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International Trade and Foreign Investment in Colombia: A Sound Economic Policy Amidst Crisis

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NOTES

INTERNATIONAL TRADE AND FOREIGN INVESTMENT IN COLOMBIA: A SOUND ECONOMIC POLICY AMIDST CRISIS

*David J. Pascuzzi**

* *Author's note:* This note is dedicated in loving memory to my father, Ronald F. Pascuzzi, and to my family and friends for all their love and support.

I. INTRODUCTION

During the 1980s, Latin American countries in need of capital and economic growth[1] parted ways with their protectionist strategies and began opening their markets to foreign investment and trade.[2] Past imperialist exploitation and the Cold War had thwarted long-term growth for developing countries.[3] However, the modern trend in the post Cold War world and the achievements of Pax Americana have led to a desire to promote long-term efficiency rather than social, cultural, and economic instability.[4] The long-term outlook has led to greater cooperation between industrialized countries and developing countries.[5]

In 1990, the Colombian government began implementation of its economic liberalization plan named *Apertura*.[6] Before 1990, Colombia had been economically stable despite its problems with Marxist guerrillas and

1. Developing countries need capital to create employment opportunities for their citizens, attain higher standards of living for their citizens, increase markets for product exportation, and fund international transactions, which usually require foreign hard currency. *See* RALPH J. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK 19 (3d ed. 1995); JOHN T. ROURKE, INTERNATIONAL POLITICS ON THE WORLD STAGE 382-96 (2d ed. 1989); *see also id.* at 329-69 (discussing the needs of industrialized nations in regard to foreign trade); *id.* at 334-36, 346-50, 356-61 (discussing policies both for and against the free-trade, economic model and the concerns developing countries may have about multinational corporations).

2. *Reforming Latin America*, ECONOMIST, Nov. 26, 1994, at 39, 39-40. *See generally* ROURKE, *supra* note 1, at 382-96 (considering whether the collapse of the Soviet Union had an effect on lowering trade barriers and the acceptance of the free-trade model of macroeconomics in Latin America).

3. *See* ROURKE, *supra* note 1, at 39, 168, 348-50, 377-78; *Prepared Testimony of Ira S. Shapiro Before the Subcomm. on the Western Hemisphere & the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, Fed. News Serv., Oct. 25, 1995, *available in* LEXIS, News Library, FEDNEW File [hereinafter *Testimony of Ira. S. Shapiro*].

4. *See generally Testimony of Ira S. Shapiro*, *supra* note 3; WHITE HOUSE OFFICE, BUILDING A PARTNERSHIP FOR PROSPERITY: WHITE HOUSE REPORT ON THE SUMMIT OF THE AMERICAS (1995) (preamble to the Summit of the Americas' Declaration of Principles).

5. *See generally Testimony of Ira S. Shapiro*, *supra* note 3.

6. U.S. DEP'T OF STATE, 102D CONG., 1ST SESS., COUNTRY REP. ON ECON. POL'Y & TRADE PRAC., REPORT SUBMITTED TO THE HOUSE COMM. ON FOREIGN AFFAIRS, HOUSE COMM. ON WAYS & MEANS, SENATE COMM. ON FOREIGN REL., & SENATE COMM. ON FIN. 425 (Joint Comm. Print 1991) [hereinafter 1991 REPORT]. In 1989, President Virgilio Barco, 1986-1990, announced plans to liberalize or open the Colombian economy. *Id.* President Cesar Gaviria, 1990-1994, implemented the majority of the *Apertura* economic plan. *Id.*

narcotics trade terrorism.[7] In 1991, hoping to increase participation within Colombia and increase protection for the rights of the Colombian people, Colombia ratified a new constitution.[8]

Hoping to make the democratic changes meaningful, the Colombian government sought several objectives in implementing *Apertura*.[9] By opening economic trade and increasing competition, the government sought to promote fairness for consumers by giving them greater choice and lower costs.[10] The government also sought fairness for importers by reducing government regulation and discriminatory barriers to trade.[11] Through *Apertura*, the Colombian government hoped to achieve an annual economic growth rate of about five percent and to increase per capita income.[12] Furthermore, the government sought to increase exports,[13] imports,[14] and net international currency reserves.[15] Finally, through *Apertura*, the government expected a decrease in public reserves, which it hoped to make up through increased imports and reduction of the public sector without harming social programs and the infrastructure.[16]

Despite Colombia's continued problems with terrorism and narcotics trafficking, *Apertura* has led to an increase in foreign trade and investment.[17] Key economic indicators continue to point in the direction of increased investment; however, it is unclear if all Colombians are winning from this policy.[18] Short-term success in the oil industry[19] and the flow

7. Howard LaFranchi, *Colombia's Economy Thrives, Despite Turmoil*, CHRISTIAN SCI. MONITOR, Sept. 13, 1995, at 8; Joseph Mann, *Colombia, One of Latin America's Strongest Economies*, INSTITUTIONAL INVESTOR, Sept. 1994, at S9; *Colombia's Financial Markets, Opening at Last*, ECONOMIST, Dec. 18, 1993, at 74.

8. Francisco Urrutia, *The View from Colombia: Recent Developments in Investment and Trade Policies*, *in* PRIVATE INVESTMENTS ABROAD — PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1992 § 6.01[3] (Carol J. Holgren ed., 1993).

9. 1 PRESEDENCIA DE LA REPUBLICA & DEPARTAMENTO NACIONAL DE PLANEACION, LA REVOLUCION PACIFICA: MODERNIZACIÓN Y APERTURA DE LA ECONOMÍA [THE PEACEFUL REVOLUTION: THE MODERNIZATION AND OPENING OF THE ECONOMY] 29-35 (1991) [hereinafter PEACEFUL REVOLUTION].

10. *Id.* at 29, 32.

11. *Id.*

12. *Id.* at 32-33.

13. *Id.* at 33-34.

14. *Id.* at 34.

15. *Id.* at 35. An increase in a strong international currency will increase the ability of Colombian companies to get, for example, dollars, which can be used to pay importers, providers of services, or large contractors who accept payment in dollars. *See* ROURKE, *supra* note 1, at 382.

16. PEACEFUL REVOLUTION, *supra* note 9, at 35.

17. LaFranchi, *supra* note 7, at 8; Mann, *supra* note 7, at S9.

18. LaFranchi, *supra* note 7, at 8; Mann, *supra* note 7, at S9.

19. LaFranchi, *supra* note 7, at 8. The oil industry is discussed at more length in *infra* note 283.

of narco-dollars[20] into Colombia distort the true legacy of *Apertura*.[21] In the meantime, Colombia continues to post healthy economic growth numbers,[22] seeks to increase spending on social programs and infrastruc-

20. LaFranchi, *supra* note 7, at 8.

> [I]n March [1995,] . . . a United Nations narcotics commission charged that Colombia's economic "miracle" could be traced to the billions of narco-dollars laundered annually into the economy. Colombian officials responded that the country's economic fortunes are more the result of decades of hard work by millions of "honest" Colombians.
>
> Still no one in Bogota doubts that narco-dollars are behind a good share of the swanky and ostentatious condominiums and shopping malls that have sprung up in recent years . . . .

