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# The Andean Common Market and the Importance of Effective Dispute Resolution Procedures

by  
Timothy F. O'Leary†

The Andean Common Market (ANCOM) was created in the Cartagena Agreement,<sup>1</sup> through which five of the smaller members of the Latin American Free Trade Association (LAFTA)<sup>2</sup> agreed to create a subregional common market. The purpose of the Agreement was "to promote a balanced and harmonious development of the Member States . . . through economic integration."<sup>3</sup> Thus, while economic development would be accelerated, the member countries intended to ensure that the benefits of that development would be equitably distributed.<sup>4</sup>

Although the signatories of the Agreement drafted a comprehensive blueprint for the integrated development of the subregion, they neglected to include a body capable of resolving the disputes which the implementation

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1. Agreement on Subregional Integration (The Cartagena Agreement), *done* May 26, 1969, 8 I.L.M. 910 (1969). The original signatories of the Cartagena Agreement were Chile, Colombia, Peru, Ecuador, and Bolivia. Acuerdo de Cartagena, ORDENAMIENTO JURIDICO DEL ACUERDO DE CARTAGENA [hereinafter ORDENAMIENTO JURIDICO], 1 *Instrumentos Basicos* 7 (1982). Subsequently, Venezuela joined in 1973. See Final Act of the Negotiations Between the Commission of the Cartagena Agreement and the Government of Venezuela for the Adherence of that Country to the Agreement, *done* February 13, 1973, 12 I.L.M. 344 (1973); Instrumento Adicional al Acuerdo de Cartagena para la Adhesion de Venezuela, ORDENAMIENTO JURIDICO, 1 *Instrumentos Basicos* 87 (1982). Chile withdrew from the Agreement in 1976. Decision 102 of the Commission of the Cartagena Agreement, October 30, 1976, ORDENAMIENTO JURIDICO, 2 *Decisiones* 204 (1982).

2. LAFTA was created by the Montevideo Treaty in 1960. By 1967, it encompassed all of Latin America except for Guyana, Surinam, and Honduras. The organization's purpose was to increase intraregional trade via piecemeal tariff reductions. The member countries never drafted a comprehensive plan for the reduction of tariffs, but instead conducted tariff-reduction negotiations on an item by item basis. LAFTA was eventually disbanded and replaced by the Latin American Integration Association in 1980. See A. GOLBERT & Y. NUN, *LATIN AMERICAN LAWS AND INSTITUTIONS* 253-56 (1982).

3. Cartagena Agreement, *supra* note 1, art. 1.

4. *Id.*, arts. 1, 2.

of their programs would inevitably entail.<sup>5</sup> This failure of ANCOM to agree upon an effective process of dispute resolution has been a major factor contributing to the organization's present state of disarray.<sup>6</sup>

Examination of the major elements of ANCOM reveals that internal discord has undermined the basic objectives of the organization. A number of dispute resolution techniques will be reviewed to determine which can better serve to resolve these conflicts. In conclusion, it will be submitted that no single dispute resolution process can resolve the various conflicts which divide the member countries, and various processes should be applied depending upon the nature, scope, and subject-matter of the dispute.

The development of this thesis will be prefaced with a sketch of the theoretical underpinnings of ANCOM. This background provides an insight into the objectives the member countries hoped to achieve when they signed the Cartagena Agreement. The major programs of the Cartagena Agreement will then be described, combined with a discussion of how ANCOM's internal dissension has prevented the successful implementation of these programs. A special section is devoted to discussing the member countries' conflicting application of Decision 24,<sup>7</sup> ANCOM's common code for the regulation of foreign investment. The dispute resolution mechanisms utilized or contemplated by ANCOM members are then reviewed in Part II.

## I THE ANDEAN COMMON MARKET

### A. ANCOM's Origins

ANCOM is a product of the unique approach to economic development pioneered in post-World War II Latin America.<sup>8</sup> Raul Prebisch, as Executive Secretary of the United Nations Economic Commission for Latin America (ECLA), was critical of traditional economic development theories, particularly as applied to Latin America.<sup>9</sup> Under Prebisch's direction,

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5. See *infra* the evaluation of dispute resolution mechanisms in Part II. For another opinion on the necessity of an Andean Court of Justice, see Note, *The Role of the Andean Court in Consolidating Regional Integration Efforts*, 10 GA. J. INT'L. & COMP. L. 351, 383 (1980).

6. Horton, *Peru and ANCOM: A Study in the Disintegration of a Common Market*, 17 TEX. INT'L. L.J. 39, 61 (1982).

7. Decision 24 of the Commission of the Cartagena Agreement, Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, December 31, 1970, ORDENAMIENTO JURIDICO, 1 *Decisiones* 59 (1982); 11 I.L.M. 126 (1972). The text of the code has been amended by Decision 37, June 24, 1971, Decision 37-A, July 27, 1971, Decision 70, February 13, 1973, Decision 103, October 30, 1976, and Decision 109, November 30, 1976. The cited version incorporates these changes and appears at 16 I.L.M. 138 (1977). Decision 24 was further amended by Decision 124, December 16, 1977. See generally Oliver, *Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763 (1972).

8. A. PALACIOS, ECONOMIC INTEGRATION AMONG UNEQUAL PARTNERS: THE CASE OF THE ANDEAN GROUP 13-16 (1982).

9. *Id.* at 13.

ECLA's objective was to conceive of an approach to economic development appropriate to Latin America's needs and circumstances.<sup>10</sup>

During the early stages of ECLA's existence, prevailing economic theory emphasized the need to maximize the efficient utilization of a country's resources.<sup>11</sup> Under the classical approach, the best way to achieve this goal was through international free trade. The theory was if protective barriers were reduced or altogether eliminated, an international division of labor based upon each country's inherent comparative advantages would develop. The expected result was that each country would export those products that it could manufacture the most efficiently; importing those products which, due to lack of resources or capital, it manufactured less efficiently.<sup>12</sup>

ECLA perceived correctly, however, that within this international division of labor, Latin America's role mainly would be to supply the industrial center with necessary raw materials,<sup>13</sup> not manufactured products. As a result, the economic development of Latin America would fall further and further behind that of the more industrialized countries. In contrast to traditional theory,<sup>14</sup> the economic and technological progress enjoyed by the global industrial center did not spread to the periphery, such as Latin America.<sup>15</sup> The terms of trade between the center and the periphery worsened to the latter's disadvantage,<sup>16</sup> manifested in a decrease in Latin America's per capita import capacity<sup>17</sup> and per capita value of export revenues.<sup>18</sup> Consequently, the economic gap between the center and the periphery steadily widened as the periphery continually paid more for the

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10. For example, ECLA theorists have written:

Development policy must be based on a correct interpretation of the real state of affairs in Latin America. The theories that we have taken up, and are still taking up, from the countries at the center of the world economy often make a fallacious claim to be generally applicable. It is essentially incumbent on us who are on the periphery to play our part in correcting these theories and introducing the dynamic elements needed to bring them into line with our own situation.

ECLA, *TOWARDS A DYNAMIC DEVELOPMENT POLICY IN LATIN AMERICA*, at 16, U.N. Doc. E/CN.12/680/Rev. 1 (1963).

11. A. PALACIOS, *supra* note 8, at 13.

12. The classical doctrine of comparative advantage was originally formulated by David Ricardo. See D. RICARDO, *PRINCIPLES OF POLITICAL ECONOMY AND TAXATION*, ch. 7 (1817).

13. ECLA, *ECONOMIC SURVEY OF LATIN AMERICA 1949*, at 4, U.N. Doc. E/CN.12/164/Rev. 1 (1951).

14. See *supra* text accompanying notes 11-12.

15. Part of the explanation that economic progress did not spread to the periphery resulted from traditional theory's erroneous assumption that complete mobility of the factors of production exists between the center and the periphery. Excess labor supply kept wages low and deprived the periphery of the benefits of increased industrial productivity. *ECONOMIC SURVEY OF LATIN AMERICA 1949*, *supra* note 13, at 11-14.

16. *TOWARDS A DYNAMIC DEVELOPMENT POLICY IN LATIN AMERICA*, *supra* note 10, at 8.

17. *ECONOMIC SURVEY OF LATIN AMERICA 1949*, *supra* note 13, at 18.

18. ECLA estimated that the per capita value of Latin America's exports decreased from \$58 in 1930 to \$39 in 1960. *TOWARDS A DYNAMIC DEVELOPMENT POLICY IN LATIN AMERICA*, *supra* note 10, at 8.

goods it required for its development.<sup>19</sup>

Presented with this scenario, ECLA theorized that simply permitting market forces to direct Latin America's development would be unsuccessful.<sup>20</sup> ECLA believed that the various governments would have to intervene to direct the progress of their economies. A certain degree of economic inefficiency resulting from government intervention would have to be tolerated so that production could be maximized.<sup>21</sup> This approach emphasized the "dynamic" quality of economic development.<sup>22</sup>

To pursue this path of development, ECLA realized that Latin America had to reduce its dependence on the industrialized countries by developing its own industrial base.<sup>23</sup> However, ECLA also recognized that erecting prohibitively high tariffs would create inefficiency in local industry, hindering development in the long-run.<sup>24</sup> ECLA also conceded that a certain degree of reliance on imported technology and essential goods from the industrialized countries would remain necessary,<sup>25</sup> concluding, therefore, that Latin America should do everything within its power to improve the terms of that trade relationship.<sup>26</sup>

The structure ECLA suggested to accomplish these objectives was a common market.<sup>27</sup> ECLA envisioned this subregional market to have three characteristics: (i) liberalized internal tariffs among the member countries, (ii) a common external tariff, and (iii) harmonized economic and trade policies.<sup>28</sup> ECLA theorized that this structure would provide a solution to Latin America's underdevelopment. Liberalization—or elimination—of in-

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19. The decline in Latin America's terms of trade partially resulted from the steady decrease in the proportion of raw materials which comprised the center's finished products. As technological progress substituted capital goods for other primary products, Latin America's raw materials commanded less of a percentage of the finished product's revenues. The result was a relative decline in the real value of Latin America's mineral exports. ECLA, DEVELOPMENT PROBLEMS IN LATIN AMERICA, at xvi-xvii (1970).

