NOTE

THE ROLE OF THE ANDEAN COURT IN CONSOLIDATING REGIONAL INTEGRATION EFFORTS

I. INTRODUCTION

On May 28, 1979, the foreign ministers of the five member states of the Andean Pact, Ecuador, Colombia, Bolivia, Peru and Venezuela, signed the Treaty Creating the Court of Justice of the Cartagena Agreement. This marked the final step in the formation of the institutions necessary for the proper supervision and enforcement of a regional integration scheme. By establishing a court to assume the judicial powers that previously were performed by the Commission, the legislative organ of the Pact, the members effected a vital separation of powers needed to ensure proper implementation of the norms set out in the Agreement. The absence of an interpretive authority with the power to impose sanctions has been a major obstacle to the Pact's integration efforts.

The need for a supranational court was recognized in the early days of the Andean Pact, when the Commission, at its Sixth Special Session in 1971, instructed the Board, the technical organ of the Pact, to carry out studies for the development of a judicial system. After an examination of dispute settlement procedures in other regional systems, principally those of the Court of Justice of the European Economic Community, as well as testimony from national and international authorities on the subject, the Board produced a Draft Treaty which it presented to the representatives of the member states for signature in 1979, the tenth anniversary of the creation of the Andean Pact. The signed Treaty now awaits ratification by the member governments.

Ten years is a long time for an international integration organization to operate without a supranational authority to inter-

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1 Treaty Creating the Court of Justice of the Cartagena Agreement, done May 28, 1979, reprinted in 18 INT'L LEGAL MATERIALS 1203 (1979) [hereinafter cited as Andean Court Treaty].
2 The dispute settlement responsibilities of the Commission are set out in the Agreement on Sub-Regional Integration, at Art. 23, reprinted in 8 INT'L LEGAL MATERIALS 910, 916 (1969) [hereinafter cited as Cartagena Agreement].
4 Authorities at the Venezuelan Embassy in Washington, D.C., indicate that, as of May 20, 1980, all of the member countries except Venezuela have ratified the Treaty. (Telephone interview).
pret and enforce its instrument of creation. It must be realized, however, that the countries of Latin America only recently emerged into the industrial world. The policies which were established by the integration agreement required reassessment and its institutional systems required testing and modification in order to develop a more workable arrangement. Many problems arose in the efforts to unify these five nations with their vastly different political, social and economic backgrounds. It probably has been to the countries' advantage that the development of the court has taken so long, since it has allowed them to adapt to the purposes and methods of the Cartegena Agreement with a flexibility of interpretation which might not have existed had there been a court to enforce strictly the Agreement's terms.

This Note examines the new Court Treaty in terms of its potential for enhancing economic integration in the Andean Pact. A brief history of Latin American integration efforts will be followed by an outline of the institutions of the Pact. Various problems that the Pact has encountered will be discussed, including the Chilean crisis. Then the Court Treaty itself will be analyzed, with emphasis placed on its strength and weaknesses as a vehicle for economic integration.

II. A BRIEF HISTORY OF LATIN AMERICAN INTEGRATION EFFORTS

Before World War II, the countries of Latin America did little to change their economies from the mercantilist structures that had been established in their colonial days. Negligible trade between the neighboring countries of Latin America was undertaken because the trade routes that had been developed were those connecting the colonies with their mother countries. Each

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5 Padilla suggests that the reason for the absence of a provision in the Agreement establishing such an authority might be the fact that economists usually play a major role in the drafting of integration plans. They tend to concentrate on the economic and financial aspects of the process while de-emphasizing the role of lawyers and courts. Padilla, supra note 3, at 91.

6 Other examples where the Treaty's flexibility has played a helpful role in the progress of the Pact include the permission granted to apply discriminatory duties to protect certain key industries under the safeguard clauses of Chapter IX of the Agreement and the allowance of special concessions for particular development projects. Adaptability is crucial to the survival of such an organization. Carl & Johnson, Venezuela and the Andean Common Market, 7 DEN. J. INT'L L. & POL. 151, 194 (1978).

7 See generally address of Filipe Herrera, President of the Inter-American Development Bank, at Centro d'Azioni Latina, Rome, Italy (Jan. 28, 1960), at 3-5 (transcript on file at Inter-American Development Bank Library).
country's exports were limited to raw materials and primary products supplying first the industrial nations of Europe, then North America and Japan. In turn, each country depended on the industrial giants to provide it with manufactured goods. This system worked well while there was a high market demand for the primary goods and an adequate supply of reasonably priced manufactured products.8

With the advent of the Depression and World War II, the fragile nature of this dependency relationship became evident. As purchase money and goods in the international market declined, Latin Americans found themselves with little foreign exchange and few production facilities to provide replacements for the necessities they could no longer buy. A search began for a way to alleviate this dependency so that they could be protected from adverse fluctuations in the world economy.9 The concept of import substitution emerged and became the keynote of a decade.

A. Import Substitution

This early and somewhat primitive economic program focused on achieving local production of local needs. Each country sought to develop industries to supply its own domestic markets while continuing to rely on the export of primary products to provide revenue to fuel the development process. Extra income was used to purchase those sophisticated goods which could not be produced locally. They hoped to produce eventually at a level of efficiency which would allow them to compete in the international marketplace.

Because of the lack of capital in the area and the slow accumulation of export revenues, the process depended heavily on the attraction of foreign investment. Various promotions were used to do this, such as tax holidays, duty free imports of raw materials and capital goods, and state underwriting of infrastructure costs.10 Foreign investors also brought technology and equipment that helped expose the inexperienced labor force of Latin America to the modern processes of the industrial world.

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9 Id. at 101.

Although this period of local industrialization improved the experience and skills of the people of the area and established, to some extent, a level of capital to form an industrial base, the strategy soon reached its limits. The markets of each country were too small to warrant production at the output level necessary to keep large manufacturing industries operating. Since the Latin American states had to erect substantial trade barriers to protect their fledging industries, there could be no competition among the countries, thus reducing the efficiency of each country’s production. The resulting limit on profits discouraged further foreign investment and the development process began to stagnate. It became obvious that a new plan was necessary if maximum development was to be achieved.

B. Integration

The integration theory was inspired by the success of the European Economic Community (EEC). The post-World War II integration movement began in 1958 with the formation of the EEC, which organized several similarly developed countries of Europe to harmonize their economic policies and development strategies to strengthen their bargaining position with the other nations of the world. This process also served to insulate the participating countries from the adverse effects of rapid changes in the world economy. Similar efforts to unify the economies of the Latin American countries have been tried since then, but with less success than the European attempts. The reasons relate to the different levels of development reached by the countries and the unstable nature of their political systems, upon which falls the task of coordinating the processes of industrialization.

In the 1950's, the governments of Latin America decided that regional integration, rather than the autarkic approach of import substitution, was a more practical method for expanding their industrial production and improving the development of their economies. This also would help reduce the dependence of Latin

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11 Id. at 11.
12 Padilla, supra note 3, at 75.
14 In general, regional integration organizations attempt to improve economic efficiency, increase each member's share of the benefits of their transactions with non-members, and equitably distribute the benefits from both processes among the members. Moxon, Harmonization of Foreign Investment Laws among Developing Countries: an Interpretation of the Andean Group Experience, 16 J. COM. MKT. STUD. 22, 23 (1977).
American nations on the developed countries and improve the overall living conditions of the area. Integration processes evolved as different groups of countries joined together to set regional goals and to structure systems to achieve them.15

The first group to organize in Latin America to pursue the process of industrial integration was the Latin American Free Trade Association (LAFTA),16 whose members were committed to the formation of a Latin American Common Market.17 The theory behind LAFTA was, in effect, import substitution on a regional rather than a national scale. Member countries agreed to lower their tariffs for products traded among themselves, hoping to create an expanded market18 that would benefit from economies of scale and help maximize productivity.19 A degree of market protection would be maintained by the erection of a common external tariff placed on imports from outside the trade region. In theory, this facilitates competition within the industries of the area, thereby promoting efficiency. Also, adoption of organized regional policies governing production eliminates unnecessary duplication of effort. Such a union would stand on a better footing in negotiations with developed countries because of the increased purchasing power of the larger market.20

The concept of integration is basically sound, as has been demonstrated by the success of the EEC. But it is a less effective method of improving overall development in the less developed areas of the world and has been particularly difficult to apply in Latin America.21 Major obstacles encountered there have been: (1) the overall lack of physical integration among the countries; (2) the inexperience of the governments, which results in inconsistent policy formulation and supervision; and (3) the divergent levels of economic development of the different countries.

First and fundamental among the problems has been the lack of

15 Other organizations that have been involved with integration efforts in Latin America include: the Economic Commission for Latin America; the Central American Common Market; The Carribean Free Trade Area, which later became the Carribean Common Market; and the Latin American Economic System.

