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Venezuela and the Andean Common Market

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Since the founding of the Andean Common Market in 1969, one member, Chile, has withdrawn while another more prosperous neighbor, Venezuela, has opted to join the Market. Chile is doubtlessly suffering her own unique withdrawal symptoms. This article, however, will focus on the legislative and commercial adjustments which had to be made by Venezuela to integrate into a preexisting common market.

I. BACKGROUND

A. *Theoretical Basis for Common Markets in Developing Regions*

Regional economic integration units such as the Andean Common Market can be of major importance to the economic development of less developed countries.[1] These integration schemes are intended to promote economic growth through the division and specialization of labor. The elimination of internal trade barriers should also provide the potential investor with a

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1. Formation of the Andean Common Market was designed to accelerate the economic integration of its members within the broader context of the Latin American Free Trade Association (LAFTA). Treaty Establishing a Free Trade Area and Instituting The Latin American Free Trade Association (Montevideo Treaty, 1960). This treaty has been printed in Inter-American Institute of Legal Studies, *Instruments Relating to The Integration of Latin America* 207 (1968). LAFTA's primary goal was to reduce tariff and trade barriers among member countries by 1973 (this date later extended to 1980 by the Caracas Protocol). *See* S. DELL, A LATIN AMERICAN COMMON MARKET? (1966); W. KRAUSE & F. MATHIS, LATIN AMERICA AND ECONOMIC INTEGRATION: REGIONAL PLANNING FOR DEVELOPMENT (1970); LATIN AMERICAN ECONOMIC INTEGRATION: EXPERIENCES AND PROSPECTS (M. Wionczek ed. 1966); WALTER & VITZTHUM, THE CENTRAL AMERICAN COMMON MARKET: A CASE STUDY ON ECONOMIC INTEGRATION IN DEVELOPING REGIONS (N.Y.U., C.J. Devine Inst. of Finance, Bull. No. 44, May 1967).

larger market[2] in which to sell its products. Because of economies of scale, a company can then produce each item at a lower per unit cost. Since the individual product will thus be cheaper, more people can buy it. This means more profit to the manufacturer who can then reinvest such funds.

Protected access to regional markets opens the possibility for new investment to take place in industries which would not be viable if confined to individual national markets.[3] Also, the resulting economies of scale and degree of specialization may even reduce production costs for preexisting industries. In due time this cost reduction should make the products of these industries competitive in world markets.

The importance of economies of scale should be stressed.[4] The national markets of most less developed countries are too limited to provide an adequate volume of demand for cost efficient mass production industries. Given the situation of a small self-contained national market, the tendency is usually for local industry to seek a high degree of protection from outside sources of competition. Such protection then fosters low productivity and artificially high costs. Regional economic integration tries to solve these problems by making it possible to establish modern plants of optimum size, with an adequate level of specialization, and to industrialize in those sectors where it was not previously feasible due to domestic market limitations.[5]

Proponents of regional economic integration units contend that formation of such units will play a direct role in alleviating those conditions which currently restrict economic growth and development.[6] Not only will overall market conditions be greatly improved, but also the combined economic power of the integrated unit will permit it to bargain more effectively with outside nations on trade and investment questions.

B. *Organization of ANCOM*

The basic structure of the Andean Common Market

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2. S. DELL, *supra* note 1 at 17.
3. *Id.* at 17-18.
4. *Id.* at 18.
5. UNITED NATIONS ECONOMIC COMMISSION FOR LATIN AMERICA, DEVELOPMENT PROBLEMS IN LATIN AMERICA 156 (1970).
6. *Id.* at 160.

(ANCOM) was established by the Cartagena Agreement of 1969.[7] The initial members were Colombia, Chile, Peru, Ecuador, and Bolivia. Although Venezuela participated in the negotiations on that accord, she decided not to sign or ratify it at that time.

The aim of ANCOM was to achieve formation of a functional subregional common market, carefully intertwined with the larger preexisting Latin American Free Trade Association (LAFTA).[8] Members of LAFTA not included in ANCOM are Mexico, Argentina, Paraguay, Brazil, Uruguay, and, today, Chile. All legal obligations incurred under LAFTA remain in effect under the ANCOM charter.[9]

Techniques to create a common market within the Andean region include internal free trade, a common external tariff, regional allocation of selected industries, and harmonization of certain laws.[10] Implementation of these objectives is entrusted to the two principal administrative institutions, the Commission and the Board (or Junta).[11] The Commission, the highest authority in ANCOM, is comprised of one cabinet level representative from each member country. It is charged with formulating general policy, resolving disputes and ensuring implementation of the Cartagena Agreement.[12] The Board, a permanent three member body selected by the Commission, is responsible for developing proposals for submission to the Commission.[13] These draft proposals, if approved by the Commission, are promulgated as its official Decisions.[14]

7. Agreement on Andean Subregional Integration, *signed* May 26, 1969, *reprinted in* 8 INT'L LEGAL MAT'LS 910-39 (1969) [hereinafter referred to as the Cartagena Agreement].

8. *Id.* art. 110.

9. *Id.* art. 114.

10. *Id.* arts. 1-3.

11. *Id.* art. 5.

12. *Id.* arts. 6-12.

13. *Id.* arts. 7(c), 13-18.

14. Although the word "Decision" has been translated into the English "Decision," the American reader should not confuse these "decisions" with our administrative or judicial decisions. In fact, the so-called Decisions of ANCOM are supranational legislation. The Andean Commission's Decisions, of which over 100 have been issued to date, should be distinguished from the Venezuelan Decrees which are domestic legislation enacted by the Venezuelan Congress. In many cases Venezuelan Decrees specifically embody the previously promulgated Decisions of the Andean Commission.

C. *Venezuela's Accession*

Venezuela's decision to join ANCOM was announced by President Caldera in 1973. This was by no means universally acclaimed within the country. Bitter political and economic disputes raged over the anticipated ills or benefits of Venezuelan membership in the subregional common market.[15] The decision to join ANCOM in 1973 and the earlier decision to join LAFTA in 1968 represented a major change in attitude by Venezuela toward regional economic integration units. Domestic political pressures[16] from private commercial interests[17] had previously caused Venezuela to refrain from joining the larger integration units of LAFTA and ANCOM. However, by 1972, it had become apparent to many of the nation's decisionmakers that participation in these organizations was essential if Venezuela were to continue its economic growth and to avoid exclusion from important trading markets.

President Caldera's 1973 action represented a complete reversal of the position taken four years earlier by his ruling Social Christian Party (COPEI) toward ANCOM. This change was somewhat confusing at the time it was made, since COPEI's main rival, the Accion Democratica (AD) had previously gone on record in 1969 as being strongly in favor of Venezuelan membership in ANCOM. COPEI's abrupt aboutface opened it to charges of political opportunism. All of this debate took place within the heated controversy of the upcoming 1973 national elections.[18]

15. *Venezuelans Form Battle Lines on Joining ANCOM,* 1971 BUS. LATIN AMERICA 272.

16. Venezuela's early attitude is somewhat reflected in a 1960 Statement by an official of the Bank of Venezuela: "Any common market or free trade area will leave us producing nothing but petroleum and iron ore, and importing everything else. Our textiles cannot compete with Brazilian textiles, our coffee cannot compete with Colombian coffee and our meat cannot compete with Uruguayan meat. For us a free trade area is utopian at the present time." BANCO DE VENEZUELA, BOLETIN DE ECONOMIA Y FINANZAS, Sept. 1960.

17. However, it would appear the stakes were not really that significant. One and one-half years after its entry in ANCOM Venezuelan trade with ANCOM countries had accounted for only 2% of Venezuela's exports and only 1% of the country's total imports. Ecuador and Peru take most of Venezuela's ANCOM exports, while Colombia and Peru provide the bulk of her ANCOM imports. INVESTING, LICENSING & TRADING CONDITIONS ABROAD (BUS. INT'L), Venezuela 21 (Aug. 1975) [hereinafter cited as IL&T].

18. *Venezuelans Form Battle Lines on Joining ANCOM, supra* note 15.

Domestic political considerations were strongly influenced by the economic interests perceived to be at stake by the various opposing groups. COPEI's new position toward membership in ANCOM met with bitter resistance by the private sector business interests. These private interests voiced their opposition through the federation of chambers of commerce (FEDECAMARAS) and the Asociacion Venezolana de Industrias (an industrial group representing Venezuela's medium-sized industries).[19]

The private sector representatives predicted that Venezuelan membership in ANCOM would result in economic disaster. It was claimed that Venezuela's unique political and economic system was incompatible with those of the other ANCOM countries. Factors cited in support of this claim included Venezuela's economic independence based on its petroleum wealth and proven ability to pay for imports, a traditionally low inflation rate, an allegedly narrower industrial base than its three potential rivals within ANCOM (Colombia, Chile, and Peru), and an alleged inability to compete with the other subregional producers because of higher production costs (especially labor). Also, the private sector contended that ANCOM's restrictive measures on foreign investment (especially technology transfer) would only discourage new investment and technology at a time when Venezuela was in need of both.[20]

The private sector spokesmen relied upon two particularly emotional issues to advance their cause.[21] The first one raised the prospect of free movement of labor among the ANCOM countries. This claim was obviously intended to raise the specter of a loss of jobs for Venezuelans. Given the fact that Venezuela was then, and still is today, beset by the rather severe problems of Colombians illegally working in Venezuela, the threat was perceived by many workers as being real. This fear was, however, unjustified since the Cartagena Agreement does not provide for the free movement of labor.

The second issue, and the one which most concerned small

19. *Id.*

20. *Summary and Highlights of Seminar on the Andean Pact Held at the American Chamber of Commerce of Peru on June 6, 1973 (Lima, Peru)*, in ANDEAN PACT: DEFINITION, DESIGN, AND ANALYSIS 77, 78-79 (Council of the Americas ed. 1973).

21. *Venezuelans Form Battle Lines on Joining ANCOM*, *supra* note 15.

and medium-sized businessmen was the reduction or disappearance of high protective tariffs vis-à-vis other ANCOM nations for manufacturers. As in many developing nations, these manufacturers were import substitution oriented. Private industrial spokesmen questioned their ability to compete with cheaper imports from other ANCOM countries. Further, the opponents claimed, Venezuelan and foreign capital would flow toward those countries with cheaper labor.

COPEI's new attitude toward ANCOM was strongly supported by representatives of heavy industries, whose larger manufacturing capacities would need additional marketing outlets. Due to diminishing petroleum reserves, Venezuela wished to diversify its economic base. Membership in ANCOM, by providing an expanded market, hopefully would encourage not only major producers for the entire region, but also stimulate a number of local satellite industries.[22] The possibility of obtaining exclusive or semi-exclusive assignments of particular industries under ANCOM's Sectorial Program was perceived as an additional means of furthering the nation's economic growth.[23]

In deciding to join ANCOM, the Venezuelan Government apparently made two basic assumptions.[24] First, it perceived Venezuela as becoming economically isolated in Latin America if it did not join. Should ANCOM become economically viable, then Venezuela would be in the unenviable position of having to compete in the international market against this powerful economic force, as well as against the traditional Latin American economic powers (Argentina, Brazil, and Mexico). Second, Venezuela was confident of its ability to compete inside ANCOM, possibly even dominate it, yet still preserve its national sovereignty. In the two years since Venezuela has been a member of ANCOM there has been a noticeable change in attitude by the previous opponents. It appears that opposition has subsided and that emphasis today is placed on working within the framework of the system and deriving to the fullest extent possible those economic benefits which are available.

