The Andean Community: Finding Her Feet within Changing and Challenging Multidimensional Conditions

Mauricio Baquero-Herrera
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Mauricio Baquero-Herrera*

I. INTRODUCTION

The process of integration between the countries of Bolivia, Colombia, Ecuador, Peru, and Venezuela has passed through different stages since its beginning in 1969. The Andean Pact (AP) was the first sub-regional attempt based upon now discredited inner-looking policies of import-substitution and protective Foreign Direct Investment (FDI) regulations. Although internal and external political factors played a part, implementation of the Andean Pact was primarily hindered by economic instability, and it came under deep scrutiny in 1989. During the early 1990's, a process towards the definition of a new strategic design took place. The consolidation of the Andean market as an economic area and the enhancement of the international relations of the Group within the region and with other economic blocks became the core goals of the member countries. As a result, important steps were taken to internally consolidate the Andean Integration such as the creation of the Andean Community (AC) in 1996 and the Andean President’s commitment in 1999 to the goal of establishing the Andean Common Market (ACM) by 2005.

As a result of the policy of open regionalism and under the framework of the Treaty of Montevideo 1980 Latin America Integration Association (LAIA), important agreements were reached with countries in the region. In 1995, Colombia, Venezuela (the main economic partners within the AC), and Mexico formed the Group of Three (G-3) with the purpose of establishing a Free Trade Area (FTA) by mid 2004. At first individually (Bolivia and Peru), and later as a group, Andean members signed several Partial Scope Agreements (PSAs) with the Common Market of the

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Southern Cone (MERCOSUR) geared towards the establishment of an FTA to be implemented on July 1, 2004. In addition in 1994, member countries initiated negotiations towards the establishment of the hemispheric Free Trade Area of the Americas (FTAA), which were supposed to end in 2005. Furthermore, since May 18, 2004, Ecuador, Colombia and Peru have started simultaneous negotiations with the United States geared towards setting up individual Preferential Trade Agreements (PTAs) by 2005.

Certainly, these internal changes and different external commitments being negotiated or in execution are putting pressure on the Andean Integration Process. This unprecedented environment of deeper sub-regional integration and evolving extra sub-regional negotiations is shaping the character and nature of the AC, challenging its internal cohesion and capacity to maneuver within evolving, unpredictable and demanding conditions. Whether she will become stronger, change her nature or simply disappear is something that cannot be foreseen in the near future. However, if implementation of the internal changes and the external commitments of the negotiations begin, the actual economic environment of the Andean Countries will progressively transform, and both their domestic and supranational legal frameworks will need to be adapted accordingly.

These concurrent and demanding processes impose upon the AC and the Andean Integration System (AIS) the core tasks of building the institutions required to that end and delivering the legal reforms involved in properly implementing, at all levels of their stated commitments. This is indeed a tremendous undertaking, testing the AC's internal cohesion and strength. Is the AC sufficiently prepared to take on these simultaneous challenges? This is a question whose answer relies on three main factors: 1) the political will of the Andean leaders and their capacity to lead the AIS to a successful achievement of all the considerable assignments imposed upon it; 2) the proactive participation of the interest groups in the negotiations still in place and their effective monitoring of the implementation of the complex kaleidoscope of internal and external commitments the AC is facing; and 3) the adequate understanding of the rule of law as a means of ring-fencing the AC from the political risk and providing supranational and domestic convergence between internal and external commitments.

II. THE ESTABLISHMENT OF THE ANDEAN COMMON MARKET AND THE INTERNAL CHANGES AND CHALLENGES ORIGINATED FROM ITS IMPLEMENTATION

The establishment and consequent implementation of the ACM constitute one of the most important internal challenges faced by the Andean process of sub-regional integration after the creation of the AC in 1996. It represents a further step in the evolving stages of economic sub-regional integration, following the achievement of an FTA and an imperfect
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Customs Union (CU) by the Andean countries. This demanding task has been undertaken by a sub-regional scheme which has developed certain specific features during its thirty-five years of existence and is based upon now-settled internal structures and bodies. Any approach to the ACM must take these features into consideration in order to assess the feasibility of having it in place by 2005.

Since its creation as the Andean Pact in 1969, this integration effort has pursued differential treatment for its members and has been strongly influenced by the political will of the Andean Presidents. It has also developed an impressive set of institutions and has been based on certain economic policies aimed at delivering development and better standards of living for the Andean citizenry. Among these four characteristics, this section underlines the direction and impulse given by the Andean Presidents to the scheme during the last decade. It also explores the cohesion and coherency of the system of institutions and bodies which comprise the AIS in order to achieve the ACM.


The AP was a step beyond the regional integration efforts already in place in South America during the 1960s. The Cartagena Agreement (CA) was created as a sub-regional integration agreement within the original Latin America Free Trade Association (LAFTA) framework and was compatible with the goal of Latin American Economic Integration. It was an attempt by some Andean countries to increase economic development through a policy of industrial development and parallel sub-regional market opening, which at that time seemed like a strategy to overcome the problems faced by the countries of the sub-region, which LAFTA could not solve.

After its creation, the AP passed through different stages. Following an

1. The Treaty of Montevideo 1960 established the first regional integration effort in Latin America creating the Latin American Free Trade Association (LAFTA), which was originally signed by Argentina, Brazil, Chile, Mexico, Paraguay, Peru and Uruguay. Colombia (1961), Ecuador (1961), Venezuela (1966) and Bolivia (1967) joined later.
3. LAFTA involved countries with diverse levels of development, size, and political interests. The most industrialized countries (Argentina, Mexico, and Brazil) had a clear interest in securing a wider market for their products, while smaller and underdeveloped countries focused on creating industrial development. This imbalance was perceived as a disadvantage of the agreement. Rubens Antonio Barbosa, The Evolution of the Integration Process in South America, introduction to Marta Haines Ferrari, The Mercosur Codes xiv (BIICL, 2000); Middlebrook, supra note 2, at 64-65 n.4; David E. Hojman, The Andean Pact: Failure of a Model of Economic Integration, 20 J. COMMON Mkt. STUD. 139, 139 (1981).
important boost in the early years, the inclusion of Venezuela in 1973 and the sudden abandonment of Chile in 1976 marked a very difficult first decade. The political will of the member countries, or the lack of it, was one of the most important elements present or missed in the early years of the CA. The AP's original mechanisms and objectives needed strong and enduring political commitment. In order to make the whole system functional, member countries set up two main bodies, the Commission and the Board, which in the long run became influenced by the political attitude of their members.

Due to the increasing non-compliance with the Andean regulation, the lack of uniform application of the Decisions of the Andean Commission (AnC), and the inconsistent understanding of the Andean rules, the Andean Court of Justice of the CA and the Andean Parliament were created in 1979. This important move was supposed to bring to the integration process a great deal of stability and legal certainty. However, if the 1970s were immersed in volatile and controversial political environments, in the 1980s the countries in the region were shattered by the economic crisis brought about by the oil and international external debt crises.

Certainly, the 1980’s ("the lost-decade"), had a tremendous impact on Latin American economic and social history, and obviously affected

4. For an explanation of the overall consequences of Venezuelan late entry to the AP, see Avery & Cochrane, supra note 2, at 99-101; Middlebrook, supra note 2, at 79-80.
10. The ECLAC called the 1980s the lost decade. The same institution called the first half of the 1990s "A lost half-decade in Latin America." Jose Antonio Ocampo, A Lost Half-Decade in Latin America, 149-150 THIRD WORLD RESURGENCE 33, 33 (2003).
the development of the AP. However, during this devastating crisis, the Andean integration effort showed one of its more important features—its endurance and commitment to prevail despite difficulties that have impeded the development and delivery of its objectives.

At the time, member countries opted for a pragmatic approach, amending the CA through the Protocol of Quito 1987. It established a new phase of the AP that would lay the foundation for the formation of an Andean sub-regional community. Member countries introduced guidelines for the institutional restructuring of the Andean Group in which regulations were relaxed to attenuate and give flexibility to the obligations originally adopted, while individual member countries implemented structural reforms based on market openness. Conscious of the consequences brought about by the external debt crisis, member countries determined, along with additional objectives of the Treaty, to reduce external vulnerability and to improve their positioning within the international economic context.