16 Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association, signed Feb. 18, 1960, reprinted in UNITED NATIONS ECONOMIC COMMISSION FOR LATIN AMERICA, I MULTILATERAL ECONOMIC COOPERATION IN LATIN AMERICA 57 (1962).

17 See UNITED STATES TARIFF COMMISSION, T.C. PUBLICATION 60 (1962).

18 An expanded market is best described as the area in which producers and consumers interact freely in the purchase and sale of goods. DEL ARCO, supra note 8, at 105.

19 Carl & Johnson, supra note 6, at 152.


21 See generally AXLINE, supra note 10.
physical integration among the countries of Latin America. With histories as colonies of the Iberian peninsula, these countries had developed economies which concentrated almost exclusively on the export of primary products to another continent, so that no significant economic links were established among the neighboring Latin American countries. For example, although oceanic shipping was well developed, other intra-regional communication and transportation connections were virtually nonexistent after World War II and still are inadequate for substantial trade or communication. Compounding the problem in these sectors is the difficult terrain and the vast distances encountered in the interior of South America; the continent covers a large geographic area, yet over 90% of its population lives within 200 miles of the coast, where all of the major cities are located. In the interior one finds jungles and mountain ranges that make road, power line, and telephone line construction difficult and costly.

The second problem has been the governments' inexperience in both the international cooperation processes involved in integration and in the supervisory responsibilities attendant upon rapid industrial development and trade expansion. These governments developed for centuries in a state of regional isolation and the extent of their trade and production experience was limited to the primary products sector. Their political processes had grown into vastly different systems whose policies were difficult to harmonize. Even within the nations it was difficult to organize the infrastructure necessary to ensure proper regulation and compliance with rules involving different duty levels, quotas, places of origin, etc., that are involved in a regional integration effort.

The third problem was the differing stages of national economic development. A few countries had made some progress under the import substitution policies and had industrial bases to build on when the expanded market was created. Others had almost no industry. They found it difficult to attract foreign investment because of the lack of skilled labor and the absence of capital needed to purchase locally produced goods. These countries found that they could not take advantage of the enlarged market created by the Free Trade Area. Consequently, the dependency that previously had rested on Western industrial countries was transferred to the relatively more developed nations of the region,

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22 17 Encyclopedia Americana 8 (1980).
23 For a discussion of the effects of political and economic changes on the implementation of the foreign investment rules, see Moxon, supra note 14, at 41.
in LAFTA's case, Brazil and Argentina. The less developed countries again found themselves exploited by larger, more developed nations, and were unable to industrialize competitively.  

An external problem also has impeded the integration process. The foreign investment which had been sought so actively in the import substitution phase of development was beginning to have adverse effects in the area. Unconcerned with assisting the development of the region, foreign investors viewed the newly expanded markets solely as an opportunity to increase their sales and profits in the area.  

To avoid the restrictions imposed on imports to the area, they simply invested in controlled subsidiaries within the region, thereby attaining the same access to the markets as local firms. With no restrictions on their patents and trademarks and with their much greater supply of capital, they could compete easily with the less experienced local companies. Such competition worked against a fundamental purpose of the association, namely, the promotion of smaller local companies.

In order to alleviate some of these problems, five of the less developed members of LAFTA joined together to form the Andean Pact. Peru, Chile, Bolivia, Colombia and Ecuador were not satisfied with the procedures set out by LAFTA and believed that the benefits of the process were being distributed unequally to the more developed nations. They gathered at Cartegena, Colom-

24 Id. at 23. This has led to distrust by Latin American countries of a free market as an equitable allocator of resources and productive activities, giving rise to an emphasis on agreed assignments of various aspects of industries to certain countries through industrial programming.

25 DEL ARCO, supra note 8, at 72.

26 Vargas-Hildalgo, supra note 13, at 409.

27 Other problems created by foreign investment include: (1) the lack of control of the national governments over the decisions of the multinationals that have a substantial impact on the national economy; (2) the increase in dependency that results from the use of large amounts of foreign technology; (3) the drain of national savings that are received by the foreign enterprises in the form of short- and long-term loans; (4) the adverse effect on the overall balance of payments as profits are repatriated to the home country of the company. DEL ARCO, supra note 8, at 73. Also, a great deal of the technology transferred was inappropriate to the region, as the foreign investors set up industries to make products for sale in their home markets. The goods were not geared to the tastes and incomes of the local people. AXLINE, supra note 10, at 20. That foreign investment is necessary to the development process has never been doubted seriously. It simply requires proper regulation. This is evidenced by the consideration in the Introduction to Decision 24 of the Andean Commission, citing the Declaration of Bogota, which recognized that foreign capital "may contribute considerably to the economic development of Latin America, provided it encourages capital formation in the country where it settles, facilitates broad participation of national capital in this process and does not create any obstacles to regional integration." Andean Commission: Decision Concerning Treatment of Foreign Capital, reprinted in 10 INT'L LEGAL MATERIALS 152 (1971) [hereinafter cited as Decision 24].
bia, on May 26, 1969, to sign the Agreement on Sub-Regional Integration, known as the Cartagena Agreement.\textsuperscript{28} Since LAFTA previously had approved of the principles of subregional integration, the members of the Pact were able to remain members of LAFTA.\textsuperscript{29} The Cartagena Agreement provided that no actions would be taken which would conflict with LAFTA policy, and the Treaty was declared compatible with the Treaty of Montevideo by the Commission of the Executive Committee of LAFTA in July, 1969.\textsuperscript{30}

III. PROVISIONS OF THE CARTAGENA AGREEMENT

The Agreement outlines both its purposes and the methods by which those purposes are to be achieved in a programmatic fashion. It creates an institutional framework similar to that of the EEC, with a Commission and a Board that perform much the same functions as the European Council and Commission.\textsuperscript{31} The Consulting Committee and the Economic and Social Advisory Committee were established to assist and advise the Commission and the Board.\textsuperscript{32} These four institutions oversee the implementation of the provisions of the Agreement and propose methods to better facilitate economic integration.

Chapter II identifies the organs of the Pact and defines their powers and jurisdictional limits.\textsuperscript{33} The Commission is the supreme institution of the Pact and consists of five representatives, one from each member country.\textsuperscript{34} It formulates the general policy of the Pact and adopts measures necessary to accomplish its objectives.\textsuperscript{35} It elects the members of the Board, issues instructions to it, and delegates to the Board what powers it deems necessary.\textsuperscript{36} In the words of the Agreement, the Commission "Promote[s] the joint action of the sub-regional countries in connection with problems derived from international trade which may affect any one of

\textsuperscript{28} See note 2, supra.
\textsuperscript{29} The preamble to the Cartagena Agreement cites Resolutions 202 and 203 of the Council of Ministers of Foreign Affairs of the Latin American Free Trade Association as the basis of the Agreement.
\textsuperscript{30} Both groups desire to pursue integration, albeit in different programs, in their efforts to unify and develop their economies.
\textsuperscript{32} Cartagena Agreement, supra note 2, at Arts. 19-22.
\textsuperscript{33} Id. at Arts. 5-24.
\textsuperscript{34} Id. at Art. 6.
\textsuperscript{35} Id. at Art. 7.
\textsuperscript{36} Id. at Art. 7 (c)-(e).
them. . ." and "[shall] be acquainted with and solve all other matters of common interest." The Commission acts through decisions that are adopted with the affirmative vote of two-thirds of the representatives.

The Board, or Junta, consists of three members, elected unanimously by the Commission, who come from any of the nations of Latin America. The Board members act independently of any government, subject only to the "common interest" of the Pact members. Established as the technical organ of the Pact, it has the responsibility of supervising the application of the Agreement and the fulfillment of the decisions of the Commission. It carries out studies for this purpose, both on its own initiative and at the request of the Commission, and plays an active role in the discussion of proposals in the meetings of the Commission. The Board acts through proposals, which must be approved by the unanimous vote of its members. These proposals are sent to the Commission, where they are approved, disapproved, or amended.

Two advisory Committees were established so that the business, labor and government groups could make their views known to the decision makers of the Pact. The Economic and Social Advisory Committee, composed of three business and three labor delegates from each of the member countries, ordinarily meets twice a year in Lima. It has no decision making authority, but has the power to review the Board's proposals before they are sent to the member countries for consideration. This committee recently has spoken out on several programs, such as the plans for

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37 Id. at Art. 8, 7 (k). Del Arco points out that this residual authority could play an important role in certain situations. It is governed by the general voting system of the Agreement, so that an affirmative vote of two-thirds of the members would suffice to pass a decision under this clause, and would not be subject to a veto that might arise in other situations. DEL ARCO, supra note 8, at 14.

38 Cartagena Agreement, supra note 2, at Arts. 6, 11. Article 11 sets out exceptions for such important matters as: the common external tariff, the trade liberalization program, and the approval of the list of goods to be reserved for the Sectoral Programs of Industrial Development. These matters must be approved by a two-thirds affirmative vote, with no negative vote. This protects members from being forced by a majority to take on more obligations than they had bargained for. Some of the exceptions limit the members to one veto, providing that on a second vote the previously negative vote will no longer be counted, so that no member may obstruct any action indefinitely.