22. Note 20 *supra*.
23. *Id.* at 83, 85-86.
24. *Id.* at 79, 83.

II. LEGAL ADAPTATIONS MADE BY VENEZUELA

Since becoming a member of ANCOM in 1973,[25] Venezuela has had to enact new legislation to fulfill its obligations as a member of the organization. Following is a description and analysis of such legislation. Within this context, four major areas of law and economic policy are considered: (A) internal free trade; (B) common external tariff policy; (C) sectorial programs; and (D) control of foreign investment.

A. *Internal Free Trade*

By definition, an integral component of a common market is a customs union. A customs union consists of internal free trade among its member states and a common external tariff erected around the entire region against products from outside the area. Thus, the first essential step in creating the Andean Common Market was to establish a mechanism to achieve internal free trade among its members. To provide adequate protection to existing industries, the internal free trade goal is achieved in most customs unions through a gradual process of internal duty reductions.

The ANCOM documents refer to this element of internal free trade as "subregional trade liberalization." The ANCOM structure uses four different, but complementary, mechanisms to reach this objective for Venezuela, Colombia, and Peru[26] by 1983 and for Bolivia and Ecuador[27] by 1988. For this purpose all products are divided into four distinct categories: (1) goods on LAFTA's Common Schedule; (2) goods reserved for the Sectorial Programs; (3) goods not produced in the region; and (4) the remaining nonscheduled goods. By December 1970, all nontariff barriers *(e.g.,* quotas) were to have been removed.[28]

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25. Final Act of the Negotiations on the Entry of Venezuela into the Cartagena Agreement *done* Feb. 13, 1973, *reprinted in* 12 INT'L LEGAL MAT'LS 344 (1973) [hereinafter referred to as the Accession Agreement]. This Agreement, the Cartegena Agreement, and ANCOM Decisions Nos. 24, 37, 37-A, 40, 46, 50, 56, and 70 were approved by the Venezuelan Congress and President on September 3, 1973. *Gac. Of* 1,620 of Nov. 1, 1973, [1973] *Gaceta Legal* No. 357, at 2 (Ven.), *reprinted in* G. PICO MANTILLA, LEGISLACION ANDINA DE INVERSIONES EXTRANJERAS Y TECNOLOGIA 265 (1975).

26. Lima Protocol Amending the Cartagena Agreement, *done* Oct. 30, 1976, art. 8, *reprinted in* 16 INT'L LEGAL MAT'LS 235 (1977) [hereinafter referred to as the Lima Protocol]. The following textual discussion reflects the latest changes incorporated in the Lima Protocol, ratification of which is currently pending before the Venezuelan Legislature. *Ancom Implements Investment Code Rules But Falters on Sectorials,* 1978 BUS. LATIN AMERICA 116.

27. *Id.* art. 9.

28. Cartagena Agreement, *supra* note 7, arts. 42 and 46; Accession Agreement, *supra* note 25, Annex B, art. 38.

1. *LAFTA Common Schedule Goods*

Under the LAFTA Treaty, the member states were required at three-year intervals to agree on lists of goods which were to circulate duty free within the LAFTA region;[29] these lists were designated the "Common Schedules." At each of these three-year sessions, the members were to have agreed to place on these Common Schedules goods amounting to 25% of the aggregate value of all trade within the region.[30] Had that objective been fulfilled, by 1973 there would have been total free internal trade within the LAFTA region.

The 1964 negotiations succeeded in placing only 175 items[31] on the LAFTA Common Schedule. The second Common Schedule negotiations, planned for 1967, never took place.[32]

Since the ANCOM members were still bound by their LAFTA obligations, the Cartagena Agreement provided that all goods included in the first stage of the LAFTA Common Schedules, *i.e.* the 175 items, would also be free of duties within the ANCOM region.[33] ANCOM's Board is further empowered to grant similar treatment to any Common Schedules which may be negotiated in the future.[34] Under the Accession Agreement, Venezuela was likewise obligated to permit these items duty free entry.[35] One should note that these particular articles may enter Venezuela free of tariffs, not only if they come from ANCOM members, but also if from any other LAFTA nation, such as Brazil.

2. *Goods Reserved for the Sectorial Programs*

Almost 2,000 goods, amounting to about one-third of all

29. Treaty Establishing a Free Trade Area and Instituting the Latin America Free Trade Association, Feb. 18, 1960, art. 7, *printed in* INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, 1 INSTRUMENTS OF ECONOMIC INTEGRATION IN LATIN AMERICA AND IN THE CARRIBEAN 3 (1975) [hereinafter referred to as the Montevideo Treaty].

30. *Id.*

31. Note, *Latin American Experience with Economic Integration,* 10 VA. J. INT'L L. 139, 153 (1969).

32. *Id.*

33. Cartagena Agreement, *supra* note 7, art. 49.

34. *Id.*

35. Accession Agreement, *supra* note 25, Annex B, art. 1 (a); *see* Ven. Decree 338 (1974), *Gac. Of.* 1,675 Ex. (Aug. 30, 1974); Ven. Decree 339 (1974), *Gac. Of.* 1,676 Ex. (Aug. 30, 1974).

the items on the tariff schedule[36] have been reserved for the Sectorial Programs.[37] Each article under the Sectorial Programs will have its own duty arrangements both for goods produced inside the ANCOM region and for those coming from outside the area (see Part II-C for a detailed description).

Items which were previously reserved for the Sectorial Programs but which, in fact, have not been incorporated into a specific Sectorial Program by the end of 1978 will become free of internal duties under certain conditions.[38] Such articles, if not already produced in the ANCOM area, will circulate duty free as of December 31, 1978.[39] However, the Commission may authorize the reservation of certain of these items not yet produced in the region for manufacture by Bolivia and Ecuador[40] and may determine whether such items shall be subject to internal duties.

The remaining articles, previously reserved for the Sectorial Programs but not actually incorporated in a Sectorial Program by December 1978, will enter Colombia, Peru, and Venezuela duty free if coming from Bolivia or Ecuador.[41] As to such items originating in Colombia, Peru, or Venezuela, the remaining duties should be eliminated by five annual successive reductions of 5%, 10%, 15%, 30%, and 40% starting by December 1979, so that they will be duty free within the region by 1985.[42]

3. *Goods Not Produced in the Region*

Goods not produced in the region and not reserved for the Sectorial Program were to be duty free[43] by 1971. However, the Commission could reserve certain goods not yet produced in the region for manufacture by Bolivia or Ecuador; any internal

36. Fulmer, *The Andean Common Market: Implications for U.S. Business,* ANDEAN PACT: DEFINITION, DESIGN, AND ANALYSIS 1, 7 (Council of the Americas ed. 1973).

37. *See also* Cartagena Agreement, *supra* note 7, arts. 34, 45(a); Accession Agreement, *supra* note 25, Annex B, art. 38.

38. Cartagena Agreement, *supra* note 7, arts. 47, 53; Lima Protocol *supra* note 26, art. 4.

39. Lima Protocol, *supra* note 26, art. 4(a).

40. *Id.*

41. *Id.* art. 4(d).

42. *Id.* art. 4(c).

43. Cartagena Agreement, *supra* note 7, arts. 50, 52.

duty structure created for such goods must be for the benefit of Bolivia or Ecuador.[44]

Products not yet produced in the region and not allocated to the Sectorial Programs could also be reserved for manufacturing by Colombia, Venezuela, or Peru. However, such products when produced by any of these three nations may enjoy the protection of internal tariff barriers only until the end of 1983.[45]

4. *Nonscheduled Goods*

The bulk of the products fall within the nonscheduled goods category, subject to the automatic tariff cutting provisions. As a first step, each nation had to designate, as its base rate from which the automatic cuts would be made, the lowest rate applied by that nation on the item prior to joining ANCOM.[46] Such base rate, moreover, could not exceed the ad valorem, CIF, price of the item by more than 100%.[47]

Annual reductions of duties on nonscheduled goods must be made by each nation. Colombia, Venezuela, and Peru, starting in December 1976, must make seven successive annual reductions of 6% each and a final reduction of 8% by December 31, 1983. Hence, by the end of 1983 all these nonscheduled goods should enter Colombia, Venezuela, and Peru duty free.[48]

Bolivia and Ecuador must begin making the automatic duty reductions on nonscheduled items with a 5% cut by December 31, 1979; five cuts of 10% each annually from 1982 to 1986; a 15% cut in December 1987; and a final reduction of 20% by December 31, 1988.[49] Hence, the nonscheduled articles from ANCOM nations should enter Bolivia and Ecuador duty free after 1988.

In August 1974, Venezuela began to reduce tariffs for intrasubregional trade in compliance with the automatic tariff cutting program.[50] In conjunction with the automatic tariff

44. *Id.*

45. *Id.;* Accession Agreement, *supra* note 25, Annex B, art. 1(b); Lima Protocol, *supra* note 26, art. 3.

46. Cartagena Agreement, *supra* note 7, art. 52(a); Lima Protocol, *supra* note 26, art. 3.

47. Cartagena Agreement, *supra* note 7, art. 52(a).

48. Lima Protocol, *supra* note 26, art. 8.

49. *Id.* art. 9.

50. Decree 339 of Aug. 30, 1974, [1974] *Gaceta Legal* No. 384, at 36 (Ven.).

reduction program, Venezuela adopted ANCOM's tariff nomenclature, referred to as the NABANDINA. This is an eight-digit code based on the Brussels nomenclature.[51]

An integral part of the automatic tariff reduction program under the Cartagena Agreement was a list of general and specific exceptions. Each member was permitted to exempt a certain number of products until 1988 from the duty reductions; however, goods on the Common List could not be so exempted.[52]

Under the Accession Agreement, Venezuela was allowed to exclude not more than 250 items.[53] In 1974 she, in fact, excluded 236 articles from the general tariff reduction program.[54] This list seems to be characterized by labor-intensive products of small and medium-sized industries. Included were such items as basic foodstuffs, leather goods, yarns and textiles, footwear, and furniture.

Venezuela was also authorized to exclude an additional 200 items from the tariff cutting on a single country-of-origin basis. This exceptions list is applied against specified items from Colombia or Peru.[55] These specific exceptions are intended to be short term only.[56] Venezuela may not direct specific tariff discriminations against more than 110 articles from any one country.[57] Conversely, Peru may apply discriminatory tariffs against thirty items from Venezuela. Peru may also impose discriminatory duties against an additional number of items from Venezuela equivalent to the number of products from Peru against which Venezuela has discriminated. Colombia enjoys the same rights as Peru in this regard.[58]

For example, assume Venezuela had discriminated against the maximum permissible number of items from Colombia, *i.e.*

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51. Decree 338 of Aug. 30, 1974, [1974] *Gaceta Legal* No. 384, at 36 (Ven.).
52. Cartagena Agreement, *supra* note 7, art. 55; Lima Protocol, *supra* note 26, art. 1.
53. Accession Agreement, *supra* note 25, Annex A, art. 2.
54. IL&T, Venezuela 22 (Aug. 1975); *see* Ven. Decree 338 (1974), *Gac. Of.* 1,675 Ex. (Aug. 30, 1974); Ven. Decree 339 (1974), *Gac. Of.* 1,676 Ex. (Aug. 30, 1974), implementing the Accession Agreement, *supra* note 25.
55. Accession Agreement, *supra* note 25, Annex A, art. 3.
56. *Id.* art. 8.
57. *Id.* art. 3(a).
58. *Id.* art. 4.

110 articles. Colombia would now be entitled to discriminate against an additional 110 articles to bring her total discriminations against Venezuelan products up to 140 different goods.