The Quito Protocol also made some progress in the institutional field. It granted to the Commission exclusive legislative capacity in the areas of its competence and gave to it additional functions aimed at fostering the sub-regional integration process. As for the Board, it continued to serve as a technical body, acting as the permanent secretariat located in Lima, Peru. The Andean Business Advisory Council (ABAC) and the Andean Labor Advisory Council (ALAC) were also created with the core aim of gaining support from the private sector, which had profound reser-

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11. A report by the Board of the CA at that time refers that: Today the Andean Group is being subjected to adverse forces that significantly hold back its progress and seriously jeopardize the community structures built with so much effort. Currently there are problems in the field of trade liberalization, difficulties that prevent the industrialization programmes from being implemented, lack of definition on issues like the common external tariff and many instances where the commitments made in the field of legal regulations have not been fulfilled. Permanent Secretariat of SELA, Latin America and Caribbean Integration Schemes in the Face of the International Crisis, available at http://www.sela.org/public_html/AA2K/EN/docs/spclxxvi9.htm (last visited Sept. 7, 2004) (quoting Board of the Cartagena Agreement, Instituto Para LA Integración de América Latina, Estrategias de Desarrollo E Integración en el Grupo Andino (1985)).


15. Id. art. 6-7, at 1172.

16. Id. art. 13, at 1175.
vations about the success of the AP.\textsuperscript{17}

In addition, the Protocol included in the CA several programs related to services.\textsuperscript{18} The Commission was in charge of formulating them.\textsuperscript{19}

Between May 1989 and December 1991, the Presidents of the Andean countries convened on nine occasions\textsuperscript{20} to evaluate and try to revive the process. The impetus of the Presidents at the time ended up in the institutionalization of the Andean Presidential Council (APC) in Machu Picchu 1990\textsuperscript{21} – one of the most important changes in the structure of Andean integration. Since then, fifteen meetings have taken place in which core decisions were made in order to progressively deepen sub-regional integration by achieving a Free Trade Area, a Customs Union, and a Common Market.\textsuperscript{22}

Without any doubt, the introduction of the APC has contributed to the dynamism of the sub-regional integration effort during the last decade. Not only were co-related economic policies and structural reforms implemented in each member country, but strong political commitments and the direct influence by the Member countries' governments have moved the Andean scheme towards the achievement of its goals.

An overview of the efforts undertaken by the Andean leaders during the last few years, proves on the one hand, the direct influence of their political will and, on the other hand, the fragility of the process, which relies heavily on the leadership of the Andean Presidents. Due to the APC's consistent work, it only took about four years to build up a solid and efficient process towards the establishment of an FTA, an agreement on a Common External Tariff (CET) and a deadline for the establishment of the ACM.\textsuperscript{23} Only a period of political turmoil in 1992, when Peruvian obligations were suspended, stopped the meetings of the Andean Presi-
Notwithstanding these circumstances, progress took place after Peru's suspension. Bolivia, Colombia, and Venezuela opened their markets up on September 30, 1992. In January 1993, Ecuador opened its market to Venezuela. Thereafter, in 1993, the Andean FTA started operating fully for all countries, except Peru. All products were liberated, and there was no list of exceptions.

Reaching a CET has not been easy. The original CA of 1969 visualized the establishment of a CU by 1980. However, the entire process has taken fifteen years more than initially planned, delivering an incomplete CU subject to exceptions (countries, sectors, and products) and delaying its application. Through Decision 370 on November 26, 1994, the Commission of the CA approved the CET, which started operating in February 1995. It was implemented only by Colombia, Ecuador and Venezuela while Bolivia maintained a special tariff schedule, as authorized by the Act of Barahona. In the Santa Cruz Declaration of 2002, the Andean Presidents determined new CET levels, and on April 14, 2003, the Andean countries completed the necessary agreements for the adoption of the Andean Community External Tariff (ACET). However, in a meeting of the Commission of the Andean Community (CAC) in May 2004,
the Andean Foreign Trade Ministers unanimously agreed to postpone the effective date of the new CET established by Decision 535, until May 10, 2005. Thereafter, the Andean countries are authorized to apply tariff levels effective in each country.\(^{30}\)

In September 1995, the Andean Presidential meetings resumed even though an old border dispute between Ecuador and Peru regarding the Amazonia resurfaced that year, leading to hostilities between the two Andean countries.\(^{31}\)

In 1995, a new strategic design for the CA was approved in Quito, Ecuador. The Andean Presidents took into account the international environment of increasing globalization and consolidation of regional blocks as well as the need for poverty reduction and peace in the Western Hemisphere. With that in mind, they channeled the Andean process into deeper sub-regional integration through the establishment of the ACM. At the same time, they promoted the external projection of the Andean Group in the region and in other blocks, and also consolidated and strengthened the actions related to the social and sectoral aspects of the process.

In order to adapt the Andean integration process to the changing environment of the 1990s, the Andean leaders focused on the structural reform of the AP by setting up the AIS including all bodies and institutions already in place. The New Strategic Design approved in Quito in 1995 was the basis for the Trujillo Protocol of 1996 by which the AP transformed into the AC and created the AIS\(^ {32}\) in order to promote effective co-ordination between the different bodies and institutions (about fourteen) that comprise it.\(^ {33}\)

The AIS is composed of: (1) the APC as the highest-level body;\(^ {34}\) (2) the Andean Council of Ministers of Foreign Affairs (ACFM) or the political leadership body;\(^ {35}\) (3) the Commission (CAC), the main policy-making body;\(^ {36}\) (4) the General Secretariat (AGS) acting as the executive

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31. On August 26, 1998, Peru and Ecuador signed the Peace Agreement and the Agreement to Accelerate and Intensify their free trade.
33. AIS was also set up to deepen Andean sub-regional integration, promote its external presence, and consolidate and strengthen actions related to the integration process. See Cartagena Agreement, as amended by the Trujillo Protocol 1996, and codified by Decision 406, art. 7, available at http://www.comunidadandina.org/normative/tratprot/acuerdo.htm (last visited Sept. 7, 2004) [hereinafter Modified Cartagena Agreement].
34. Id. arts. 11-14.
35. Id. arts. 15-20.
36. Id. arts. 21-28.
body of the system;\textsuperscript{37} (5) the Court of Justice of the AC (CJAC), the judicial body;\textsuperscript{38} (6) the Andean Parliament (AP) or the deliberative body;\textsuperscript{39} (7) the Advisory Institutions;\textsuperscript{40} (8) the Financial Institutions;\textsuperscript{41} (9) Social Conventions;\textsuperscript{42} and finally, (10) the Simón Bolívar Andean University.\textsuperscript{43}

The Andean Pact was created in a period where state-led institutions and programs were influential in domestic models of development. Even though a change in the economic policies during the 1990s promoted privatization and diminution in the size of the State, and also lessened Constitutional Presidential attributions, the dependency of the Andean Community on the political will of its leaders has not changed. Furthermore, the institutions and bodies re-invented in the last reforms are still strongly influenced by the local governments with little room for private entrepreneurs.

This sense of “public ownership” of the process has kept private initiative far from convinced of the real benefits of the sub-regional scheme. Interest groups remain cynical about the achievement of the Andean aims. Their position within the Andean committees is frequently cynical, and an example of this cynicism can be found in the Andean Summit in Quirama, Colombia, in 2003.\textsuperscript{44}

This strong political control over almost all the main bodies and institutions of the IAS may be conducive to a rapid process of implementing the guidelines issued by the Andean Presidential Council, assuming there is consensus and political will. Nevertheless, the structure becomes utterly bureaucratic when the Presidential commitments are not duly and timely implemented, becoming unfulfilled promises. Due to the remaining politicalization of the Andean bodies and institutions, the AIS is highly vulnerable to external shocks, such as political changes and misunderstandings among member countries.