20. One of ECLA's central theses was to utilize government planning to direct development. Capital formation, the redistribution of income, and land reform were considered necessary to Latin America's economic development. TOWARDS A DYNAMIC DEVELOPMENT POLICY IN LATIN AMERICA, *supra* note 10, at 10-12, 39.

21. For example, ECLA was willing to sacrifice efficiency by using Latin America's abundant manpower to produce articles which could be manufactured more efficiently elsewhere. ECLA, THEORETICAL AND PRACTICAL PROBLEMS OF ECONOMIC GROWTH, at 39, U.N. Doc. E/CN.12/221 (1951).

22. ECLA used the term "dynamic" to refer to Latin America's need to mobilize the productive factors of the economy through social reform and government planning. TOWARDS A DYNAMIC DEVELOPMENT POLICY IN LATIN AMERICA, *supra* note 10, at 12.

23. *Id.* at 6-7.

24. An overly protected national industry impedes economic development because the inefficiency it engenders prevents local manufacturers from expanding to foreign markets. *Id.* at 71-72.

25. ECLA, A CONTRIBUTION TO ECONOMIC INTEGRATION POLICY IN LATIN AMERICA, at 30, U.N. Doc. E/CN.12/728 (1967).

26. *Id.* at 31.

27. ECLA, THE LATIN AMERICAN COMMON MARKET, at 38-50, U.N. Doc. E/CN.12/531 (1959).

28. *Id.*

ternal tariffs would encourage local industry by expanding intra-regional trade,<sup>29</sup> supplying the dynamic element that Latin America's economic development required.<sup>30</sup> These larger, integrated markets would reduce the strain on local capital and channel investment into a broader range of efficient industrial activities, as duplicative production facilities within the national markets would be eliminated.<sup>31</sup> Production costs would also be reduced as plants formerly built only for a national market could be utilized to service the entire subregion.<sup>32</sup> These decreased unit costs would enhance the attractiveness of Latin America's exports in markets throughout the world.<sup>33</sup> Finally, the common external tariff and the harmonization of trade policies vis-a-vis the industrialized countries would minimize internal competition for foreign investment, resulting in better terms for external resources the member countries could not obtain locally.<sup>34</sup>

### B. *The Cartagena Agreement*

The subregional common market envisioned by ECLA was implemented in 1969, when representatives from Chile, Peru, Colombia, Bolivia, and Ecuador signed the Agreement of Cartagena. The Agreement established a subregional common market while devising programs for harmonious and mutual economic development.<sup>35</sup> To implement these programs and to elaborate their precise details, the Agreement established two organs, the Commission and the Junta.<sup>36</sup>

The five member Commission is a decision-making body composed of one plenipotentiary from each member country.<sup>37</sup> It meets regularly three times a year, and may convene for special sessions called by the Commission's President, a member country, or the Junta.<sup>38</sup> The Commission adopts legislative actions in the form of Decisions,<sup>39</sup> requiring a two-thirds majority vote for passage.<sup>40</sup> The Agreement provides certain exceptions to

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29. A CONTRIBUTION TO ECONOMIC INTEGRATION POLICY IN LATIN AMERICA, *supra* note 25, at 24.

30. *Id.* at 10, 24.

31. TOWARDS A DYNAMIC DEVELOPMENT POLICY IN LATIN AMERICA, *supra* note 10, at 71.

32. A CONTRIBUTION TO ECONOMIC INTEGRATION POLICY IN LATIN AMERICA, *supra* note 25, at 27.

33. THE LATIN AMERICAN COMMON MARKET, *supra* note 27, at 8, 9.

34. A CONTRIBUTION TO ECONOMIC INTEGRATION POLICY IN LATIN AMERICA, *supra* note 25, at 31.

35. Cartagena Agreement, *supra* note 1, arts. 1-3; F.V. GARCIA-AMADOR, THE ANDEAN LEGAL ORDER 15 (1978).

36. Cartagena Agreement, *supra* note 1, art. 5.

37. *Id.*, art. 6.

38. *Id.*, art. 10.

39. *Id.*, art. 6.

40. *Id.*, art. 11. A two-thirds majority was decided upon by the member countries because they expected ANCOM to consist of six members. Since only five countries are now members, the Commission's Decisions must be approved by four-fifths vote. A. WARDLAW, THE ANDEAN INTEGRATION MOVEMENT 9 (1973).

this requirement, most notably the selection of Junta members, which requires unanimous approval.<sup>41</sup>

The Junta is composed of three independent members, who may be from any Latin American state.<sup>42</sup> Its chief functions include submitting legislative proposals to the Commission and supervising the implementation of the Cartagena Agreement and the Commission Decisions.<sup>43</sup> When the Junta determines a member country is not properly applying a Decision, it acts in the form of a Resolution to remedy the situation.<sup>44</sup> All actions must be approved by unanimous vote.<sup>45</sup> Unlike the Commission, the Junta operates on a continuous basis.<sup>46</sup>

Four tasks implementing the principal goals of the Agreement are imposed upon the Commission and the Junta. First, the Commission, upon proposal by the Junta, is assigned the task of establishing Sectoral Programs of Industrial Development (hereinafter "SPIDs").<sup>47</sup> Second, the two bodies must devise a plan for subregional trade liberalization.<sup>48</sup> Third, they must set forth the steps for enacting the Common External Tariff (CET).<sup>49</sup> Fourth, they must devise an investment code for the common treatment of foreign capital.<sup>50</sup>

ANCOM's progress towards these four goals is reviewed below. While the Cartagena Agreement assigned the responsibility of establishing its principal programs to the Commission and the Junta, it failed to create an entity capable of enforcing uniform implementation of these programs. This absence of an effective dispute-resolution body has undercut these programs' effectiveness and has prevented the attainment of the Agreement's objectives.

*Sectoral Programs of Industrial Development (SPIDs)*. Articles 32 and 33 of the Cartagena Agreement instruct the member countries and the Commission to initiate a concerted plan of economic development through the creation of SPIDs. The Programs are designed to promote industry by creating a coordinated division of production by country.<sup>51</sup> To date, the Commission has adopted projects in metalworking, petrochemicals, and automobiles.<sup>52</sup>

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41. Cartagena Agreement, *supra* note 1, art. 11.

42. *Id.*, art. 14.

43. *Id.*, art. 15.

44. See ORDENAMIENTO JURIDICO 1 *Resoluciones* (1982).

45. Cartagena Agreement, *supra* note 1, art. 17.

46. *Id.*, art. 18.

47. *Id.*, art. 33.

48. *Id.*, arts. 47, 49-59, and 54.

49. *Id.*, art. 62.

50. *Id.*, art. 27.

51. F.V. GARCIA-AMADOR, *supra* note 35, at 23.

52. Decision 57 (metalworking), August 20, 1972, ORDENAMIENTO JURIDICO, 1 *Decisiones* 213 (1982) and Decision 146 (restructured metalworking program), July 23, 1979, ORDENAMIENTO JURIDICO, 4 *Decisiones* 1 (1982); Decision 91 (petrochemicals), August 29,

These projects entail a market-wide apportionment and distribution of manufactured goods.<sup>53</sup> For example, in the metalworking program, the Junta assigned each country the responsibility of manufacturing a particular set of metal products.<sup>54</sup> In allocating a product to a particular country, the Junta is obligated to consider guidelines set out in the Agreement,<sup>55</sup> including the installation capacity of existing industries, the financial and technical assistance needs for installation, manpower requirements, possibilities of horizontal combination, and the potential for joint ventures.

The program for assignment of products under the SPID operates concurrently with a system of tariff protection for local industry. The Agreement provides that products manufactured by the assigned countries may be imported to the other member countries tariff-free.<sup>56</sup> The same product, when manufactured by any other country, would be subject to tariff restrictions.<sup>57</sup> To provide further protection, the member countries have agreed to withhold incentives from any local industry that wishes to manufacture goods not assigned to its host country<sup>58</sup> and to prohibit foreign investment in enterprises which manufacture goods assigned to another country.<sup>59</sup>

Only the three sectoral programs listed above are in effect;<sup>60</sup> there appears little hope that even these will be fully implemented.<sup>61</sup> The automobile program, for example, was severely damaged by Peru's decision to develop its own automobile industry.<sup>62</sup> Similarly, while elaborate plans have been drawn up, the sheer enormity of the metalworking and petrochemical projects and the number of existing producers who must be accommodated present tremendous obstacles to the implementation of these programs.<sup>63</sup> These logistical difficulties and the member countries' failure

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1975, ORDENAMIENTO JURIDICO, 2 *Decisiones* 1 (1982); Decision 120 (automobiles), September 13, 1977, *id.*, at 415.

53. See the description provided in BUSINESS INTERNATIONAL CORPORATION, *THE ANDEAN COMMON MARKET* 36-40 (1970).

54. Fulmer, *The Andean Common Market: Implications for U.S. Business*, in ANDEAN PACT: DEFINITION, DESIGN, AND ANALYSIS 14, 15 (1973).