Venezuela has in fact used this discriminatory power against certain products from Colombia such as foodstuffs, beer, lubricants, vinyl fibers, cement, bicycles, and footwear. Likewise, Venezuela has discriminated against canned fish, coffee, footwear, copper bars, and various other articles from Peru.[59]

Bolivia and Ecuador may also apply discriminatory tariffs against thirty items from Venezuela.[60] However, if the product discriminated against by a particular nation is not produced in that country, the Board of ANCOM may disallow the exception.[61]

B. *The Common External Tariff*

As stated previously, in a customs union, the individual nations must eventually cease applying their own tariff rates to goods coming from outside the customs union and create common tariffs applicable to goods entering any country in the region. In contrast, under a free trade association, the member nations, although aiming toward free internal trade among themselves, will continue to apply their own individual rates as against products from outside the area. Thus in LAFTA, a free trade association, the member states continue applying their own individual duty rates to articles from outside the region. As a common market, however, ANCOM has to construct common tariffs applicable to goods from outside the area. This means, for example, Venezuela will eventually have no individual Venezuelan duties, but will simply apply the common rate which ANCOM has established for all its members in reference to a particular product.

In building this common external tariff, the Cartagena Agreement provided for a two-step procedure.[62] The first step called for the creation of a minimum common external tariff for each NABANDINA item. For goods with duty rates below those established by the minimum common external tariff, the

59. IL&T, Venezuela 22 (Aug. 1975).

60. Accession Agreement, *supra* note 25, Annex A, art. 5.

61. *Id.* art. 7.

62. Cartagena Agreement, *supra* note 7, arts. 60, 61.

member states were required to have raised their tariffs up to the level of this minimum common external tariff by 1975.[63] For products with duty rates above those minimum common external tariff levels, the individual nations could retain their existing duties for the time being. Although this requirement was particularly difficult for Venezuela because of her traditionally low duty structure, she complied with the obligation in 1974 by raising most of her duties up to that minimum level.[64]

A special hardship clause in the Cartagena Agreement makes it possible for a country to seek temporary suspension of the minimum common external tariff.[65] Venezuela exercised the right in 1975 when it requested suspension of the minimum common external tariff on some sixty items. Permission was granted to suspend it on forty-five of the items. Included in the suspension list were certain essential raw materials and foodstuffs. This was permitted because the necessary goods were not available from other member countries.[66]

The second step in establishing the common tariff against products from outside the region is the fixing of the final common external tariffs. The rates ultimately set should be sufficiently high to protect new industries in the region and yet low enough to permit some foreign competition as an inducement to increased efficiency on the part of Andean manufacturers.

The ANCOM Commission is to set the rates of the final common external tariff by the end of December 1978. By December 31, 1983, Venezuela, Peru, and Colombia must have brought all their duties into line with that final common tariff; Bolivia and Ecuador have until 1988 to reach this goal.[67] It should be noted that neither the minimum nor the final common external tariffs apply to products reserved for the Sectorial Programs, since goods under these programs will be governed by their own special tariff arrangements.[68]

63. *Id.* art. 64.

64. Decree 484 of Oct. 8, 1974, [1974] *Gaceta Legal* No. 379, at 57 (Ven.); Ven. Decree 339 (1974), *Gac. Of.* 1,676 Ex. (Aug. 30, 1974); Accession Agreement, *supra* note 25, Annex B, art. 8.

65. Cartagena Agreement, *supra* note 7, art. 67.

66. *Ancom Actions on Outer Tariff Could Aid Firms in the Region*, 1975 BUS. LATIN AMERICA 132.

67. Lima Protocol, *supra* note 26, art. 2.

68. Cartagena Agreement, *supra* note 7, arts. 34(f), 46, 65(a).

As indicated before, ANCOM was meshed into LAFTA so that all obligations incurred under the LAFTA Treaty still apply to the ANCOM nations. Thus, the question arises, how does the ANCOM common external tariff affect imports from the LAFTA nations which are not members of ANCOM?

Generally, products from LAFTA nations entering the ANCOM region will be subject to the ANCOM common external tariff, with two major exceptions. First, as already explained, all goods placed on the LAFTA Common List will circulate duty free within the ANCOM region if they originate from *any* LAFTA nation.[69]

However, the LAFTA Treaty provided, in addition to the Common List, a second technique for reducing internal duties among its members. Under article 5 of the LAFTA Convention, each member was obligated to enter into bilateral negotiations with other member states in which they agreed to reduce duties on certain items. For example, Venezuela might have negotiated with Brazil to lower the duty on Brazilian widget *X* entering Venezuela from 50% to 30%. Once such bilateral agreement is concluded, under the most favored nations clause of the LAFTA Agreement,[70] Venezuela is required to extend that most favored nations rate of 30% on widget *X's* from every other LAFTA nation. Each LAFTA nation was obligated to reduce its total tariff structure by a weighted average of 8% per year[71] through these National Schedule negotiations. Unable to reach this 8% goal, the LAFTA nations in the Protocol of Caracas reduced this obligation from 8% annually to 2.9% yearly.[72] As of 1964, more than 8,000 bilateral concessions[73] had been made. Few additional concessions have been concluded. Under the Cartagena Agreement, an ANCOM nation must continue to grant the lower duties conceded under a National Schedules negotiation to all LAFTA members.[74]

Suppose, as in the above hypothetical, Venezuela did

69. Cartagena Agreement, *supra* note 7, art. 49.

70. Montevideo Treaty, *supra* note 29, art. 18.

71. *Id.* art. 5.

72. Protocol of Caracas Modifying the Treaty of Montevideo (Dec. 11, 1969), art. 6; [1970] *Gaceta Legal* No. 288, at 5 (Ven.). Note that Bolivia and Ecuador are exempted from the strict application of these rules.

73. Note, *supra* note 31, at 151.

74. Cartagena Agreement, *supra* note 7, art. 114.

agree with Brazil to reduce its duty on widget *X* under a LAFTA National Schedules negotiation from 50% to 30%. ANCOM now sets the minimum common external tariff on widget *X's* at 75% and the final common external tariff at 85%. Widget *X's* from Brazil, Mexico, and all other LAFTA nations outside ANCOM will still enter Venezuela at 30%. On entry into Peru, Colombia, Ecuador, or Bolivia, widget *X's* from LAFTA nations outside ANCOM will have to pay the ANCOM common external tariff rate (75% and later 85%). In other words, Venezuela's duty of 30% will be an exception to the general applicability of the ANCOM common external tariff.

In contrast, assume Venezuela had a duty rate of 80% on widget *Y*. ANCOM sets a minimum common external tariff of 110% on widget *Y*. Venezuela will have to raise her duty on widget *Y* from LAFTA nations outside ANCOM because the prohibition in the LAFTA Agreement against increasing tariffs has been interpreted to apply only to items on which a LAFTA concession has been made.[75] Since Venezuela's duty of 80% on widget *Y* was not the result of a LAFTA concession, Venezuela would have to bring the tariff on this item up to the ANCOM common external tariff level of 110%.

In all future trade negotiations with LAFTA and with other world trade organizations, such as GATT, ANCOM must negotiate as a unit.[76] Thus, for example, Venezuela may no longer on its own enter into tariff agreements with any outside countries.

C. *The Sectorial Programs*

Had the members of ANCOM simply created a customs union without more, new investments would have tended to flow into the areas with the most highly developed infrastructure and the most sophisticated commercial foundation. Thus, development throughout the region would have been uneven, with the wealthier nations attracting increasing amounts of investment, while the poorer nations lagged progressively further behind in new capital formation. This vicious circle could have prevented Bolivia and Ecuador from ever reaching the takeoff point in the development process. Thus, the framers of

75. Ereli, *The Andean Common Market*, 8 HOUS. L. REV. 487, 494 (1971).
76. Cartagena Agreement, *supra* note 7, art. 26(e).

the Cartagena Agreement had to build in certain compensatory mechanisms to ensure a more balanced development within the region.

One technique, already discussed in Part II-A and II-B, was to grant Bolivia and Ecuador longer time periods in which to reduce their internal and external tariffs to the prescribed levels. Another was the establishment of the Andean Development Corporation, capitalized at $25 million. Authorized to provide financial and technical assistance, this organization is charged with fostering "an equitable distribution of investment in the region."[77]

Moreover, the potential gain from integration of a number of small markets derives from the more rational allocation of new investment on a multinational regional basis. Consequently, the scale of new industries may be closer to optimal, thereby reducing costs below what they would be in small national markets protected by tariffs.[78] Duplicate production of an item by different small manufacturers on a local level may be viewed as inefficient. To maximize the gains from the improved allocation of new investment, the ANCOM nations have resorted to regional economic planning.

Finally, the planners of an integrated multinational economy must take steps to curb the natural tendency of their individual member nations to compete with each other for new industries through offering more attractive investment and tax incentives. To restrict this particular form of competition, the Cartegena Agreement provided that the member states should harmonize their laws on industrial incentives.[79] Although the countries in ANCOM have not yet accomplished this objective, they did recently agree to refrain from establishing any foreign investment incentives more favorable than those currently existing.[80] In addition, ANCOM has approved Decision 40 on the Avoidance of Double Taxation.[81]

77. Agreement Establishing the Andean Development Corporation, *signed* Feb. 7, 1968, arts. 3,4,5, *reprinted in* 8 INT'L LEG. MAT'LS 940 (1969).

78. WALTER & VITZTHUM, *supra* note 1, at 12 *et seq.*

79. Cartagena Agreement, *supra* note 7, art. 28, para. 2.

80. Temporary Provisions promulgated as Decision 103 and modified by Decision 109, *amending* Decision 24 of the Commission of the Cartegna Agreement, as amended (Andean Foreign Investment Code) (Nov. 30, 1976), *reprinted in* 16 INT'L LEGAL MAT'LS 138, 155 (1977).

81. As cited in Furnish & Atkin, *The Andean Group's Program for Industrial*

Nonetheless, the Sectorial Program for Industrial Development is the most important mechanism established by ANCOM to achieve a more equitable distribution of new investment and to ensure "rational specialization of production."[82] Under the Sectorial Programs, production of various goods is to be assigned either on an exclusive or a shared basis to a particular nation or nations, hereinafter referred to as the "favored" nation(s). Such assignments do not technically create a monopoly since companies in nonfavored countries are not prohibited from manufacturing the same item. However, a preferential tariff structure is temporarily established to benefit the favored nation(s) and certain applicable legal provisions may limit or discourage the production of the same article in the nonfavored nation(s).

In constructing a Sectorial Program, the ANCOM Commission deals with an entire industrial segment, determines what products are to be included therein,[83] and assigns each of these items to one or more favored nation(s). Special internal duty structures and common external tariffs[84] are created for every product in a particular Sectorial Program.

To date, two Sectorial Programs have been approved: (1) the metalworking sector and (2) the petrochemical sector. An analysis of the legal framework of these programs will reveal how this multinational planning tool is intended to achieve the desired allocation of industries.

1. *The Metalworking Sector*

In August 1972, the ANCOM Commission, by Decision 57, adopted its first Sectorial Program for the metalworking industry. Initially, 128 items in the NABANDINA classification list had been reserved for this sector.[85] Ultimately, however, only seventy-two units were assigned under the program. The remaining items originally reserved for this Sectorial Program but not actually assigned now fall into a different category, and

Development of the Metalworking Sector: Integration with Due and Deliberate SPID, 7 LAW. AM. 29, 36 & n.55 (1975).

82. Agreement Establishing the Andean Development Corporation, *signed* Feb. 7, 1968, art. 3, *reprinted in* 8 INT'L LEGAL MAT'LS 940 (1969).

83. Cartegena Agreement, *supra* note 7, arts. 47, 50.

84. *Id.* arts. 34(f), 45(b), 49.