The formally impressive AIS is still in its early stages of being fully operative. Only the rule of law will bring real balance to it. It will happen when the responsibilities of each one of the bodies and institutions comprising the AIS are clearly determined, when supranationality and

\textsuperscript{37} Id. arts. 29-39. 
\textsuperscript{38} Id. arts. 40-41. 
\textsuperscript{39} Id. arts. 42-43. 
\textsuperscript{40} They are the Andean Business Advisory Council (ABAC) and the Andean Labor Advisory Council (ALAC). Id. art. 44. 
\textsuperscript{41} They are CAF and FLAR. Id. arts. 45-46. 
\textsuperscript{42} The social conventions are intergovernmental institutions created to complement the integration efforts in other fields different from the economic and trade sectors. These are the Hipólito Unánue created to support the member countries’ efforts to improve their peoples’ health and the Simón Rodríguez Convention to promote social and labour integration. 
\textsuperscript{43} For more information, see Andean Community website, available at http://www.comunidadandina.org/ingles/who/university.htm (last visited Sept. 7, 2004). 
\textsuperscript{44} Luis Carlos Villegas Echeverri, Address at Quirama, Colombia (2003), in Andres Mompotes & Carlos Salgado, Cumbre de Incumplidos, EL TIEMPO, June 26, 2003, at 1-2.
direct application of Andean regulation become more than a formality and when the authority of the CJCA is fully respected in every Member State. In this sense, the independent work of the Secretariat putting together coherent proposals to that end could introduce dynamism and coordination to the system.

In order to assess the changes and challenges faced by the AC upon achieving the aim of the ACM, it is essential to study the work done by the APC in this area. To that end, the next sub-section discusses the main guidelines issued by the Andean Presidents during the last seven Andean Summits. Equally, it considers the work carried out to date by the bodies and institutions of the AIS. Whether the AIS has been capable of creating the conditions for the smooth and timely establishment of the ACM is an issue the jury is still considering.

B. The Long and Winding Road Towards the Establishment of the ACM: From 1989 To 2005 And Beyond

The establishment of the ACM can be traced back to the Galapagos Summit, December 1989. The Andean Presidents adopted a Strategic Design aimed at consolidating the Andean economic area, promoting, among other six objectives, the growth of flows of capital, goods, services, and labour within the sub-region. In La Paz, Bolivia, in November 1990, the Andean Presidents accelerated the integration process bringing forward the deadline for forming the FTA and defining the Andean CET. They also ordered the establishment of the ACM by 1995. In Caracas, Venezuela in May 1991 and Cartagena, Colombia in December 1991, the Andean leaders carried on with the process of evaluating the achievements and imparting guidelines related to the harmonization of macroeconomic policies. However, as explained above, the entire process was affected in 1992-1993 by external political factors which lead to the suspension of the APC summits for three years, until the transformation of the AP into the AC, effective from June 3, 1997.

45. Defining sub-regional integration policy became a historical responsibility of the Andean Presidents, which finally was institutionalized, becoming part of CA, through its article 12. See a summary of the main guidelines related to the ACM in Table I in the following sub-section I.B.

46. See a summary of the main regulation related to the ACM to date in the following sub-section, Table II.

47. The Strategic Design for the Future Orientation of the Andean Group was based on two main objectives: (1) to consolidate the Andean market as an economic area; and (2) to enhance international relations of the Group within the region and with other international blocks. See Decision 321, supra note 24, at 39-93.

48. In relation to services, it proposed a gradual and selective liberalization of services related to the productive sector, transportation, telecommunications, and tourism. Financial services were not referred to within the text. Id.

49. In the Annex to the La Paz Declaration, there is a detailed plan, schedules, and programmes for the achievement of the ACM. They instructed the Andean bodies and institutions to intensify their work on harmonization of macroeconomic policies and those related to transport, telecommunications, and services, and to modify the Andean regulation related to foreign investment and Andean enterprises. See supra note 24 and accompanying text.
From the Sucre IX Summit in 1997 onwards, the APC imparted guidelines to the different bodies and institutions of the AIS for the establishment of the ACM, shown in Table 1. The APC meets at least annually and is responsible for issuing guidelines about different matters related to Andean sub-regional integration. The Chairman of the APC is bound to ensure that the other AIS bodies and institutions carry out these guidelines in accordance with responsibilities and mechanisms established in their respective treaties and instruments.

What is the legal nature of these Presidential guidelines? The Treaty Creating the CJAC 1996 establishes the legal system of the AC, which does not include the Presidential guidelines. Therefore, they are not binding for member countries and should be considered as internal general frameworks establishing parameters and criteria of action for the AIS. Following Chapter II of the CA and consequently the APC being the highest-level body of the AIS, the guidelines are internally binding for all its bodies and institutions.

APC has entrusted CAC with the major responsibilities along with ACFM. The AGS has the gigantic task of supporting these bodies, undertaking the studies and analysis required and drafting proposals and regulations accordingly.

One of the main ACFM duties as the political leadership body is to carry out the guidelines given to it by APC and to ensure that those given to the other bodies and institutions of the AIS are performed. The Council expresses itself through Declarations and Decisions adopted by consensus. Its Declarations are statements that are non-binding, while its Decisions are legally binding and therefore form part of the Andean...
Community Law governed by the Charter of the CJCA. In order to achieve the best possible coordination within the AIS, the Chairman of the ACFM calls and chairs the Meetings of Representatives of the institutions that comprise the System. Among other issues, this annual meeting is set up to exchange information about the actions taken by the respective institutions to carry out the guidelines issued by the APC.

The ACC, in turn, is the main policy-making body. It issues Decisions, sharing the legislative role with the ACFM. Among other responsibilities, the ACC's must adopt the necessary measures for implementing APC guidelines. According to Chapter VIII, article 79 of the Cartagena agreement, as amended by the Sucre Protocol, the ACC is in charge of approving the general framework of principles and provisions for liberalising intra-sub-regional services.

This structure generates significant political and legal issues as the APC determines the general content of a future regulation, which will be discussed and enacted by bodies, formed of non-democratically elected members whose decisions will have direct application within the domestic legislation of the member countries. In fact the ACFM is made up of the Ministers of Foreign Affairs of the member countries, and the ACC is composed of a plenipotentiary representative from each one of the member governments. Their composition depends entirely on the will, interest and ideology of the local governments. As establishing a Common Market implies regulating broader areas than those related to an FTA of a CU, the AC's design might bring unrest to domestic political parties supporting or in opposition, and to interest groups when the Andean regulation starts affecting them.

Table II shows the main Andean regulation related to the ACM. The AIS has yielded important achievements in the area of liberalization of services. In 1998 the General Framework of Principles and Provisions for Liberalising Trade in Services in the Andean Community was approved, and three years later in 2001, the CAC finally adopted the Inventory of Measures Restricting Trade in Services. Areas such as trade in telecommunications, intellectual property, the development and integration of tourism and tax harmonisation have received a great deal of attention. However, the process has been rather slow and laborious.

57. Id. arts. 17-18. Decisions become binding for member countries as of the date they are approved by the ACFM or the CAC. See TCCJCA, supra note 53, art. 2. These Decisions and Resolutions of the AGS are directly applicable in member countries as of the date they are published in the Official Gazette of the Agreement, unless they indicate a later date. See also id. art. 3.

58. Modified Cartagena Agreement, supra note 33, art. 9.

59. Id. arts. 21-28.

60. Id. art. 21.

61. Id. art. 22.

During its existence, the Andean scheme reveals a recurrent tendency to establish time limits which seem reasonable to the setters but are not complied with. Inadequate planning and the establishment of unrealistic targets are also features present within the process of integration, which bring imbalances among the bodies and institutions of the AIS, imposing on some of them tremendous amounts of work and responsibilities without proper funding and structural support. It gives a sense of improvisation and unreliability to the Andean citizenry.

As shown in Table II, the establishment of the ACM has become a heavy burden on CAC and AGS. Compare Table I (Presidential guidelines) with Table II (regulation in place). While the APC keeps reaffirming the commitment towards the ACM by 2005, there are areas such as movement of capital (regulation dating from 1991), liberalization of financial services (none) and circulation of persons (with some exceptions) in which AIS has not yet delivered meaningful results. It was expected that by the APC Summit held in Cuenca, Ecuador, in July 2004, regulation related to the liberalization of Financial Services and other sectors would be enacted. But it was not.

Trade in services, capital and labour is still nascent within the AC. The Andean regulation is in the process of being drafted and issued with limited participation of the private sector. Therefore, the domestic implementation of the binding supranational Andean regulation may produce a certain degree of resistance, as the consequences of an enhanced Andean market for capital, services and labour are far from clear to and not entirely assessed by the private sector. In addition to their historically cynical approach to the Andean scheme, interest groups seem to be distracted by the on-going negotiations of PTAs with stronger non-members. This is certainly not an optimal environment for the successful achievement of the ACM.