Id. But see Carlos Urrutia, Jr., *Colombia*, 7 FLA. J. INT'L L. 15, 15 (1992) (stating that the economic growth of Colombia is not due to revenues from the drug trade).

Whether or not one accepts that the drug trade has helped Colombia achieve economic growth, the drug trade also may have had a negative impact on the Colombian economy. The President of Colombia, Ernesto Samper stated in his 1995 State of the Nation address, "Contrary to what many people believe, especially abroad, drug trafficking has created serious distortions in our economic system as it has altered the relative prices of goods and services, eroded the purchasing power of our exports, and generated undesirable pressure on our monetary system." President of Columbia, Ernesto Samper, State of the Nation Address Before a Joint Session of Congress at the Opening of the 1995-96 Legislative Period (July 20, 1995), *English transcript available in President Addresses Congress: Need to Prevent Colombia Becoming Ungovernable*, BBC SUMMARY OF WORLD BROADCASTS, July 22, 1995, *available in*, LEXIS, News Library, BBCSWB File [hereinafter *President Addresses Congress*].

Regardless of how one posits the effects of the drug trade on the Colombian economy, one must accept that it does create some effect based on the fact that "Colombia is the world's leading supplier of cocaine and is the source of tons of refined cocaine, heroin, and marijuana." BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 7767, 6(1) BACKGROUND NOTES: COLOMBIA 5 (1994). Furthermore, in 1990 the global drug industry was estimated to be worth US$500 billion a year. JOHN M. MARTIN & ANNE T. ROMANO, MULTINATIONAL CRIME: TERRORISM, ESPIONAGE, DRUG & ARMS TRAFFICKING 66 (1992); *see also* CENTRO PARA EL ESTUDIO DE LAS RELACIONES INTERNACIONALES Y EL DESAROLLO (CERID), EL IMPACTO DEL CAPITAL FINANCIERO DEL NARCOTRAFICO EN EL DESAROLLO DE AMERICA LATINA (1991); FRANCISCO E. THOUMI, POLITICAL ECONOMY AND ILLEGAL DRUGS IN COLOMBIA (1995) (discussing the impact of the drug trade on Colombia).

21. LaFranchi, *supra* note 7, at 8.

22. Gilles Castonguay, *Colombia First-Half Foreign Investment Soars*, Reuters Fin. Rep., Oct. 5, 1995, *available in* LEXIS, News Library, FINRPT File; *see Business Outlook: Colombia*, CROSSBORDER MONITOR, May 17, 1995, at 3 [hereinafter *Columbia*, CROSSBORDER MONITOR]; LaFranchi, *supra* note 7, at 8 (stating that economic growth was estimated to be 5% for 1995, and unemployment was estimated to decrease to less than 10%); Caroline Allen, *F&C Sees Buying Opportunity in Colombia*, Reuters Fin. Rep., Aug. 22, 1995, *available in* LEXIS, News Library, FINRPT File (reporting that despite political scandal involving allegations that President Samper and his campaign fund took contributions from the narcotics trade industry, the Colombian economy has a solid base and offers investors a buying opportunity). *But see Business Outlook: Colombia*, BUS. LATIN AM., Sept. 25, 1995, at 4 (noting a general slowdown in the economy due to the political crisis and predicting economic growth of around 4.8% in 1995, short of the Colombian goal, and growth of only 4.5% in 1996) [hereinafter *Columbia*, BUS. LATIN AM.]; Gilles Castonguay, *Investors Leery of*

ture,[23] and continues to seek multilateral trade agreements with other nations,[24] including entry into the North American Free Trade Agreement (NAFTA).[25]

Part two of this note offers a brief history of Colombia. Part three explains and examines the current legal framework for foreign investment and trade in Colombia, focusing on foreign investment reform, exchange reforms, the trade system, and the commerce, taxation, and labor codes. Part four analyzes the current framework, examining the patterns of growth over the last five years of *Apertura* along with several criticisms of the policy.

II. HISTORICAL BACKGROUND

The history of Colombia is relevant to its current economic policies because Colombia's past continues to affect its present day image, which in turn affects foreign investment within the country.[26] Despite a long history of commitment to democratic institutions, Colombia has had periods of violent conflict.[27] Since the period following independence from Spain in 1810, Colombia has predominantly been governed by two equal factions, the Liberals and the Conservatives.[28] Two civil wars have erupted between these two sides.[29] The first, the War of a Thousand Days, occurred from 1899 to 1902.[30] More recently, *La Violencia*, occurred during the 1940s and 1950s, and over 300,000 people were killed.[31]

A military coup, led by General Gustavo Rojas Pinilla in 1953, ended the crisis.[32] In 1957, the military overthrew Pinilla, and a provisional government was installed, backed by the Liberals and Conservatives.[33] The

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Colombia, Though Lenders Eager, Reuters Fin. Rep., Oct. 16, 1995, *available in* LEXIS, News Library, FINRPT File (reporting that the current political crisis heightens general investor fear toward investing in Latin America).

23. *Columbia*, BUS. LATIN AM., *supra* note 22, at 4. President Samper vowed not to dismantle *Apertura* but unveiled his new four-year economic plan, *El Salto Social*, the Social Leap, which focuses on investments in social programs and the infrastructure. *Colombia: A Socially Conscious Brew*, BUS. LATIN AM., Dec. 5, 1994, at 3.

24. *See infra* part III.D.3 for a discussion of bilateral and multilateral foreign trade agreements.

25. Randall Ashley, *Business Report on International Business, Colombia Seeking NAFTA Status*, ATLANTA CONST., Apr. 12, 1994, at D2; Robert Selwitz, *No Threat from Latin Trade Pact — For Now*, GLOBAL TRADE & TRANSP., Nov. 1994, at 6.

26. James Brooke, *Despite Violence, Colombia Surges*, N.Y. TIMES, Feb. 10, 1994, at D1; *Colombian Tourism: The Inn Crowd*, BUS. LATIN AM., May 29, 1995, at 3.