85. Furnish & Atkin, *supra* note 81, at 42.

internal duties on these must be gradually reduced to zero by all members as set forth in Part II-A-2.

Forty-five units were assigned on an exclusive basis to individual nations. Bolivia and Eduador received twenty of these exclusive assignments. The remaining units were assigned on a shared basis to two or three nations.[86] Examples of products included within these metalworking sector assignments include drill bits, agricultural machines, mining equipment, generators, and clocks.[87]

Once a nation has received an assignment, it must submit to the ANCOM Board a feasibility study on the production of the item within a stipulated time period—two years for Colombia and Peru,[88] and three years for Bolivia and Ecuador.[89] Production of the assigned items must begin within three years after delivery of the feasibility study. In exceptional cases the Board may extend this production startup deadline, but by no more than one additional year for Colombia and Peru.[90]

If the feasibility study shows that it is not practical to manufacture an item, or if the favored nation(s) fails to meet the production startup deadline, then the item shifts out of the Sectorial Program and internal duties on it must be reduced as described in Part II-A-2 above.[91]

Within thirty days after Decision 57 was approved, all nontariff barriers (*e.g.*, quotas) were to have been removed on the assigned products.[92] Also on that date a discriminatory tariff structure went into effect, thereby creating a preferential margin for the benefit of the favored nations. For items from outside ANCOM, all members have to apply the common external tariff rates for assigned products, starting on December 31st of the year preceding the scheduled production startup date.[93]

The operation of this preferential tariff structure can best

86. *Id.*
87. *Id.* at 43.
88. Decision 57 of Aug. 23, 1972, Annex A, arts. 4, 5.
89. *Id.* art. 6.
90. *Id.*
91. *Id.* art. 8.
92. *Id.* art. 14.
93. *Id.* art. 17. A member state may petition the Board for temporary relief from the common external tariff when necessary to relieve a "deficiency in supplies." Cartagena Agreement, *supra* note 7, art. 67.

be illustrated by a hypothetical case. (Venezuela has been omitted from this example because she was not a member of ANCOM when Decision 57 was approved; but for future analytical purposes Venezuela should be classified with Colombia and Peru in thinking about Sectorial Programs.)

Assume that widget *X* was exclusively assigned to Bolivia, that the common external tariff was set at 75%, and that Bolivia has begun producing the item. Assume further that prior to Decision 57, the duties on widget *X* were as follows:

	Pre-Existing Rate
Bolivia	95%
Colombia	85%
Peru	25%
Ecuador	65%

Now let us explore what happens under Decision 57 when widget *X* enters an ANCOM nation.

a. *From Bolivia to Colombia or Peru?* The rate would be zero, because the nonfavored nations must immediately eliminate all duties on assigned products from the favored nations.[94]

b. *From Bolivia to Ecuador?* Again the rate would be zero. Although for many purposes Ecuador is accorded special treatment as a poorer nation, Ecuador too must eliminate her duty on assigned products from favored nations.[95]

c. *Colombian Widget X's entering Peru?* A duty of 25% would be imposed on the Colombian widget *X's*. Member nations are to continue applying their existing duty rates on assigned products from nonfavored nations.[96] However, after 1980, such duties must be eliminated on these products even if they are manufactured in a nonfavored nation.[97]

d. *Peruvian Widget X's entering Colombia?* The duty would be 75%. The rule would have been the same as in "c" above (*i.e.* 85%), except that Decision 57 prohibits any member from applying a rate higher than the common external tariff,

94. *Id.* art. 10.
95. *Id.*
96. *Id.; Furnish & Atkin, *supra* note 81, at 45.
97. Decision 57 of Aug. 23, 1972, Annex A, art. 10.

i.e. 75%.[98] Again this charge will have to be eliminated after 1980.[99]

e. *Colombian Widget X's entering Ecuador?* The duty would be 65%. Ecuador may impose her existing tariff against assigned items from nonfavored nations, but she too will have to eliminate it after 1980.[100]

f. *Colombian or Peruvian Widget X's entering Bolivia?* The duty would be 75% since no member can charge in excess of the common external tariff rate.[101] As a favored nation for this product, Bolivia will be able to apply this rate until 1985, after which she may impose no duty on this item if it is produced in any ANCOM nation.[102] The same result would follow if the assignment had been made to Ecuador. However, if the assignment had been made to Colombia or Peru, they would have to cease applying duties to widget *X's* from ANCOM nations by 1981.[103]

g. *Widget X's from the United States to any ANCOM Country?* Widget *X's* are subject to the common external tariff of 75% and that rate will continue to apply to these widgets from outside the ANCOM region indefinitely.

h. *Widget X's from Brazil into any ANCOM nation?* Normally, they would be subject to the 75% common external tariff. However, as explained in Part II-B above, if any ANCOM member has made a LAFTA concession on widget *X*, that country must continue offering that lower duty rate to all members of LAFTA, including the six LAFTA nations outside of ANCOM.

Assuming the same preexisting duty rates postulated above, what would be the situation if the assignment had been made to both Bolivia and Ecuador? As indicated *supra*, Ecuadorean and Bolivian widget *X's* would enter Peru and Colombia duty free. Likewise, widget *X's* from nonfavored ANCOM nations would pay 25% on entry into Peru and 75% on entry into Colombia. After 1980, they would be duty free.

98. *Id.* art. 13.
99. *Id.* art. 10.
100. *Id.*
101. *Id.* art. 13.
102. *Id.* art. 11.
103. *Id.*

What about widget *X's* entering Bolivia or Ecuador? Decision 57 requires that where a shared allocation has been made, the lowest preexisting duty rate among the favored nations be the rate applied by all those favored nations to that item.[104] Since Ecuador's duty was 65% and Bolivia's 95%, both Ecuador and Bolivia may now impose only a 65% duty on widget *X's* from any ANCOM nation. Moreover, three years after production has begun in any one of the favored nations, they too must eliminate duties on that item. Thus, if Ecuador began producing widget *X* in 1978, both Bolivia and Ecuador would have to reduce their duty for widget *X*'s from other ANCOM nations by 40% in 1979, by an additional 30% in 1980, and a final 30% in 1981.[105] By 1982, all widget *X's* from ANCOM countries would circulate throughout the region duty free.

It should be noted from the above analysis that if an item has been assigned exclusively to Colombia or to Peru, it will circulate throughout the region duty free after 1980, even if it is manufactured in a nonfavored nation. If widget *X* is assigned exclusively to Bolivia or Ecuador, then widget *X's* from the favored nation (Bolivia or Ecuador) will have to compete equally after 1980 with widget *X's* from nonfavored nations in ANCOM countries, except in the countries which received the assignment. The favored nation (Bolivia or Ecuador) may continue protecting its own infant industry in this widget *X* a few years longer by maintaining its own tariffs against widget *X's* from other ANCOM nations until 1985.

If widget *X* is assigned to two or more countries, widget *X* from those favored nations must compete equally in nonfavored nation markets with widget *X's* produced in nonfavored nations after 1980. The favored nations, however, may apply duties to protect their own industry against widget *X's* from nonfavored countries until three years after production of the widget has begun in one of the favored nations. Upon expiration of that three years, widget *X's* will circulate duty free through the entire region.

The above analysis shows that the Metalworking Sectorial Program should not be described as a "monopoly." Competing

104. *Id.* art. 12(a).
105. *Id.* art. 12(b).

firms in nonfavored nations may still produce the product. Within their home-nation market, they would be selling on an equal basis with companies from the favored nation(s), although economies of scale could theoretically give the favored-nation producer certain cost advantages. Moreover, the manufacturer in the nonfavored nation may even be able to sell the item in other ANCOM nations, if his efficiency is such that he can absorb the cost differential of the tariff from which the favored-nation competitor is relieved. Finally, all these discriminatory tariffs are scheduled to disappear within a few years.

Member countries are obligated to refrain from encouraging competing projects in nonfavored nations. They may not render assistance of a positive nature, such as government loans, tax benefits, or investment incentives, to new projects to produce such items.[106] (Preexisting obligations of a member government may still be respected.) Likewise, a nonfavored nation may not authorize new direct foreign investment to manufacture the assigned item.[107] Both the foregoing prohibitions will cease after 1982 for items assigned to Colombia or Peru and after 1987 for goods assigned to Bolivia or Ecuador.[108] An existing foreign owned producer of the item is free to continue producing it in nonfavored countries, and there is nothing in the law to prevent a locally owned company from starting up a new project to manufacture this item in a nonfavored nation.

Since Decision 57 was promulgated prior to Venezuela's joining ANCOM, considerable difficulty was encountered in meshing this country into that preexisting scheme. The Accession Treaty did provide that a revised Metalworking Sectorial Program would be developed to include Venezuela.[109] Meanwhile, Venezuela was relieved of any obligation to permit duty free entry of the assigned products from the favored nations.[110] Also during the interim period, Venezuela promised to refrain from encouraging production in its territory of the assigned items.[111]

106. *Id.* art. 24.
107. *Id.*
108. *Id.* art. 26.
109. Accession Agreement, *supra* note 25, art. 27.
110. *Id.* art. 29.
111. *Id.*

The withdrawal of Chile from ANCOM provided an opportunity to solve this problem. Products which had previously been assigned to Chile were reallocated to other ANCOM members and thirty of the reassigned items went to Venezuela. This included products such as harvesters, railroad equipment, and fuel pumps. The final draft of this revised Metalworking Sectorial Program was completed[112] at the end of 1977.

The most widely publicized dispute arising under the Metalworking Sectorial Program involves an investment by Dresser Industries in Cia. Andina de Tricones (CATSA), a Bolivian joint venture, to produce tricone drill bits. These bits had been exclusively assigned to Bolivia. However, after two years, CATSA found itself unable to export these bits to other ANCOM nations and was forced to shut down.

It has been alleged that this failure was due to other ANCOM members not honoring their obligations. However, an analysis of the applicable laws may lead to a different conclusion. First, the ANCOM common external tariff for tricone drill bits had been set at 55%, but some of the ANCOM nations had previously granted LAFTA concessions on tricone drill bits. Thus the 55% rate was not applied on the bits when they entered those countries. This permitted long established manufacturers in Brazil and Argentina to sell their bits in those ANCOM states more cheaply than the new Bolivian company.[113] Such result though merely represents compliance with the law, since the ANCOM nations are still bound by their LAFTA obligations.

In addition, new plants producing tricone drill bits were reportedly established in Venezuela and Peru.[114] Decision 57 does prohibit direct foreign investment in the nonfavored nations, but, as to local manufacturers, the government is only obligated to refrain from encouraging them. Hence, the facts as reported do not seem to provide any basis for a claim of illegality.

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112. *Ancom's Revisions of Metalworking Sectorial Are Upbeat Sign for Pact*, 1977 BUS. LATIN AMERICA 398.

113. *The Pullout of Dresser from Bolivian Operation Shows Problems of Ancom*, 1977 BUS. LATIN AMERICA 57.

114. *Id.*

2. *The Petrochemical Sectorial Program*

On August 29, 1975, ANCOM approved Decision 91 on the Petrochemical Sectorial Program,[115] covering more than 150 products.[116] Some fifty were assigned to member states, most on a shared basis.[117] Of these Venezuela received twenty-four items, including carbon black, chlorofluoromethanes, and PVC.[118] On an exclusive basis, she was allocated methanol, epoxy resins, and toluene diisocynates.[119]

The internal tariff structure of the Petrochemical Sectorial Program parallels that of the Metalworking Sectorial Program, except for the following modifications. Against assigned products from nonfavored nations, the members will apply the common external tariff rate instead of their individual preexisting rates.[120] Likewise, the favored nations will apply the common external tariff rate to protect their own assigned products until 1985 in the case of Bolivia and Ecuador and until 1980 for the other three countries.[121] Of course, any lower rates established under LAFTA concessions would still be applicable.