55. Cartagena Agreement, *supra* note 1, art. 37.

56. *Id.*, art. 45(a).

57. Fulmer, *supra* note 54, at 13.

58. *Id.*, at 16.

59. *Id.*

60. Sectoral programs in the areas of chemicals, pharmaceuticals, electronics, and telecommunications have been abandoned. *Latin American Introduction*, in INVESTING, LICENSING, AND TRADING CONDITIONS ABROAD, (Business International Corporation) (July 1983), at 11.

61. See INSTITUTE FOR LATIN AMERICAN INTEGRATION (hereinafter cited as INTAL), *THE LATIN AMERICAN INTEGRATION PROCESS IN 1981*, at 78-83 (1982).

62. *Peruvian Auto Regulations Sidestep ANCOM Scheme*, BUSINESS LATIN AMERICA, Dec. 8, 1982, at 389. The Commission recently decided to postpone implementing the program until December 31, 1986. Decision 181 of July 6-9, 1983, reported in INTEGRACION LATINOAMERICANA, Oct. 1983.

63. For precisely these reasons, the automobile sectoral program was thought to have the best chance for success. Given the small number of manufacturers, most of whom already produced for the subregion, a coordination of automobile manufacturing was considered feasi-

to properly implement the programs have prevented the subregional industrial development the SPIDs were designed to promote.

*Internal Trade Liberalization.* The second major goal of the Agreement is the establishment of a free-trade area.<sup>64</sup> This market is created by reducing, and in some cases eliminating, the tariffs on products traded among the member states.<sup>65</sup> The plan creates four categories of goods: goods produced under the SPIDs, goods included within the tariff reduction schedule of LAFTA, goods not presently being produced within ANCOM, and a residual category of all other goods.<sup>66</sup>

The internal tariffs on products manufactured under the SPIDs are to be reduced according to the timetable established when each program was, or is, developed.<sup>67</sup> The tariffs on goods covered by LAFTA's schedule were to be eliminated 180 days after the Agreement entered into force,<sup>68</sup> while goods not yet produced in the member countries were not to be subject to any tariff restrictions.<sup>69</sup> Finally, tariffs on all other products were to be reduced by stages of ten percent decreases, with complete liberalization intended by 1980.<sup>70</sup> The Agreement does provide, however, that the member countries can exempt certain products from this last tariff-reduction schedule, though the number of such exemptions is limited.<sup>71</sup> The period of tariff protection for these exemptions expires in 1985 for Colombia, Venezuela, and Peru, and in 1990 for Bolivia and Ecuador.<sup>72</sup>

Although the member countries have achieved some success in removing internal tariffs, the timetable for complete internal liberalization has been extended.<sup>73</sup> For example, in April 1983, Colombia added two thousand products to the list of those that required import licenses.<sup>74</sup> Similarly, in December 1982, Venezuela imposed new duties and license requirements on twelve hundred items traded within the subregion.<sup>75</sup> In that same month, Ecuador banned the import of 639 items.<sup>76</sup> These individual im-

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ble. Interview with Fernando Inzunza, Associate at Baker & McKenzie, Caracas office, June 14, 1983. Peru's withdrawal from that program, therefore, is particularly unfortunate.

64. Cartagena Agreement, *supra* note 1, art. 41.

65. For a description on how the internal liberalization was to proceed, see BUSINESS INTERNATIONAL CORPORATION, *supra* note 53, at 22-28.

66. Cartagena Agreement, *supra* note 1, art. 45.

67. *Id.*, art. 46.

68. *Id.*, art. 49.

69. *Id.*, art. 50.

70. *Id.*, art. 52(c).

71. *Id.*, art. 55.

72. *Id.*, arts. 55 and 102.

73. INTAL, *supra* note 61, at 72.

74. *Colombia Takes Action to Impede Reserve Drain and Studies Capital Lures*, BUSINESS LATIN AMERICA, Apr. 27, 1983, at 129.

75. *Mixed Reactions to Venezuelan Import Curbs*, BUSINESS LATIN AMERICA, Dec. 22, 1982, at 408.

76. *Import Bans Through 1983 Augur Ecuador's Resolve to Shore up its BOP*, BUSINESS LATIN AMERICA, Dec. 15, 1982, at 395.

port restrictions have undermined the member countries' desire to develop local industry through intraregional trade, defeating any real progress toward the program's objective.

*The Common External Tariff (CET).* The third major goal of the Cartagena Agreement is the establishment of the CET.<sup>77</sup> In this section, the signatories developed a system whereby a common tariff would be erected to protect subregional production.<sup>78</sup> The Agreement provided a two-stage plan: a Minimum Common External Tariff was to become fully operative within five years,<sup>79</sup> followed by the CET five years thereafter.<sup>80</sup> To protect those industries relying on the subregional liberalization scheme, the CET immediately applied to products which are not subject to internal tariffs.<sup>81</sup> The precise details of the applicable range of the tariff remained vague in the Agreement, but the outline suggested a scheme divided into general categories, such as basic, semi-manufactured, and manufactured goods.<sup>82</sup> Different tariff levels then would apply according to the category of product involved.<sup>83</sup>

The member countries' implementation of the CET has been relatively more successful than that of the other ANCOM programs. The three largest member countries, Venezuela, Peru, and Colombia, have established a minimum CET covering over two thousand products.<sup>84</sup> However, the outlook for future cooperation appears less bright as the member countries have indefinitely postponed enacting the CET.<sup>85</sup> No further progress has been reported in this area.<sup>86</sup>

*Decision 24.* The last major element of the Cartagena Agreement is a common system for the treatment of foreign capital.<sup>87</sup> It is implemented through the provisions of Decision 24, the Common Code for the Treatment of Foreign Investment.<sup>88</sup>

The first section of Decision 24 requires that all foreign investment be registered with and authorized by the competent national authority of the member country where the investment is placed.<sup>89</sup> The national authority's first duty is to assure that the foreign investor has supplied certain registra-

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77. Cartagena Agreement, *supra* note 1, art. 3(d).

78. F.V. GARCIA-AMADOR, *supra* note 35, at 31.

79. Cartagena Agreement, *supra* note 1, arts. 63-64.

80. *Id.*, arts. 61-62.

81. *Id.*, art. 65.

82. BUSINESS INTERNATIONAL CORPORATION, *supra* note 53, at 30.

83. *Id.*

84. *Peru*, in INVESTING, LICENSING, AND TRADING CONDITIONS ABROAD, (Business International Corporation), March 1983, at 20.

85. *Latin American Introduction*, *supra* note 60, at 6.

86. INTAL, *supra* note 61, at 73.

87. Cartagena Agreement, *supra* note 1, art. 27.

88. Decision 24, *supra* note 7.

89. *Id.*, arts. 2, 6.

tion information.<sup>90</sup> Annex 1 to Decision 24 provides that the registration information include the investor's identification, the details of the investment, requirements to be satisfied, and the investor's plans for national participation in the venture.

Besides serving this data collection function, the national authority performs a second, more important task. The national authority must review applications for investment submitted by foreign investors,<sup>91</sup> following general guidelines established by Decision 24. These guidelines provide that the national authority shall not approve foreign investment that enters a market adequately served by local industry, does not correspond to development priorities, or purchases shares in enterprises owned by national or subregional investors.<sup>92</sup>

In addition to these general guidelines, Decision 24 includes a number of provisions which impose specific restrictions on the exercise of foreign investment. Article 37 limits the amount of profit a foreign investor can repatriate to twenty percent of the value of its total registered investment. Article 17 denies foreign investors access to local credit for any loan with a maturity exceeding three years. Article 16 prohibits a corporation domiciled in a foreign country from loaning funds to a subsidiary organized and operating in an ANCOM-member country at an interest rate in excess of three percentage points above the prime rate in the country of origin.<sup>93</sup> Finally, reinvestments of profits which exceed seven percent of the registered foreign investment must be authorized by the national authority.<sup>94</sup>

In addition to these restrictions on the use of foreign capital, Decision 24 provides for divestment of foreign ownership in local entities.<sup>95</sup> Article 30 requires foreign enterprises established after July 1, 1971, to divest fifty-one percent of their holdings to national investors over a fifteen to twenty

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90. *Id.*, art. 5. One example of a national authority is the Superintendency of Foreign Investment of the Venezuelan Ministry of Finance (SIEX). SIEX supervises all foreign investment, licensing, and credit operations for all industries save petroleum services, petrochemicals, tourism, financial services, and national defense. While all new ventures must receive prior approval by SIEX, the normal financial operations of established companies must only be reported subsequently. Besides SIEX, Venezuela has created a network of agencies whose approval must be obtained before proceeding with the investment. Thus, new industrial projects must be authorized by the Industrial Division of the Ministry of Energy and Mines. SIEX, VENEZUELA MINISTRY OF FINANCE, VENEZUELA, A GUIDE FOR FOREIGN INVESTMENT AND TECHNOLOGY LICENSING IN THE 1980's 26, 27 (1980).

91. Decision 24, *supra* note 7, art. 2. Art. 1 also provides that investments from fellow member countries must be registered and approved by the national authority of the host country.

92. *Id.*, arts. 2, 3. Article 3, however, provides the exception that foreign investment will be permitted in nationally-owned industries which are on the verge of bankruptcy.

93. This restriction appears to foreclose the previously common practice of repatriating earnings via interest paid to a foreign parent far in excess of a reasonable rate.