39 Id. at Arts. 13, 14.

40 Id. at Art. 17. The Board also plays a large role in maintaining relations with the member governments, helping to convince them of the soundness of its proposals and the effects of the proposals on the development of both the Pact and the individual member states. It also must follow up on the fulfillment of the obligations of the Agreement by the members. DEL ARCO, supra note 8, at 15.
sectoral programming and for the common external tariff. A study is now under way to determine if this committee's voice has had a positive impact on any decisions. It is now under way to determine if this committee's voice has had a positive impact on any decisions.\textsuperscript{42} The Consultative Committee, with one representative from each of the member countries, meets only when called by the Board or the Commission, unless a member country requests that it consider a complaint or a special problem. This committee maintains a close connection among the member countries, advises and helps the Board in the fulfillment of its duties and analyzes the proposals of the Board before they are considered by the Commission.\textsuperscript{43}

That the institutions outlined in the Andean Pact were modeled after those of the EEC is evidenced by their similarities. The Andean Commission, like the Council of the EEC, functions as the legislative arm of the organization. Each member of these two bodies represents a different member country in the organization.\textsuperscript{44} Both bodies are final decision makers, acting on the proposals of the "executive" body of their respective group, the Board in the case of the Pact and the Commission in the case of the EEC.\textsuperscript{45} Although in most cases they can act only on such proposals, each is given the power to approve actions which it deems necessary, but which have not been mandated specifically by the Agreement or Treaty, when doing so is in the common interest.\textsuperscript{46}

The Andean Board and the European Commission, as executive bodies, both represent the interests of their communities rather than those of the individual member nations.\textsuperscript{47} Both study and initiate proposals that are presented to the legislative bodies for approval as decisions applicable to all members.\textsuperscript{48} These proposals may be amended by the legislative branch only by unanimous vote, and if not approved may be sent back for modification.\textsuperscript{49} These executive institutions act as the supervisors of the pro-

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  \item \textsuperscript{42} Cartagena Agreement, supra note 2, at Art. 22. See BUSINESS INT'L CORP., OPERATING IN LATIN AMERICA'S INTEGRATING MARKETS 27 (1977) [hereinafter cited as BUS. INT'L].
  \item \textsuperscript{43} Cartagena Agreement, supra note 2, at Arts. 19-21. BUS. INT'L, supra note 42, at 27.
  \item \textsuperscript{44} See EEC Treaty, supra note 31, at Arts. 49, 51, 54, 59, 63; Cartagena Agreement, supra note 2, at Arts. 14(c), 28, 29, 30, 33, 35, 36, 38.
  \item \textsuperscript{45} Treaty Establishing a Single Council and a Single Commission of the European Communities, O.J. 1967, No. 152, 2, at Art. 2 [hereinafter cited as Merger Treaty].
  \item \textsuperscript{46} EEC Treaty, supra note 31, at Art. 235; Cartagena Agreement, supra note 2, at Art. 7(k).
  \item \textsuperscript{47} Merger Treaty, supra note 45, at Art. 10(2); Cartagena Agreement, supra note 2, at Art. 14.
  \item \textsuperscript{48} See note 45, supra.
  \item \textsuperscript{49} EEC Treaty, supra note 31, at Art. 149; Cartagena Agreement, supra note 2, at Art. 11 & Annex 1.
\end{itemize}
cesses mandated by their juridical structures, undertaking the studies necessary to make sure that the members comply with the requirements set out by legislative organs.\textsuperscript{50} They both may enact binding regulations in this regard, pursuant to their delegated or inherent powers.\textsuperscript{51} Finally, both the EEC and the Andean Pact have provided for a committee with similar responsibilities for aiding and advising the authoritative branches in the performance of their duties.\textsuperscript{52}

The major differences between the EEC and the Andean Pact involve the binding nature of the institutional obligations and the processes developed to settle disputes. In the Cartagena Agreement, the members have committed themselves to obey those rules and regulations which are negotiated.\textsuperscript{53} Each country, with its own unique political system and level of development, must enact laws aimed at achieving the same economic result. No institution was created by the Agreement to decide ultimately whether the national laws are in harmony, as compared to the EEC Treaty, which established the Court of Justice. Instead, the Andean Commission was given the authority to supervise negotiations among the members when differences arise concerning the intent, effect, or fulfillment of obligations that the Commission has produced.\textsuperscript{54} Thus, the Agreement is so dependent on voluntary compliance and good faith negotiation that there are no provisions for the imposition of sanctions, the removal of a member, or even the withdrawal of benefits in a situation where a member is clearly in violation of a provision and refuses to cooperate. This aspect of the Andean process, while providing some needed flexibility, has almost resulted in the breakdown of the Pact. It is hoped that the Andean Court Treaty will fill the gaps in the Agreement that have allowed this situation to exist. Before examining the treaty creating the Andean court, it will be helpful to outline the programs by which the members of the Pact sought to integrate their region. The inadequacy of the juridical structure created by the Agreement to implement those programs will be illustrated by ex-

\textsuperscript{50} EEC Treaty, \textit{supra} note 31, at Art. 155; Cartagena Agreement, \textit{supra} note 2, at Art. 15(d).
\textsuperscript{51} EEC Treaty, \textit{supra} note 31, at Art. 155; Cartagena Agreement, \textit{supra} note 2, at Art. 15(h).
\textsuperscript{52} EEC Treaty, \textit{supra} note 31, at Art. 193; Cartagena Agreement, \textit{supra} note 2, at Chapter I, Section C.
\textsuperscript{53} Cartagena Agreement, \textit{supra} note 2, at Arts. 32, 61.
\textsuperscript{54} \textit{Id.} at Art. 23.
amining the most significant problem to have developed in the Pact’s ten year history: the Chilean crisis.

A. Programs Outlined in the Agreement

The Agreement sets ambitious goals aimed at “balanced and harmonious development [that] should convey equitable distribution of the benefits derived from the integration of the Member Countries in order to reduce the differences existing between them.”

It outlines specific programs, in Chapters III through IV, which are to be developed and implemented through decisions of the Commission, and which deal with the various problems that had been encountered in LAFTA. These include:

1. formulation of plans to harmonize the national laws of the member states in certain areas to facilitate cooperation;
2. adoption of a plan whereby various industries will be assigned to particular countries in an equitable fashion that will better allow the processes to thrive in the form of Sectoral Programs of Industrial Development;
3. development of a plan to reduce systematically all tariffs and restrictions between the member countries, known as the Trade Liberalization Program, while simultaneously establishing the Common External Tariff between the group and the outside world;
4. adoption of a system for the regulation of foreign investment which will best serve the needs of the region;
5. programs of industrial development that will better allow the processes to thrive in the form of Sectoral Programs of Industrial Development;
6. development of a plan to reduce systematically all tariffs and restrictions between the member countries, known as the Trade Liberalization Program, while simultaneously establishing the Common External Tariff between the group and the outside world;
7. adoption of a system for the regulation of foreign investment which will best serve the needs of the region.

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55 Id. at Art. 2.
54 Id. at Chapter III. This chapter broadly outlines the purposes and structures of the programs that are dealt with more specifically in the rest of the Agreement. Among the important areas of policy harmonization are: treatment of foreign capital, trademarks, patents, licenses, and royalties; uniform regime of multinational enterprises; guidelines for the harmonization of industrial development laws; harmonization of foreign exchange and fiscal policies. DEL ARCO, supra note 8, at 11.
57 This is outlined in Chapter IV of the Agreement. One of the key elements for the success of this program is the obligation of each member to respect the allocations received by the others. This is done by restricting further development in those areas. DEL ARCO, supra note 8, at 6.
58 Trade restrictions include such non-tariff restrictions as: administrative restrictions, including refusal or delay in granting of import licenses; tax restrictions in the form of additional charges, such as taxes on consumption, regional taxes, requirement of prior deposits; laws that establish systems of preference for national purchases; differences in interpretation of common rules resulting in the paralysis of industry; and import quotas on subregional products. DEL ARCO, supra note 8, at 126.
59 Cartagena Agreement, supra note 2, at Chapters V, VI. The Liberalization program favors only goods originating in the subregion. Payment of the Common External Tariff does not enable a good to be traded freely throughout the area, as is the policy in a true customs union. Origin determination in the Andean system is, therefore, an essential element. DEL ARCO, supra note 8, at 6.
60 Cartagena Agreement, supra note 2, at Chapter XII. Three reasons for the harmonization of foreign investment laws can be stated: (1) to achieve better bargaining positions
motion of the physical integration of the area;\textsuperscript{61} and (6) provision of special treatment for the lesser developed countries of Bolivia and Ecuador to reduce the existing differences among Pact members.\textsuperscript{62}

The major programs of this scheme that address the problems of LAFTA are the Trade Liberalization Program (TLP), the Sectoral Programs for Industrial Development (SPID), and the plan governing foreign investment in the area. It was believed that these three programs, working harmoniously, would ensure the achievement of a proper distribution of the benefits of increased development. The Trade Liberalization Program is similar to the process developed by LAFTA. It provides for an automatic, gradual elimination of duties, restrictions and charges on goods that were produced in and imported from member countries, while simultaneously establishing a common tariff applicable to all goods imported from outside the Andean region.\textsuperscript{63} Irrevocable deadlines were set for the attainment of the levels to be reached, with special consideration given to Bolivia and Ecuador in respect of their need for greater protection.\textsuperscript{64} In order to allow the countries to adapt to the process slowly, each was permitted to list a specific number of products that it could exempt from the TLP for a period of time.\textsuperscript{65} An escape clause provided that countries in

with foreign investors; (2) to avoid inequities in the integration process; (3) to help accelerate the overall integration process. Harmonization is necessary to prevent the investors from playing the countries off against each other for their investment capital. This will ensure the efficient allocation of resources and production activities, and ensure that each member gets its fair share of foreign investment. Moxon, supra note 14, at 25, 34.

