attempt to revitalize the integration process, the Andean Pact members signed the Quito Protocol

29. The first oil shock of 1973-74 did not produce the same negative effects, because it coincided with a price increase in traditional primary product exports of the Andean states and resulted in only a short-lived recession in the industrialized nations, and petro-dollars soon made themselves available at cheap interest rates to "subsidize" any trade imbalances. ALFREDO FUENTES & JAVIER VILLANUEVA, ECONOMÍA MUNDIAL E INTEGRACIÓN DE AMÉRICA LATINA 124-25 (1989).

30. Peñaherrera, *supra* note 28, at 178.

in May of 1987.[31] The Quito Protocol eliminated the strict time deadlines for establishing an Andean free trade area and a CET; abolished the industrial development programs and replaced them with efforts that placed the initiative for integration with the private sector; and encouraged member states to reach bilateral (as opposed to more complicated multilateral) accords to reduce tariff barriers and eliminated import restrictions. In conjunction with the adoption of the Quito Protocol, the Commission also repealed the controversial and counterproductive Decision 24 and substituted it with Decision 220. Decision 220, in turn, lifted prohibitions on foreigners purchasing stock in Andean companies and eliminated restrictions on repatriation of remittances of earnings.[32]

However, the changes introduced by the Quito Protocol ultimately proved incapable of reviving the Andean economic integration process. For a revival to occur, it would take a reformulation of the entire philosophical underpinnings of the Andean Pact coupled with the adoption of free market-oriented economic policies by all the member states. These events did not begin until the start of the 1990s.

V. The Revival of the Andean Pact

Between May of 1989 and December of 1991 the presidents of the Andean Pact countries met on six separate occasions in an attempt to revive the Andean Pact integration process. All but one of these meetings were followed by important announcements that made it clear that the Andean Pact was making a definitive break with a past defined by heavily protected markets and inward-looking, centrally planned economies to a future where market forces and export-led growth would dominate.[33] At the fifth of these meetings, held in Caracas in May of 1991, the Andean presidents agreed to establish an intraregional free trade area by January 1, 1992.[34] At the sixth meeting, held in Cartagena in December of 1991, a four-tiered CET of 5 percent, 10 percent, 15 percent, and 20 percent was announced that would be implemented by January 1, 1992 (with Bolivia permitted to maintain its two-tiered 5 percent and 10 percent external tariff system). In addition, any special lists of goods temporarily exempt from the CET had to be abolished by January 1, 1993 (with Ecuador being given an additional

31. Andean Pact: Official Codified Text of the Cartagena Agreement Incorporating the Quito Protocol, May 12, 1987, 28 I.L.M. 1165 (1989).

32. Andean Group: Commission Decision 220 Replacing Decision 24, the Common Foreign Investment and Technology Licensing Code, *entered into force* May 24, 1988, 27 I.L.M. 974. One thing that Decision 220 did not do, however, is eliminate the requirement that at least 51% of the shares of a company had to be owned by Andean nationals before it could partake in the intraregional free trade scheme.

33. These six presidential summit meetings included Cartagena, Colombia (May 1989), the Galapagos Islands (December 1989), Machu-Picchu, Peru (May 1990), La Paz, Bolivia (November 1990), Caracas, Venezuela (May 1991), and Cartagena, Colombia (December 1991).

34. *See* Graham, *Andean Nations Put Common Back Into Market*, FIN. TIMES, May 30, 1991, at 4.

year to comply).[35] In conjunction with the announcements emanating from the various presidential summits, the Andean Commission also began issuing decisions reflective of the deregulated and market-oriented direction of the new Andean Pact. In March of 1991, for example, the Commission adopted Decision 291, which superseded earlier decisions regarding foreign investment. Henceforth, there would, in principle, be no legal difference between foreign or domestic capital. Foreigners were generally free to repatriate investment capital and profits at will; any requirements of prior authorization or registration of foreign investments were abolished; and all foreign companies operating in the region (regardless of the percentage of Andean stockholders) could partake of the intraregional free trade scheme.[36]

Despite the best intentions of the Andean presidents to have an intraregional free trade area in place by January 1, 1992, and a fully functioning customs union by 1995, differences among the member states soon emerged that disrupted the implementation timetable. In April of 1992 Peru's membership in the Andean Pact was temporarily suspended following President Alberto Fujimori's abrogation of the Constitution, closing of the courts, and dissolution of Congress. Ecuador resisted opening its entire market to intraregional free trade until 1993 and did not adopt the CET until 1994 (and only then with significant modifications). Isolated at the southern end of the Andean Pact, Bolivia focused its attentions on seeking admission into the MERCOSUR with whom it conducts more trade than with its fellow Andean Pact member states. Only Colombia and Venezuela came close to meeting the deadlines for implementation of the intraregional free trade area and the CET.