27. BUREAU OF PUBLIC AFFAIRS, *supra* note 20, at 3.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

parties established the National Front whereby the Liberals and Conservatives jointly governed through regular elections, but the presidency alternated between the two parties every four years.[34]

The National Front ended in 1974, after making efforts to solve the problems of inflation, unemployment, and inequitable income distribution.[35] "Between 1978 and 1982, the government focused on ending the limited . . . Cuban-backed insurgency that sought to undermine Colombia's traditional democratic system."[36] In 1984, President Belisario Betancur negotiated a cease-fire with the insurgents.[37] In 1985, however, a group called the Democratic Alliance/M-19 (M-19) resumed fighting, unraveling the cease-fire.[38] Perhaps one of the worst acts of terrorism in the recent past occurred when the M-19 attacked the Palace of Justice in Bogotá, the capital.[39] One hundred fifteen people were killed, eleven of whom were Supreme Court Justices.[40] In 1986, a truce was renewed with only one of the revolutionary groups, the Revolutionary Armed Forces of Colombia (FARC). Fighting by the other revolutionary groups continued.[41]

Colombia also had to contend with violence caused by the narcotics trade.[42] The narcotics industry has given support both to leftist insurgents and right-wing paramilitary groups in return for protection of cocaine processing laboratories in the jungles of Colombia.[43] In 1990, narco-terrorists assassinated three presidential candidates.[44]

With the aid of the United States, Colombia has continued to fight against the drug trade.[45] In 1993, Pablo Escobar, the leader of the Medellín cartel, was killed during a shoot out, and this has abated the power of the organization.[46] Furthermore, the Colombian authorities have arrested the supposed leaders of the Cali cartel, Miguel and Gilberto Rodriguez Orjuela.[47]

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34. *Id.* The parties agreed to have parity among the other elected and appointed positions. *Id.*; *see* Douglas Farah, *Colombia's Culpables; Drug Corruption Probe Implicates Entrenched Ruling Class*, WASH. POST, Aug. 23, 1995, at A25 (arguing the National Front created a small, elite political ruling class that continues to rule Colombia today).

35. BUREAU OF PUBLIC AFFAIRS, *supra* note 20, at 3.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 4.

43. *Andean Drug Strategy: Hearing Before the Subcomm. on Western Hemispheric Affairs of the House Comm. on Foreign Affairs*, 102d Cong., 1st Sess. 11 (1991).

44. BUREAU OF PUBLIC AFFAIRS, *supra* note 20, at 4.

45. *Id.* at 6.

46. *Id.* at 4.

47. Roger E. Hernandez, *Colombia Comes to a Crossroads*, ROCKY MTN. NEWS, Aug. 11, 1995, at 58A. The Cali Cartel is believed to supply three-quarters of the cocaine

In August 1995, allegations surfaced that in 1994 Fernando Botero, the campaign treasurer and eventual Defense Minister for President Samper, had accepted seven million dollars from the Cali cartel on orders from Samper.[48] The scandal has caused fear that the corruption of the drug industry is still pervasive within Colombia.[49] In part, the scandal has led the United States to decertify Colombia, which has the effect of cutting off certain portions of U.S. foreign aid and has the potential of canceling all aid, including any trade preferences granted under U.S. law.[50]

Despite Colombia's violent past and its struggles with revolutionaries and the drug industry, it has followed conservative fiscal policies, resulting in consistent economic growth.[51] During the 1980s, the countries of Latin and Central America took sovereign loans to promote growth in their economies.[52] Many Latin and Central American countries defaulted on their loans, becoming either unwilling or unable to pay.[53] Colombia was one of the few countries to neither default on its external debts[54] nor enter into a Brady Bond program.[55] In 1990, Colombia began an economic

consumed in the United States. *Id.*

48. *Id.* Botero eventually resigned from his position as Defense Minister. *Id.*

49. Farah, *supra* note 34, at A25. Experts claim that the investigation of Samper is the first investigation into the political class of Colombia. *Id.* Some argue that the political class as a whole has allowed the drug trade to go on and accepted political contributions from drug cartels. *Id.* at A29. Others go further and argue that the scandal is not a sign of reform to clear the government of any drug trade taint, but a political trick to force Samper to resign so that his accusers can gain more influence and maintain the ties between the drug trade and the ruling political class. *Id.*

50. U.S. DEP'T OF STATE, ON-THE-RECORD BRIEFING ON INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 1996 BY UNDER SECRETARY FOR GLOBAL AFFAIRS TIMOTHY WIRTH & ASSISTANT SECRETARY FOR INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS ROBERT GELBARD, Mar. 1, 1996, (visited Dec. 18, 1996) <http://moby.ucdavis.edu/GHH/docs/briefing.txt> [hereinafter INCSR BRIEFING].

The Foreign Assistance Act of 1961 created the certification process that ties U.S. foreign aid to cooperation in fighting the illegal drug trade. *Id.* The certification process has two stages, which are completed annually. *Id.* First, the President of the United States must identify a list of the major drug producing and transit countries. *Id.* Second, the President must make a certification determination based on whether the listed countries have cooperated fully with the United States or have taken adequate steps on their own to meet the goals and objectives of the 1988 U.N. Convention on drug trafficking. *Id.*

51. LaFranchi, *supra* note 7, at 8; Mann, *supra* note 7, at S9.

52. Anne Swardson & Martha M. Hamilton, *Investment Funds Link Economies*, WASH. POST, Aug. 21, 1995, at A1, A16. The loans were important for Latin American countries to avoid large deficits due to large public spending. *Id.* at A16.

53. *Id.* at A16.

54. BUREAU OF PUBLIC AFFAIRS, *supra* note 20, at 4.

55. Daniel Dunaief, *Chase Launches $150M Sovereign Credit for Colombia*, AM. BANKER, Sept. 21, 1995, at 20. Brady Bonds are "pre-1982 commercial bank loans, steeply discounted from their original value, that have been repackaged and restructured into dollar-denominated securities." Kevin Muehring, *Looking for a Lasting Relationship*, INSTITUTIONAL INVESTOR, July 1995, at 127, 128.

liberalization program along with most of Latin and Central America to reduce deficits, increase importation of goods and capital, and increase investment in infrastructure and industry.[56]

III. CURRENT FRAMEWORK OF FOREIGN INVESTMENT AND TRADE

A. *Constitution of 1991*

The Constitution of 1991 directly affected the Colombian economy not only through economic provisions but also through the rights enumerated and protected by the document.[57] The new constitution was important to Colombians because it gave them greater protection of their rights and greater participation in the democratic process.[58] The new Constitution also sent a message to the world that Colombia was committed to democracy and peace.[59]

One goal of the Constitution was to increase participation among all segments of the Colombian people.[60] The Constitution expanded protection of fundamental rights, including environmental,[61] collective,[62] and cultural rights.[63] A Constitutional Court was established to be the final arbiter of all constitutional matters.[64] Also, an action called *Tutela* is now available to "any person before any judge when no other remedy is available and a fundamental right is in immediate jeopardy."[65] Furthermore, the Constitution created the Office of the Attorney General in order to prosecute and investigate national crimes.[66]

56. *Reforming Latin America*, *supra* note 2, at 39; 1991 REPORT, *supra* note 6, at 425.

57. Urrutia, *supra* note 8, § 6.01[3].

58. *Id.*

59. *Id.*; *see* COLOM. CONST. pmbl., *translated in* 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 163 (Gisbert H. Flanz ed., Peter B. Heller & Marcia W. Coward trans., 1995) [hereinafter CONSTITUTIONS].

60. Urrutia, *supra* note 8, § 6.01[3]. The people's ability to directly elect public officials was expanded from being able to elect the President and members of Congress to include electing governors, mayors, and the newly created position of Vice President. Dario Cardenas-Navas, *Colombia Country Update*, 8 FLA. J. INT'L L. 232, 233 (1993); *see* COLOM. CONST. arts. 202-205, 260, CONSTITUTIONS, *supra* note 59, at 209-10, 224-25.