Where an assignment is shared by more than one nation, those favored countries will apply to the assigned items from nonfavored nations the rates stipulated in Annex IV of Decision 91.[122] On some items, such rates are higher for Bolivia and Ecuador than for the remaining members. The protective tariffs maintained by the favored nations must be removed after 1985 in Bolivia and Ecuador and after 1980 in the remaining states.[123]

The products previously reserved for this sector but not

115. *Reprinted in* [1976] *Gaceta Legal* No. 428, at 2 (Ven.). *See also* Molins, *Andean Common Market, The Sectorial Program for the Development of the Petrochemical Industry,* in BUSINESS AND LEGAL ASPECTS OF LATIN AMERICAN TRADE AND INVESTMENT 85 (D. Shea & F. Swacker eds. 1976).

116. *Id.* Annex I, at 6.

117. *Ancom Approves Petrochemical Program; Auto Allocations Set,* 1975 BUS. LATIN AMERICA 297.

118. Decision 91 of August 29, 1975, Annex II, *reprinted in* [1976] *Gaceta Legal* No. 428, at 2 (Ven.).

119. *MNCs, Ancom Programs Are Slotted Into Venezuela's Auto and Petrochemical Plans,* 1975 BUS. LATIN AMERICA 390.

120. Decision 91, *supra* note 118, art. 12.

121. *Id.* art. 13.

122. *Id.* art. 14(a).

123. *Id.* art. 14(b).

actually assigned under Decision 91, were divided into two categories. The first group, consisting mostly of goods not produced in the region become duty free through the common market almost immediately.[124] The second group of products will eventually be duty free throughout the market. Those entering into Bolivia or Ecuador from the other ANCOM nations will be subjected to duties which will progressively decline until they reach zero after 1985.[125] Those items originating in Bolivia or Ecuador will enter the other three nations duty free today.[126] As to such products manufactured in Colombia, Peru, or Venezuela, duties may be applied on the entry of such items into any one of these three nations; such tariffs must be progressively reduced to zero by the end of 1980.[127]

The Petrochemical Sectorial law also prohibits nonfavored nations from encouraging new investment in assigned items[128] and forbids approval by nonfavored nations of new direct foreign investment in such products.[129] In addition, this Decision prohibits contracts for technology transfers from foreign companies to produce the assigned items in nonfavored nations.[130]

One of the prime goals of Venezuela has been the creation of a major petrochemical export industry by the mid-1980s. In 1975, the Venezuelan National Petrochemical Council was established to undertake the economic planning necessary to achieve this goal.[131] Consequently, it was vital to this nation that the allocations made under the Sectorial Program not deprive her of the possibility of building a strong petrochemical industry oriented toward exports to the outside world. Hence she bargained for and obtained a crucial exception to the general rules of the Sectorial Program.

That exception provides that the prohibition against nonfavored nations stimulating investments in the assigned items

124. *Id.* art. 15(a).
125. *Id.* art. 15(b)(iii).
126. *Id.* art. 15(b)(ii).
127. *Id.* art. 15(b)(i).
128. *Id.* art. 26.
129. *Id.* art. 27.
130. *Id.*
131. Decree 707 of Jan. 14, 1975, [1975] *Gaceta Legal* No. 387, at 2 (Ven.).

will not apply, if all the production of such goods is exported outside the common market. Likewise, the prohibition against foreign direct investment and foreign technology transfer contracts will be inapplicable in this situation.[132] Some additional conditions must be satisfied to avoid those prohibitions. All the raw materials for such excepted projects must come from within the ANCOM region, unless there are insufficient supplies therein.[133] Also, the authorization of an excepted project must not have a prejudicial effect on other ANCOM nations, especially the country to whom the product has been assigned.[134] Finally, the interested government must conclude a contract with the excepted firm ensuring compliance with the foregoing conditions.[135] In the event of shortages of the item concerned, the ANCOM Board may authorize the sale of such products from the excepted company inside the common market, subject to a duty rate equivalent to the common external tariff. If the product is sold inside the nation where the excepted company is located, such country shall impose an internal charge equivalent to the common external tariff. The Board may authorize a reduction in or suspension of these internal duties or charges.[136]

Decision 91 also provides that where an assignment is shared with either Bolivia or Ecuador, an agreement must be concluded with or steps taken by the other favored nation to "ensure equitable participation" in the market by Bolivia or Ecuador.[137] Pursuant to this provision, Venezuela, which shares an assignment of high density polyethylenes with Bolivia,[138] agreed to yield this market to Bolivia until 1991. As soon as Bolivia begins producing this chemical, Venezuela will direct all of its sales thereof to nations outside ANCOM.[139]

3. *Other Sectorial Programs*

By the end of 1977, ANCOM had negotiated the terms of an agreement on the Automotive Sector. Under this proposal,

132. Decision 91, *supra* note 118, art. 41(b).
133. *Id.* art. 41(c).
134. *Id.* art. 41(a).
135. *Id.* art. 41(d).
136. *Id.* art. 44.
137. *Id.* art. 36.
138. *Id.*, Annex II.
139. *Ancom Approves Petrochemical Program; Auto Allocations Set*, 1975 BUS. LATIN AMERICA 297.

Bolivia and Ecuador would have duty free access to the markets of the other three nations by 1983 for these products. Such items will be traded duty free between Venezuela, Colombia, and Peru by 1983. Bolivia and Ecuador would have to institute progressive duty cuts on these products beginning in 1983 to achieve a zero rate by 1989.

To qualify for the preferential tariff treatment, strict local content rules will have to be satisfied. At present, the local content of the three producing nations averages about 35%. Under the proposed program, Venezuela would have to reach a local content level of 75% by 1980.[140]

A key element of this program is the emphasis placed on coproduction of automobiles rather than on individual allocations of items. For example, Ecuador and Venezuela have made an agreement under which Ecuador will produce components for cars manufactured in Venezuela.[141]

The common external tariffs have been agreed upon. They average around 50% for component parts and range from 40% to 155% for chassis and finished vehicles. These common external tariffs are provisional and are to be reviewed in two years.[142]

Negotiations are currently pending on a sectorial program for the fertilizer industry. The planners hope to achieve an internal duty structure which will promote fertilizer production on a region-wide basis.[143]

D. *Control of Foreign Investment*

One of the most important legislative acts of the Andean Common Market was the promulgation of Decision 24 in 1970,[144] hereinafter referred to as the Andean Foreign Invest-

140. *Ancom Sets Final Terms on Sectorial Program for Automotive Industry*, 1977 BUS. LATIN AMERICA 327; Decree 921 of May 16, 1975, [1975] *Gaceta Legal* No. 394, at 27 (Ven.). *See also* Regulations for the Development of the Automotive Industry (Ven. Ministry of Development, Aug. 28, 1975), [1975] *Gaceta Legal* No. 402, at 20 (Ven.).

141. *Ancom Automotive Program Is Ready for Signing With Something for All*, 1977 BUS. LATIN AMERICA 286.

142. Note 140 *supra*.

143. *Recent Fertilizer Seminar May Serve To Bolster Ancom's Sectorial Program*, 1977 BUS. LATIN AMERICA 271.

144. Decision 24 of the Commission of the Cartagena Agreement, Common Re-

ment Code. This law governs direct foreign investment, foreign private loans, and technology transfers from abroad. The Code establishes a minimum level of restrictions which each member state must impose on these foreign inputs; however, the individual nations remain free to impose other limitations in addition to those stipulated in the Code.

On joining the common market, Venezuela had little difficulty in accepting the philosophy underlying this Code. As early as 1971—two years before she joined ANCOM—the Venezuelan government had proposed national legislation which incorporated many of the basic concepts of the Code.[145] As part of her adhesion to ANCOM, she adopted the Code and shortly thereafter enacted Decree 62[146] and Decree 63[147] to implement the Code. Recently, she replaced Decree 62 with Decree 2,031[148] and Decree 63 with Decree 2,442[149] to bring her domestic law into conformity with the 1976 amendments to the Andean Foreign Investment Code.[150]

Both the Code and Venezuela's internal laws require all new and existing foreign investments to be registered with and approved by the government.[151] Loans from foreign sources to companies in Venezuela must also receive prior governmental authorization.[152] All contracts to import technology, as well as those to use patents or trademarks, must likewise be approved and registered.[153] Failure to comply with these registration requirements will result in the loss of the right to remit earnings[154]

gime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, as amended (1976), *reprinted in* 16 INT'L LEGAL MAT'LS 138 (1977) [hereinafter cited as AFIC]. *See also* note 25 *supra*.

145. *Venezuela's Proposed Investment Law Shows Influence of Ancom's Regulations*, 1972 BUS. LATIN AMERICA 71.

146. Apr. 28, 1974, *reprinted in* 13 INT'L LEGAL MAT'LS 1220 (1974).

147. Apr. 28, 1974, *reprinted in* 13 INT'L LEGAL MAT'LS 1221 (1974).

148. Feb. 8, 1977, *reprinted in* 16 INT'L LEGAL MAT'LS 1531 (1977) and *in Gac. Of.* 31,171 (Feb. 9, 1977) (Ven.).

149. Nov. 8, 1977, *Gac. Of.* 2,100 Ex. (Nov. 15, 1977) (Ven.).

150. *See* Decision 103 of Oct. 30, 1976 and Decision 109 of Nov. 30, 1976, integrated into Decision 24 *reprinted in* 16 INT'L LEGAL MAT'LS 138 (1977).

151. AFIC, *supra* note 144, arts. 2, 5; Ven. Decree 2442 *supra* note 149, arts. 13, 20.

152. AFIC, *supra* note 144, art. 14; Ven. Decree 2442, *supra* note 149., art. 55.

153. AFIC, *supra* note 144, art. 18; Ven. Decree 2442, *supra* note 149, art. 63.

154. AFIC, *supra* note 144, art. 37; Ven. Decree 2442, *supra* note 149, art. 32.

or capital,[155] to make payments on principal or interest,[156] as well as to transfer royalties abroad.[157]

The agency in Venezuela charged with supervising these foreign inputs is SIEX (the Foreign Investment Agency), responsible to the Ministry of Finance.[158] SIEX must decide whether to approve a direct foreign investment within 180 days after filing of the completed application.[159]

Inspired by Professor Hirschman's thesis that foreign companies should gradually begin divesting themselves of equity investments in Latin America,[160] the decisionmakers of ANCOM built into the Andean Foreign Investment Code provisions to compel periodic sales of foreign held shares to nationals within the member states. Since an extensive literature already exists on these fadeout provisions,[161] this article will focus only on Venezuela's laws implementing the Code and the recent amendments thereto.

1. *The Divestment Provisions*

All foreign enterprises[162] making new investments in Vene-

155. AFIC, *supra* note 144, art. 8; Ven. Decree 2442, *supra* note 149, arts. 41, 42.

156. AFIC, *supra* note 144, art. 16; Ven. Decree 2442, *supra* note 149, art. 62.

157. AFIC, *supra* note 144, art. 21; Ven. Decree 2442, *supra* note 149, art. 64, sole para.

158. Ven. Decree 2442, *supra* note 149, arts. 3-12.

159. *Id.* art. 26. For appeal from an adverse decision by SIEX, *see id.* arts. 74-77.