VI. The Andean Intraregional Free Trade Scheme Today

At the present time no duties are charged on goods native to, and traded among, Bolivia, Colombia, Ecuador, and Venezuela. In theory, nontariff barriers have also been eliminated among the four countries, although recent actions by Colombia and Venezuela indicate that this is still not always the case in practice.[37] The one Andean Pact country that currently does not fully participate in the intraregional free trade scheme is Peru. Although the political dilemma that was

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35. CEPAL, *supra* note 25, at 55.

36. Andean Group: Commission Decision 291—Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties, Mar. 21, 1991, 30 I.L.M. 1283. The only significant requirements that Decision 291 retained from the previous legal regime for foreign investment was the registration of technology licenses and a prohibition that such licenses contain restrictions on the export of the goods manufactured under them.

37. *See* Patti Lane, *Colombia Places Restrictions on Venezuelan Foodstuffs*, J. COM., May 19, 1995, at 5A. In May 1995, Colombia prohibited rice imports from Venezuela and imposed countervailing duties on Venezuelan corn and sugar imports. Colombia claimed that Venezuelan middlemen were importing these items from abroad at well below the Andean Pact's CET and were then selling them in Colombia, threatening to put local producers out of business.

responsible for Peru's suspension from the Andean Pact in 1992 was resolved in May of 1995 following Fujimori's reelection in democratic elections, Peru's adoption of bold market-oriented, neoliberal economic policies make it difficult for the country to participate fully in the Andean Pact when Peru's partners have been much slower in adopting these same policies. Peru does, however, enjoy tariff-free commerce with its four Andean Pact partners for all goods not levied 15 percent or 20 percent tariffs under the Andean CET regime (see below). Goods that are levied the 15 percent to 20 percent tariffs (and are therefore generally excluded from free trade), include meat, poultry, fish and lactates, agricultural products, textiles, and paper goods. However, Peru also has separate bilateral free trade agreements with all four of its fellow Andean Pact countries under the auspices of ALADI and, therefore, some of the goods with 15 percent or 20 percent tariffs under the Andean CET are traded by Peru with the other countries tariff-free. In the Peruvian-Bolivian agreement, in fact, there is now complete free trade between the two countries for almost all products. Negotiations to incorporate Peru fully into the Andean Pact intraregional free trade scheme are expected to be completed sometime in 1996.

In order to take advantage of the intraAndean free trade system, a product must comply with the requisite rules of origin requirements of the Andean Pact. The rules of origin requirements for the Andean Pact are governed by Decision 293 and are patterned on ALADI Resolution 78.[38] In general, only goods that are native to the Andean countries, or are substantially transformed within the region so as to undergo a change in tariff classification, can be traded among the Andean Pact countries duty free. However, goods whose extraregional content does not exceed 50 percent of the final product's FOB (freight on board) price will also generally be accorded intraregional free trade treatment. In the case of goods made in Bolivia and Ecuador, the minimal regional content requirement can be 60 percent.

VII. The Andean Common External Tariff System

The Andean Pact's CET consists of a four-tiered system. Since February 1, 1995, the majority of goods imported into Colombia, Ecuador, and Venezuela are charged Andean tariffs of either 5 percent, 10 percent, 15 percent, or 20 percent. Bolivia is specifically exempted from this four-tiered system by Andean Pact Decision 370 and is allowed to retain its two-tiered system of 5 percent and 10 percent. Currently, Peru does not participate in the Andean CET system and levels its own two-tiered external tariff regime of 15 percent and 25 percent. In addition to the fact that neither Bolivia nor Peru adheres to the Andean Pact CET, there are also a number of important exceptions applied by the three member

38. Andean Group: Commission Decision 293—Special Norms for Determining the Origin of Goods, Mar 21, 1991, 32 I.L.M. 172.

states that theoretically adhere to it in full. Most of these exceptions will be gradually phased out over the next four years so as to comply with the general four-tiered system.