61. COLOM. CONST. arts. 8, 78-82, CONSTITUTIONS, *supra* note 59, at 164, 176-77.

62. COLOM. CONST. arts. 39, 55-56, at 168, 172.

63. COLOM. CONST. arts. 8, 70, 72, at 164, 175; Cardenas-Navas, *supra* note 60, at 233.

64. COLOM. CONST. arts. 239-245, CONSTITUTIONS, *supra* note 59, at 219-21; Cardenas-Navas, *supra* note 60, at 233.

65. COLOM. CONST. art. 86, CONSTITUTIONS, *supra* note 59, at 178; Cardenas-Navas, *supra* note 60, at 233.

66. COLOM. CONST. arts. 249-253, CONSTITUTIONS, *supra* note 59, at 221-23; Cardenas-Navas, *supra* note 60, at 233.

The Constitution also changed the Central Bank.[67] The Central Bank now has authority for monetary exchange, credit, and monitoring of international reserves.[68] One important change affecting international relations is that extradition was prohibited.[69] The constitutional reforms set the foundation upon which the Colombian government would seek to build its economic policies.[70] With increased rights and protection for its people, the stage was set for the radical changes that would affect Colombia through its neoliberal economic policies.[71]

B. *Foreign Investment*

1. Andean Common Market, Decision 291

Colombia's economic liberalization plan could only begin through a reassessment of common policies that were in place under the Agreement on Andean Subregional Integration (Cartagena Agreement).[72] After several years of negotiations among the Andean pact nations to liberalize restrictions on foreign investment and a failed attempt to change restrictions in 1989, the Andean Pact Commission issued Decision 291 in March 1991.[73] The purpose behind the decision was to stimulate the flow of foreign capital and technology into the Andean region.[74]

The decision eliminated all prior restrictions on foreign investment within the region and returned power to the individual member nations to adopt their own rules.[75] All companies, whether Colombian, foreign, or mixed, operating within the region are entitled to take advantage of the trade liberalization program provided they meet the origin requirements in the regulations of the Andean Pact.[76]

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67. COLOM. CONST. arts. 371-373, CONSTITUTIONS, *supra* note 59, at 257-58; Cardenas-Navas, *supra* note 60, at 233.

68. Cardenas-Navas, *supra* note 60, at 233.

69. COLOM. CONST. art. 35, CONSTITUTIONS, *supra* note 59, at 167; Cardenas-Navas, *supra* note 60, at 234.

70. Urrutia, *supra* note 8, § 6.01[3].

71. *Id.*

72. *Id.* § 6.02[1]; Eduardo A. Wiesner, *ANCOM: A New Attitude Toward Foreign Investment?*, 24 U. MIAMI INTER-AM. L. REV. 435, 436 (1993). The governments of Bolivia, Chile, Colombia, Ecuador, and Peru signed the Cartagena Agreement, which created the Andean Common Market in 1969. *Id.* at 436 n.1. Venezuela joined in 1973, and Chile withdrew in 1976. *Id.*

73. Urrutia, *supra* note 20, at 16.

74. Wiesner, *supra* note 72, at 436-38.

75. Urrutia, *supra* note 20, at 16.

76. Urrutia, *supra* note 8, § 6.02[1].

2. Law 9 and Resolution 51 of 1991

Following Decision 291 of the Andean Pact, Colombia enacted the *Ley 9 de* 1991 (Law 9 of 1991) to implement the changes in Colombia's economy.[77] The law empowered the National Economic and Social Policy Council (CONPES), a private government consulting agency, to promulgate rules; the most important being Resolution 51 of 1991, implementing Law 9 of 1991.[78] Now, foreign investors do not receive more favorable treatment than resident investors, with the exception of taxation.[79] This treatment standard is known as the national treatment standard.[80]

Under Resolution 51, ownership of local companies by foreign investors is not limited.[81]

> Foreign investments may be made in all areas of the economy, except (i) defense and national security; (ii) processing and disposal of toxic waste produced outside Colombia; (iii) purchase, sale, or lease of real property when it is the main business of the company; (iv) securities issued as a result of the securitization process of real estate or a construction project; and (v) securities issued by a real estate fund.[82]

Furthermore, foreign investors can repatriate all after-tax profits and proceeds from the sale of shares or the liquidation of a business.[83]

Resolution 51 also sets up three ways to invest: direct investments in a local company, indirect investments, and portfolio investments.[84] Direct

77. Wiesner, *supra* note 72, at 456; Ley 9 de 1991 (Jan. 17, 1991) (Colom.), *reprinted in*, 78 LEGISLACION ECONOMICA NO. 921, at 259, 259-61 (1991) [hereinafter Law of 1991].

78. Law of 1991, arts. 3 & 15, *supra* note 77, at 259-261; Resolución 51 del Consejo Nacional de Política Económica y Social de 1991, Consideraciones [Considerations, subsection preceding art. 1], Oct. 22, 1991 (Colom.), *reprinted in*, 78 LEGISLACION ECONOMICA 895, 896 (1991) [hereinafter Resolution 51].

79. Resolution 51, *supra* note 78, art. 3, at 896; *see* Wiesner, *supra* note 72, at 456-57.

80. Wiesner, *supra* note 72, at 456-57.

81. Carlos Urrutia-Valenzeula, *Foreign Investment Laws 1995: Colombia*, LATINLAW (LATINFINANCE Suppl.), June 1995, at 13.

82. *Id.* The purpose behind the restriction on dealings in real estate is to curb money laundering. BUREAU OF PUBLIC AFFAIRS, *supra* note 20, at 5. Under Decrees 2018 and 2764 of 1994, foreign investment is not permitted in companies whose primary activity is the purchase, sale, or lease of real estate. Urrutia-Valenzuela, *supra* note 81, at 13. "The restriction does not apply when the local recipient company has owned and developed the project." *Id.*

83. Urrutia-Valenzuela, *supra* note 81, at 13.

84. *Id.*

investments involve a permanent contribution to the capital of a company.[85] An investor can make indirect investments by making either a tangible or an intangible contribution to a company without acquiring a share participation.[86] Intangible investments can take the form of technology, patents, and trademarks.[87] Income will be derived depending on the profits generated by the company.[88]

Portfolio investments must be made either through institutional or individual funds.[89] Through an individual investment fund, an investor can personally tailor his or her fund.[90] Institutional funds can be created "by a group of foreign individuals or entities or by an entity placing share participation among third parties."[91]

The funds may invest in shares or bonds traded at the three Colombian stock exchanges.[92] However, Resolution 51 limits the types of securities in which funds may invest and limits a fund's ability to attain total ownership of an entity.[93] One advantage of portfolio investments is that the funds can be converted into foreign currency and pay abroad all earnings and capital gains obtained in Colombia.[94] In general, the earnings are not subject to taxation.[95] Finally, as a general rule, investments are not subject to prior government approval.[96]