94. *Id.*, art. 13. The same provision permits foreign investors to reinvest profits up to seven percent of their total registered investment without authorization, although the reinvestment must be registered with the national authority. *Id.*

95. *Id.*, art. 30.

year period. Enterprises established prior to 1971 are not required to divest, but those that do not lose the advantages granted to them by ANCOM's liberalized trading agreements.<sup>96</sup>

The Decision provides that divestment shall proceed in stages. For example, national investors must own fifteen percent of the stock of enterprises in Venezuela, Colombia, and Peru when production begins, and fifty-one percent of the stock fifteen years later.<sup>97</sup> When one-third of the period for divestment has elapsed, national investors must control thirty percent; when two-thirds have passed, they must control forty-five percent.<sup>98</sup>

Finally, Decision 24 prohibits foreign investment in certain vital sectors and industries of the economy. New foreign investment is not permitted in public services, including sanitation, electric power, telephone, postal, and communication services,<sup>99</sup> in insurance, commercial banking, and other financial institutions,<sup>100</sup> or in domestic transport, advertising, the media, and domestic marketing.<sup>101</sup>

The member countries' implementation of Decision 24 shows most dramatically how inconsistent interpretations of ANCOM programs have undermined the members' original communal objectives. Consequently, a detailed analysis of the member countries' implementation of Decision 24 is of value.

### C. *Conflicting National Implementation of Decision 24*

From its very inception, the efficacy of Decision 24 has been undermined by the member countries' unwillingness to implement its provisions uniformly.<sup>102</sup> This inconsistent application of the Decision frustrates the central purpose of Decision 24—the creation of favorable terms for the treatment of foreign investment<sup>103</sup>—because it permits foreign investors to

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96. *Id.*, arts. 27, 28.

97. *Id.*, art. 30.

98. *Id.* The length of the divestment period depends on the agreement between the foreign enterprise and the national authority. In Venezuela, Colombia, and Peru, this period can not exceed fifteen years. In Bolivia and Ecuador, the maximum divestment period is twenty years.

A similar program is devised for Ecuador and Peru, with five percent national control three years after production begins, ten percent after one-third of the period has elapsed, and thirty-five percent after two-thirds has elapsed. *Id.* Majority control of the enterprise must rest in the hands of national investors twenty-two years after production begins. *Id.*

99. *Id.*, art. 41.

100. *Id.*, art. 42. Article 42 also provides that existing foreign banks shall cease to receive local deposits three years from the date that Decision 24 enters into force, unless they sell eighty percent of their shares to national investors within that period.

101. *Id.*

102. For an early and thorough analysis of the inconsistent implementation of Decision 24, see Dañino, *The Andean Investment Code After Five Years*, 8 *LAWYER OF THE AMERICAS* 635, 648-62 (1976).

103. One of the basic objectives of Decision 24 was the creation of a unified bargaining position capable of obtaining favorable terms for foreign investment. Decision 24, *supra* note 7, Declaration 9.

play one member country against the next to select that country imposing the least onerous restrictions.<sup>104</sup> Ultimately, all members suffer as they individually relax restrictions in their efforts to compete for foreign investment.

One of the major reasons that Decision 24 has been inconsistently applied results from the Decision itself. The number of exceptions contained in Decision 24 undermines a strict implementation of the Decision. For example, article 34 of the Decision provides a method to circumvent the divestment procedures by withholding the application of those procedures from companies which export eighty percent of their products.<sup>105</sup> Similarly, enterprises engaged in the tourism industry are expressly not required to transform into national or mixed enterprises.<sup>106</sup> In addition, article 40 provides that companies involved in the extraction of mineral resources are exempt from the Decision's transformation requirements.<sup>107</sup>

The member countries' inconsistent application of Decision 24 has been further exacerbated by exceptions framed by the Commission which allow foreign investors to satisfy the divestment requirements without selling a majority of the stock to local investors. One such exception is found in Decision 47, providing that a company shall have satisfied its divestment requirements if the State possesses thirty percent of the stock and has acquired a veto power over the company's "fundamental actions".<sup>108</sup> Similarly, Decision 109 provides an exception to the divestment requirements by treating the investment of national monetary agencies as neither foreign nor national capital.<sup>109</sup>

The ANCOM members have utilized and developed a great many rules and policies leading to the inconsistent application of Decision 24, some under the aegis of the Decision itself. For example, article 37 of Decision 24 provides that a country may permit the remittance of profits exceeding twenty percent of net capital invested where "special circumstances" are involved.<sup>110</sup> The definition of special circumstances is left up to and, ac-

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104. Dañino, *supra* note 102, at 641.

105. Decision 24, *supra* note 7, art. 34.

106. *Id.*

107. The article 40 exception is particularly important in light of the dominant role mineral resources play in the export revenues of several ANCOM member states. In 1971, the year Decision 24 was enacted, forty-nine percent of Bolivia's export revenues derived from tin. Copper comprised seventy-three percent of Chile's export revenues. ECLA, ECONOMIC SURVEY OF LATIN AMERICA 1972, at 170, 171, U.N. Doc. E.77.II.G.I. (1976); ECLA, ECONOMIC SURVEY OF LATIN AMERICA 1974, at 30, U.N. Doc. E.76.II.G.I. (1976).

108. Decision 47 (arts. 1, 2), December 18, 1971, ORDENAMIENTO JURIDICO, 1 *Decisiones* 159 (1982). These fundamental actions include corporate liquidation, disposition of royalties, and transfer of shares to other foreign investors. PRICE WATERHOUSE, DOING BUSINESS IN THE ANDEAN COMMON MARKET 58 (1975).

109. Decision 109 (art. 2), November 30, 1976, ORDENAMIENTO JURIDICO, 2 *Decisiones* 229 (1982). An example of an international monetary agency to which Decision 109 applies is the Inter-American Development Bank. Decision 124 (art. 7), December 16, 1977, *id.*, at 525.

110. Article 37 originally limited profit remittances to fourteen percent of the registered foreign investment. In 1976, however, the Commission passed Decision 103, which increased

cordingly, varies with each member country.<sup>111</sup>

Perhaps most importantly, the member countries have fashioned exceptions to the restrictions imposed by Decision 24 without the Decision's grant of such discretion to the countries. This has occurred in several key areas, such as the transfer of profits from foreign investment capital, the restrictions preventing foreign investment in certain industries, and the divestment of foreign-owned enterprises. Ecuador, for instance, adopts very liberal guidelines for permitting reinvestment of profits.<sup>112</sup> Similarly, Venezuela permits the reinvestment of profits exceeding seven percent of the registered investment if the proposed reinvestment finances economic activities considered by the national authority to favor the country's development.<sup>113</sup> Venezuela further provides that profits which can neither be remitted nor reinvested may be deposited in one of three different accounts.<sup>114</sup>

Just as the Decision 24 restrictions concerning the remittance and reinvestment of profits have been inconsistently applied, so have the provisions describing the industries to be restricted to national investors. Peru, for example, officially permits new foreign investment in *all* the enterprises which Decision 24 was originally designed to protect, including the media, advertising, electricity, sanitation services, banks, insurance, and other financial institutions.<sup>115</sup> Venezuela, however, strictly interprets Decision 24, prohibiting new foreign investment in all public services and every form of media.<sup>116</sup> Ecuador has adopted a middle approach: new foreign investment is prohibited in advertising and the media, but is permitted in internal

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the remittance maximum to twenty percent and permitted the member countries to authorize a higher percentage, to be remitted under special circumstances. Decision 103 (art. 10), October 30, 1976, *ORDENAMIENTO JURIDICO, id.*, at 205, 208.

111. In Colombia, special circumstances are deemed to exist when the investment is of utmost importance to the economy, involves special risks, or when a return on the investment has been delayed. PRICE WATERHOUSE, *DOING BUSINESS IN COLOMBIA* 17 (1978). Colombia also permits the foreign investor to remit in subsequent years profits which exceed twenty percent of its registered investment. *Id.*

112. *Venezuela Moots Changes in Andean Investment Rules But Investors are Wary*, *BUSINESS LATIN AMERICA*, June 29, 1983, at 208.

113. Decreto No. 32067, art. 1, Septiembre 12, 1980, *Gaceta Oficial de la Republica de Venezuela* [hereinafter cited as *Gaceta Oficial de Venezuela*].

114. First, the funds may be placed in "portfolio development securities." These are securities issued by the government which do not confer any right to participate in the issuing company's technical, financial, administrative, or commercial management. Decision 24, as modified by Decision 70, *supra* note 7, art. 1. The interest on these securities may be remitted, but the principal must remain in the country until the investor sells his shares or the company is liquidated. PRICE WATERHOUSE, *DOING BUSINESS IN VENEZUELA*, 15-16 (1981). Second, the funds may be placed in a trust fund. *Id.* Third, the funds may be left in the business as a credit in favor of the foreign investor, earning interest at the rate set by the Central Bank. *Id.*

115. Decreto Ley 18900, art. 2, Junio 30, 1971, *El Peruano* (Diario Oficial de Peru), *reprinted in* *REGIMEN DEL MERCADO ANDINO* [hereinafter cited as *REG. DEL MERC. AND.*] 192-10 (Envio Periodico No. 22—Enero—Abril 1978).