\textsuperscript{61} Cartagena Agreement, supra note 2, at Chapter XI.

\textsuperscript{62} Id. at Chapter XIII. One of the major concerns of the Pact was the prevention of the inequitable distribution of benefits that occurred in LAFTA. Thus, the Cartagena Agreement made a specific policy providing special treatment which allowed a more accelerated rate of growth for these lesser developed members. Vargas-Hidalgo, supra note 13, at 402. This preferential treatment is found in all areas of the Agreement, and distinguishes it from most other integration mechanisms. See DEL ARCO, supra note 8, at 13.

\textsuperscript{63} Cartagena Agreement, supra note 2, at Arts. 41, 61. The products are divided into four categories: goods on the Common Schedule of LAFTA; goods reserved for the sectoral programs; goods not yet produced in the region; and remaining non-scheduled goods. There were 175 items on the LAFTA Common List, which has not been expanded. Almost 2,000 goods have been reserved for the sectoral programs, amounting to about one-third of the tariff schedule items. The bulk of the goods are in the non-scheduled, automatic category, subject to the automatic reductions. Carl & Johnson, supra note 6, at 157.

\textsuperscript{64} Cartagena Agreement, supra note 2, at Arts. 45, 46, 50.

\textsuperscript{65} Id. at Art. 55. This is to allow the industries that are disadvantaged in competing with the others in the subrogation to adapt to the new conditions or to terminate business with the least impact on the national economy of a member. Goods excepted are not allowed to benefit from the advantages of the Liberalization Program in the other countries and the goods on the LAFTA Common List may not be excepted. DEL ARCO, supra note 8, at 169.
emergency situations, such as severe imbalance of payments, could find temporary relief from the program.66

The Sectoral Program for Industrial Development had never been attempted by any other integration organization. It was established to better achieve an equitable distribution of industrial activities by assigning the different production processes of an industry equally among all of the interested countries. For example, under the Sectoral Program for the Automotive Industry, enacted in September, 1977, each participating nation was assigned a different class of vehicle to produce exclusively. The vehicles were classified according to the number of cylinders and weight. Within each category, a nation was required to elect a basic model on which it would concentrate. Production of component parts was governed by a similar process.57

To prevent member countries from gaining any advantage before the SPID's could be organized and allocated, the Commission, acting on a proposal of the Board, established a list of goods that were reserved for these programs.68 The goods on the reserve list were not subject to the Trade Liberalization Plan so that producers in the region could not benefit from the automatic reductions in import duties in their neighboring countries.69 A deadline was established for the approval of the SPID's, after which time the goods on the list automatically reverted to the Trade Liberalization Schedule.70

In order to prevent the negative impacts caused by the unorganized treatment of foreign capital and ownership rights, Article 27 of the Agreement provides that the Commission, at the proposal of the Board, should approve a "common regime for the treatment of foreign capital, . . . patents, trademarks, and royalties." Decision 24 was approved by the Commission and entered into force on June 30, 1971.71 It outlines an extensive set

Del Arco believes that the establishment of these lists was necessary to prevent problems in the imbalance of the benefits and costs of the integration process, but that their size was too large and the length of their duration too long, causing a delay in the establishment of the expanded market that was so essential to the system. Id. at 109.

66 Cartagena Agreement, supra note 2, at Art. 79.
67 BUS. INT'L, supra note 42, at 69. Difficulties are encountered in the development of these programs because they require great amounts of investment and quick development of technology, as well as effective and homogenous application of the other provisions of the Agreement, each of which has met with delays in implementation. Vargas-Hidalgo, supra note 13, at 411.
68 Cartagena Agreement, supra note 2, at Art. 47.
69 Id. at Art. 47.
70 Id. at Art. 53.
71 See note 27, supra.
of regulations and restrictions designed to help the member countries control the effects that foreign companies could have on their economic development. The major provisions of the Decision stipulate: (1) that all foreign investment must be registered and approved by the agency set up in each country to supervise the regime; 72 (2) that all new foreign investors and old foreign investors wishing to take advantage of the benefits of the Agreement must divest themselves, through sales to local investors over a period of fifteen years, of sufficient interest in their companies to reduce their ownership and control to less than 50%, as reflected in the administrative, technical and financial aspects of management; 73 (3) that the sale of local companies to foreign investors be approved only in special circumstances, such as their imminent bankruptcy; 74 (4) that access to local credit be limited to short-term loans; 75 (5) that limits be placed on the payment abroad of profits, royalties, and technical fees; 76 and (6) that regulations dealing with contractual restrictions concerning trademarks, patent rights and transfer of technology be established. 77

Many of the provisions of this controversial decision were considered harsh by foreign investors and required extensive negotiations before receiving approval. 78 The restrictions did not seek to deter foreign investment; rather, they were designed to set out clearly the rights and obligations of foreign investors and the guarantees that would protect them. 79 The Andean Pact hoped

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72 Id. at Arts. 2, 6. For an excellent analysis of the foreign investment code established by Decision 24, see Danino, supra note 20. The decision was adopted in the first months of the Pact's existence, with the hope of inducing foreign investors to direct their investments toward development in accordance with the will of the governments. Vargas-Hidalgo, supra note 13, at 404. The preamble to the decision reads,

integration must be fully at the service of Latin American enterprises by means of a strong financial and technical support which will permit it to develop and efficiently supply the regional market, and recognize that foreign private initiative may play an important role to assure the achievement of the objectives of integration within the national policies of each of the countries of Latin America.

Decision 24, supra note 27.

73 DEL ARCO, supra note 8, at 78.

74 Decision 24, supra note 27, at Arts. 41, 43, 44.

75 DEL ARCO, supra note 8, at 81.

76 DEL ARCO, supra note 27, at Arts. 7, 16. These have not been significant yet because most firms have not been productive enough to reach the limits. Moxon, supra note 14, at 48.

77 DEL ARCO, supra note 8, at 85.

78 Because of the changes which Decision 24 required in the members' national laws, one writer predicted, correctly, that it would be quite difficult to implement. Moxon, supra note 14, at 37, 38.

79 DEL ARCO, supra note 8, at 72.
that this would promote certainty and security, which would attract new foreign investment while providing an efficient structure to measure and regulate its participation.\footnote{Del Arco has concluded that, in spite of the predictions of the different members as to the positive or negative impact of the Code, it has had no significant effect on the quantity or nature of investments in the area. See Aho \& del Arco, United States Direct Investment in Latin America, 1966-77: An Empirical Analysis of the Impact of the Andean Code (Decision 24), (Nov. 10, 1978) (paper presented at the Annual Meeting of the Southern Economic Association in Washington, D.C., obtained from the Inter-American Development Bank).}

One final aspect of the Agreement warrants emphasis because of the important role it has played in the evolution of the Andean regime. Throughout the Agreement, deadlines were set for the establishment and implementation of the different programs.\footnote{Cartagena Agreement, supra note 2, at Arts. 27-30, 45-47, 49, 52.} The imposition of deadlines is both necessary and dangerous in an organizational effort of this type.\footnote{Del Arco, supra note 8, at 18.} They are important because they remove a great deal of discretion from the member governments, freeing them somewhat from the political pressures involved in trade negotiations.\footnote{Carl \& Johnson, supra note 6, at 193.} This is particularly important in Latin America, where the less stable governments must balance internal factors with external goals in seeking the best means of survival. However, deadlines also create a risk of non-fulfillment. If the consequences of non-fulfillment are not specified clearly, the passing of a deadline could lead to stagnation of the entire integration effort.\footnote{Del Arco, supra note 8, at 19.} With the Pact, the process is further complicated by the fact that each decision is the product of a dual procedure: an agreement on a program first must be reached unanimously by the Board in the form of a proposal, which then must be sent to the Commission for approval.\footnote{Cartagena Agreement, supra note 2, at Art. 33.} In effect, this creates two deadlines, the first of which is not stated explicitly. The Board must pass its proposals to the Commission in time for the latter to meet the specified deadline. Since it is impossible to determine how long the Commission will take to approve the proposals (indeed, the Commission may decide to send a proposal back to the Board), the imposition of deadlines is not very efficacious in the integration effort.