Table I contains the APC guidelines for the establishment of the ACM. Column 1 details the year of the APC Summit and the major declaration (Act) issued by the Andean Presidents. The following columns display the main responsibilities given to CAC, AGS, ACFM, ACTM/CB/CBA and other bodies of the AIS by the APC.
Table II shows the results of the work of the CAC and ACFM, naming the main Andean regulation actually in place, enacted by these bodies in the areas of Services, Investment, Labour and Taxation.

III. THE CHANGES AND CHALLENGES IMPOSED ON THE AC BY THE IMPLEMENTATION OF THE POLICY OF OPEN REGIONALISM

As a consequence of the domestic structural reforms starting in the 1980s and carried out during the 1990s, a certain degree of policy harmonization in the macroeconomic and trade areas took place in Latin America, boosting economic interdependence. The “consolidation of a coherent, stable macroeconomic framework, unilateral trade liberalization, non-discriminatory promotion of exports, deregulation and elimination of obstacles to foreign investment, privatizations and the lifting of payment restrictions” were similar tendencies that configured what is called by ECLAC de facto integration. This process did not require any kind of negotiations among the Andean countries within the framework of the CA. It was negotiated unilaterally with multilateral international institutions with the aim of bringing stability to the local economies according to each country’s needs. This “strategy,” conceived by G-10 and implemented by multilateral international institutions, was further strengthened in order to prevent economic crises with the capability of threatening international financial stability due to the different crises still erupting in developing countries during the 1990s.

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66. ECLAC is the United Nations Economic Commission for Latin America and the Caribbean. Its Spanish acronym is CEPAL. ECLAC has developed its own school of thought being extremely influential within the region. See ECLAC website, available at http://www.eclac.cl/acerca/default-i.asp (last visited Sept. 7, 2004).

67. See Open Regionalism, supra note 65.

68. See Guide, supra note 12, at 8-11.

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<thead>
<tr>
<th>APC</th>
<th>CAC</th>
<th>AGS</th>
<th>ACM</th>
<th>ACTFM/CE/EPAL</th>
<th>Other bodies</th>
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<tr>
<td>SUCRE 1997</td>
<td>To propose and carry on what is needed to establish the ACM</td>
<td>To study air and maritime regulation and to propose to the ACC rules related to it</td>
<td>To work in the field of free movement of persons with Andean Ministers of Foreign Affairs and a group of experts in the field set up with this specific aim</td>
<td>Created by the APC with the mandate of working on harmonisation of macroeconomic policies (deadline October 1997)</td>
<td>Ministers of Education Recognition of academic degrees in the sub-region</td>
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<td>IX APC</td>
<td>To set up the general framework of principles and rules in order to liberalise and expand the market of services (given ninety days to do so)</td>
<td>To propose to ACC the general framework of principles and rules in order to liberalise and expand the market of services</td>
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<td>Sucre Protocol</td>
<td>To analyse sectors in which liberalisation could be accelerated</td>
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<td>GUAYAQUIL 1998</td>
<td>To work in the adoption of a general framework of principles and rules for liberalising trade in services, (accomplished through Decision 439, 11 July 1998)</td>
<td>To propose the general parameters to gain and deepen Andean integration geared towards the establishment of ACM (Deadline to draft a first document, July 1998)</td>
<td>To propose the general parameters to gain and deepen Andean integration geared towards the establishment of ACM</td>
<td>To co-ordinate efforts in order to advance in the integration of financial and capital markers and to maintain sound, safe and competitive financial systems</td>
<td>Creation of the Andean Entrepreneurial Forum</td>
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<tr>
<td>X APC</td>
<td>To adopt regulation related to the promotion and protection of sub-regional investment, before the next Summit</td>
<td>To assess the issues related to the facilitation of movement of persons within the Sub-region and to present proposals in order to overcome difficulties</td>
<td>To work on the facilitation of movement of persons within the Sub-region</td>
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<td>Act of Guayaquil</td>
<td>To update regulation related to Foreign Investment</td>
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<tr>
<td>To establish transparent procedures in the area of government procurement and to grant under equally competitive conditions, national treatment to member countries' goods, services and suppliers</td>
<td>To support the ACFM</td>
<td></td>
<td></td>
<td>To elaborate an agenda for the harmonisation of exchange, monetary, financial and fiscal policies</td>
<td></td>
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<tr>
<td>To work on a Common Agricultural Policy</td>
<td>To propose rules to avoid double taxation</td>
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<tr>
<td>CARTAGENA 1999 XI APC Act of Cartagena The establishment of the ACM by 2005</td>
<td>To prepare a draft Protocol with the commitments and timetables for the formation of the ACM</td>
<td>To work with the Andean Committee of Authorities of Tourism on the elaboration of a programme of tourism development</td>
<td>To prepare a draft Protocol with the commitments and timetables for the formation of the ACM</td>
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<tr>
<td>To study changes in the AIS and the creation of an Economic Council</td>
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<td>To study changes in the AIS and the creation of an Economic Council</td>
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<td>To move forward towards the establishment of criteria for achieving macroeconomic convergence</td>
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<tr>
<td>To accelerate the work towards the establishment of Andean regulation related to the promotion and protection of investment, double taxation and indirect taxation</td>
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<td>To accelerate the work towards the establishment of Andean regulation related to the promotion and protection of investment, double taxation and indirect taxation</td>
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<td>To accelerate the work towards the establishment of Andean regulation related to the promotion and protection of investment, double taxation and indirect taxation</td>
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**TABLE I. APC GUIDELINES FOR THE ESTABLISHMENT OF THE ACM (continuation)**