116. Decreto No. 2031, art. 1, Febrero 8, 1977, *Gaceta Oficial de Venezuela, reprinted in* *REG. DEL MERC. AND.* 204 (Envio Periodico No. 22—Enero—Abril de 1978).

marketing and financial institutions.<sup>117</sup>

The final major section of Decision 24 which has been inconsistently applied by the member countries concerns the divestment of foreign enterprises. A major problem that each country has encountered in applying these provisions is the insufficiency of local capital to meet the Decision's transformation requirements.<sup>118</sup> Decisions 47 and 109 have served to alleviate the problem by relaxing certain local capitalization requirements.<sup>119</sup> When these alternatives have not proven sufficient, the individual countries have devised their own alternatives. In some instances, the member country simply does not require the transformation to be made. In Ecuador, for example, transformation to a mixed-ownership status has not been enforced on foreign investors in the marketing industries.<sup>120</sup> Similarly, Venezuela permits a foreign enterprise to satisfy the transformation requirements by increasing capitalization through local investment.<sup>121</sup> In this way, the foreign investor can obtain the required mixed-ownership status without re-

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117. Decreto No. 900, arts. 4, 10, 11, Noviembre 30, 1976, *Gaceta Oficial de Ecuador*, reprinted in REG. DEL MERC. AND. 192-7, 192-9 (Envío Periodico No. 33—Noviembre de 1980—Agosto de 1981). However, Ecuador permits new foreign investment in financial institutions if the investment does not increase the percentage of foreign investment which already exists. *Id.*, art. 4.

One particular industry which has been subject to varied and inconsistent regulation is domestic marketing. Despite Decision 24's prohibition against new foreign investment in this area, nearly every country permits a certain degree of foreign investment in domestic marketing, though each has its different set of restrictions. Venezuela permits foreign investors to engage in the local marketing of durable and consumer goods, if these products are imported and the exporter supplies the necessary services to maintain and repair the products. Decreto No. 2031, art. 1(1), *supra* note 116. Venezuela will also permit foreign investment in enterprises that market foreign goods in Venezuela if the enterprise locally manufactures the goods that it trades. *Id.*, art. 1(2). Venezuela requires, however, that a minimum of fifty-one percent of the enterprise's income results from such manufacturing and at least thirty percent of the materials in its products originate in Venezuela. *Id.*, art. 1(3).

Colombia also permits foreign enterprises to engage in domestic marketing, but adds the condition that forty percent of its business must be directed to the export of its products out of Colombia. Decreto No. 169, art. 5, Enero 31, 1975, *Gaceta Oficial de Colombia*, reprinted in REG. DEL MERC. AND. 198-3 (Envío Periodico No. 26—Mayo—Junio de 1979). Finally, Ecuador permits foreign entities to engage in internal marketing if the corporation agrees to transform to mixed-ownership status and if it plans to use a distribution system which either integrates the national industry or is located in an underdeveloped region. Decreto No. 900, art. 11.

118. BUSINESS INTERNATIONAL CORPORATION, OPERATING IN LATIN AMERICA'S INTEGRATING MARKETS: ANCOM, CACM, CARICOM, LAFTA 88 (1977).

119. Decision 47 relieves the burden on local capital by considering an enterprise with thirty percent national investment, instead of the usual fifty-one percent, a mixed corporation. Decision 47, *supra* note 108. Similarly, Decision 109 reduces the total of national investment necessary to satisfy the divestment requirements by removing a percentage of the shares of the company from the mixed status computation. If, for example, an international agency buys twenty percent of a corporation's stock, local investors only have to purchase fifty-one percent of the remaining eighty percent (40.5%) to satisfy the divestment requirements. Decision 109, *supra* note 109.

120. *Latin American Introduction*, *supra* note 60, at 8.

121. *Venezuela*, in INVESTING, LICENSING, AND TRADING CONDITIONS ABROAD, (Business International Corporation), November 1983, at 8.

ducing its total investment.<sup>122</sup>

Thus, member countries have unilaterally altered the major aspects of Decision 24 in order to compete with other members. This subverts the central purpose of the Decision: to obtain favorable terms for foreign investment in the members by establishing a unified market. As a result, investment restrictions have been relaxed and, perhaps more importantly, subregional unity has suffered.

#### *D. The Unraveling of ANCOM*

When a member country has failed to comply with the terms of an ANCOM program, the remaining member countries, to date, have not combined to coerce the noncomplying party into implementing the program as designed. Rather, as just seen, the members have reacted unilaterally to remain competitive with the non-complier. Each responsive act of non-compliance in turn triggers a divisive reaction, acquiring momentum as each country individually responds to the others' violations. These inconsistent implementations not only prevent the attainment of a program's goals, but also signal a program-by-program demise of ANCOM unity.

The member countries' unilateral responses to Peru's recent relaxation in its application of Decision 24 demonstrates the momentum generated and accompanying undesirable result when one member country deviates from the planned implementation of an ANCOM program.<sup>123</sup> Beginning in October 1981, Peru passed a series of Resolutions which subverted the efficacy of the most important provisions of Decision 24. In one such Resolution, Peru relaxed the criteria for determining when a foreign investor could repatriate profits exceeding twenty percent of its registered investment.<sup>124</sup> The Resolution also provides that the remittance level will not apply to industries engaged in tourism, industries which export eighty percent or more of their products, or industries involved in the production of basic products.<sup>125</sup> For all other industries, the Resolution permits remittances exceeding twenty percent of investment if the foreign investment develops backward regions of the country, creates new employment opportunities, diversifies exports, substitutes for selective imports, produces goods required by the country's economy, or, ironically, furthers the Andean integration process.<sup>126</sup> These relaxed criteria all but eliminate the restriction that profit remittances shall not exceed twenty percent of registered foreign investment.

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122. *Id.*

123. See generally, Peru: *Enticing Back the Foreign Investor*, LATIN AMERICA REGIONAL REPORTS: ANDEAN GROUP, November 12, 1982, at 3.

124. Resolución de Directorio de CONITE No. 3, art. 3, Octubre 23, 1981, El Peruano (Octubre 26, 1981).

125. *Id.*, art. 4.

126. *Id.*, art. 3.

While severely undermining the restrictions on capital remittance, Peru has also undercut the efficacy of the divestment provisions of Decision 24. A second Resolution passed in 1981 eliminated the requirement that foreign enterprises sell their shares to local investors.<sup>127</sup> While this Resolution has no effect on enterprises existing before July 1, 1971,<sup>128</sup> it is significant because it directly contravenes article 30 of Decision 24, which requires all new foreign enterprises to transform to mixed status. This provision's only sanction is that corporations refusing to divest will be denied tariff-free access to the markets of the other member countries.<sup>129</sup>

The member countries responded in predictable fashion to Peru's relaxation of the restrictions imposed by Decision 24. First, Venezuela and Colombia complained that Peru's actions violated the provisions of Decision 24.<sup>130</sup> When these protests produced no effect, member countries responded by contemplating liberalization of their own applications of Decision 24, rather than risk losing investment opportunities to Peru.

Ecuador is presently considering relaxing its restrictions on the remittance of profits.<sup>131</sup> Similarly, the Bolivia legislature has declared an intention to attract foreign investment through tax incentives available across a wide range of industries.<sup>132</sup> The Colombian national authority has drafted a proposal which substantially modifies that country's implementation of Decision 24.<sup>133</sup> The proposal would authorize higher profit remittances in certain priority sectors, such as electronics, scientific equipment, and plastics.<sup>134</sup> Remittance restrictions would be lifted for foreign enterprises that export fifty percent of their products,<sup>135</sup> and a larger percentage of foreign control would be permitted in insurance companies and financial institutions.<sup>136</sup> Similarly, Venezuela has considered loosening restrictions of foreign investment.<sup>137</sup>

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127. Resolucion del Directorio de CONITE No. 4, art. 6, Octubre 23, 1981, El Peruano (Octubre 27, 1981).

128. As previously noted, foreign enterprises which existed before July 1, 1971, are not subject to the divestment requirements. Decision 24, *supra* note 7, art. 30.

129. Resolucion del Directorio de CONITE No. 4, *supra* note 127, art. 7. This provision is no sanction at all for foreign enterprises which export items exempted from the the importing country's liberalization scheme.

130. *Peru: Enticing Back the Foreign Investor*, *supra* note 123.

131. The Ecuadorian Industries and Commerce Ministry (MICEI) is considering an increase in the maximum percentage of remittances from investments necessary to the development of that country. Letter from Diego Rosero, Price, Waterhouse and Co., Quito, Ecuador, to the author (Aug. 3, 1983) (on file with the offices of the International Tax & Business Lawyer).

132. Decreto No. 18751, Diciembre 14, 1981, Gaceta Oficial de Bolivia.

133. *Columbia Takes Action to Impede Reserve Drain and Studies Capital Lures*, *supra* note 74, at 130.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Venezuela Moots Change in Andean Investment Rules But Investors Are Wary*, *supra* note 112, at 204, 208.

The member countries' reactions to Peru's recent relaxations of Decision 24 demonstrate the sporadic and unilateral method of handling violations presently being employed by the member countries. These responses are not limited to the member countries' application of Decision 24, however, but have affected all the major programs of the Cartagena Agreement. Thus, when Venezuela restricted the import of particular products from Colombia,<sup>138</sup> Colombia responded by barring the import of ninety products from Venezuela.<sup>139</sup> Similarly, when the member countries refused to erect a common external tariff on steel products, Venezuela responded by refusing to implement the sectoral program in metalworking.<sup>140</sup>

These retaliatory actions have crippled the major programs of the Cartagena Agreement. The Sectoral Programs of Industrial Development, the Common External Tariff, and the internal liberalization plan are behind the schedule mandated in Agreement.<sup>141</sup> Even Decision 24—the most successful program of the Cartagena Agreement—is rapidly losing its efficacy due to the inconsistent application of that Decision by the member countries.<sup>142</sup>

The present disarray of these programs might have been avoided if the member countries had available a reliable mechanism for dispute resolution which could impose sanctions and thus deter straying from the common standards of the Cartagena Agreement. This conclusion is supported by the observation that all the member countries initially expressed a serious commitment to adhere to the goals of regional integration.<sup>143</sup> Recent disaffections may have been mitigated if the member countries could have relied upon an effective mechanism. Supporting the assertion that these member countries' recent unwillingness to apply ANCOM's programs results from their disillusionment with the efficacy of the Cartagena Agreement's enforcement mechanisms is the fact that these countries did not relax their enforcement until they perceived considerable cheating on the part of other member countries. For example, Venezuela's threatened relaxation of Decision 24 only came after the other member countries had loosened their applications of the Decision. Similarly, Colombia's restrictions on imports did not occur until Ecuador and Venezuela had imposed similar bans.