Since the formation of the Pact, the Commission has approved over 100 decisions establishing the structure of the programs outlined in the Agreement.\footnote{Among the decisions are: Decision 22, establishing procedures for harmonizing the
with the application of the Agreement and the fulfillment of the decisions of the Commission, it is given only the power to study the members' compliance and report the results to the Commission. To have legal effect within the member states, the decisions must be transformed into national law, either by presidential decree or by the proper legislative enactment. The fact that the countries have unique political systems results in a flexibility of implementation which impedes the harmonization of national policies.

The Board is charged with the promotion of this harmonization through negotiations with the member governments. However, negotiations are difficult to conclude with the countries of Latin America. The governments are quite sensitive to the issue of sovereignty and still follow the Calvo Doctrine. The instability of the political situations in these countries also makes it especially difficult to promote those decisions that appear adverse to the countries' short-term interests. In the ten years of the Pact's existence, the member countries have changed governments an

members' various policies: Decision 40, eliminating double taxation and multiple charging in the region; Decision 45, establishing norms against unfair trade practices, dumping, and price manipulation; Decision 46, dealing with the Andean multiple enterprise; and Decision 56, regulating highway traffic between the Andean Countries. The Latin American Times, June, 1979, at 8, col. 1.

Cartagena Agreement, supra note 2, at Art. 15.

An agreement for new economic measures has no value if not accompanied by internal implementation through appropriate laws and institutions, as well as by uniform interpretation of the rules. See generally 10 LAW. AMER. 414 (1978). As stated by Felipe Salazar, coordinator of the Board in 1973, emphasizing the internal consolidation of the group as essential to putting the Agreement into practice,

only in this way will there begin to exist that string network of economic bonds and specific interests whose existence will itself be the best guarantee of the survival of the system; only in this way will the Andean Group have its own life and that impetus towards the future it needs.

Del Arco, supra note 8, at 131.

Cartagena Agreement, supra note 2, at Art. 15.

This has been true particularly with Decision 24, as many of its terms are ambiguous or undefined, leaving it open to different interpretations by the legislating bodies. Moxon, supra note 14, at 39.

The governments are suspicious of any outside influences, a reaction resulting from their experience with outside intervention, both during the colonial days and afterward, which was not always in their best interests. This gave rise to such political principles as the Calvo Doctrine in the early 1900's, which requires everyone doing business in Latin America to subject themselves to local law and to be restricted to the local courts for any redress of grievances. Padilla, supra note 3, at 91. In most of the countries, the executive branch of the government plays a major role in policy formation and dispute settlement, overshadowing the other branches, especially the judiciary. The conservative inclinations that prevail are impeding the reluctant governments from submitting to the jurisdiction of a supraregional institution such as the Andean Court. Id. at 92.
average of twice each. These new governments naturally are more responsive to local opinion emphasizing national goals than to the pressures created by the obligations of the Agreement.

Added to the difficulty of the harmonization process is the complexity of the total integration plan proposed by the Agreement, which would require the simultaneous application of all of the different programs. This multiplies the number of variables that must be dealt with by the members, presenting a monumental task for governments which have little experience in the areas of industrialization and regulation. Countries making good faith efforts to apply the rules often find it difficult to identify goods as coming from within or outside of the region, and have substantial problems recognizing, registering and regulating foreign investments. There also have been problems with the decisions themselves, which often leave terms ambiguous or undefined. For instance, the legality of payments, investments and means of finance under Decision 24 depend on the interpretation of such terms as "capital," "short-term credit" and "affiliate," but these words are not defined in the decision. Repatriation of profits is limited to 14%, but it is unclear whether that means gross or net, before- or after-tax profits.

The final failing of the Pact’s system stems from the lack of meaningful sanctions provided for enforcement. Even if the Board and the Commission were able to conclude that a member was in violation of the Agreement, the only punishment they could impose would be to cease allowing the goods from that country to

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92 Del. Arco, supra note 8, at 130. These changes in governments have led to marked changes in the economic policies of the countries, causing problems that have forced the obligations of the integration process to take a lower priority at the national level. Del. Arco, supra note 8, at 134. The unique economic problems of the countries are transformed into demands communicated through the political process to the governing body. These demands must be satisfied to ensure political survival. Concessions demanded from the members by the organization may cause severe strain on both sides. 10 Law. Amer. 195, 196 (1978).

93 In his evaluation, Vargas-Hidalgo identifies this problem as “politicization,” where the “national interest appears more immediate, actual, and urgent than the integration goal, which is perceived as distant, uncertain, and less attractive from a domestic point of view.” Vargas-Hidalgo, supra note 13, at 40.

94 Id. at 41.

95 While not all of the member countries have succeeded in establishing the agencies required to supervise the application of Decision 24, some have created more than one. This has resulted in confusion and contradictory application of some of the rules, reducing the overall effectiveness of the code and impeding the integration process. Danino, supra note 20, at 644.

96 See Moxon, supra note 14, at 43.
benefit from the expanded market created by the Trade Liberalization Program and to remove the country from the industrial programming schemes. However, because of the Reserve List and the exceptions lists granted to each country, which effectively remove a country's goods from those benefits, and because the Sectoral Programs have been delayed in their implementation, these penalties have little impact. The countries are left with persuasive efforts to bring the disobedient member in line, a method of enforcement which has not been very effective.

Given this situation of substantially different governments organized in a group that requires the application of rather flexible rules without enforcement authority, it is understandable why progress in the integration process has been slow. From the standpoint of an individual member country, then, the most advantageous short-term strategy is to apply the rules loosely to itself while insisting on strict compliance from the others. The countries tend to support and emphasize those programs perceived as favorable to their own situations, while enacting those considered disadvantageous in a diluted form that complies literally with the group standards yet allows them some advantage over other members. Alternatively, they can enact the law correctly but limit its enforcement. Since all of the countries are involved to some extent in this lack of compliance, none is anxious to complain about the others' behavior. This has led to what has been described as a "virtually legalized state of non-fulfillment of obligations."

**B. The Chilean Crisis**

Weaknesses in the Andean Pact's legal structure were major factors contributing to the crisis that developed within the Pact in 1974 and resulted in the withdrawal of Chile in 1976. The crisis began with a dispute over Decision 24 and climaxed when two of the deadlines established in the Agreement expired and the members could not agree on their extension.

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97 DEL ARCO, supra note 8, at 91.

98 The national legislation may also contain loopholes that can be used by different groups to their advantage. Vargas-Hidalgo, supra note 13, at 415. Moxon calls this aspect of the implementation process the "degree of tolerance," and suggests that it will be greater if the national government, rather than a regional agency, is responsible for implementing the Agreement. Moxon, supra note 14, at 31, 44, 52. Moxon's article, which deals primarily with investment law harmonization, provides a good illustration of the forces that work against the complete commitment by the member countries to the long-term objectives of the integration group.

99 DEL ARCO, supra note 8, at 16.
The Cartagena Agreement was drafted by a committee of experts representing Chile, Venezuela, Bolivia, Colombia, Ecuador and Peru. Throughout the negotiations it was clear that there were two divergent positions concerning the role to be played by the liberalization and sectoral programming schemes. Chile and Colombia advocated a commercialist concept, believing that the market should play the key role in establishing the location of industries. They favored a universal, automatic and irrevocable liberalization program applied to all goods so that only competitive product lines would be maintained and expanded. Sectoral programming, in their view, was needed only in a few dynamic sectors.\(^{100}\)

The other four countries supported a developmentalist thesis, in which sectoral programming was considered the most important mechanism of the integration process. They argued that the problems which had hampered LAFTA were the result of its liberalization procedure, which had led to the concentration of industry in the larger, more industrially advanced countries. The idea of SPID's with an organized allocation of plants was developed and refined during the negotiations.\(^{101}\)

As the Agreement shows, the developmentalists succeeded in establishing industrial programming as the vital process of the integration scheme of the Andean Pact, but not without having to make some compromises. To safeguard the interests of the commercialists, the Agreement provides: (1) that the members negotiate the list of products that are to be placed on the Reserve List for Sectoral Programming, so that Chile and Colombia could defend their positions; and (2) that these programs be approved by the Commission before December 31, 1973, with the option to extend that deadline to December 31, 1975, if all of the goods on the Reserve List had not been approved for a program.\(^{102}\) The programs that are approved must contain provisions governing the liberalization of the products included in them, while those products that fail to be approved for a program by the deadline must automatically revert to the trade liberalization program.\(^{103}\)

The reason for including the option to extend the deadline was that the developmentalists feared that the commercialists would stall the approval of the SPID's in order to have the reserved pro-

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\(^{100}\) Id. at 21.