<table>
<thead>
<tr>
<th>APC</th>
<th>CAC</th>
<th>AGS</th>
<th>ACFM</th>
<th>ACTFM/CB/EPA</th>
<th>Other bodies</th>
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</table>
| LIMA 2000          | Entrusted in coordination with ACFM, with the task of leading politically the process of establishing the ACM in the areas of trade and investment | Entrusted in coordination with ACC with the task of leading politically the process of establishing the ACM in the areas of trade and investment | To work with the Andean Committee on Migrations in the definition of a schedule for the harmonisation, simplification and unification of migratory procedures and other related issues | The Andean Committee on Migrations  
The Andean Committee of Authorities of Tourism | Ministers of Foreign Relations to adopt the actions needed to harmonise domestic regulation and to reform judiciary Central Banks concerted work and harmonisation of macroeconomic policies |
<p>| XII APC            |                                          |                                          |                                          |                                                 |                                                                            |
| Act of Lima        |                                          |                                          |                                          |                                                 |                                                                            |
| Annexes I, II, III |                                          |                                          |                                          |                                                 |                                                                            |
| Actions towards the establishment of ACM |                                          |                                          |                                          |                                                 |                                                                            |
| VALENCEA 2001      | To accelerate the implementation of the guidelines contained in the Act of Lima and to report on it in the following summit of the APC | In coordination with the Andean Committee on Migrations, to propose to the ACFM not later than December 2001, regulation related to harmonising rules regarding student migrations, businessmen, investors, artists and sportsmen. To determine technicalities related to the Andean Passport | To accelerate the implementation of the guidelines contained in the Act of Lima and to report on it to the APC in the following Summit | To establish a mechanism to monitor the compliance with the macroeconomic goals set up by ACTFM/ CB/EPA | The Andean Committee on Migrations and AGS To propose to the ACFM not later than December 2001, regulation related to harmonising rules regarding student migrations, businessmen, investors, artists and sportsmen. To determine technicalities related to the Andean Passport |
| XIII APC           |                                          |                                          |                                          |                                                 |                                                                            |
| Act of Carabobo    |                                          |                                          |                                          |                                                 |                                                                            |</p>
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<th>APC</th>
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<th>ACTFM/CB/EPA</th>
<th>Other bodies</th>
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<tr>
<td></td>
<td></td>
<td>To make progress in the liberalisation of Services, in the achievement of a Common Agricultural Policy and a Common Regime of Government Procurement</td>
<td>To carry on working in the area of tourism jointly with the Andean Committee of Authorities of Tourism</td>
<td></td>
<td></td>
<td>Ministers of Education and ACC. To establish Decisions aimed at simplifying and harmonising requirements to validate professional and postgraduate degrees</td>
</tr>
<tr>
<td></td>
<td></td>
<td>To establish Decisions aimed at simplifying and harmonising requirements to validate professional and postgraduate degrees, in cooperation with the Ministers of Education</td>
<td>To support and strengthen the Andean Statistical Information System, specially in the areas of investment, services, social development and the informal sector of the economy</td>
<td></td>
<td></td>
<td>The Andean Committee of Authorities of Tourism and the AGS. To carry on working in the area of tourism</td>
</tr>
<tr>
<td>QUIRAMA XIV APC</td>
<td></td>
<td>To work with the Ministers of Agriculture on a Common Agricultural Policy (deadline 30 September 2003)</td>
<td>To establish a game plan for the liberalisation of services (deadline 30 September 2003)</td>
<td>To support and strengthen the AIS, promoting sectoral meetings of the member countries' Ministers to analyse, to make proposals and to participate in the debates within the AIS</td>
<td></td>
<td>The Court of Justice of the Andean Community. To propose jointly with the AGS mechanisms to seek extra-judicial conflict resolution</td>
</tr>
<tr>
<td>Act of Quirama</td>
<td></td>
<td>To support and strengthen the AIS, promoting sectoral meetings of the member countries' Ministers to analyse, to make proposals and to participate in the debates within the AIS</td>
<td>To propose jointly with the Court of Justice of the Andean Community, mechanisms to seek extra-judicial conflict resolution</td>
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<td>Subject</td>
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<td>Liberalisation of trade in telecommunications</td>
<td>Decision 462 May 1999, to deregulate all telecommunication services, with the exception of sound radio and television broadcasting, as of January 1, 2002. Other relevant Decisions: Decision 395, Decision 429, Decision 479, Decision 480, and Decision 509.</td>
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<tr>
<td>The development and integration of tourism</td>
<td>Decision 463, 1999, Regime for the Development and Integration of Tourism in the Andean Community. It rests on three pillars: liberalisation of tourist services, execution of tourist projects of Community interest, and removal of obstacles to the movement of tourists in the Sub-region; Decision 498, March 30, 2001, establishes May 24 as the Andean Tourism Day.</td>
<td>Decision 503, June 22 2001, recognises from January 1, 2002, national identification documents as the only requirement for tourist traveling among the Sub-region's five countries.</td>
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<td>Subject</td>
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</table>
| Tax harmonisation   | Indirect Taxes  
Decision 330 of October 1992  
Decision 388 of July 1996  
Double Taxation  
Decision 40 Approval of the Agreement among Member Countries to avoid double taxation and of the Standard Agreement for executing agreements on double taxation between Member Countries and other States outside the Sub-region  
Decision 578, May 4, 2004. To avoid double taxation and to prevent Tax Evasion |      |
Other relevant Decisions: Decision 185; Decision 224; Decision 257; Decision 271; Decision 277; Decision 289; Decision 526; Decision 290; Decision 314; Decision 320; Decision 359; Decision 289; Decision 314; Decision 360; Decision 361; Decision 390; Decision 467; Decision 491; Decision 561 |      |
| Energy Sector       | Decision 557, June 25, 2003 created the Council of Andean Community Ministers of Energy, Electricity, Hydrocarbons and Mines  
Decision 536, December 19 2002, the General Framework establishing the rules for the sub-regional interconnection of the electric systems and the exchange of electricity among the Andean Community Member Countries |      |
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<tr>
<th>Subject</th>
<th>CAC</th>
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<td>and format of the TAM</td>
<td>national and foreign residents of the Member Countries</td>
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<td>Decision 526, July 7, 2002, Airport immigration formalities booths for nationals and foreign residents of Member Countries</td>
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<td>Decision 545, June 25, 2003, Andean Labor Migration</td>
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<td>Decision 546, June 25, 2003, Social Security instruments restricted to workers</td>
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<td>Other related Decisions:</td>
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<td>Decision 584, Decision 583, Decision 554, Decision 553, Decision 552, Decision 551, Decision 550, Decision 549, Decision 548,</td>
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<td>Decision 547, Decision 504, Decision 397, Decision 148, Decision 116, Decision 113</td>
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<tr>
<td>Transportation and Infrastructure</td>
<td>Decision 398, January 17, 1997, International Passenger Transportation by Road; Decision 399, January 17, 1997, International Transport of Merchandise by Road, Decision 288, March 21, 1991, Freedom of access to Cargo Originated in and Intended for Shipment by sea within the Subregion, Decision 297, May 16, 1991, Integration of Air Transport in the Andean Subregion, Decisions 331, March 4, 1993, and Decision 593, regulating Multimodal Transportation</td>
<td>Other relevant Decisions: Decision 185; Decision 224; Decision 257; Decision 271; Decision 277; Decision 289; Decision 526; Decision 290; Decision 314; Decision 320; Decision 359; Decision 289; Decision 314; Decision 360; Decision 361; Decision 390; Decision 467; Decision 491; Decision 561.</td>
</tr>
<tr>
<td>Energy Sector</td>
<td>Decision 557, June 25, 2003 created the Council of Andean Community Ministers of Energy, Electricity, Hydrocarbons and Mines Decision 526, December 19, 2002, the General Framework establishing the rules for the sub-regional interconnection of the electric systems and the exchange of electricity among the Andean Community Member Countries</td>
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### TABLE II. MAIN ANDEAN REGULATION RELATED TO THE ACM (continuation)

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<th>Subject</th>
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<td>and format of the TAM</td>
<td>national and foreign residents of the Member Countries</td>
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<td>Decision 526, July 7, 2002, Airport incoming immigration formalities for nationals and foreign residents of Member Countries</td>
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<td>Decision 545, June 25, 2003, Andean Labor Migration</td>
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<td>Decision 546, June 25, 2003, Social Security instruments restricted to workers</td>
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<td>Decision 584, Decision 583, Decision 554, Decision 553, Decision 552, Decision 551, Decision 550, Decision 549, Decision 548,</td>
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<td>Decision 547, Decision 504, Decision 397, Decision 148, Decision 116, Decision 113</td>
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The resulting need to open markets to foreign trade invigorated integration schemes during the late 1990s. As countries in the region shared the same market-oriented economic policies, "the impact of concessions given to each other was not very different from the concessions given to third countries." In this sense, bilateral and trilateral arrangements appeared as well as several preferential trade arrangements. For instance, PSAs provided for in the Montevideo Treaty of 1980 brought about MERCOSUR. Reciprocal FTAs were negotiated mainly by Chile and between sub-regional schemes. The establishment of the G-3 between Colombia, Mexico and Venezuela is another example.

All these circumstances gave rise to what is defined by ECLAC as "Open regionalism." As stated by this institution, it is:

[A] process of growing economic interdependence at the regional level, promoted both by preferential integration agreements and by other policies in a context of liberalization and deregulation, geared towards enhancing the competitiveness of the countries of the region and, in so far as possible, constituting the building blocks for a more open and transparent international economy.

Open regionalism contains two antithetical propositions. On the one hand, it advocates regional integration as opposed to multilateral or global integration. Regionalism implies certain preferences among the members and a degree of protection against non-members. On the other, it proposes openness to other countries, blocks and economies through different means, among them, multilateralism.

This two-folded definition implies an enormous degree of multiple interactions. First of all, there are interactions within the countries of the sub-region. Secondly, there are interactions with non-members and with other arrangements or regional schemes which could be negotiated and agreed in blocks or individually. Additionally, there is a high degree of difficulty in finding the right balance among the particular concerns and interest of the Andean member countries and those of the Latin American region as a whole when negotiating with other countries (such as the United States) and blocks (i.e. the European Union).

71. See id. at 62. See also O'Keeffe, supra note 8, 1-11.
A. Legal and Institutional Effects of the Policy of Open Regionalism and Its Articulation Within the AC Law and the AIS: Fixing a Hole

1. Legal Development

As seen in section I, the AP was conceived as an inner-looking integration agreement which did not encourage open trade with non-members, at least, in its early stages. This feature was included in the drafting of the original CA. Even though the AP was established within LAFTA’s framework aimed at encouraging Latin American integration, article 68 obliged member countries to consult to the AnC before unilaterally granting any tariff preference to non-members in the region. With this mechanism, the AP wanted to promote coordination among its members, as negotiations at the time were generally conducted on a bilateral basis (member/non-member) and not as a bloc.