160. A. HIRSCHMAN, HOW TO DIVEST IN LATIN AMERICA AND WHY (1969).

161. Abbott, *Bargaining Power and Strategy in the Foreign Investment Process: A Current Andean Code Analysis*, 3 SYR. J. INT'L L. & COM. 319 (1975); Danino, *The Andean Code After Five Years*, 8 LAW. AM. 635 (1976); Fouts, *The Andean Foreign Investment Code*, 10 TEX. INT'L L.J. 537 (1975); Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763 (1972); Schill, *The Mexican and Andean Investment Codes: An Overview and Comparison*, 6 LAW & POL'Y INT'L BUS. 437 (1974); Schliesser (ed.), *Recent Developments in Latin-American Foreign Investment Laws*, 6 INT'L LAW. 64 (1972); Valdez, *The Andean Foreign Investment Code: An Analysis*, 7 J. INT'L L. & ECON. 1 (1972); Comment, *Chile's Rejection of the Andean Common Market Regulation of Foreign Investment*, 16 COLUM. J. TRANSNAT'L L. 138 (1977); Note, *Andean Pact Constitutionality: A Final Word from Colombia*, 7 LAW. AM. 614 (1975); Note, *The Multinational Enterprise in the Context of Latin American Economic Integration: The Andean Agreement Model*, 11 SAN DIEGO L. REV. 245 (1973); Note, *Political Components and Practical Effects of the Andean Foreign Investment Code*, 27 STAN. L. REV. 1597 (1975).

162. Foreign investment is defined in article 1 of the AFIC, *supra* note 144, and articles 2(a) and (b) of Decree 2442, *supra* note 149.

zuela after December 31, 1974, must agree to transform themselves into "mixed" or "national" companies within a time period not to exceed fifteen years.[163] The expansion of an existing investment is treated as "new" for this purpose.[164]

A mixed enterprise is one in which foreign investors hold less than 50% of the stock.[165] A firm in which foreigners own less than 20% of the shares is a "national" company.[166] A citizen of any ANCOM member state may be treated as a national when computing these percentages.[167] For example, a Peruvian shareholder in a Venezuelan company would be considered "Venezuelan." However, where required by the law of his home nation, a subregional investor must receive the consent of his own government to make such an investment.[168]

Under these transformation agreements, at least 15% of the shares must be held by Venezuelans (or other subregional investors) at the time production begins. National investors must own 30% of the stock by the time that one-third of the stipulated time period has passed; upon expiration of two-thirds of this time period, 45% of the stock must be in the hands of local persons. At the end of not more than fifteen years, at least 51% of the total shares must be owned by Venezuelans or nationals from other ANCOM states.[169] Where shares are sold publicly on the stock market, foreign investors may sell their shares to other foreign investors, but such transfers must be registered with SIEX.[170]

Subject to the exceptions described below, foreign owned companies existing in Venezuela prior to January 1, 1974, do not have to satisfy these divestment requirements. However, if such preexisting companies wish to receive the benefits of the

163. AFIC, *supra* note 144, art. 30; Decree 2442, *supra* note 149, art. 51.

164. AFIC *supra* note 144, art. 1; Decree 2442, *supra* note 149, arts. 2(a), (b).

165. *Id.*

166. *Id.*

167. AFIC, *supra* note 144, art. 1; Decree 2442, *supra* note 149, arts. 2(c), 27.

168. AFIC, *supra* note 144, art. 1; Decree 2442, *supra* note 149, art. 28.

169. AFIC, *supra* note 144, art. 30; Decree 2442, *supra* note 149, art. 51; *see* Ley Sobre Transformaciones de Empresas Extranjeras (May 21, 1975), *Gac. Of.* 30774 (Aug. 21, 1975) *as printed in* G. PICO MANTILLA, *supra* note 25, at 349, *translated and reprinted in* 14 INT'L LEGAL MAT'LS 1489 (1975).

170. Decree 2442, *supra* note 149, art. 25.

reduced internal tariffs upon shipping their products to other ANCOM nations, they too must agree to transform themselves into national or mixed companies by 1989.[171]

The Andean Foreign Investment Code provides for some major exceptions to these divestment requirements. Article 34 of the Code exempts foreign enterprises which export more than 80% of their production outside the ANCOM region; such firms, however, would not qualify for the reduced internal tariffs when they sell to other ANCOM nations. This Article also exempts investments in the tourism sector from the fadeout provisions. Article 36 of the Code stipulates that a company shall be considered as "mixed," if the state owns a portion of its shares, even if that percentage be less than 51%, so long as the state has a "determining capacity" in the decisions of the enterprise. Finally, the recent ANCOM Decision 124 provides that investments by public international lending institutions (*e.g.*, the World Bank) or by foreign government development assistance programs shall be treated as "neutral" capital and excluded in computing the percentages required to qualify as a "mixed" or "national" company.[172]

It is not clear whether the provisions of Articles 34 and 36 of the Andean Foreign Investment Code and ANCOM Decision 124 are effective law in Venezuela. Neither Venezuelan Decree 2,031 nor Decree 2,442 mentions such exceptions. It may be that the Venezuelan decisionmakers concluded their economy was strong enough to attract foreign investments without these special exemptions. On the other hand, one might argue that these exceptions are incorporated by reference into this nation's domestic law since the congressional decree approving Venezuela's accession to ANCOM specifically included Decision 24, the Andean Foreign Investment Code. Moreover, article 1 of Venezuela's Decree No. 2,442 states that Decision 24 and the recent amendment thereto, Decision 103, shall govern foreign investments.

The Andean Foreign Investment Code also provides that the fadeout provisions do not have to be applied to the basic

171. AFIC, *supra* note 144, art. 28; Decree 2442, *supra* note 149, art. 49.
172. Art. 2(c); *See* AFIC, *supra* note 144, at 155 (temporary provisions).

products sector for a period of ten years.[173] The term "basic products" refers primarily to oil and gas, minerals, and pipelines. Since Venezuela has already nationalized her petroleum and iron ore industries,[174] that provision of the Code probably has little significance for this nation.

Certain sectors of the economy are reserved for "national" companies only. Included in this category are all public services,[175] a term defined in Venezuelan legislation to include telephones, mail, telecommunications, drinking water, electricity, sewage works, sanitary services, street cleaning, and garbage collection, as well as security services.[176]

New investments in insurance and commercial banking are limited to national companies. Existing banks in Venezuela must convert to national companies or lose the right to accept local deposits[177] or to increase their capital.[178] No branches of foreign banks may be established in Venezuela after 1975.[179] Insurance companies may not operate in this nation if more than 20% of their shares are held by foreigners;[180] existing insurance companies were given two years in which to convert into national companies.[181]

New investments are also restricted to national companies for the following industries: domestic transportation services, advertising, television, and newspapers and magazines in

173. AFIC, *supra* note 144, art. 40.

174. Ley Organica Que Reserva al Estado la Industria and el Comercio de los Hidrocarboros (August 29, 1975), [1975] *Gaceta Legal* No. 405, at 5 (Ven.); Decree 580, Por El Cual Se Reserva al Estado La Industria De La Explotacion De Mineral De Hierro (November 26, 1974), [1974] *Gaceta Legal* No. 384, at 5 (Ven.).

175. AFIC, *supra* note 144, art. 41; Ven. Decree 2031, *supra* note 148, art. 1(a).

176. Decree 2031, *supra* note 148, art. 1(a).

177. AFIC, *supra* note 144, art. 42; Ley General de Bancos y Otros Instituciones de Credito, Decree 869 of Apr. 22, 1975, arts. 95, 98, [1975] *Gaceta Legal* No. 394, at 3 (Ven.); Ven. Decree 2031, *supra* note 148, art. 4.

178. Ley General de Bancos y Otros Instituciones de Credito, Decree 869 of Apr. 22, 1975, art. 97, [1975] *Gaceta Legal* No. 394, at 3 (Ven.).

179. *Id.* art. 96.

180. AFIC, *supra* note 144, art. 42, and Ley de Empresas de Seguros y Reaseguros, Decree 870 of Apr. 22, 1975, art. 25(b), [1975] *Gaceta Legal* No. 400, at 3 (Ven.).

181. *Id.* art. 192(a). Companies affected by this law were Pan American Life

Spanish.[182] Existing foreign enterprises operating in these fields were to have been transformed into national enterprises by December 30, 1977.[183]

The Andean Foreign Investment Code, however, does permit a member state to waive the requirements that certain economic sectors be reserved for national companies,[184] but, unless the firms operating in these fields qualify as either "mixed" or "national," they will be denied the privilege of selling to other ANCOM nations at the reduced internal duty rates.[185] Venezuelan law authorizes SIEX to approve mergers or sales which will result in a mixed company, even in those sectors which are reserved for national companies.[186] This exception allows SIEX to aid in reducing the financial loss which would otherwise be incurred by foreign enterprises forced to sell the bulk of their shares to local investors within a very short time period, *e.g.*, by the end of 1977 for advertising firms.

Venezuela also reserves professional consulting for "national" firms;[187] this restriction is not required by the Andean Foreign Investment Code. Mixed companies in Venezuela, nevertheless, may engage in professional consulting if SIEX finds their work is "contributing technology" for the development of the country.[188]

Finally, the Andean Code reserves domestic marketing services for national companies,[189] but allows its member states to make exceptions to this rule in special circumstances.[190] Venezuelan law stipulated that firms engaged in marketing goods shall convert into national firms by December 30, 1977.[191] To accomplish this, such companies could either sell existing

Insurance Co., American International Underwriter's Corp., AFIA World Ins., and Confederated Life of Canada. IL&T, Venezuela § 3.03, at 6-7 (July 1977).

182. AFIC, *supra* note 144, art. 43; Decree 2031, *supra* note 148, art. 1(b).

183. AFIC, *supra* note 144, art. 43; Decree 2031, *supra* note 148, arts. 2, 3.

184. AFIC, *supra* note 144, art. 44.

185. *Id.*

186. Decree 2442, *supra* note 149, art. 52.

187. Decree 2031, *supra* note 148, art. 1(d).

188. *Id.*

189. AFIC, *supra* note 144, art. 43.

190. *Id.* art. 44.

191. Decree 62, *supra* note 146, art. 2; Decree 2031, *supra* note 148, art. 2.

shares or increase their capital. Many foreign firms encountered difficulty finding buyers for their shares. Other foreign companies found purchasers, but among the traditional industrial groups. The government refused to approve those sales because it wanted stock ownership to be more widely distributed among smaller investors.[192] Thus, the new law provides that SIEX may extend the 1977 deadline for an additional year where justified by special circumstances.[193]

The new Venezuelan statute on marketing refers only to "goods."[194] Consequently, firms marketing services, such as leasing IBM machines or renting AVIS autos, are not obligated to convert to national companies.[195]

There are several other important exceptions to the transformation requirements for marketing concerns. First, companies which market goods they themselves have manufactured within Venezuela are exempted from this obligation.[196] A company will qualify for this classification if the locally manufactured articles account for 51% of its total activities and if the value added to the product within Venezuela amounts to at least 30%. These percentages must be proportionately reflected in the firm's gross sales and its total income. Furthermore, other items marketed by these excepted companies must bear a relation to the articles made locally.[197] Marketing companies which before the end of 1977 have agreed with the government to begin such local production by February 8, 1980, will also be exempt from the transformation requirement.[198]

Another exception is made for existing concerns that market goods produced under subcontracts with local firms. The only requisite is that the excepted company provide, either directly or through an affiliate, real and effective technology to the local subcontractor. Such arrangements must be approved

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192. *New Venezuelan Decree Shows Changes in Attitude Toward Foreign Investors*, 1977 BUS. LATIN AMERICA 75, 79.

193. Decree 2031, *supra* note 148, art. 2.

194. *Id.* art. 1(c).