85. Bernardo P. Cárdenas-Martínez & Enrique Llano-Ferro, *Foreign Investment Laws 1994: Colombia*, LATINLAW (LATINFINANCE Suppl.), Sept. 1994, at 16.
86. *Id.*
87. Urrutia-Valenzuela, *supra* note 81, at 13.
88. Cardenas-Martinez & Llano-Ferro, *supra* note 85, at 16.
89. Urrutia-Valenzuela, *supra* note 81, at 13.
90. Urrutia, *supra* note 20, at 17.
91. Urrutia-Valenzuela, *supra* note 81, at 13. Institutional and individual funds require local administration. *Id.* Normally, a local trust company acts as custodian of the fund. *Id.*
92. *Id.*
93. *Id.* Also, portfolio funds may not obtain loans from financial institutions. *Id.*
94. *Id.*
95. *Id.*
96. Cárdenas-Martínez & Llano-Ferro, *supra* note 85, at 16. However, CONPES must approve investment in public services except cellular communications, the disposal and processing of toxic waste produced in Colombia, mining projects in which the investment exceeds US$100 million, and projects that are protected, guaranteed, or insured under international agreements. *Id.* The Superintendency of Banks must approve foreign purchases of 10% or more of the subscribed shares of a financial institution and the incorporation of new financial institutions. *Id.* The Superintendency of Securities must approve the investment of institutional funds. *Id.* The Ministry of Mines and Energy must authorize investments in the exploration and production of petroleum and the total or partial transfer of interests in such projects. *Id.* Also, the Ministry must authorize projects related to the refinement, transport, and distribution of petroleum. *Id.*

Overall, foreign investment must be registered with the Central Bank within three months of the investment with a possible six-month extension. Luis Lizarralde, Foreign Investment in Colombia, Address at the IX Annual Conf. on Doing Bus. in Latin Am. (Feb. 23, 1996), *in* 11 FLA. J. INT'L L. (forthcoming May 1997). Registration will preserve the

3. COINVERTIR

Corporación Invertir en Colombia, COINVERTIR,[97] is a non-profit, independent corporation that is funded by both the public and private sectors.[98] The purpose of COINVERTIR is to promote, attract, and facilitate the flow of foreign investment into Colombia.[99] Its specific mission includes consolidating foreign investment and matching foreign investments with the sectors and projects most appropriate to the development of the Colombian economy.[100]

C. *Foreign Exchange*

1. Resolution 57 of 1991

While Law 9 of 1991 opened up the Colombian economy for foreign investment, it also established a new exchange control regime.[101] Resolution 57 of 1991, issued by the former Monetary Board, implemented the new foreign exchange system.[102] Overall, the new system decentralized the exchange market and allowed for more flexibility and freedom from regulation.[103]

Before Law 9 of 1991, the Central Bank of Colombia controlled all foreign exchange transactions through the Office of Exchange.[104] Under the old system, in order to purchase foreign currency a person or business would apply for an exchange license, which would usually take several weeks to process.[105] Under the new system, the Central Bank still maintains overall control, but the Office of Exchange has been dismantled.[106]

Also, there is no longer any need to obtain prior exchange licenses in order to remit money abroad.[107] Instead of rigid centralized control, local banks are now responsible for administering the foreign exchange sys-

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investor's exchange rights. *Id.*; *see infra* part III.C. for a discussion on a new exchange control regime.

97. President Gaviria created COINVERTIR on Nov. 18, 1992. COINVERTIR, COINVERTIR, Aug. 1994, at 2, *available from* Colom. Gov't Trade Bureau.

98. COINVERTIR, *supra* note 97, at 2.

99. *Id.* at 2.

100. *Id.* at 1.

101. Urrutia, *supra* note 20, at 18.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 19.

tem.[108] Another added feature of the new system is that there are two foreign exchange markets.[109] The exchange market comprises the majority of foreign exchange transactions, including imports, exports, foreign investments, foreign indebtedness, payments of royalties and fees, and investments by Colombians abroad.[110] The free market is composed of all the transactions not included under the exchange market, including revenues originating from personal services, labor contracts, and tourism.[111]

The revenues originating through the exchange market must be channeled through the local banks, while the earnings from the free market may circulate without restriction.[112] The most important change in the foreign exchange system is that the exchange rate is no longer set by the government but by the markets.[113] The Superintendent of the Banks certifies on a daily basis the "representative market rate" based on analysis of the sale and purchase of foreign currency by the banks on the previous day.[114]

Resolution 57 affected exchange obligations denominated in foreign currency such as contracts that require payment in U.S. dollars.[115] In order for the exchange obligations to be paid in the contracted foreign currency or in Colombian pesos at the representative market rate in force at the time of payment, the underlying transaction "must originate from what Resolution 57 calls 'Foreign Exchange Operations.'"[116] Foreign exchange operations are all the legitimate transactions that comprise the free market and the exchange market.[117] Obligations stipulated in foreign currency that do not originate from foreign exchange operations must be paid in the local currency at the representative market rate in force at the time the obligation was incurred.[118] This places the risk of peso devaluation on the contracting parties receiving the currency, who must determine if a transaction is a foreign exchange operation in order to protect their interests.[119]

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108. *Id.* at 18.
109. *Id.* at 19.
110. *Id.*; Urrutia-Valenzuela, *supra* note 81, at 13.
111. Urrutia, *supra* note 8, § 6.03[2]. Free-market exchanges also include revenues from the sale of goods and services to foreign tourists and donation transfers. Urrutia, *supra* note 20, at 19.
112. Urrutia, *supra* note 8, § 6.03[2].
113. *Id.*
114. *Id.* There is still an official market rate issued by the Central Bank, which has an impact on certain transactions such as redemption of certificates of exchange, but on the whole, the official rate will have very little impact on business since most private obligations will be set by the market rate. Urrutia, *supra* note 20, at 19.
115. Urrutia, *supra* note 20, at 19.
116. Urrutia, *supra* note 8, § 6.03[3].
117. *Id.*
118. Urrutia, *supra* note 20, at 19-20.
119. *Id.*

2. Resolution 21 of 1993

Resolution 21 of 1993 promulgated by the Central Bank, now governs the foreign exchange regime,[120] but in reality, it only made alterations to the system put in place by Resolution 57.[121] Resolution 21 also governs foreign indebtedness.[122] All foreign loans must be registered with the Central Bank and can only be obtained from financial institutions.[123] Under Resolution 57, Colombian residents and local companies can only obtain loans in foreign currency for certain specified purposes, which generally include credit for financing investments and expenses in the country, for financing exports, and for financing expenses to be incurred abroad.[124] Under Resolution 21, "if the term of a loan is less than five years, or if more than 40% of the principal of a loan is to be repaid during the first five years, the borrower must make deposits" with the Central Bank, making such loans inefficient.[125]

Under the new legislation, violations of the foreign exchange system are no longer criminal offenses.[126] Previously, under Decree 444 of 1967, the government could sanction violations of the foreign exchange regulations through monetary penalties, which could have resulted in arrest if the sanctions went unpaid.[127] Overall, the new exchange regime added flexibility in order to ease the internationalization of the Colombian economy.