\(^{101}\) Id. at 22.

\(^{102}\) Id. at 23.

\(^{103}\) Id.
ducts begin the process of liberalization. The commercialists, however, did not want the reserve lists to be transformed *de facto* into another exceptions list of products excluded from the liberalization program. They advocated a short reserve period. To reassure the developmentalists, provision was made for Commission approval of new SPID's at any time, even for products that had already entered the liberalization process. Thus, the negotiations established the pre-eminence of sectoral programming over the automatic liberalization program, while assuring the commercialists that their interests would be advanced. 104

The crisis developed in two steps. The first involved Chile's dissatisfaction with the regime created by Decision 24 and its efforts to legislate around the decision's provisions. The second resulted from the failure of the Commission to approve more than two SPID's before the final deadline, due to the delays in their negotiations caused by the dispute over Decision 24 and by the entry of Venezuela into the Pact on December 31, 1973. 105

During the early 1970's, Salvador Allende and the Government of the Popular Unity pursued policies that restricted foreign investment. They believed that Chile's economy could develop without external aid. The government imposed high tariffs and restrictions on imports and many industries were nationalized. 106 This system proved to be unworkable and soon Allende began to ease some of the restrictions. When Allende was overthrown in 1973, there were about 600 enterprises which had been nationalized since the 1930's. 107 General Pinochet, the new ruler, decided to proceed under the free-trade commercialist theory and sought to remove these industries from the government's portfolio. He returned all of those industries which had been nationalized to their former owners and placed on sale the shares of those that had been legitimately transferred. However, there was insufficient capital in Chile to purchase the state owned shares. 108 Since

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104 *Id.* at 24.

105 The accession of Venezuela meant the addition of a market helpful to the achievement of economies of scale that was the objective of industrial programming. It has one of the most modern industrial bases in the Andean Group, with high productivity levels. Its markets are more sophisticated than the other member states, which presented problems for the Pact members who needed to improve quality and efficiency to satisfy Venezuelan demand. The accession also provided the need for renegotiated lists of exceptions in view of the participation of the new member. DEL ARCO, *supra* note 8, at 110.


108 DEL ARCO, *supra* note 8, at 87.
sales to foreign investors were limited by the provisions of Decision 24, the government found itself forced to maintain large enterprises that it had neither the capital nor the sufficiently trained personnel to operate.\(^9\)

Chile began negotiations with the other members in an effort to find a solution to its problem, pressing for amendment to Decision 24. These efforts were completely unproductive. When no sympathetic consideration from the other members was forthcoming, Chile enacted Decree Law 600 on July 13, 1974, which provided for treatment of foreign investment in a way that conflicted with the provisions of Decision 24.\(^{10}\) This action caught the attention of the other members, who perceived that Chile was using this law to attract foreign investment, to their detriment and in violation of the decision.\(^{11}\) The Commission responded in September, 1974, with a declaration that Decree Law 600 was incompatible with the letter and spirit of Decision 24 and charged the Board with the responsibility of negotiating a solution to the controversy.\(^{12}\)

The Board agreed to review Decision 24 and determined what reforms were necessary to ensure its proper implementation. Chile then enacted Decree Law 746 on November 9, 1974, which expressly stated that Decision 24 was part of Chilean Law and named the Foreign Investment Committee, created by Decree Law 600, as the national agency responsible for its application.\(^{13}\) In response to Chile's needs, the Andean Commission subsequently approved Decision 97, which authorized Chile to sell government owned enterprises to foreign investors. Further general amendments to Decision 24 and to the Agreement were approved in 1976 in Decisions 103 and 109.\(^{14}\)

During this period, the negotiations on the approval of the SPID's naturally were quiescent. None of the members could decide how to allocate industries so long as substantial uncertainty persisted regarding the regulation of foreign investment. Chile possibly could establish a more solid capital base than the other countries, giving it an advantageous position in new industries. The negotiations were delayed further during the period when

\(^{9}\) Id.

\(^{10}\) Id. at 88.

\(^{11}\) Id. at 87, 88. This acts as a barrier to the Common Market because the other countries would be less inclined to open their markets to a country that has strengthened its industrial base with extra investment capital. Moxon, supra note 14, at 50.

\(^{12}\) DEL. ARCO, supra note 8, at 89; Vargas-Hidalgo, supra note 13, at 405.

\(^{13}\) Vargas-Hidalgo, supra note 13, at 406.

\(^{14}\) Id. at 407.
Venezuela acceded to the Pact, since it was obvious that the entry of such a large and wealthy country would have a tremendous impact on all aspects of the industrialization process.\textsuperscript{115}

These factors led to the passage of the deadline of December 31, 1975, with only two programs having been approved: the Metalworking Program and the Petrochemical Program.\textsuperscript{116} Technically, this meant that the member countries should immediately begin reducing the duties and restrictions on the products on the Reserve List, as required in the Agreement. However, the developmentalists preferred to amend the Agreement to provide a further extension. They argued that the sectoral programming scheme should be maintained because it was the most important aspect of the Agreement. But Chile had anticipated this action and refused to approve any extension, and was perfectly within its rights under the Agreement to do so. Chile argued that these prolonged extensions would harm the consumers and would cause uncertainty in the business community. It also contended that the extensions were an obstacle to the formation of the expanded market, since most of the large industrial products were part of the Reserve List, exempt from the Trade Liberalization Program.\textsuperscript{117}

The Board began to study the situation to try to arrive at some compromise. It produced a Draft Protocol to the Agreement, which it presented to the Commission at its Sixteenth Special Session on February 28, 1976.\textsuperscript{118} This document provided for an extension of all expired deadlines for another two years and revised the method of approval of the SPID's so that only four members were required to participate, thus preventing one member from being able to defeat the approval process. This Draft Protocol was discussed at length and was approved finally as Decision 100, along with several other decisions responding to the needs of each member.\textsuperscript{119}

Decision 100, however, was only a proposal to amend the Agreement under Article 7(j). Therefore, it was unanimously approved as a “proposal to the Member Countries [of a modification] to th[e] Agreement,” and still had to be signed by each of the member

\textsuperscript{115} See note 105, supra.

\textsuperscript{116} \textsc{Del Arco}, supra note 8, at 25, 26.

\textsuperscript{117} This reduced the members' incentive to abide by the agreement, since the only sanction available against them was their removal from this program. Moxon, supra note 14, at 43, 48.

\textsuperscript{118} \textsc{Del Arco}, supra note 8, at 138.

\textsuperscript{119} \textit{Id.} at 145.
Chile still was not satisfied with some of the provisions. When the Protocol was presented to the members for signature on August 4, 1976, Chile refused to sign. Since the Protocol required all of the members to sign for it to be effective as an amendment, the Pact was at an impasse. The Agreement was virtually amended, yet technically the members were obligated to begin the liberalization of the products on the Reserve List. Negotiations began again to find a solution to the problem. The major difficulty preventing a quick solution was the fact that there were no provisions for the removal or suspension of a member, even where apparently no compromise could be reached.

Finally, on October 5, 1976, an Additional Protocol was signed creating a Special Commission made up of the five developmentalist countries and Colombia (which had been satisfied with the negotiated amendments to the Agreement) on one side, and Chile on the other. The Special Commission was charged with resolving the differences between the two sides, although it generally was felt that no compromises would be offered by either. A critical provision of the Protocol, however, provided that if no agreement between the countries could be reached within twenty-four days, Chile would withdraw from the Pact by renouncing all of its rights and terminating all of its obligations. This was, in effect, a polite postponement of the inevitable. No agreement could be reached and on October 29, 1976, Chile ceased to be a member of the Cartagena Agreement.

The impasse was resolved and the survivors were unified by their efforts to keep the Pact operating. Soon after Chile's withdrawal, several decisions were approved to eliminate some of the divisive aspects of the Agreement that had precipitated the crisis, but these amendments were not concerned with the structure of the Pact itself. Thus, the Agreement still left the Pact open to problems caused by differences of interpretation and implementation. The flaws in the dispute settlement mechanisms provided by the Agreement have been described succinctly as follows:

When a dispute arises between member states, certain steps are to be taken towards the resolution of differences. The first

120 Cartagena Agreement, supra note 2, at Art. 7(j).
121 DEL ARCO, supra note 8, at 165.
122 Id. at 168.
123 Id. at 169.
124 Id. at 162.
step is direct negotiation between the parties to the dispute. Where direct negotiation fails, the Commission may intervene by exercising its good offices and taking other informal measures. If these measures fail to resolve the parties' differences, then the Commission must make formal efforts at conciliation.