195. *Venezuelan Decree On Marketing Operation Is Being Clarified*, 1977 BUS. LATIN AMERICA 126, 127.

196. Decree 2031, *supra* note 148, art. 1(c).

197. *Id.* art. 1, par. 3.

198. *Id.* art. 1, par. 2.

by SIEX.[199] It has been reported that, upon expiration of the relevant technology agreement, SIEX will not compel the exempted firm to convert into a national company.[200]

A final exception is provided for firms importing capital equipment and consumer durables (as well as their accessory and complementary parts), providing that such goods are not produced in Venezuela and are not subject to import restrictions. To qualify for this exemption, the company must furnish inside the nation the services needed to use and to maintain these goods. Such firms are also obligated to train Venezuelan nationals to perform this work.[201]

It is not clear whether the above described excepted firms in the marketing field are required to convert into mixed companies. Decree 2,031 is silent on this question; however, the general provisions of Decree 2,442 may be interpreted to require their eventual transformation into mixed enterprises, at least for new investments and for existing companies that wish to sell to other ANCOM countries at the reduced internal duty rates.[202]

One final prohibition on foreign investors should be noted. Venezuela and the four remaining nations may not authorize direct foreign investment to produce goods which have been reserved for manufacture by Ecuador or Bolivia (see Part II-A-3 *supra*).[203]

Several administrative provisions had to be built into the laws, if the divestment requirements were to be effectively enforced. First, the Andean Foreign Investment Code stipulates that all bearer shares must be converted into shares registered in the name of the owner.[204] This mandate was implemented in Venezuela in 1975,[205] and no bearer shares may be issued in the future.[206] Next, the Venezuelan legislation compels all enter-

199. *Id.* art. 1, par. 4.

200. *Venezuelan Decree On Marketing Operations Is Being Clarified,* 1977 BUS. LATIN AMERICA 126.

201. Decree 2031, *supra* note 148, art. 1, para. 1.

202. Decree 2442, *supra* note 149, arts. 49, 51, 52.

203. AFIC, *supra* note 144, art. 46.

204. *Id.* art. 45.

205. SIEX, Aviso Oficial of Feb. 3, 1975, Acciones Nominativas, *reprinted in* G. PICO MANTILLO, *supra* note 25, at 335.

206. Decree 2442, *supra* note 149, art. 79.

prises with any foreign shareholders to obtain from SIEX certificates[207] which indicate the category in which the company falls—national, mixed, or foreign.[208] Finally, both the Andean Foreign Investment Code[209] and the Venezuelan law[210] provide for a system of certificates of origin to be issued to firms which have agreed to transform themselves into national or mixed companies and which are therefore entitled to sell to other ANCOM nations at the reduced internal duty rates.

2. *Controls over Earnings*

Originally, the Andean Foreign Investment Code prohibited foreign investors from remitting abroad yearly profits in excess of an amount equal to 14% of the investment.[211] Exceptions to this rule could be authorized only by the ANCOM Commission.[212] Likewise, member states could not authorize foreign investors to reinvest annually profits in excess of the equivalent of 5% of the company's capital.[213] Questions arose as to what was to be done with any profits over these ceilings. On accession to ANCOM, Venezuela did secure the right to permit foreign investors to apply these limbo profits to Portfolio Development Bonds,[214] which includes public debt certificates, mortage bonds, financial bonds, certificates of deposit, private company bonds, and bonds or securities of the Andean Development Corporation.[215]

Foreign investors were quick to complain that these ceilings on profits were too restrictive, especially in the case of Venezuela. In 1973, just prior to Venezuela's accession to the common market, that nation had been considered the most profitable investment site in Latin America, with an average return of 25.8%. At that time U.S. direct investment in Vene-

207. *Id.* arts. 44, 45.

208. "Foreign" is defined as an enterprise with 50% or more foreign ownership. AFIC, *supra* note 144, art. 1.

209. *Id.* arts. 29, 32.

210. Decree 2442, *supra* note 149, art. 53.

211. AFIC, *supra* note 144, art. 37.

212. *Id.*

213. *Id.* art. 13.

214. Accession Agreement, *supra* note 25, Annex B, art. 34; AFIC, *supra* note 144, art. 13.

215. Decree 2442, *supra* note 149, art. 36.

zuela was $2.6 billion;[216] two years later it had dropped to $2.1 billion. Likewise, the rate of return on investments had fallen to 17.1%.[217] In 1976, only $51 million new foreign investment in Venezuela was approved.[218]

The Venezuelan government was not unsympathetic to these complaints from the foreign private sector. Even when negotiating her entry into ANCOM, Venezuela had favored increasing the ceiling on remittances to 20%.[219] Finally, in 1976, the Andean Foreign Investment Code and the Venezuelan law were revised to liberalize the provisions on earnings of foreign investors.

The ceiling on remittances abroad was increased from 14% to 20% of the investment.[220] Moreover, the President of Venezuela may authorize remittances in excess of that amount.[221] Venezuela's currency is freely convertible.[222] Therefore, to make these prohibitions effective, her law also had to forbid distributions to foreign shareholders above the 20% ceiling. However, distributions above that amount may be made to a majority foreign-owned company, if it is incorporated in Venezuela and if the distributed funds will not be sent abroad.[223] In addition, SIEX may permit distributions above the 20% for approved investments or reinvestments in the nation.[224] Finally, distributions above 20% are allowed if the President has authorized remittances abroad in excess of that ceiling.[225]

For profits in excess of the amount permissible for distribution to a foreign shareholder, SIEX may authorize such funds to be declared as a dividend for the benefit of said shareholder and to be used in one of the following ways. First, the

216. *LA Investment and ROI Prospects Turn Favorable for US Firms,* 1974 BUS. LATIN AMERICA 370, 371.

217. *US Direct Investment in LA And Rates of Return Doing Better Than Elsewhere,* 1976 BUS. LATIN AMERICA 321, 322.

218. IL&T, Venezuela § 1.06, at 4 (July 1977) (unofficial figures).

219. *Venezuela Seeks Major Concession in Ancom Bid,* 1972 BUS. LATIN AMERICA 101.

220. AFIC, *supra* note 144, art. 37; Decree 2442, *supra* note 149, art. 33.

221. Decree 2442, *supra* note 149, art. 33.

222. IL&T, Venezuela § 1.04, at 3 (July 1977).

223. Decree 2442, *supra* note 149, art. 32.

224. *Id.* art. 34(1).

225. *Id.* art. 34(2).

company may utilize these excess profits in the normal operations of the firm. Such funds are to be treated as a loan from the foreign shareholder to that company and will earn interest at the rate set by the Central Bank. Alternatively, such excess profits may be placed in a trust fund for the benefit of the foreign shareholder and receive the earnings therefrom. As a third option, the monies may be invested in the Portfolio Development Bonds.[226] The earnings on amounts invested in any of these three alternatives may be remitted abroad, and the principle amount may be remitted upon liquidation of the company or sale of the shares, bonds, or rights.[227]

The ceiling on the amount of profit which the foreign investor has an automatic right to reinvest was increased from 5% to 7%. While permission is not necessary for amounts under that ceiling, such reinvestments must be registered with SIEX.[228] Such profits are classified as "reinvestments" and may be added to the capital base upon which the 20% remittance and 7% reinvestment limits are computed in the future.[229] Reinvestments above that 7% figure are treated as new investments and must receive prior approval by SIEX before they can be added to that base.[230] Foreign enterprises which have signed agreements with the government to convert into national or mixed companies can reinvest profits above the 7% ceiling without special permission of SIEX.[231]

3. *Loans from Foreign Sources*

Both the Andean Foreign Investment Code[232] and the Venezuelan legislation[233] provide that, for foreign source loans between related companies, the effective rate of interest may not exceed three points above the market rate for first class securities in the country of origin of the funds. This prohibition applies to loans between a foreign parent and its subsidiary, as

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226. *Id.* art. 35.

227. *Id.* arts. 35, 41.

228. AFIC, *supra* note 144, art. 13; Decree 2442, *supra* note 149, arts. 29, 30.

229. AFIC, *supra* note 144, art. 13; *see* Valdez, *supra* note 161, at 12; IL&T, Venezuela 10 (March 1976).

230. *Id.*

231. Decree 2442, *supra* note 149, art. 31.

232. AFIC, *supra* note 144, art. 16.

233. Decree 2442, *supra* note 149, art. 58.

well as between subsidiaries and/or affiliates of a foreign company.[234] The "effective" rate of interest includes commissions and surcharges of all sorts.[235] For foreign source loans between unrelated companies, SIEX must establish the maximum effective annual interest rate after consultation with the Central Bank.[236] In addition, Venezuelan law requires that all such foreign loan contracts contain a clause permitting prepayment free of penalties.[237]

The Andean Foreign Investment Code calls on its member states to deny long term credit from the domestic market to foreign enterprises.[238] The individual nations may establish their own policies on short and medium term domestic credit; medium term credit is defined as less than three years.[239] The Venezuelan statute has no specific provision on this point, but SIEX, upon the advice of the Central Bank, must establish the conditions governing the access of foreign firms to the domestic credit market.[240] Finally, Article 15 of the Andean Code provides that member governments shall refrain from guaranteeing foreign private loans, unless the state is a participant in the project involved.

4. *Restrictions on Technology Transfer Contracts*

Venezuelan legislation specifically incorporates as domestic law Articles 20 and 25 of the Andean Foreign Investment Code.[241] Article 20 provides that no contract for the transfer of foreign technology or patents shall be approved if it contains any of the following clauses: those allowing the supplier to fix the sale or resale price of the goods produced thereunder; those prohibiting the use of competing technology; those giving a purchase option to the technology supplier; those obligating the licensee to transfer back to the supplier inventions or improvements arising out of such technology; those restricting the volume or structure of production; or those requiring the purchaser to pay royalties on patents which are not used. Save in

234. *Id.*
235. *Id.* art. 57.
236. *Id.* art. 57; *see* AFIC, *supra* note 144, art. 16.
237. Decree 2442, *supra* note 149, art. 59.
238. *Supra* note 144, art. 17.
239. *Id.*
240. Decree 2442, *supra* note 149, art. 61.
241. *Id.* art. 66.

exceptional circumstances, these contracts may not include clauses limiting or prohibiting exports of the goods manufactured thereunder. Likewise proscribed are clauses that require the licensee to employ permanently personnel selected by the supplier and clauses that limit the licensee to procuring capital goods, raw materials, intermediate products, or other technology from a particular source. This procurement prohibition may be waived in exceptional cases, so long as the cost of the item does not exceed the world market price.

Article 25 stipulates that licensing agreements for foreign trademarks may not incorporate clauses which limit or forbid exports of the goods produced under the trademark, which fix the sale or resale price of that product, which obligate the licensee to pay for an unused trademark, or which require the user to employ permanently personnel selected by the licensor. Also these contracts may not compel the licensee to use raw materials, intermediate goods, or equipment supplied by the licensor or its affiliate companies; in exceptional cases, the recipient nation may permit such a clause, if the cost of the items does not exceed the world market price.