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138. *Andean Pact Commission to Look at the Rules*, LATIN AMERICA REGIONAL REPORTS, January 28, 1983, at 2.

139. *ANCOM Members Pledge Revival of Integration via Private Sector*, BUSINESS LATIN AMERICA, February 9, 1983, at 46-47.

140. *Cold Wind Blows Through the Pact*, 7 ANDEAN REP., March, 1981, at 53.

141. *See generally*, INTAL, *supra* note 61, at 72-74, 78-83. *See also* discussion in Section I.B. *supra*.

142. Vargas-Hidalgo, *The Crisis of the Andean Pact: Lessons for Integration Among Developing Countries*, J. COMMON MKT. ST. 213, 219-20 (1979).

143. Middlebrook, *Regional Organizations and Andean Economic Integration 1969-1975*, 17 J. COMMON MKT. ST. 62, 65 (1978).

The problem with this analysis, however, is that not every violation was in response to another country's violation of the terms of the Cartagena Agreement. In each case, one country initially bent the terms of the Agreement to comply with its own investment needs. A credible method of dispute resolution should be capable of accommodating each country's needs *without* sacrificing the common goals which the member countries share. This objective ANCOM has failed to achieve. Without an effective dispute resolution mechanism, the member countries had no choice but to respond unilaterally in order to compete with their non-complying partners.

## II

### THE PROPER DISPUTE RESOLUTION PROCESS

#### A. ANCOM's Traditional Dispute Resolution Procedures

The basic methods of dispute resolution utilized or contemplated by ANCOM's member countries include negotiation, good offices, mediation, conciliation, arbitration, and judicial settlement.<sup>144</sup> The following discussion evaluates these methods, revealing that the success of each dispute resolution method depends upon the type, stage, and subject matter of the dispute. It is submitted that the most effective procedure to successfully enforce compliance with the terms of the Cartagena Agreement is to employ a variety of dispute resolution methods, selecting the method appropriate to the circumstances of the particular dispute.

*Negotiation.* The simplest and most direct method of avoiding impasse is through bilateral negotiation between the parties to the dispute. The trend among member countries may be in this direction, as these countries are beginning to deal directly with each other, circumventing the formal channels established by the Agreement.<sup>145</sup> The recent agreement between Ecuador and Peru reflects this trend. Ecuador became disenchanted with the low tariffs imposed by Peru on imports of foreign chemicals. Ecuador, planning to develop its infant chemical industry, consulted with Peru directly, rather than pursuing the channels provided by the Junta. Peru agreed to increase its tariff on chemical products in exchange for Ecuador's agreement to purchase Peruvian acrylic fiber.<sup>146</sup> Bolivia and Peru have had similar bilateral talks, as have Columbia and Venezuela.<sup>147</sup>

Attempting to avoid disputes through negotiation may bring other tangible benefits, such as a greater opportunity for input from private industry. Recognition of the positive results of input from the private sector has

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144. See generally, G. SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW, 194-95 (6th ed., 1976).

145. *The Pangs of Rebirth*, 7 ANDEAN REP., December 1981, at 235.

146. *Id.*

147. *Id.*

gained acceptance within ANCOM.<sup>148</sup> The Junta is making a concerted effort to add representatives from private business to the delegations to its meetings as one of its responses to the disruptive effects political conflicts have produced in ANCOM activities.<sup>149</sup> Political difficulties, such as the Ecuador-Peru border conflict and Bolivian military coups d'états, have set back economic integration. For a number of months, trade between Ecuador and Peru came to a standstill.<sup>150</sup> Similarly, the installation of a Bolivian military regime in 1980 received unanimous condemnation from the other member countries, resulting in suspension of Bolivian participation in ANCOM activities.<sup>151</sup> In addition, the withdrawal of Chile from ANCOM in 1976, resulting from the inability of the Pinochet government to reconcile its approach to economic development with the rest of ANCOM, delayed the implementation of the metalworking SPID.<sup>152</sup> A greater private sector role in economic integration may be able to reduce the paralyzing effects of political conflicts on ANCOM activities.

While negotiation may, thus, achieve a certain amount of success in settling disputes concerning the implementation of the Cartagena Agreement, it produces inconsistent results and may prove deleterious to the ANCOM goals. First, increased participation by private business may very well undermine the long-term objectives of Andean integration. While input from the private sector renders the decision-making process less susceptible to political conflicts, it is primarily self-interested; the long-term objectives of Andean integration may be lost in the shuffle for short-term profits.<sup>153</sup> Second, negotiation cannot be relied upon as a consistent method of dispute resolution because it lacks an enforcement mechanism. As previously discussed, when negotiations between member countries fal-

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148. In January 1983, the Commission adopted Decisions 175 and 176, creating the Andean Business Consultative Council and the Andean Labor Consultative Council, respectively. These Councils are designed to provide business and labor with an advisory role in the economic integration process. See *Participation del sector privado en el proceso de integracion, INTEGRACION LATINOAMERICANA*, August 1983, at 63. See also *ANCOM Members Pledge Revival of Integration via Private Sector*, *supra* note 139, at 47-48.

149. INTAL, *supra* note 61, at 59-61, 104.

150. *No Go Since January*, 7 ANDEAN REP., April 1981, at 73-76.

151. Horton, *supra* note 6, at 59; *Andean Pact: The Pact's Future Under a Cloud*, 7 ANDEAN REP., January 1981, at 16, 17.

152. For an explication of the Pinochet regime's problems with ANCOM, see Comment, *Chile's Rejection of the Andean Common Market Regulation of Foreign Investment*, 16 COLUM. J. TRANSNAT'L L. 138, 151-171 (1977). As a result of Chile's withdrawal, the entire metalworking program had to be redrafted and was incorporated into Decision 146, July 23, 1979, ORDENAMIENTO JURIDICO, *supra* note 52.

153. A recent study argues that the failure of Latin American integration efforts resulted from the input from private business, which was largely controlled by foreign interests. The author notes that entrenched foreign interests, which developed their industries based on isolated markets, fiercely resisted and lobbied against Latin America's attempts at economic integration. Foreign multinational corporations feared subregional integration because it would place their subsidiaries in competition with one another and provide new opportunities for other foreign interests. UNCTAD, *THE ROLE OF TRANSNATIONAL ENTERPRISES IN LATIN AMERICAN INTEGRATION EFFORTS* (1983).

ter, the countries may resort to unilateral and defensive actions.<sup>154</sup> Thus, while negotiation is useful as a quick and direct method of avoiding or resolving minor disputes, reliance often must ultimately be placed on a supranational agency that can both resolve disputes and enforce its decisions.

*Good Offices, Mediation, and Conciliation.* Article 23 of the Cartagena Agreement empowers the Commission to execute procedures of negotiations, good offices, mediation, and conciliation. Good offices and mediation introduce a friendly third party which, by eliciting facts or the relevant law, assists the parties in resolving their dispute. Conciliation is more formalized than mediation. If negotiations under any of these three methods fail, an *ad hoc* Committee is appointed by the Commission to conduct its own investigation of the dispute.<sup>155</sup> The Committee hears the claims of both parties and files a report with the Commission. The Commission then makes a decision, which is not binding on the parties.<sup>156</sup>

*Arbitration.* If these less formal procedures fail, article 23 refers the parties to the arbitration procedure in the LAFTA Protocol for the Settlement of Disputes.<sup>157</sup> Under this scheme, the parties select three arbitrators from a pool previously chosen by all member countries.<sup>158</sup> If the disputing parties cannot agree upon three arbitrators, they will be assigned according to a system of rotation devised by the Commission.<sup>159</sup> The arbitration procedures call for legal representation, oral argument, and the submission of written briefs.<sup>160</sup> Arbitral decisions are made by majority vote<sup>161</sup> and may be appealed if one of the parties brings to the court's attention "some preexisting fact which would have been able to influence the award decisively."<sup>162</sup> If the losing party fails to comply with the arbitral decision, the prevailing party and any other party affected by the noncompliance, after obtaining approval from the Commission, may suspend concessions and preferential treatment to the noncomplying party.<sup>163</sup>

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154. See *supra* Section I.C.

155. For a general discussion of the application by the Commission of the techniques, see Padilla, *The Judicial Resolution of Legal Disputes in the Integration Movements of the Hemisphere*, 11 *LAWYER OF THE AMERICAS* 75, 83 (1976).

156. *Id.*

157. Protocol Establishing the Final Mechanism for the Settlement of Disputes within LAFTA, *done* September 2, 1967, 7 *I.L.M.* 747 (1968).

158. *Id.*, arts. 12, 18.

159. *Id.*, art. 18(c). The arbitral panel selected by the Commission cannot include arbitrators selected by the parties or arbitrators from the parties' home countries (art. 18(d)). Furthermore, arbitrators with a direct or personal interest in the dispute may be disqualified, but the parties must request the disqualification (art. 19).