The procedure devised for conciliating legal disputes consists of the appointment of an ad hoc committee by the Commission composed of a national representing each disputant and a national from each of the remaining member countries. The Committee is charged with conducting its own investigation, hearing the parties, and, by majority vote, adopting a report containing recommendations for the resolution of the problem. The report is then referred to the Commission for its final decision. Notwithstanding these procedures, this method of dispute settlement has proven totally inadequate since the decision of the Commission is not binding.

Where these efforts do not resolve the dispute, the Agreement provides that the member countries shall be subject to the LAFTA Protocol on the Settlement of Disputes. While the Agreement provides that members of the Andean Group shall undertake steps to ratify the Protocol as soon as possible, only Bolivia, Colombia, and Ecuador have ratified it to date. Thus, as in the case of LAFTA, there is no formal method of litigating disputes and obtaining authoritative judgments regarding the application of Andean Pact law.125

These inadequacies suggest an acute need for a supranational court. Two important characteristics of such a court would be (1) provision of a permanent legal function, particularly for key areas of subregional law; and (2) provision of a uniform interpretation of the legal regime, especially regarding treatment of foreign capital under Decision 24.126

IV. THE ANDEAN COURT TREATY

The new Treaty probably can solve some of the dispute settlement problems associated with the Agreement. It expands the juridical structure of the Agreement, providing that the decisions of the Commission and the resolutions of the Board shall be binding on the member countries. It also establishes a court to oversee the activities of the Pact's institutions, to ensure member state

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125 Padilla, supra note 3, at 83.
126 Id. at 84, quoting and translating Professor Orrego-Vienna, La Creacion de un Tribunal de Justicia en el Grupo Andino, 8 DERECHO DE LA INTEGRACIÓN 37 (1974).
compliance with the supranational juridical structure, and to provide advisory opinions concerning what the norms of that structure entail. In creating a court with these functions, the Andean Pact has moved closer to the organization of the European Economic Communities.

Chapter I of the Treaty provides a new definition of the juridical structure of the Agreement. Article 1 of that chapter states: "The juridical structure of the Cartagena Agreement comprises the following: a) Cartagena Agreement, its Protocols and Additional Instruments, b) this Treaty, c) Decisions of the Commission, and d) Resolutions of the Junta [Board]." The Cartagena Agreement, with its protocols and supplementary instruments, was discussed in the preceding section. The decisions of the Commission are obligatory for the member countries and become directly applicable to them when published in the Official Gazette of the Cartagena Agreement.127 A decision may provide that it be adopted as internal law by the member states through express acts.128 In this respect, a decision is similar to a directive of the Council of the EEC, which is binding on the member states as to result but leaves to the choice of national authorities the form of implementation.129 Resolutions of the Board are effective as provided in the regulations approved by Decision 9 of the Commission in 1970.130 Similar to Article 5 of the EEC Treaty, Article 5 of the Andean Treaty states that the members are committed to adopt any measures "necessary to assure the fulfillment of the norms which comprise the juridical structure of the Cartagena Agreement," and are "committed not to adopt or apply any measure which may be contrary to such norms, or which may, in any way, prejudice their application."131 Thus, Article 5 makes the decisions of the Commission and the Proposals of the Board binding on the member countries.

Having strengthened the other institutions of the Pact, the Treaty, in Chapter II, establishes the Court as "one of the princi-

127 Andean Court Treaty, supra note 1, at Art. 3.
128 Id.
130 Andean Court Treaty, supra note 1, at Art. 4.
131 Art. 5 of the EEC Treaty provides:
Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks.
They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.
ple institutions of the Cartagena Agreement” and sets out its basic structure and functions. The Court is charged with three responsibilities in Chapter III: (1) hearing actions of nullification, which ensure that actions of the Board and Commission remain within their powers under the Agreement; (2) hearing actions of non-compliance, which involve procedures and sanctions designed to ensure compliance by the member states with the obligations of the Agreement; and (3) giving advisory opinions, which interpret the norms of the Agreement to ensure their uniform application in the member states. These responsibilities cast the Court in the vital role of maintaining the Andean Pact’s fidelity to the Cartagena Agreement.

Section 1 of Chapter III concerns the Court’s power to nullify any actions of the Commission or Board “adopted in violation of the norms which comprise the juridical structure of the Cartagena Agreement, including ultra vires acts.” These actions, decisions or resolutions may be challenged by the Commission, by the Board, by member states, and by any natural or juridical person harmed by the challenged actions. Any nullification action must be

132 Article 6 of the Treaty establishes the Court and provides that it will sit in Quito, Ecuador. It is to be “endowed with the organization and functions established in [the] Treaty.” It will be composed of five justices, nationals of the member countries, of high moral reputation, who meet the standards required in their countries of origin for the highest judicial functions. They are to be independent in the exercise of their functions and may not perform any type of professional activities other than teaching, whether remunerated or not. Andean Court Treaty, supra note 1, at Art. 7.

The judges will be selected by unanimous vote of plenipotentiary representatives of the member countries for terms of six years and may be reelected once. Id. at Arts. 8, 9. The Commission is to approve, at the proposal of the Board and within three months of the ratification of the Treaty by its signatories, a statute governing the functions of the Court and outlining the judicial procedures to which causes of action in the Court are to be subject. Id. at Art. 14. A judge may be removed from the Court, upon complaint of a member country, only if he “has committed a grievous fault stipulated in the statute of the Court, and in accordance with the procedure established therein.” Id. at Art. 11. This is done by unanimous vote of plenipotentiaries of the member states convened to hear the complaint. Id. Otherwise, the number of judges may be modified by the Commission upon unanimous proposal of the Court. Id. at Arts. 7, 14.

The Commission also, on unanimous proposal of the Court, must create the position of Attorney General for the Court, with the number and functions of its office to be established in the statute of the Court. Id. at Art. 7. The member countries are obligated to provide the Court any facilities necessary for the performance of its functions and must grant the Court and its justices the immunities recognized by international practice, with justices given the rank of chief of a diplomatic mission. Id. at Art. 13. Finally, the Court must propose its budget each year to the Commission for approval. Id. at Art. 16.

133 Andean Court Treaty, supra note 1, at Chapter III, First Section.
134 Id. at Chapter III, Second Section.
135 Id. at Chapter III, Third Section.
136 Id. at Art. 19. Member States may only challenge decisions approved without their affirmative vote. Id. at Art. 18.
presented to the Court within a year of the act's entry into force.\textsuperscript{137} The challenge of any act does not affect its applicability or enforceability until the Court rules that it partially or totally nullified.\textsuperscript{138} In either event, the Court must indicate what effect its ruling is to have. The institution whose actions have been nullified then must adopt the required measures.\textsuperscript{139}

The Andean Court nullification provisions closely resemble those of the European Court of Justice. Article 173 states that the European Court "shall review the legality of acts of the Council and the Commission. . . ."\textsuperscript{140} Nullification actions may be brought by a member state, the Council, or the Commission. Grounds for the actions include lack of competence, infringement of an essential procedural requirement, infringement of the EEC Treaty or any rule of law relating to its application, or misuse of powers.\textsuperscript{141} As with the Andean Court, any natural or legal person may bring a nullification action. The European qualifications of this right are that the decision challenged either must be directed toward the complainant or, if "in the form of a regulation or a decision directed to another person, [be] of direct and individual concern to the former."\textsuperscript{142} The European rules regarding natural or legal persons differ only slightly from those of the Andean Court. The Andean Court Treaty requires that decisions of the Commission or resolutions of the Junta be applicable to the complainants and that the complainants be harmed by them.

One difference between the European and Andean nullification procedures concerns the situation where an institution is called upon to act but fails to do so. Article 175 of the EEC Treaty provides that, in such a situation, any of the parties entitled to bring nullification actions may bring a second action. The EEC Treaty specifically states that an institution whose act is declared void or whose failure to act is declared contrary to the Treaty "shall be required to take the necessary measures to comply with the Court's judgment."\textsuperscript{143} Lacking this specific reference to suits against institutions for failure to act, the Andean Court might appear to be without a crucial enforcement power. However, the An-
dean Court seems to have sufficient authority by virtue of its general nullification provisions, which require that the institution "whose act has been nullified must adopt the measures required to assure the effective fulfillment of the decision of the Court." Thus, upon an institution's failure to act, a complainant need only bring a second nullification action, pleading for a specific compliance order by the Court against the offending institution. This difference between the two Treaties, then, probably will be minor in practice. The absence of a specific provision on the part of the Andean Treaty should not impair the effectiveness of that court.

The second responsibility of the Andean Court concerns actions of noncompliance by member states. It, too, closely resembles the provisions of the EEC Treaty. Both require that the respective legislative organ, the Junta in the case of the Andean Pact and the Commission in the case of the EEC, be the major participant in any action against a member. Both may act on their own or upon the presentation of a complaint by a member country. The legislative institution must present an opinion to the member country whose actions are being challenged and allow it to respond, subject to time limits set by the legislative body. If no suitable response is received, the institution may present the case before the court. If the institution fails to act upon a member's complaint within the time limit, the complaining member state may bring the action directly to the court.