D. *Foreign Trade*

1. Import Trade Regulations

An important purpose behind *Apertura* was to open Colombia to foreign imports.[128] Legislation lowered tariffs to levels between 0% and 20%, with a few exceptions.[129] The requirements of prior import licenses and

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120. Urrutia-Valenzuela, *supra* note 81, at 13; *cf.* Urrutia, *supra* note 20, at 19-20.

121. *Compare* Urrutia-Valenzuela, *supra* note 81, at 13 (discussing the new exchange control system) *with* Urrutia, *supra* note 20, at 18-20 (discussing the old exchange control system).

122. Urrutia-Valenzuela, *supra* note 81, at 13.

123. *Id.*

124. Urrutia, *supra* note 8, § 6.03[4].

125. Urrutia-Valenzuela, *supra* note 81, at 13. "Resolution 21 provides for a special foreign exchange policy applicable to oil, gas, coal, and nickel exploration and production." *Id.*

126. Urrutia, *supra* note 20, at 20.

127. *Id.*

128. *Id.*

129. *Id.* One important exception is automobiles; tariffs and surcharges have been set between 30% and 40% in order to protect the Colombian auto industry. *Id.* Colombia's average tariff rate is about 12%. 1995 USTR, NAT'L TRADE ESTIMATE REP. ON FOREIGN

prohibited import lists were substantially eliminated so that importers may now freely import goods and services without having to obtain prior governmental approval.[130]

The government also has eliminated the import surcharge by incorporating the surcharge into the tariff percentages.[131] Recent trade legislation created the Ministry of Foreign Trade, which is responsible for all matters having to do with imports, exports, and other trade-related matters, including bilateral and multilateral trade negotiations.[132] Within the Ministry of Foreign Trade, the Committee for Services and Technology is charged with registering all technical assistance, license agreements, transfer of technology agreements, and engineering services agreements.[133]

2. Free-Trade Zones

Decree 2131 of 1991 substantially amended the regulations regarding established free-trade zones within Colombia.[134] Free-trade zones have special regulations regarding customs, foreign exchange, banking, finance, and income taxes.[135] There are three types of free-trade zones: zones involving industrial goods and services, zones involving tourist services, and zones involving technological services.[136] The purpose behind the special regulations is to provide incentives for imports and services, especially the promotion of the tourist industry and increasing research and development of science and technology.[137]

TRADE BARRIERS 67 [hereinafter USTR]. However, since Colombia has accepted the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), it has opted to bind most of its rates at 35% to 40% and has retained the option of raising rates at a future date. *Id.*

130. Urrutia, *supra* note 20, at 20. Colombia requires licenses on less than two percent of its products. Those requiring licenses include weapons, defense-related products, chemicals used in refining cocaine, and most used goods. USTR, *supra* note 129, at 68. Colombia denies licenses for importation of used cars, tires, and clothing. *Id.* Prior to all importation into Colombia, importers must apply for a registration form called a *Registro de Importacion*. *Id.*

131. Urrutia, *supra* note 20, at 20.

132. *Id.*

133. *Id.*

134. Urrutia, *supra* note 8, § 6.02[3]. There currently are seven free-trade zones within Colombia: Barranquilla, Buenaventura, Cali, Cartagena, Cúcuta, Rionegro, and Santa Marta. COINVERTIR, LEGAL BASES FOR INVESTING IN COLOMBIA 6 (1993), *available from* Colom. Gov't Trade Bureau.

135. Urrutia, *supra* note 8, § 6.02[3].

136. *Id.*

137. *Id.*

3. Bilateral and Multilateral Trade Agreements

a. *Andean Pact*

As mentioned above, Colombia is a member of the Andean Pact.[138] Products manufactured in Colombia have free access to the Andean group market, which consists of Bolivia, Ecuador, Peru, and Venezuela.[139] Colombia and the other Andean Pact nations established a Common External Tariff (CET), which started February 1, 1995.[140] The CET has a four-tier structure with levels of 5%, 10%, 15%, and 20% for most products.[141] Columbia has harmonized its CET tariff schedule with Venezuela and Ecuador, including some exceptions by each country.[142] All duties and other restrictions for trade among the Andean Pact nations were eliminated.[143]

Colombia also benefits from Andean Pact membership under the Andean Trade Preference Act,[144] which allows the majority of Colombian exports duty-free entry into the United States until December 4, 2001.[145] Through the Andean Pact, Colombia has adopted improved protection for U.S. intellectual property rights.[146] However, Colombia is "on the U.S. Special 301 watch list due to continuing concerns over deficiencies in licensing, patent regulations, and copyright protection."[147]

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138. *See* Wiesner, *supra* note 72, at 436.

139. Jose M. Perez, *Developments in Investment and Trade Policies in Ecuador, Colombia, and Venezuela, in* PRIVATE INVESTMENTS ABROAD — PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1992, § 7.01 (Carol J. Holgren ed., 1993).

140. USTR, *supra* note 129, at 67.

141. *Id.*

142. *Id.* Colombia also has adopted a new "harmonized" automotive policy with Venezuela and Ecuador, which began on January 1, 1995. *Id.* Tariff rates are 35% for passenger vehicles, 15% for mass transit and cargo vehicles, and 3% for kits. *Id.* The new automotive policy also contains regional content requirements. *Id.*

143. Perez, *supra* note 139, § 7.01.

144. 19 U.S.C.A. §§ 3201-3206 (West Supp. 1995).

145. 19 U.S.C.A. § 3206(b); BUREAU OF PUBLIC AFFAIRS, *supra* note 20, at 6. The President of the United States designated Colombia as a beneficiary of trade preference on July 2, 1992. Proclamation No. 6455, 57 Fed. Reg. 30,069 (1992). The President of the United States may withdraw or suspend the designation of any country as a beneficiary, if the President determines that as a result of changed circumstances, the country should be barred from designation as a beneficiary. 19 U.S.C.A. § 3202(e)(1); *see also id.* § 3203(a) (eligible articles under the act); § 3203(b) (exceptions to duty-free treatment); § 3203(c) (duty reductions for certain goods). Trade benefits under the Andean Trade Preference Act were not affected by Colombia's decertification. INCSR BRIEFING, *supra* note 50.

146. BUREAU OF PUBLIC AFFAIRS, *supra* note 20, at 6; *see* Juan David Uribe Hurtado & Marianna Londono Mejia, *Intellectual Property Laws 1995: Colombia*, LATINLAW (LATINFINANCE Suppl.), June 1995, at 24; USTR, *supra* note 129, at 69-70.