160. *Id.*, arts. 22, 23.

161. *Id.*, art. 28.

162. *Id.*, art. 33. In addition, the Court may rectify any material errors in the award or interpret the manner in which the award shall be executed (arts. 31, 32).

163. *Id.*, art. 34.

Evaluation of these procedures is difficult because Venezuela and Peru have not yet ratified the Protocol, preventing its entry into force with respect to ANCOM members.<sup>164</sup> Negotiation and mediation are merely consultative, lacking mechanisms to impose sanctions on noncomplying countries. Thus, while they may enjoy certain limited success, they cannot be relied upon to enforce the terms of the Agreement against uncooperative parties. The third stage, arbitration, includes sanctions for noncompliance and provides a more formalized procedure for dispute resolution. Examples can be forseen in which arbitration could perform a useful function. For instance, article 41 of Decision 24 prohibits new foreign investment in public works unless the investment is needed "to operate under technically and economically efficient conditions."<sup>165</sup> A system of arbitration, with its ability to render rapid decisions on technical questions, would appear appropriate and quite useful in such circumstances.

*The Andean Court of Justice.* Judicial settlement is the most recent process for dispute resolution available to the member countries. This method was incorporated into the Agreement through the recent entry into force of the Treaty creating the Andean Court of Justice, a supranational tribunal proposed in 1979.<sup>166</sup>

The Treaty provides for a court of five justices selected from a list of candidates supplied by the individual member countries.<sup>167</sup> The justices are to be of high moral reputation, must qualify for the highest judicial post within their member countries,<sup>168</sup> and are forbidden from engaging in any other professional activity, except academic positions.<sup>169</sup> While there shall be one justice selected from each country, the Treaty instructs the justices to "be fully independent in the exercise of their functions."<sup>170</sup> They are elected for a term of six years,<sup>171</sup> but may be removed upon complaint of a member country if plenipotentiaries elected by the member governments find that the justice has committed a grievous fault.<sup>172</sup> Three months after the Treaty entered into force, the Commission, acting upon the proposal of

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164. To date, only Bolivia, Colombia, and Ecuador have ratified the Protocol. Padilla, *supra* note 155, at 83.

165. Decision 24, *supra* note 7.

166. Treaty Creating the Court of Justice of the Cartagena Agreement, May 23, 1979, 18 I.L.M. 1203 (1979) (entered into force May 7, 1983). The permanent seat of the Court is Quito, Ecuador. The Court scheduled its first meeting for December 1983. See *Venezuela aprobo el tratado que crea el Tribunal de Justicia del Acuerdo de Cartagena*, INTEGRACION LATINOAMERICANO, September 1983, at 63.

167. Andean Court of Justice Treaty, *supra* note 166, arts. 7, 8. The first five justices elected were Hugo Poppe (Bolivia), Luis Carlos Sachica (Colombia), Eduardo Hurtado Larrea (Ecuador), Gonzalo Ortiz de Zevallos (Peru), and Guillermo Anduza (Venezuela).

168. *Id.*, art. 7.

169. *Id.*

170. *Id.*

171. *Id.*, art. 9. At least two justices must be replaced every three years. *Id.*

172. *Id.*, art. 11.

the Junta, shall approve the Court's procedures.<sup>173</sup>

The Court's central role is to interpret the norms of the juridical structure of the Cartagena Agreement. This structure has four elements: the Treaty of Cartagena, the Andean Court Treaty, the Decisions of the Commission, and the Resolutions of the Junta.<sup>174</sup> Court decisions are binding upon the organs of the Cartagena Agreement and the member countries.<sup>175</sup> The Court has three functions: to nullify Commission Decisions and Junta Resolutions in violation of the Cartagena Agreement, to take action against those member countries violating the Agreement, and to render advisory opinions.

The Court's first function is to nullify those Commission Decisions and Junta Resolutions which violate the norms of the Cartagena Agreement.<sup>176</sup> Parties who can bring actions for nullification include the member countries, the Commission, the Junta, and natural or juridical persons who have been injured by the Decision or the Resolution.<sup>177</sup> Once an act has been nullified, it is incumbent upon the designated body to adopt those measures necessary to carry out the Court's decision.<sup>178</sup> The Treaty provides no opportunity to appeal nullification decisions.

The Court's second function is to act upon complaints brought by the Junta or a member country that another member country is not complying with the norms of the Agreement.<sup>179</sup> In this role, the Court cannot act until after the Junta has notified the member country of its non-compliance.<sup>180</sup> If the member refuses to comply, the Junta issues an opinion.<sup>181</sup> If the member persists in its non-compliance, the Junta may then present the matter to the Court for decision and possible sanctions.<sup>182</sup>

If a member country believes another member is not complying with the juridical norms, it shall first complain to the Junta, which undertakes

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173. *Id.*, art. 14.

174. *Id.*, art. 1.

175. *Id.*, arts. 22, 25.

176. *Id.*, art. 17. The Treaty of Rome possesses a similar check on acts of the Council of Ministers and the Commission. Under the Treaty of Rome, however, a cause of action also lies if the Council of Ministers or Commission, by inaction, violates a provision of the Treaty. Treaty Establishing the European Economic Communities, art. 175, March 25, 1957, 295 U.N.T.S. 2 (German). The official English version is reprinted in (1973) Gr. Brit. T.S. No.1 (Cmd. 5179-II).

177. Andean Court of Justice Treaty, *supra* note 166, arts. 17, 19. A member country can bring an action to nullify a Decision only if the country did not vote for the Decision originally. *Id.*, art. 18.

The statute of limitations for bringing an action is one year from the entry in force of the relevant Decision or Resolution. *Id.*, art. 20. Parties wishing to bring actions to nullify pre-existing Decisions or Resolutions may do so within one year from the date the Treaty enters into force. *Id.*, Transitory Provision 1.

178. *Id.*, art. 22.

179. *Id.*, arts. 23, 24.

180. *Id.*, art. 23.

181. *Id.*

182. *Id.*

the process described above.<sup>183</sup> The member country has the opportunity to bring an action directly before the Court in four situations, if the Junta: (i) finds noncompliance and the member country wishes to proceed in an action before the Court, (ii) fails to bring the cause of action before the Court two months after rendering its final decision, (iii) fails to present an opinion three months after the complaint is brought, or (iv) concludes that the accused country is complying with the norms of the juridical structure.<sup>184</sup> This opportunity is not available to natural or juridical persons whose only resort is to bring actions for noncompliance within their national legal system.<sup>185</sup>

If the Court finds that the member country is not adhering to the juridical norms, the country has three months to adhere to the Court's decision.<sup>186</sup> If the country refuses, the Court, after hearing the Junta's opinion, may restrict or suspend those advantages of the Cartagena Agreement which the noncomplying country enjoys.<sup>187</sup> An interested party may petition the Court for review of its decision if the party can produce a fact which could have decisively influenced the outcome of the proceeding, provided that fact was unknown to the party on the date that the decision was handed down.<sup>188</sup> The party has two months from the discovery of the fact, but no longer than one year from the date of the ruling, to bring the petition for review.<sup>189</sup>

The Court's third function is to render advisory opinions.<sup>190</sup> Judges from the national courts of the member countries may solicit advisory opinions.<sup>191</sup> If the judge's decision is subject to appeal within the national judicial system, the judge may make his decision before the Court has ruled.<sup>192</sup> If the judge's decision may not be appealed, the proceeding must be stayed until the Court has acted.<sup>193</sup> The Court may only opine on the norms of the ANCOM juridical structure; it must not interpret the scope and intent of national legislation.<sup>194</sup> The national judge must adopt the interpretation of the Court.<sup>195</sup>

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183. *Id.*

184. *Id.*

185. *Id.*, art. 27.

186. *Id.*, art. 25.

187. *Id.*

188. *Id.*, art. 26.

189. *Id.*

190. *Id.*, art. 28.

191. *Id.*, art. 29.

192. *Id.*

193. *Id.*

194. *Id.* A similar intention to immunize national legislation from community adjudication is followed by the European Court of Justice. E. STEIN, P. HAY & M. WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE: TEXT, CASES, AND READINGS*, at 182-3 (1976).

195. Andean Court Treaty, *supra* note 166, art. 31.

The Court of Justice will perform a number of important dispute resolution functions which ANCOM lacked. First, the Court sanctions provide a credible mechanism which a complaining member country can rely upon to deter another member from violating a provision of the Cartagena Agreement, a Commission Decision, or a Junta Resolution. Second, as a supranational organ divorced from national politics, the Andean Court should help avoid the political conflicts which have slowed Andean integration in the past.<sup>196</sup> Thus the Andean Court, if combined with the procedures of negotiation, good offices, mediation, conciliation, and arbitration, hopefully will provide a competent and effective means to resolve disputes and impede the unraveling of ANCOM.

### *B. The Dispute Resolution Mechanisms of Decision 169*

In addition to the Andean Court of Justice, the enforcement role given the Junta, national authorities, and member countries under the provisions of Decision 169 merits great interest. Although limited in scope to the violation of only certain ANCOM provisions, this mechanism is an important addition to the other processes currently in force and available to sanction member countries.