As a consequence of the economic crisis of the 1980s, Andean countries started looking for other markets and engaging in bilateral agreements with non-members under LAIA’s umbrella. These actions affected the cohesion of the AP. In the early 1990s, before the AP embraced open regionalism, the Andean Presidents allowed a certain degree of openness, at least towards the Caribbean countries and those within the region, while at the same time imposing discipline on the members. Through the Act of Barahona in 1991, the Andean Presidents established that negotiations with Latin American and Caribbean countries should preferably be of a communal nature. However, the Presidents considered any bilateral negotiations acceptable when it was impossible to negotiate as a bloc. The AnC adopted this guideline with Decision 322 on August 25, 1992. It was the legal basis for the negotiations between Colombia, Mexico and Venezuela for the creation of the G-3 and the origin of a period of increasing commitments with non-members.

At the same time, as seen above in section I.A., the Andean leaders started shaping, Summit by Summit, the features of the Andean integra-


76. The actual CA article 86 regulates the subject obliging member countries not to unilaterally alter the customs duties set in the CET and to hold consultations with CAC before assuming tariff obligations with countries outside the sub-region. Modified Cartagena Agreement, supra note 33, art. 86.


78. It allows member countries to advance their bilateral negotiations with other countries in the region, provided that at least two members of the Andean Group are involved. Andean Community, Decision 322: Trade Relations with the Countries of ALADI and of Central America and the Caribbean, available at http://www.comunidadandina.org/ingles/treaties/dec/D322e.htm (Dec. 5, 1991).
tion until it became the AC. Within this progressive work, the APC developed the basis for the creation of an Andean Common External Policy whose structure was included in Chapter III of the CA through the Sucre Protocol 1997.

2. Institutional Effects

ACFM is in charge of formulating the Andean Common Foreign Policy (ACFP) on matters that are of interest to the sub-region. ACFM and CAC are also entrusted with defining and implementing a community strategy aimed at deepening integration with other economic blocks in the region and establishing political, social and economic-trade relations with other groups outside the region. ACFM and CAC can coordinate joint negotiations of the AC with other integration processes or with third countries or groups of countries. They can also instruct the AGS to perform research, studies and activities that will make it possible to achieve the objective stated in Chapter III of CA and to carry out the measures needed.

Even though the AC has international legal capacity or status, the individual Presidents of the member countries or their representatives have signed all economic agreements (PTAs) with non-members. This will continue until this legal capacity is clearly defined and allocated within AIS. At the same time, although it makes sense to entrust the Ministers of Foreign Affairs with formulating the overall ACFP, economic integration agreements are mainly related to trade. It supposes at least the primary involvement of the Ministers of Trade of the Member countries. However, they do not have a relevant formal role in the formulation of the Andean strategy and under the formal CA they are not the main coordinators of the negotiations with third countries or blocks, being under the leadership of the Ministers of Foreign Affairs and the members of the CAC. Furthermore, as a result of the institutional design, CAC and AGS are overwhelmed with additional responsibilities as there are several agreements under simultaneous negotiation and implementation, apart from the demanding duties related to the establishment of the ACM. Finally, the AIS keeps making the same mistake of not including

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79. Modified Cartagena Agreement, supra note 33, art. 50.
80. Id. art. 51.
81. Id. art. 52(b).
82. Id. art. 52(c).
83. Id. art. 48.
the private sector when designing common strategies and coordinating negotiations, confirming its nature of being a government-lead scheme.

The final result for the AC is its inability to have a strong strategy able to support the policy of open regionalism recurrently advocated by the Andean Presidents. In the middle of several simultaneous negotiations the counter-party has found the Andean's Achilles Heel: its nascent and shy common external policy. The possibilities of acting as a block are minimal if each country is invited to negotiate individually by a party which understands the benefits of negotiating with counter-parties with weak bargaining power.

The AGS introduced the concept of variable geometries in an attempt to uphold Andean cohesion within an environment of increasing expectations towards agreements with non-members. It means that "within the context of a legal system generally characterized by equal rights and duties to its members and by unitary legal regime, room is left open for special arrangements chosen by the members and granted to them under special circumstances." However, this flexible framework for channeling contrasting interests requires not only a high degree of sense of community, but also strong institutions and rule of law, which are not present in the AC yet.

Within this context of lacking a clear and effective common strategy, Andean member countries actually are engaged in further negotiations towards the establishment of South-South and North-South-PTAs. The following sub-sections address some of the main treaties in place or under negotiation and make some comments on the role of the AIS and the possible consequences of their implementation on the AC's nature and future existence as a bloc.

B. THE GROUP OF THREE (G-3): COLOMBIA, MEXICO AND VENEZUELA

Colombia, Mexico and Venezuela entered into a treaty on free trade in accordance with the GATT, conferring upon it the nature of a PSECA under LAIA's framework. As for liberalization of trade in goods, the G-3 agreement is based on a linear and automatic tariff reduction pro-

gram of 10 percent per year until the full completion of a FTA by mid 2004.89 The G-3 agreement acknowledges that Colombia and Venezuela are members of the CA by establishing special rules in article 1-03 pertaining to the two countries.90 However, it is important to note that after three years of negotiations and discussions based upon different approaches and structures, the final agreement was strongly influenced by NAFTA, including sectors such as services, investment, government procurement and intellectual property. None of these subjects were negotiated before in the previous Latin American South-South regional, sub-regional, or bilateral PTAs.91 For instance, article X of the agreement establishes the general principles applicable to the trade of services, and article XII focuses on trade in financial services. As little research has been done in these areas, gradual implementation will be conducive to a better understanding of these special regimes and their consequences within the domestic legal frameworks of the members. The objectives of the G-3 are based on the principles of national treatment, most-favoured nation treatment, and transparency.92 The agreement has been formally successful regarding the implementation of the gradual tariff reductions. By July 2004, a great deal of sectors will be fully open. The achievement of a complete G-3 FTA will not collide with the Andean regulation, as the Andean CET was suspended until March 2005.

In addition, the completion of the G-3 FTA may also contribute to changing the economic environment of the Andean countries. Colombia and Venezuela have become major trading partners within the AC. At the same time, there is increasing interest by Colombian and Venezuelan exporters to reach the Mexican market. The situation is challenging however due to Mexico’s stronger position in technology and infrastructure.93

89. There are some products under special tariff reduction frameworks (soap and automobiles). See Sandra Zuluaga & Olga Lucia Lozano, El Grupo de Los Tres (G-3): Las Negaciones Comerciales Entre Colombia, Mexico y Venezuela [The Group of Three (G-3), the Commercial Negotiations Between Colombia, Mexico and Venezuela] 181 (Antoni Estevadeordal & Carolyn Robert eds., 2001).

90. Articles III, IV, V (section A), VI, VIII, IX, XVI, and XVIII of the G-3 Treaty do not apply to those two countries. As such, G-3 recognizes the different obligations acquired by its members in each one of the referred agreements. However, article 1-02,2 specifies that in the event of inconsistency between provisions of these treaties and agreements and the provisions of the Treaty, G-3 prevail to the extent of the inconsistency. Treaty on Free Trade Between the Republic of Colombia, the Republic of Venezuela and the United Mexican States, available at http://www.sicie.oas.org/Trade/G3_E/G3E_TOC.asp (last visited Sept. 7, 2004) [hereinafter G-3 Treaty].

91. The agreement was originally conceived under the traditional LAIA framework, establishing a coherent schedule for progressive tariff reductions. Equally, it was thought to include all AP member countries at the time. See Zuluaga & Lozano, supra note 89, at 163-65.

92. See G-3 Treaty, supra note 90, art. 1-01.

93. The Colombian automobile industry is already feeling pressure as tariff reductions are going to cover this sector soon. Competing against Mexican producers will be very difficult. Voices seeking for postponing deadlines are starting to speak loudly to the Colombian government. Will it listen? See La Prisa del TLC es de E.U., El
Finally it is important to underline the AC’s failure to act as a block in achieving a 5 + 1 agreement during the negotiation process\(^4\) as well as the absence of interest by the remaining Andean partners to join the G-3 as a bloc. Bolivia has an independent FTA with Mexico similar in structure to the G-3. Peru and Ecuador have not started any negotiations yet.