147. BUREAU OF PUBLIC AFFAIRS, *supra* note 20, at 6.

b. *Colombia, Venezuela, and Mexico: Free-Trade Agreement*

Colombia, Venezuela, and Mexico reached a free-trade agreement in 1994, known as the G-3 Agreement, which went into effect on January 1, 1995.[148] The G-3 Agreement offers preferential treatment to 62% of goods exported from Colombia into Mexico.[149] Only 16% of Mexican goods are expected benefit from preferential treatment.[150] This asymmetry is to balance the growth that the Mexican economy will experience under NAFTA.[151] Over the next ten years, duties on many items between G-3 members will be reduced by 10% every year.[152]

c. *Chilean Accord*[153]

Under the trade accord between Colombia and Chile, tariffs were abolished on forty percent of bilateral trade.[154] Tariffs on other items were eliminated over the next year or two.[155] Another 100 products will be duty free by 1999.[156] The accord excludes 320 items from industries that Colombia and Chile want to protect such as textiles, certain agricultural commodities, petroleum and its derivatives, coal, and glass.[157] Even though trade between the two countries used to be only two percent of either countries' total external commerce, as a result of the accord, trade between the two countries is expected to double by 1997.[158]

d. *Bilateral Investment Treaties*

The United Kingdom, Peru, and Spain have each signed investment treaties with Colombia under which the Colombian government agreed to abide by the standards of international law in cases involving indemnity for

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148. USTR, *supra* note 129, at 67.

149. *Free Trade Focus Moves Economic Goals Forward*, LAGNIAPPE LETTER, Jan. 7, 1994, at 6 [hereinafter *Free Trade Focus*].

150. *Id.*

151. *Id.*

152. *Id.* Problems in Venezuela's economy may complicate the benefits for Colombia under the agreement. *Id.* Mexico's entry into NAFTA may benefit Colombia if goods partially made in Colombia (or elsewhere) are finished in Mexico, thereby receiving preferential treatment into the United States and Canada. *See* 19 U.S.C.A. §§ 3301-3473 (NAFTA enabling legislation); Leonard Rosenburg, Presentation, *NAFTA: Status and Prospects*, 8 FLA. J. INT'L L. 276, 286-90 (1993).

153. The actual title of the accord is *El Acuerdo de Complementación Económica Colombo-Chileno.*

154. *Free Trade Focus*, *supra* note 149, at 6.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

Florida Journal of International Law, Vol. 9, Iss. 3 [1994], Art. 6

nationalization or expropriation of foreign assets.[159] Article 58 of the 1991 Constitution gives legislators the power, by a vote of absolute majority in both houses of Congress, to expropriate private property without compensation if the legislators considered the expropriation without compensation just and in the public interest.[160] Colombia's Constitutional Court may reject the treaties if the Court considers the treaties to be unconstitutional.[161] The Colombian government, fearing that even the remotest possibility of expropriation without compensation will deter foreign investment, has vowed to pursue a constitutional amendment that would allow such treaties even if the treaties are ruled unconstitutional.[162]

e. *Central American Common Market*

Colombia and Venezuela signed an accord with Guatemala, Honduras, Costa Rica, El Salvador, and Nicaragua, which aspires to establish free trade among these countries within ten years.[163] Colombia and Venezuela agreed to eliminate or lower their tariffs in three to five years on Central American goods while the Central American economy would open up in ten years.[164] Exceptions may be made in the agricultural sector.[165] Like Colombia's trade relationship with Chile, trade between Colombia and Central America is small, yet is expected to grow as a result of the accord.[166]

f. *Other Agreements*

In 1994, Colombia signed a preferential tariff agreement with Cuba, which allows over 1000 items to receive preferential treatment.[167] On January 1, 1995, Colombia's free-trade agreement with Panama took effect.[168] Colombia receives trade benefits as a member of the Caribbean Common Market (CARICOM),[169] and as a member of the Latin American

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159. 6 COINVERTIR, COLUMBIA FOREIGN INVESTMENT: GREATER PROTECTION OF PRIVATE PROPERTY TOPS LIST OF GOVERNMENT PRIORITIES, July 1995, at 1, *available from* Colom. Gov't Trade Bureau.

160. *Id.*; *see* COLOM. CONST. art. 58, CONSTITUTIONS, *supra* note 59, at 172-73.

161. COINVERTIR, *supra* note 159, at 1.

162. COINVERTIR, *supra* note 159, at 2; *cf.* Wiesner, *supra* note 72, at 465 (arguing that Colombia needs to give foreign investors greater guarantees against expropriation in order to increase foreign investment).

163. *Free Trade Focus*, *supra* note 149, at 6.

164. *Id.*

165. *Id.*

166. *Id.*

167. Donna Rich Kaplowitz, *The Cuban Market: Opportunities and Barriers*, 30 COLUM. J. WORLD BUS. 6, 11 (1995).

168. USTR, *supra* note 129, at 67-68.

169. *Id.* at 67.

Association for Integration (ALADI).[170] It also receives trade benefits from the European Union under a special cooperation program.[171] Finally, Colombia is a member of the Overseas Private Investment Corporation (OPIC), whose goal is to promote investment from the United States in developing countries,[172] and is a signatory of the Multilateral Investment Guarantee Agency (MIGA) agreement, a multilateral organization that offers guarantees against non-commercial risks.[173] Overall, the trade agreements not only have made other markets more accessible to Colombian goods, but also have made foreign goods more accessible to Colombian consumers.

E. *Colombian Code of Commerce*

1. Business Entities

Since commercial relationships within Colombia are governed by the Colombian Code of Commerce, it is important to understand the existing business framework, as well as the attempts by the Colombian government to make the business framework flexible.[174] The three types of business entities established by Colombian commercial law are corporations,[175] limited-liability companies,[176] and branches of foreign companies.[177] Corporations may be incorporated by five or more shareholders who are liable up to the amount of their contributions.[178] Corporations issue share certificates that are freely negotiable unless the by-laws provide restrictions.[179]

Limited liability companies may be incorporated by two to twenty-five

170. COINVERTIR, COLOMBIA: GENERAL PRECEPTS FOR FOREIGN INVESTMENT 10 (Apr. 1995), *available from* Colom. Gov't Trade Bureau.

171. *Id.* (El Programa Especial de Cooperación Comercial).

172. *Id.* at 12; *see* 22 U.S.C.A. §§ 2191-2200b (West Supp. 1995). OPIC insures investment projects against risks such as non-convertibility of currency, expropriation, and political violence. *Id.* OPIC insurance benefits were not suspended under decertification. INCSR BRIEFING, *supra* note 50.

173. COINVERTIR, *supra* note 170, at 12. *See generally* IBRAHIM F.I. SHIHATA, MIGA & FOREIGN INVESTMENT: ORIGINS, OPERATIONS, POLICIES, & BASIC DOCUMENTS OF THE MULTILATERAL INVESTMENT GUARANTEE AGENCY (1988); WORLD BANK, MIGA, THE FIRST FIVE YEARS AND FUTURE CHALLENGES (1994). MIGA guarantees against non-convertibility of currency, discriminatory expropriation, war, and civil disturbances. COINVERTIR, *supra* note 170, at 12.

174. *See* Urrutia-Valenzuela, *supra* note 81, at 13.