Besides those restrictions, Venezuela has added her own list of other clauses which may not be included in any trademark, patent, or licensing agreement: those which prohibit the manufacture or sale of the goods involved after expiration of the contract; those calling for royalty payments even where the technology has been "sold" to the user; those which forbid the use of knowledge or improvements arising out of the technology after the agreement has expired; those requiring implementation of specific quality controls; those forbidding the use of similar trademarks after termination of the contract; those stipulating that the user will pay the licensor's local taxes on the royalties; those providing for royalty payments for technical assistance which has not been transferred; and those calling for the licensee to give the supplier an irrevocable power to sell the goods manufactured under the license.[242]

All technology agreements must also obligate the supplier to train Venezuelan personnel in the use of the technology.[243]

242. Decree 746 of Feb. 11, 1975, art. 1, *reprinted in* G. PICO MANTILLO, *supra* note 25, at 331.

243. Decree 2442, *supra* note 149, art. 67.

In addition, SIEX, in deciding whether to approve a technology transfer agreement, may take into account its effect on employment, on development, on income generation, on the environment, and on the balance of payments.[244] Finally, the Venezuelan Congress has delegated to the President authority to designate other clauses which must be included in or excluded from foreign technology contracts.[245]

Royalty payments between a majority foreign owned subsidiary and its parent or affiliates are prohibited, and such payments may not be deducted from taxable income.[246] Minor "occasional services" are excepted from this prohibition, provided that SIEX approves the amount of the payment. In addition, foreign enterprises which have agreed to convert into national or mixed enterprises are exempt from this proscription.[247] Finally, technology contributions may not be counted as part of the capital of a company.[248]

Formerly, under Venezuelan law, no new technology contract could exceed five years.[249] Under the 1977 change, however, SIEX may approve contract periods up to fifteen years in exceptional circumstances.[250]

5. *Miscellaneous Laws Affecting Foreign Investment*

SIEX must present to the President for his consideration, any foreign investment in excess of Bs. 20 million (about U.S. $5 million).[251] Although SIEX is empowered to establish the criteria for foreign investments, the statute does list certain factors and states the project may be approved if two of such features are present. These itemized factors are: projects which, within a reasonable time, will incorporate within their products a local value added component of at least 51%; pro-

244. ANCOM Decision 84 of May 27, 1974, art. 7, *reprinted in* G. PICO MANTILLO, *supra* note 25, at 367. For an excellent discussion of the application of these laws on technology transfer, *see* Pate, *Present and Future Venezuelan Technology Policies: Implementation and Implications for Technology Suppliers and Foreign Investors*, 9 LAW. AM. 1 (1977).

245. Decree 2442, *supra* note 149, art. 73.

246. AFIC, *supra* note 144, art. 21; Decree 2442, *supra* note 149, art. 68.

247. Decree 2442, *supra* note 149, art. 69.

248. *Id.* art. 68.

249. Decree 63, *supra* note 147, art. 56(e).

250. Decree 2442, *supra* noe 149, art. 65(e).

251. *Id.* art. 9(9).

jects exporting goods which contain at least a 30% local value added component; investments which will generate a significant amount of employment; those located in the lesser developed areas of the nation; projects which will use vital technology; enterprises which agree to convert into national or mixed companies more rapidly than required by law; and those projects whose organizers promise to reinvest the profits generated within Venezuela in Portfolio Development Bonds.[252]

Article 51 of the Andean Foreign Investment Code states that no investment contract or technology transfer agreement may contain a clause submitting possible conflicts to a foreign court. This article also prohibits clauses permitting the subrogation of a foreign government to the rights of the investor. This latter proscription resulted in the suspension of the insurance and guaranty programs of the U.S. Overseas Private Investment Corporation in the ANCOM nations.[253] Neither Venezuelan Decree 2,031 nor Decree 2,442 contains any provisions similar to this Article 51 of the Andean Code. As indicated above, however, Venezuela may consider itself bound by such provisions since the Code has been specifically approved by her Congress.[254]

III. EVALUATION AND RECOMMENDATIONS

The foregoing analysis reveals that, through the Accession Treaty and subsequently enacted legislation, Venezuela has managed to mesh her legal structure neatly into a preexisting common market. There are still a few cloudy areas, such as, whether the Andean Code's prohibition against foreign court selection clauses has been incorporated into Venezuela's domestic law. In general, however, it is clear that this nation has brought her municipal law into close conformity with the international prescriptions established by ANCOM.

The legal framework laid down by ANCOM and Venezuela appears to have produced a balanced combination of mandatory requirements and essential flexibility. It will be recalled that the LAFTA Treaty left the actual tariff cutting to future agreements between its members. For instance, every item to go on the Common Schedules had to be discussed individually

252. *Id.* art. 22.
253. 22 U.S.C. § 2197(b)(Supp. V 1975); *OPIC Country Lists.*
254. *See* note 25 *supra;* Decree 2442, *supra* note 149, art. 1.

and agreed upon by the nations in subsequent negotiations. The same was true for each article on which a duty concession was to be offered under a National Schedule negotiation. Consequently, whenever a particular product was suggested for a possible concession, the manufacturers of that item could exert strong pressure on their governments to retain the existing protective tariffs. Ultimately, the LAFTA countries found themselves stymied by their inability to offer articles for concessions, and the system ground to a halt.

In contrast, the ANCOM structure removes a good deal of discretion from its member nations by mandating that certain actions must occur by fixed dates. Internal duties on nonscheduled goods are to be reduced automatically by prescribed percentages each year. Nonfavored nations have to abolish duties on sectorial products from favored countries at once. Every member had to bring its duties up to the minimum common external tariff level by a set date. By framing these provisions in obligatory terms, ANCOM has, to a large extent, freed its member governments from the political pressures to which they could otherwise be subjected by every industrialist who feared outside competition.

On the other hand, if the rules established by a new common market are overly rigid, the member states will be tempted to ignore them and the integration effort will fail. The Central American Common Market Treaty provided for immediate free internal trade.[255] Yet when political and commercial pressures became too great, her members began imposing duties on each other's goods.[256] Honduras finally withdrew, and this integration unit is currently in limbo.

Some observers thought the withdrawal of Chile sounded the death knell for ANCOM. Chile's action, however, should perhaps be attributed more to political differences than to any inherent defect in the ANCOM structure. Moreover, the response of ANCOM to this event may indicate a flexibility

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255. Multilateral Treaty of Free Trade and Central American Integration (June 10, 1958), art. 1, *printed in* INTER-AMERICAN INSTITUTE ON INTERNATIONAL LEGAL STUDIES, 2 INSTRUMENTS OF ECONOMIC INTEGRATION IN LATIN AMERICA AND IN THE CARIBBEAN 365 (1975).

256. *Honduras Checks CACM Recovery By Slapping Duties on Region's Goods,* 1971 BUS. LATIN AMERICA 8; *Costa Rica Import Restrictions Provoke New Crisis in Central America,* 1971 BUS. LATIN AMERICA 193.

which will allow this common market to survive, not only this setback, but also future crises. Chile's departure did provide an opportunity to bring Venezuela into the Metalworking Sectorial Program through the reallocation of products previously assigned to Chile. Many of the ANCOM features to which Chile had objected and with which Bolivia and Ecuador were having problems were modified in 1976. The deadlines for duty reductions were extended by as much as five years. The possibility of attracting foreign investment was increased by relaxing the remittances and reinvestments provisions. Nations, such as Venezuela, appear to have developed an increased sensitivity to the special needs of Bolivia and Ecuador, as evidenced by Venezuela's agreement to yield the high density polyethylene market to Bolivia.

Even the strictest provisions in the ANCOM accords incorporate a degree of flexibility. Venezuela was allowed to exclude 236 items from the automatic tariff cutting provisions. Likewise, she was permitted to apply discriminatory duties to certain products from individual member nations in order to protect key sensitive industries. On the grounds of hardship, she was authorized to suspend the minimum common external tariff on sixty items. In structuring the Petrochemical Sectorial Program, the designers made a special concession to satisfy Venezuela's interest in developing a petrochemical export industry. The possibilities for relief built into ANCOM's legal structure, combined with the flexible response of its leadership, may mean this organization is sufficiently adaptable to survive.

The Andean region has decided for now to retain its current divestment rules. Only time and experience will demonstrate whether this expanded market can attract sufficient foreign capital and technology under these norms. If the results are favorable, the Andean Foreign Investment Code will have provided the world community a model whereby foreign influence on an economy can be reduced, without resort to massive expropriations.

The Sectorial Program of ANCOM offers an innovative approach to the need for balanced regional development. It attempts through the discriminatory tariff structures to give the favored nations a temporary edge over their competitors—an advantage which may be crucial for Bolivia and Ecuador. On the other hand, it avoids the outright creation of monopolies and envisions eventual free competition between national producers.

Unlike the European Economic Community (EEC), ANCOM does not have a supranational tribunal to resolve disputes affecting private persons on common market matters.[257] The Court of Justice of the EEC has played a vital role in enforcing the internal free trade obligations, in developing the antitrust rules, and in determining whether national or community law prevails.[258] In ANCOM no judicial organ is available to decide whether a member state has violated an ANCOM law, to rule on exactly how much a certain foreign company can reinvest, or to ascertain which duty rate should apply to a particular item in a specific case. If Venezuela should now pass a statute inconsistent with the Cartagena Agreement or with an ANCOM Decision, which law would prevail—the Venezuelan national law or the ANCOM rule? Who will decide this question?

Should decisions of the Colombian Supreme Court on a common market question conflict with those from Venezuela, there is no higher tribunal to establish a uniform position on the issue. Although civil law courts do not follow the theory of stare decisis, in fact, the existence of the supranational tribunal in the EEC has been highly effective in achieving a consistent pattern of regulation in that market.

Nonetheless, it may be preferable for ANCOM to leave the creation of a supranational tribunal to the future and to concentrate for now on molding her basic structure to fit the economic realities as they develop. Merely to implement the numerous and complex ANCOM rules at the nation-state level poses an enormous task for its members.

Government agencies will need to establish and police certificates-of-origin systems so that only those goods which have satisfied the local content rules will receive the advanta-

257. A procedure is established for settling disputes between member states. Cartagena Agreement, *supra* note 7, art. 23, and LAFTA Protocol for the Settlement of Disputes (Sept. 2, 1967), 7 INT'L LEGAL MAT'LS 747 (1968).

258. *See, e.g.*, Costa v. Ente nazionale Energia elettrica impress già della Edison Volta, 10 Recueil 1141 (July 15, 1964), [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8023 (1965).

geous internal duty treatment. Onsite inspection of factories by relatively honest officials will be essential to any meaningful certificate-of-origin system.

The annual tariff revisions will have to be published and distributed in a timely fashion to customs offices in the most remote border towns. Low level customs officers, perhaps with little formal education, will be expected to make sophisticated determinations whether the duty on a particular item is the ANCOM internal rate, the ANCOM common external tariff, a LAFTA concession rate, a Sectorial Program "favored nation" rate, or a Sectorial Program nonfavored nation rate. Even deciding under which NABANDINA classification on article falls can produce disputes.

Practising lawyers within ANCOM will need to become familiar with the detailed working of this complex tariff structure, the divestment rules, and the sectorial programs, if they are to properly advise clients who are planning investments, reinvesting earnings, or exporting goods. Both judges and attorneys will have to perceive when an incorrect duty has been levied. The attorneys and the courts must ensure that importers, exporters, and other businessmen can depend on litigation for appropriate enforcement of their rights under the ANCOM rules.

If ANCOM is to become a viable integration unit, its governing bodies and its member states should embark on a major educational effort. Easily understood manuals and lectures should be prepared and delivered to customs officers at all levels. The bar associations and the law schools should organize one-day institutes to provide attorneys with the practical knowledge they need to apply the ANCOM rules. Scholars knowledgeable about intricacies of ANCOM could greatly assist in this implementation process by writing short articles explaining the concrete working of this system to practitioners and judges. The legal profession, in drafting the ANCOM and the Venezuelan legislation, has proved itself innovative and imaginative; now that same profession is called upon to make these laws effective by training the customs officials, the judiciary, and the practising bar.