C. THE ESTABLISHMENT OF A CAN-MERCOSUR FTA, THE PROCESS TOWARDS ACTING WITH A SINGLE VOICE

The stages concerning the formation of a FTA between CAN and MERCOSUR have been complex and have extended for a long period of time. During the mid 1990s some Andean countries proposed negotiating an agreement similar to the G-3 proposal rejected by MERCOSUR, which favoured a scheme relating only to the trade of goods.\(^5\)

In the meantime, MERCOSUR and Bolivia signed the ECA No. 36 on December 17, 1996, under LAIA’s framework.\(^6\) Within the ECA’s objectives established in article 1, the contracting parties committed to setting up an FTA within ten years, starting in 1997. To that end, the contracting parties set up a detailed program of trade liberalization, regulated in Section II, and a framework of rules aimed at facilitating gradual trade liberalisation and dispute settlement. Even though it does not regulate trade in services as set forth, article 33 indicates that the contracting parties will promote trade regulations according to WTO regulations.

Changing its position, the remaining countries signed a PTA with MERCOSUR on April 16, 1998, the PSA AAP.A14TM No. 11, which set up the framework for the creation of an FTA between these two blocks, negotiating first the preferences given under the ALADI’s framework and establishing further progressive agreements in the future.

Peru, Ecuador, Colombia and Venezuela (as members of the Andean Community) signed a PSECA No. 39 with Brazil under LAIA’s framework on August 12, 1999.\(^7\) This agreement was aimed at establishing fixed preferences among the contracting parties as a first step towards the conformation of an FTA. It also set up a commission integrated by representatives of certain institutions detailed in article 18, which is in charge of its administration. Peru, Ecuador, Colombia and Venezuela (as mem-

\(^4\) It was mainly due to the lack special treatment to the less developed Andean partners and the broader agenda proposed by Mexico at the time. See ZULUAGA & LOZANO, supra note 89, at 168.

\(^5\) See Frontaura, supra note 75, at 21.


bers of the Andean Community) signed a PSECA No 48 with Argentina under LAIA's framework on June 29, 2000, that was similar to PSECA No. 39.

AC- MERCOSUR signed once more an ECA No. 56 on December 6, 2002, whereby they agreed to implement an FTA by 2003. However, it is important to note that a PSECA between MERCOSUR and Peru was signed on August 25, 2003 under LAIA’s framework. Its main purpose is to establish the foundations for the formation of an FTA among the contracting parties.

The remaining Andean countries, Colombia, Ecuador, and Venezuela, finally reached an agreement with MERCOSUR by signing the ECA No. 59 on December 16, 2003. It takes into consideration the treaties already signed with Bolivia and Peru for the constitution of an FTA between the two blocks. It will enter into force by mid 2004. Like the previous agreement, this agreement continues to promote a program based on a progressive and automatic liberalization of tariffs and non-tariff barriers. This process shows the difficulties the AC faces when negotiating with strong counter-parties in the region. The strong cohesion required to act with a single voice was diminished by the early agreements signed by Bolivia and Peru. Although the final result achieved in 2003 is an important sign of political cohesion among South American nations, it also imposes tremendous challenges to the Andean economic sectors, as Brazilian and Argentinean products will start circulating in markets which used to be highly protected from their competition. However, the road for increasing cooperation, coordination, articulation and convergence between the two blocks is already open. This scenario requires vigorous leadership from the bodies and institutions of the AIS, close monitoring by private interests and detailed converging supranational and domestic regulation.


As for the FTAA process itself, there is a great deal of literature available on the subject. This sub-section only refers to the meaning and

results of acting with a single voice in the negotiations.

The APC received with interest the original proposal made by the American Government in the Summit of the Americas in 1994, and has consistently imparted instructions to the AIS in order to act jointly within the negotiations. The Presidential guidelines have stressed the importance of ensuring an agreement that will offer the necessary conditions for the equitable participation of the Andean countries, considering their varying levels of development and the different sizes of their economies. In the XIII Summit, Act of Carabobo 2001, APC entrusted ACFM and CAC, with the assistance of AGS, with working on preparing, executing, and following up a Community strategy within the context of the negotiations towards the FTAA.

It is clear from the member countries' point of view that acting as a bloc increases their bargaining power and also assists them with strategically protecting the sub-regional market already gained from sudden or less progressive opening to non-members as a consequence of a badly negotiated FTAA. The AC already has in place an FTA that allows member countries to have a single market for Andean products. As a result, it has been easier for Andean countries to agree on certain matters relating to trade in goods, bringing a joint position to the FTAA's negotiation table.

However, depending on the scope of application of the MFN clause within the final FTAA agreement, the AFTA may not survive because it risks being absorbed by the enhanced Hemispheric FTA. In addition, the flexibility gained by the postponement of the Andean CET to 2005 may give a false sense of internal lack of consensus affecting their single proposals and cohesion within the final part of the negotiations when the most problematic issues are addressed.

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101. For information on the FTAA, see Free Trade Area of the Americas – FTAA website, at http://www.ftaa-alca.org/alca_e.asp (last visited Sept. 7, 2004).

102. See Frontaura, supra note 75, at 21.

103. According to a press release by the AGS on Feb. 15, 2003, as consensus has been reached on 86% of intra-Community trade, the Andean countries have proposed to the FTAA negotiations tariff reduction periods of up to ten or more years. See Press Release, High Level of Agreement Strengthens Andean Position in FTAA (Feb. 15, 2003), available at http://www.comunidadandina.org/ingles/press/npl5-2-03.htm.

Following the NAFTA model, FTAA includes, among others, novel issues such as trade in services, investment, copyright and government procurement, making it more difficult for the Andean countries to reach a concerted position. However, an important factor resultant from the movement towards the establishment of the ACM and the convergence G-3 may create is precisely this slow process towards the harmonization of regulation related to these subjects. Although there is Andean regulation in place related to intellectual property and also a framework for trade in services, (see Table II), this Andean harmonization may collide with the FTAA if the single voice gained by the Andean countries is not enough to defend its vision on these subjects.\textsuperscript{105}

On March 19, 1998 the Andean countries started participating for the first time as a bloc in the FTAA negotiations. Their joint participation in the FTAA’s groups, committees, and ministerial and vice-ministerial meetings has resulted in the Andean Countries chairing three of the nine negotiating groups. It has also permitted the AC member countries to assume the chairmanships and vice-chairmanships of several of the FTAA bodies.\textsuperscript{106} This result is seen as a sign of success ensuring that the region’s interests are taken into account.

In the end, whatever the results of the negotiations, the AC must continue speaking with a single voice internally, as the implementation of the FTAA could change the economic\textsuperscript{107} and legal structure of the Andean countries. First, this scenario will pressure the AC to design adequate policies to bring economic and financial stability to the region. Secondly, it should result in the issuance of the regulations needed to properly implement and enforce the commitments reached and to lead their domestic implementation.


On Tuesday May 18, 2004, in Cartagena, Colombia, three members of the AC started negotiations with the United States for the establishment of a Free Trade Agreement. These negotiations resulted from at least two circumstances. From the Andean countries point of view, negotiating a PTA with the United States is core as the unilateral tariff preferences granted to certain products by the U.S. Government, firstly through the


Andean Trade Preference Act (ATPA) and later on by the Andean Trade Promotion and Drug Eradication Act (ATPDEA) will expire in 2006. There is an obvious need to preserve the advantages obtained and the positions already gained by some Andean products within U.S. markets. From the U.S. perspective, due to the difficulties present in the negotiations towards the establishment of the FTAA and within the WTO Doha Round,108 the U.S. Trade Representative, Robert Zoellick, adopted a policy of one-by-one negotiation. This policy has already delivered within the region the US-Central America and the US-Chile PTAs.