The most important exception to the Andean Pact's four-tiered CET system is the option given to Ecuador to keep its tariffs for some 960 items five percentage points either above or below its obligations under the CET. These goods are listed in Annex 2 to Decision 370 and primarily consist of agricultural, chemical, pharmaceutical, and steel products, as well as certain types of machinery. Another important exception to the CET is the 0 percent tariff that each Andean Pact country may charge on capital good imports as well as mutually agreed upon primary goods not produced in the region. Yet another important exception exists for automobiles, for which Colombia, Ecuador, and Venezuela currently levy a 40 percent tariff until a definitive regime for the automobile industry can be established. The three countries, however, charge a 5 percent tariff on disassembled automobiles and motorcycles imported into the Andean Pact that are put together in regional factories. Finally, the Andean Pact also maintains a variable tariff system (Decision 371) for certain basic agricultural goods for which there are often wide fluctuations in price on the international market. Under this mechanism, when the price of, for example, winter wheat falls below the average international market price as measured over the preceding five years, the Andean countries will impose an additional duty in order to bring the price up to the so-called historical range. This mechanism is designed to give Andean producers some level of predictability for making adequate production decisions and escape volatile swings in input costs or final products prices.

VIII. The Legal Regime for the Protection of Intellectual Property

The current legal norms for the protection of intellectual property rights in all five Andean Pact countries are found in three decisions issued by the Commission. Because the Commission has supranational authority, its decisions should automatically become the law in each of the five member states upon their publication in the *Gaceta Oficial del Acuerdo de Cartagena* (unless the decision itself provides for a later date). In the event of conflicting or pre-existing domestic law, Andean community law theoretically takes precedence without the need to resort to the national legislatures for enabling or corrective legislation. In actual practice, however, there have often been delays in the full implementation of decisions of the Andean Commission, and the area of intellectual property norms has been no exception.

Decision 344 contains the rules for the protection of patents, utility models, trademarks, industrial secrets, and so-called place of origin denominations.[39]

39. For the full text of Decision 344 in the original Spanish, see Decisión 344: Régimen Común Sobre Propiedad Industrial, Oct. 29, 1993, 10 GACETA OFICIAL DEL ACUERDO DE CARTAGENA 142.

Patents are protected for twenty years, including patents for pharmaceutical products (as long as they do not appear in the list of essential medicines maintained by the World Health Organization) and biotechnology inventions. The protection offered to patent holders in the Andean Pact is actually greater than that which exists in some of the individual MERCOSUR countries (since there are, as yet, no MERCOSUR norms). For example, Argentina has yet to amend its patent law so as to protect pharmaceuticals until after the year 2000. As for trademarks, Andean Pact Decision 344 affords an initial ten-year period of protection, which can subsequently be renewed.

Decision 351 contains the rules governing copyright and related protection for books, records, movies, computer software, and other forms of literary, artistic, and scientific works (including radio, television, and audiographic productions).[40] Unlike Decision 344, Decision 351 offers so-called pipeline protection to copyright holders. Protection of copyrights is offered for the life of the author plus an additional fifty years following the author's death.

Decision 345 is a particularly innovative addition to the realm of intellectual property protections available in the Andean countries.[41] Any person who has created or otherwise obtained a new plant variety through scientific research will enjoy the exclusive right to produce and commercialize such plant for a period of fifteen to twenty-five years.

The area where the delays have come in implementing Decisions 344, 351, and 345 has been in the establishment of regulatory bodies and procedures in each Andean country for the effective and adequate enforcement of the rights granted protection. Traditionally, this has been a serious problem in the Andean countries whose judicial systems tend to be overwhelmed with heavy case loads, are understaffed, and are severely underfunded. In such an atmosphere, the possibilities for petty corruption to flourish are rampant. One solution that many of the Andean countries have adopted is to set up independent administrative agencies as alternatives to the local courts. These administrative bodies provide quick resolutions of copyright or trademark infringement complaints as well as allegations of pirating of intellectual property rights. In Peru, for example, the administrative agency charged with enforcing Decisions 344, 345, and 351 is INDECOPI (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual).