*Scope of Violations Covered.* Decision 169 imposes restrictions on capital repatriation and reinvestment for foreign investors in Andean Multinational Enterprises (AMEs) which do not satisfy certain national ownership requirements.<sup>197</sup> The first of these requirements is that two investors from separate member countries must each control a minimum of fifteen percent of the corporation's stock.<sup>198</sup> In addition, subregional investors must own eighty percent of the stock, unless the corporation is domiciled in Ecuador or Bolivia, in which case subregional investors need only control sixty percent of the capital.<sup>199</sup> A third requirement is that national investors in the country of the corporation's domicile must control a minimum of fifteen percent of the stock.<sup>200</sup> Finally, those countries whose national investors possess fifteen percent of the stock must be represented on the Board of Directors.<sup>201</sup>

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196. The idea that the Andean integration process had been impeded by the absence of a supranational institution and the influence of national interests has been expressed in Middlebrook, *supra* note 143, at 62.

197. Decision 169 of the Commission of the Cartagena Agreement, Andean Multinational Enterprises, March 18, 1982, 21 I.L.M. 542 (1982). For a more detailed treatment of Decision 169, see Chero and Arco, *Andean Multinational Enterprises: A New Approach to Andean Multinational Investment in the Andean Group*, 21 J. COMMON MKT. ST. 409 (1983).

198. Decision 169, *supra* note 197, art. 1(c).

199. *Id.*, arts. 1, 2. This provision modifies Decision 46 by reducing by twenty percent the amount of foreign investment permitted in AME's domiciled in Venezuela, Peru, and Colombia. Decision 46 of the Commission of the Cartagena Agreement, Andean Code on Multinational Enterprises and the Regulations with Regard to Subregional Capital, December 18, 1971, ORDENAMIENTO JURIDICO, 1 *Decisiones* 145 (1982); 11 I.L.M. 357 (1972), art. 10.

200. Decision 169, *supra* note 197, art. 1(c).

201. *Id.*, art. 16.

If these requirements are met, Decision 169 extends the advantages of the Cartagena Agreement to the AME. The AME's products are eligible to enjoy the benefits of the internal trade liberalization scheme.<sup>202</sup> The corporation has a right to invest in its domicile state without requiring approval by the national authority.<sup>203</sup> It has access to local credit<sup>204</sup> and can invest in sectors—such as banking, insurance, public works, and the media—that are restricted to national investment by Decision 24.<sup>205</sup> Finally, there are no limits on the amount of profits that the AME can remit.<sup>206</sup>

*Dispute Resolution Mechanisms.* In case of disputes concerning the implementation of these provisions, Decision 169 provides two channels for resolving the conflict.<sup>207</sup> If the infringement occurs within the country of the AME's residence, the national authority is entrusted with the responsibility of remedying the situation.<sup>208</sup> Alternatively, regardless of where the violation occurs, if another member country believes that an AME is violating the terms of the Decision, it may petition the Junta to seek redress.<sup>209</sup> The Junta then issues an opinion to the national authority of the noncomplying AME's domicile. If the national authority doesn't respond, the Junta then submits a final opinion to the national authorities of both the country of the noncomplying enterprise and the complaining country. If the Junta's opinion confirms that a violation has occurred, the national authority of the AME's domicile shall apply the corresponding sanctions and may revoke the enterprise's special status. A declassified enterprise loses the liberalized trading advantages of the Cartagena Agreement and becomes subject to the investment restrictions of Decision 24.<sup>210</sup> The Junta itself, however, has no authority to directly sanction either a violating AME or a national authority refusing to apply a requisite sanction.

Decision 169 clearly creates an enhanced dispute resolution role for the Junta. The Junta has structural advantages peculiarly suited to this func-

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202. *Id.*, art. 18.

203. *Id.*, art. 21. If the corporation wishes to invest in a member country other than its domicile, and if the planned investment is in any of the areas covered by arts. 40-43 of Decision 24 (*i.e.*, financial institutions, public services, basic products, and the media), then the corporation has to obtain authorization from the competent national authority (arts. 21, 22).

204. Decision 169, *supra* note 197, art. 20.

205. *Id.*, art. 22. *See also, supra* note 203.

206. *Id.*, art. 21.

207. It must be noted that the enforcement provisions of Decision 169 are temporary until the Commission passes final regulations concerning the enforcement of the Decision. These provisions are discussed at length because they reduce the supervisorial responsibilities of the Junta by introducing other entities into the dispute resolution process. It is suggested that the final enforcement provisions should reflect the same approach.

208. Decision 169, *supra* note 197, art. 34.

209. *Id.*

210. *Id.*

tion. First, the Junta meets continuously, thus permitting it to respond quickly when disputes arise. Second, Junta members are not representatives of any particular country, reducing potential political influences on the decision-making process.<sup>211</sup> Finally, since the Junta is responsible for proposing the Decisions that the Commission acts upon, it is able to determine the proper interpretation of a Decision's provisions.<sup>212</sup> When disputes arise as to the implementation of these Decisions, and the intent of these Decisions is examined, the Junta is best equipped to decide whether the countries' application of the Decision is consistent with its purpose.

These advantages have served the Junta well in the past. In one instance, the Junta resolved a dispute concerning Peru's desire to restrict the importation of zippers from Colombia and Ecuador.<sup>213</sup> Similarly, in 1975, the Junta was able persuade Chile to terminate its protections against intra-regional imports.<sup>214</sup> Finally, when Commission meetings were suspended for eight months following the border conflict between Ecuador and Peru, the Junta convinced the member countries to resume Commission meetings.<sup>215</sup>

While the above examples indicate that the Junta has achieved a measure of success in resolving disputes concerning the implementation of ANCOM's programs, it has been criticized for its institutional shortcomings. For instance, the Junta cannot impose sanctions on countries which refuse to comply with the Commission's Decisions.<sup>216</sup> A second criticism is that the Junta has not lived up to its expectation as an organization independent of national politics.<sup>217</sup> In particular, the implementation of the SPIDs has suffered because of the Junta's inability to make decisions divorced from national interests.<sup>218</sup>

In addition, since it is already responsible for proposing the legislation for the subregion, the Junta lacks the material resources to also supervise their implementation. Decision 169 adopts a pragmatic response to the structural limitations of the Junta by reducing its supervisory responsibilities, placing them in the hands of the member countries and the national authorities. This frees the Junta to concentrate on its secretariat duties and its responsibilities as a final arbiter.

Thus, while the dispute resolution mechanisms of Decision 169 lack the sanctioning power and political independence of the Andean Court, they may achieve a certain measure of success in enforcing uniform imple-

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211. While each country elects a representative to the Commission, the Junta is composed of "nationals of any Latin American state." Cartagena Agreement, *supra* note 1, arts. 6, 14, 18.

212. *Id.*, art. 15.

213. BUSINESS INTERNATIONAL CORPORATION, *supra* note 118, at 26.

214. Middlebrook, *supra* note 143, at 78.

215. INTAL, *supra* note 61, at 59.

216. Middlebrook, *supra* note 143, at 78.

217. *Id.*, at 78-80.

218. *Id.*

mentation of the AME provisions not available in other processes currently in force.

### III CONCLUSION

Our thesis—that the trend toward disintegration of ANCOM results from the absence of an effective dispute resolution mechanism—is certainly subject to criticism. It could be contended that the disintegration of ANCOM results from the member countries' overwhelming financial crises, which force them to compete for a scarcer supply of external financial resources such as foreign investment. However, while a financial crisis will place added strain on any integrated market, economic difficulties should not justify a complete abandonment of subregional unity. Even though economic conditions may require that member countries relax their restrictions on foreign capital, economic integration can still be maintained as long as the member countries act in concert when responding to the crisis.

Second, it could be advanced that the disintegration of ANCOM reflects a failure of political consensus rather than an ineffective dispute resolution mechanism. Support for this argument can be found in the first major crisis to confront ANCOM: Chile's withdrawal from ANCOM in 1976. Although this triggered the available channels of dispute resolution, Chile's ultimate rift with the subregion was not averted.<sup>219</sup> Our response to this analysis is that Chile's incompatibility with ANCOM was too irreconcilable for any dispute resolution mechanism to overcome. This Article, however, concentrates on the disillusionment of the member countries who expressed a serious commitment to pursue subregional integration, but who later became frustrated by the non-compliance of other member countries. For these member countries, an effective method of dispute resolution would have prevented their frustration and their ultimate disillusionment.

An examination of the various methods of dispute resolution showed that each method had its advantages and disadvantages. Negotiation may provide a quick and direct solution to a minor conflict, but cannot be consistently relied upon because it lacks an enforcement mechanism. Good offices, mediation, conciliation, and arbitration have not yet proved to be viable methods for ANCOM member countries. The Junta can resolve certain technical disputes, but its administrative responsibilities and its susceptibility to national interests prevent it from becoming an effective institution for enforcing subregional integration. Finally, while the Andean Court appears to satisfy the need for a supranational institution with a credible en-

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219. The Junta responded to the Chilean crisis by making proposals which the Commission passed in an effort to keep Chile from leaving ANCOM. Decision 103, *supra* note 7. Chile nevertheless withdrew. See generally, *Chile's Rejection of the Andean Common Market Regulation of Foreign Investment*, *supra* note 152, at 164-71.

forcement mechanism, it has only recently been established, and its institutional effectiveness is as yet untested.

The conclusion that we have reached—that one method of dispute resolution cannot resolve the various conflicts which divide the member countries—provides a more flexible and less drastic response to ANCOM's present difficulties. The recent Decision 169 reflects an understanding of this conclusion by utilizing different sources, including the Junta, the national authorities, and the member countries, depending upon the type and stage of the dispute. Under this approach, the appropriate process of dispute resolution can be selected to apply to the particular conflict that it is best equipped to resolve. This approach has the added advantage of overcoming the member countries' natural reluctance to adopt a universal dispute resolution process. This reluctance might be overcome if the member countries felt assured that the judicial process would only be utilized under carefully selected circumstances.