When either court rules that a member has failed to fulfill an obligation of the Treaty or Agreement, that state is required to adopt the measures necessary for compliance with the decision of the court. If it fails to do so, it may be subjected to sanctions imposed by the court. In the EEC, the Court is allowed to impose penalties which have been approved by the Council in regulations. The regulations, in some cases, may give the Court unlimited discretion. In contrast, the Andean Court must determine the

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144 Andean Court Treaty, supra note 1, at Art. 22 (emphasis added).
145 Id. at Arts. 23, 24; EEC Treaty, supra note 31, at Arts. 169, 170.
146 Andean Court Treaty, supra note 1, at Arts. 23, 24; EEC Treaty, supra note 31, at Arts. 169, 170. This time limit varies according to the urgency of the matter, and cannot exceed two months in the case of the Pact or three months in the EEC. Andean Court Treaty, supra note 1, at Art. 23; EEC Treaty, supra note 31, at Art. 170.
limits "within which the complainant country, or any other country, may restrict or suspend, totally or partially, the advantages deriving from the Agreement which benefit the noncomplying member country."150 Thus, the Andean Court can resort only to indirect penalties to ensure proper implementation of the Agreement by the member states, whereas the European Court, in some cases, may impose direct penalties.

Two procedures are provided in the Andean Court Treaty which are not found in the EEC. First, the Andean Court's rulings which are issued in noncompliance actions may be reviewed upon the petition of an interested party if the petition is based on facts, unknown at the time of the original proceeding, which might have influenced the outcome of the case.151 Second, and more significant, natural and juridical persons are given the right to bring causes of action in their national courts when member countries fail to adopt measures necessary to fulfill the norms of the Agreement, provided that those persons are affected thereby.152 No such right of action is granted explicitly by the EEC Treaty, although there has been debate whether that Treaty implicitly gives a private right of action to nationals of member countries.153

The extent to which the Andean Court Treaty provides an effective form of redress for member state noncompliance will depend on the Court's ability to interpret the national laws of the member states, an essential element for determining compliance. The final section of Chapter III prescribes the Court's powers of interpretation. The Court first is given the authority to interpret the norms of the juridical structure of the Agreement with "prior advisory opinions" which, it is presumed, will be published in the Official Gazette.154 This will provide more certainty to those who are affected by the norms and will assist the uniform application of the norms by the member countries. However, because the An-

150 Andean Court Treaty, supra note 1, at Art. 25.
151 Id. at Art. 26.
152 Id. at Art. 27. That article provides:
Natural and juridical persons shall have the right to bring causes of action in the competent national courts, in accordance with the provisions of domestic law, when the member countries do not comply with that provided in Article 5 of this Treaty and the rights of such persons are affected by this noncompliance.
It is not clear yet whether the requirement that the actions be brought "in accordance with the provisions of domestic law" will serve to limit the scope of the Treaty-based right to sue for noncompliance.
153 For a discussion of the direct applicability of EEC law, see H. Steiner & D. Vagts, Transnational Legal Problems 1270-1280 (1976).
154 Andean Court Treaty, supra note 1, at Art. 28.
dean Court Treaty retains a measure of flexibility reminiscent of the Cartagena Agreement, the Court's interpretative powers still must accommodate the sovereignty of the member states. Resolution of the tension between sovereignty and uniform interpretation is attempted in the remainder of Chapter III, which deals with the right of the Andean Court to interpret the norms of the Agreement upon a petition from a judge of a national court.

Under Article 29, a national judge who is trying a case involving the norms of the Agreement may petition the Andean Court for its interpretation of those norms, provided that the Court's ruling is subject to appeal within that national system. If the ruling is not appealable, "the judge shall suspend the proceeding and petition the interpretation of the Court, ex officio in all cases, or upon the petition of an interested party, if so required by law." In either situation, the judge hearing the case must adopt the interpretation of the Court. Article 30 states that "the Court shall restrict its interpretation to defining the content and scope of the norms of the juridical structure of the Cartagena Agreement. The Court may not interpret the content and scope of domestic law nor judge the substantive facts of the case."

It appears that, by virtue of the rules for advisory opinions, member state governments retain, to some extent, the power to determine ultimately the interpretation of norms of the Cartagena Agreement. This seems to conflict somewhat with other parts of the Treaty. Article 5 requires the member states to adopt all necessary measures to fulfill the norms of the Agreement and not to adopt those that conflict with them. Article 27 gives natural and juridical persons the right to bring an action in national courts when the members do not comply with Article 5 and the persons are affected by the noncompliance. Such a procedure will involve the norms of the Agreement and their interpretation. However, the judges of the national courts may petition the Andean court for its interpretation only if the Court's ruling is appealable within their national system or upon petition by an interested party, if required by national law. Furthermore, if national law requires the national court to make its ruling before the Andean Court's interpretation is received, the national court must proceed to decide the case. Since referral to the Court in either case depends upon national law, it is up to the member

155 Id. at Art. 29.
156 Id. at Art. 31.
157 Id. at Art. 29.
state governments to provide this procedural right. Even if a judge should petition the Court for its interpretation, the Court is prohibited from assessing the content and scope of any domestic laws that might be involved. It is limited to the interpretation of the norms of the Agreement. As a result, the only recourse for the aggrieved party would lie not in the form of an advisory opinion, but rather in an action for noncompliance. The Court's power to render advisory opinions has been limited to accommodate the sovereignty of the member states.

The European Court of Justice is empowered to give what are called "preliminary rulings" concerning EEC Treaty interpretation, the validity and interpretation of the acts of Community institutions, and the interpretation of the statutes of entities established by and act of the Council. Although this is a more detailed enumeration of interpretative powers than is found in the Andean Court Treaty, the two courts seem to have basically the same function in this area. A noteworthy difference, however, is the fact that the EEC Treaty takes a more direct approach to the problem of accommodating member states' sovereignty. When a question which is within the European Court's interpretative powers is raised before a national court, that court "may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon." In the EEC, the test for referral is two-fold: (1) it must be a question within the Court of Justice's interpretive powers; and (2) the national court must consider the question to be necessary to enable it to give judgment.

The Andean Court Treaty provides national courts with less discretion. Under that treaty, the national court can refer the question only if: (1) the question concerns the norms of the Agree-

158 Id. at Art. 30.
159 The final chapters of the Treaty contain various general provisions, including: (1) the rulings of the Court do not have to be legislated in any of the member countries to be enforceable; (2) the member countries are limited to the Court for the resolution of any controversies arising under the Agreement and cannot look to any other court, arbitration system or other procedure not provided by the Treaty, such as those outlined in Article 23 of the Agreement; (3) the Board is given the responsibility of publishing the Official Gazette, containing the Decisions of the Commission, the Resolutions of the Board, and the decisions of the Court; and (4) a provision that the Treaty will enter into force when the subscribing members have deposited their instruments of ratification with the Secretary of the Commission of the Pact and will remain in effect independently of the existence of LAFTA, which is expected to dissolve at the end of 1980. Id. at Arts. 32-34, 37, 38.
161 Id.
ment; (2) the Andean Court’s ruling is appealable in the national system; and (3) if the ruling is not appealable, referral can be made at the court’s discretion or upon petition if required by law. By imposing the conditions relating to appealability and legal authorization to refer questions, the Andean Treaty has made the Court’s relation to national courts more complex and perhaps more tenuous.

The Andean Court offers much hope for resolving some of the enforcement problems which have hampered progress in the Andean Pact. Endowed with the power to nullify acts by Pact institutions which conflict with Cartagena Agreement, the power to compel member states to comply with the norms of the Pact, and the power to render advisory opinions concerning those norms, the Andean Court can consolidate regional integration efforts. It closely resembles the European Court of Justice. Two important points of difference are that the Andean Court can hear non-compliance actions brought by natural or legal persons, and that the Andean Court has more limitations placed upon its power to give advisory opinions. In fact, the striking similarities between the courts raises the question whether a facsimile of the European Court can function effectively in a regional integration scheme where the economies and development levels of the member states are substantially different from those of EEC countries.

V. CONCLUSION

The Andean Court Treaty promises to advance integration in the Andean system considerably, having filled many of the gaps left by the original Agreement. But the success of the Pact will depend on the willingness of its members to submit to a program that shows promise for the long term while seeming somewhat harmful for the individual members in the short term. With determination and flexibility the Andean Pact has survived for a decade. It not only reflects a significant effort by Latin American countries to improve their economic position in the world, it represents an example after which others groups seeking the same goals can model themselves. Accordingly, the role of a central court in this regional integration scheme can be expected to receive much attention.

_Edwin P. Lochridge_