At the present time, all countries in the Andean Pact apply Decision 344, although a matter is currently before the Venezuelan Supreme Court challenging the constitutionality of Decision 344 in Venezuela. To date, only Colombia and

40. For the full text of Decision 351 in the original Spanish, see Decisión 351: Régimen Común Sobre Derechos de Autor y Derechos Conexos, Dec. 21, 1993, 10 GACETA OFICIAL DEL ACUERDO DE CARTAGENA 145.

41. For the full text of Decision 345 in the original Spanish, see Decisión 345: Régimen Común de Protección a los Obtentores de Variedades Vegetales, Oct. 29, 1993, 10 GACETA OFICIAL DEL ACUERDO DE CARTAGENA 142.

Ecuador have set up the registration process mandated by Decision 345. Although Decision 345 is technically valid law in the other Andean Pact countries, it is without practical effect until these countries establish the requisite registration procedures.

IX. Recent Proposals for Institutional Reform

One of the things that sets the Andean Pact apart from other regional economic integration programs in Latin America is the existence of well-developed communitarian institutions with supranational authority. This scenario contrasts with the situation that exists in the MERCOSUR, for example, where the institutional structure is weak and any decisions or resolutions adopted by the respective governing bodies must first be implemented into the domestic law of each member state before they become effective in the respective countries.[42]

One of the specific proposals for institutional reforms adopted by the five Andean Pact presidents in Quito last September is the restructuring of the Junta del Acuerdo de Cartagena into a General Secretariat under the leadership of a secretary general. With this change it is hoped that some of the impasses created in the past when the three-member junta was unable to reach unanimous agreement on how to implement the decisions of the Andean Commission can be avoided. In addition, the highest political decision-making body of the Andean Pact will now be the Council of Andean Presidents and not the Commission (although the latter retains its powers to issue decisions involving integration matters that have direct applicability in the legal systems of the member states). Also, the Council of Andean Ministers of Foreign Relations will be expanded so as to include the respective Ministers of Industry, Commerce, and/or Integration of the respective member states. This Council will also be entrusted with authority to negotiate treaties and agreements with other countries and international organizations.

Regarding the Andean Pact's Tribunal of Justice, proposals will be voted on in 1996 which will, inter alia, give individuals the right to sue a member state for noncompliance of Andean Pact norms and will also permit the Tribunal to serve as an arbitration panel for business disputes involving private parties.[43] In recent years the Tribunal has gained increased importance as a result of the greater emphasis given within the Andean Pact to the protection and enforcement of intellectual property rights. In 1995 the court's case load increased five times

42. This situation no longer appears to be the case in Argentina as a result of amendments made to its Constitution in 1994 and recent Supreme Court holdings interpreting those amendments. Accordingly, most norms flowing out of bodies created by international treaties (such as the Treaty of Asuncion, which created MERCOSUR) have direct applicability in Argentina and, theoretically, even take precedence over conflicting domestic legislation.

43. TRIBUNAL DE JUSTICIA DEL ACUERDO DE CARTAGENA, PROYECTO DE REFORMAS AL TRATADO DEL TRIBUNAL DE JUSTICIA DEL ACUERDO DE CARTAGENA (1995).

from the year before and approximately 90 percent of the court's present case load deals with actions involving interpretation of intellectual property norms.[44]

X. Conclusion

Once derided as the worst manifestation of protectionist, import-substitution economic policies and blamed for creating an economically stagnant Latin America, the Andean Pact has in recent years been at the forefront of efforts to establish uniform rules that encourage free trade and attract foreign investment. Because of a preexisting network of communitarian institutions enjoying supranational authority, the Andean Pact has been much more successful in establishing uniform norms for the protection of foreign direct investment and intellectual property rights than have other Latin American integration projects. These institutions are currently being reformed in an effort to make them more effective as well as more compatible with the new market-oriented economic policies that now predominate in the Andean countries.

44. Luis Henrique Farías Mata, President of the Tribunal of Justice of the Cartagena Agreement, Address at the 32d Conference of the Inter-American Bar Association in Quito, Ecuador (Programa Especial del Tribunal de Justicia del Acuerdo de Cartagena) (Nov. 14, 1995).