I. From ATPA to ATPDEA

Due to difficulties generated by drug production in some Andean countries, drug smuggling to and drug consumption in the United States, a program was adopted in 1991 for the promotion of economic alternatives to drug-crop production in the Andean region.109 The ATPA110 authorized the U.S. government to proclaim duty-free treatment for all eligible articles from any beneficiary country, to designate beneficiary countries, and to proclaim duty reductions for certain goods not eligible for duty-free treatment. Consequently, Bolivia, Colombia, Ecuador and Peru were granted duty-free access to the U.S. market for a wide range of approximately 5,600 products.111

From the beginning of the program, Colombia was the largest ATPA trading partner of the United States, with flowers being its leading export under the ATPA. Bolivia was the main supplier of jewelry and precious metals, followed by Peru. The overall effect of ATPA imports on the U.S. economy and consumers was considered small, whereas U.S. imports of ATPA-exclusive products had a potentially significant effect on domestic

108. This was mainly as a consequence of the strong opposition from developing countries, such as Brazil and India, to accept certain conditions related to agricultural subsidies. This issue is also sinking FTAA negotiations.
ATPA expired ten years later on December 4, 2001. The duties for the products included in the ATPA were reinstated at the time, and the program was renewed and expanded in 2002 by the Trade and Development Act of 2002. Division C, Title XXXI of the Act entitled the ATPDEA rules the renewal and expansion of ATPA. Section 3102 amended section 208 of ATPA, establishing the termination of the preferential agreement on December 31, 2006.

2. From ATPDEA to PTAs

Before extending the benefits granted under ATPDEA, the U.S. President estimates whether the eligible countries meet the suitability criteria established in the law. Among others, and for the purposes of this article, the following should be highlighted: (1) whether the beneficiary country has demonstrated a commitment to participate in negotiations toward the completion of the FTAA or another free trade agreement; and (2) the extent to which the country provides protection of intellectual property rights consistent with or greater than the protection afforded under the WTO.

Certainly, the ATPA/ATPDEA process has influenced the Andean countries during the last decade. When assessing the work towards the establishment of the ACM, Table II indicates that one of the areas in which Andean regulation has developed the most is precisely the protection of intellectual property rights. This effort made the countries not only ready for ATPA/ATPDEA eligibility, at least in one of the long list of criteria, but also promoted the harmonization of standards among the sub-region. This is indeed an example of the consequences of developing countries entering into agreements with developed nations. The expected benefits of a North-South relation pressure the harmonization and convergence of regulations which is very difficult to attain within South-South integration schemes.

The unilateral tariff reduction granted under the previous compliance of determined requirements has paved the way for a certain degree of legal convergence among the ATPA/ATPDEA beneficiaries. This in turn will make negotiations towards the PTAs less complicated and may ex-


plain the U.S. decision to conduct them simultaneously with individual Andean members.

It is also important to consider that the FTAA, if agreed, will dilute the ATPDEA benefits because it allows all Latin countries equal access to U.S. markets. This may generate trade-diversion and AC exports to the United States may fall.\textsuperscript{114} In this sense, the hurry evidenced in some of the Andean countries to negotiate a PFT with the United States, perhaps under better conditions and before other countries get preferential access to the U.S. markets, makes sense for their individual interests. Perhaps less when considering the bargaining powers the region could gain if negotiating as a bloc with the United States and Canada.

On the other hand, the ATPA/ATPDEA processes have been originated by political, social, health and other national security related issues which necessarily link the United States with the Andean countries. Colombia for instance, may try to play the political cards of being both a reliable partner in the fight against terrorism as well as the victim of the dangerously extended vermin of drug dealing and drug consumption. However, it is clear that a PTA is a different proposition that goes further than the unilateral granting of certain tariffs within the context of a core program for the eradication of cocaine crops. Hence, the conditions in these negotiations once again tend to accommodate the interest of the parties, i.e., the best interests of the strongest party and the less detrimental consequences for the rest.

No Andean government is going to take on the political hazard of failing to reach any agreements with the United States despite the trading conditions offered by the American administration. The fear of losing the positions already gained by some Andean products within the U.S. markets and, therefore, the extreme pressure from the Andean local interest groups will give little room for the Andean negotiators to maneuver. In this sense, the Andean position is rather weak, as the counter party is not under such stress and has enough experience in dealing with countries facing similar conditions. Chile\textsuperscript{115} and Central American\textsuperscript{116} countries, for example, ended up with similar NAFTA-styled agreements.

The defensive nature of these negotiations will find the Andean parties looking for sensible frameworks for liberalization. Therefore, the role of the Andean governments and of the interest groups should be that of establishing and putting in place at the Andean and domestic levels, the adequate policies which enable the maximum amount of Andean eco-

\textsuperscript{114} See Light, \textit{supra} note 107.


nomic sectors to get ready for and to bare the consequences of competition, when tariffs finally reach zero.

In this sense, the AC has an important leading role to play. First of all, it is core that the Andean Secretariat efficiently supports and follows up the negotiations. Secondly, within an effort of articulation, coordination, cooperation and convergence, the respective Andean bodies and institutions of the AIS should discuss, establish and enact adequate policies and related regulations to better prepare the sub-region for the positive and negative consequences of the competition about to come. Having appropriate policies and regulations at the supranational level will shield any attempt by local governments to delay or redirect whatever was gained on the negotiation tables in detriment of the Andean citizens or any other member country.

At the same time, strong leadership and understanding is required within the Andean Secretariat, as Venezuela is not negotiating a PTA with the United States, and Bolivia has not yet been invited to participate in the negotiations. This article argues that the AC strongly relies on the political will of its Presidents. There is momentum within three out of five member governments to engage in a PTA with the United States. As these agreements will certainly have direct and indirect consequences in the AC, this political will should be channelled to attain adequate decision making within the AIS. Therefore, it is essential to direct this collective work in benefit of the sub-regional scheme and to have the stamina required in order to propose and to support decisions that could change temporarily or on a regular basis the nature or even the actual composition of the AC.

IV. CONCLUDING REMARKS

This article has been a journey through the Andean Integration since its creation. It has defined it as a “top down process” which heavily relies on the Presidential leadership of their members whose guidelines are being implemented by means of an elaborate system of bodies and institutions. In this sense, the AC still substantially depends on the political limitations of its leaders rather than the rule of law. It has been one of its historical features and legacies. However, it is indeed a millstone able to sink the pace of integration when the sub-region enters into politically turbulent phases. This weakness in the AC structural design threatens both the internal and external undertakings currently going on and discussed in this paper.

Even though these complex processes have already started and actions are being taken, it is too early to draw a conclusion regarding the future of the AC. However, the establishment of the ACM is such a crucial task that indeed affects the welfare of the Andean citizens. Making ACM functional on a scheme that scores extremely high when assessing political risk might jeopardize its successful achievement. The simultaneous negotiations of important mechanisms geared towards opening sub-re-
gional boundaries to free trade is another element actually affecting the
efficiency of the AIS in order to comply with the timeframe given by the
APC to set it up.

In this sense, the answer lays in convergence. Almost all agreements in
place and the ones under negotiation, namely G-3, FTAA, and PTAs be-
tween some Andean countries and the United States already include or
might incorporate chapters related to subjects which are directly related
to sectors that should be liberated to establish a Common Market (cap-
tal, labour and services). Before issuing any Andean supranational rules,
the AIS should sensibly consider the adoption of a pragmatic approach
delaying the establishment of the ACM as it has already done with the
ACET, until the horizon is clearer.

At the same time, when issuing decisions concerning the movement of
capital, services and labor, they should incorporate at least minimum
standards that allow convergence with actual and future commitments
with non-members, bearing in mind the direct application of the Andean
supranational law into the domestic legal frameworks. By doing so, the
sub-region gains a great deal of supranational and domestic convergence
through the rule of law, ring-fencing with it what has already been
achieved against political risk.

This important work in the field of the rule of law will be meaningless
without the proactive participation of the private sector. Its influence will
shape the answer to the question about whether member countries are
ready to sacrifice their legitimate interests of securing and deepening
their relations with non-members in order to advance to greater Andean
consolidation. The internal cohesion required and the extraordinary ef-
forts of articulation, cooperation, co-ordination and convergence it takes
to implement the ACM and to carry on the demanding negotiation
processes, claim from the AIS prioritization of duties and finding the pre-
cise balances in order to overcome its historic sluggishness.

Offering a legal framework that allows the convergence of the ACM
with the external commitments of the member countries will be condu-
cive to reconcile the divided loyalties this complex environment is pro-
moting. Notwithstanding their differences and contrasting positions,
these demanding times require from all those involved not only a great
deal of loyalty and protection of their own countries’ interests but also a
strong consciousness of the Andean related issues. Furthermore, those
involved must remain aware that they are all also citizens of an increas-
ingly globalized world.