175. *Sociedades Anonimas.*

176. *Sociedades Limitadas.*

177. Urrutia-Valenzuela, *supra* note 81, at 13.

178. Cárdenas-Martínez & Llano-Ferro, *supra* note 85, at 16. In June 1996, the Colombian government reformed the Commercial Code to allow corporations to be owned by one person; they are called *sociedades unipersonales*. Lizarralde, *supra* note 96.

179. Cárdenas-Martínez & Llano-Ferro, *supra* note 85, at 16.

Florida Journal of International Law, Vol. 9, Iss. 3 [1994], Art. 6

partners who also are liable up to the amount of their contributions.[180] The capital of the company must be fully paid at the time of incorporation.[181] Furthermore, the capital is divided into quotas, instead of shares, of the same value, which can be assigned.[182]

In order for a commercial company to be incorporated, a public notary must grant a public deed, which will contain the agreement between the shareholders or partners.[183] Colombian commercial law allows foreign companies to establish branches. It is also required that a public notary grant a public deed in order for the foreign branch to be incorporated in Colombia.[184] The public deed must contain authenticated copies of the articles of incorporation, by-laws of the branch, and documents that prove the existence of the foreign company.[185] The public deed also must list the names of the legal representatives and state the activities the business will undertake, the duration of the business, and the circumstances that would lead to termination.[186]

2. International Contracts

Commercial or private contracts are governed by Article 869 of the Colombian Code of Commerce.[187] Article 869 provides that "contracts signed abroad and whose performance takes place within the country will be governed by Colombian law."[188] Colombia does not prevent foreign investors from bringing suit in a foreign country, but does reserve the right to jurisdiction over all investors within its borders.[189] Article 23 of Resolution 51 states that Colombian law and Colombian rules of arbitration shall apply to the resolution of controversies or conflicts derived from the application of the foreign investment scheme, unless an international treaty or convention provides otherwise.[190]

Article 23 further provides that if a foreign investor decides to bring an action outside of Colombia, all matters pertaining to that person's in-

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180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 17. *See generally* Armando Tirado, *Notarial and Other Registration Systems*, 11 FLA. J. INT'L L. (forthcoming May 1997) (discussing the role of the notary in Latin America).
184. Cárdenas-Martínez & Llano-Ferro, *supra* note 85, at 16.
185. *Id.*
186. *Id.* at 16-17; *see* COINVERTIR, *supra* note 170, at 7 (stating registration requirements). The *Sociedad Unipersonal* also has registration requirements. Lizarralde, *supra* note 96.
187. Wiesner, *supra* note 72, at 461 n.188.
188. *Id.* (quoting CÓDIGO DE COMERCIO [CÓD. COM.] art. 869 (Colom.) (Wiesner trans.)).
189. *Id.*
190. *Id.* at 462; *see* Resolution 51, *supra* note 78, at 900.

vestments in Colombia also must be submitted to the jurisdiction of Colombian courts and laws.[191] Submissions to international arbitration shall only be governed by Colombian arbitration rules.[192] Treaties or conventions can waive the requirements of Article 23 of Resolution 51.[193] Currently, the Colombian Congress is in the process of ratifying the treaty of the International Center for the Settlement of Investment Disputes (ISCID) in order to gain greater access to international arbitration and dispute resolution.[194]

3. Antitrust, Mergers, and Acquisitions

With the opening of the Latin American economies, the number of mergers and acquisitions has increased. This is due, in part, to the attractiveness of partnerships between local companies who seek modern technology and protection from increased foreign competition, and companies from developed countries, who seek local insight into a potential new market.[195] Antitrust laws derive from Article 333 of the Colombian Constitution.[196] In order to protect economic freedom, Article 333 forbids the abuse of a dominant position in the market and supports regulation against unfair trade practices and monopolies.[197]

Colombian law "forbids trade agreements that directly or indirectly tend to limit production, supply, distribution or consumption of raw materials, locally manufactured or imported goods, or local or foreign services for the purpose of determining or maintaining unfair prices detrimental to consumers or producers of raw materials."[198] Under Articles 4 and 12 of Decree 2153 of 1992, the Superintendency for Industry and Commerce must approve the merger, consolidation, or integration of two or more enterprises engaged in the same activity of production, distribution, or consumption of a given raw material, product, or service if the assets of the companies, either individually

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191. Resolution 51, *supra* note 78, at 900; Wiesner, *supra* note 72, at 462.

192. Resolution 51, *supra* note 78, at 900; Wiesner, *supra* note 72, at 462.

193. Resolution 51, *supra* note 78, at 900; Weisner, *supra* note 72, at 462.

194. CONINVERTIR, *supra* note 170, at 12. *See generally* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID BASIC DOCUMENTS (1985).

195. Katherine Conradt, *Tying the Knot: Companies Seek Cross-Border Marriages of Convenience*, LATINFINANCE No. 61, Oct. 1994, at 19.

196. Alejandro Linares Cantillo, *Mergers and Acquisitions Laws 1994: Colombia*, LATINLAW (LATINFINANCE Suppl.), Dec. 1994, at 20; *see* COLOM. CONST. art. 333, CONSTITUTIONS, *supra* note 59, at 247; *see also* Jaime E. Fernandez, *Antitrust Regulation in Latin America*, 30 INT'L LAW 521, 535-40 (1996) (discussing competition regulation in Chile).

197. Cantillo, *supra* note 196, at 20.

198. *Id.* If a sector of produced goods or services is important to the country's overall economy, the Colombian government may authorize collusive agreements even though the agreements may restrict trade. *Id.* The government also may control prices if companies are in a position, due to their volume of production, to control markets. *Id.*

or jointly, amount to Col$20 million or more.[199] The main legal framework for mergers in Colombia is under Decree 410 of 1971 of the Colombian Code of Commerce.[200]

Article 172 of the Colombian Code of Commerce defines a merger to be the dissolution of one or more corporations without liquidation for absorption by another corporation or the formation of a new one.[201] Upon the formalization of the merger agreement, the absorbing corporation acquires the rights and obligations of the dissolved corporation or corporations.[202] Under Article 178 of the Colombian Code of Commerce, the absorbing corporation also will take charge of the payment of the absorbed corporation or corporations internal and external debt.[203] The acquisitions process takes on the securities market, unless a financial or insurance institution is being sought.[204]

> According to article 130 . . . , a public offer to buy the controlling interest must be made when (i) a person or group of persons intends during a continuous 12-month period to become the beneficial owner by acquiring more than 10% of the outstanding shares of a corporation whose shares are registered with the National Securities Registry, and (ii) a person or a group of persons owning 10% or more of the outstanding shares of a company intends to acquire more than 5% of the outstanding shares of a company during a continuous 12-month period.[205]

Before making an offer, a buyer must give prior notice to the Superintendency of Securities.[206] After prior notice is given, the buyer must publish the offer to buy in the financial section of a commonly read newspaper and in

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199. *Id.* (Law 155 of 1959 provides the requirements for antitrust and business practices.). Under Articles 58, 60, and 64 of Decree 663 of 1993, the Superintendency of Banking may object to the merger of any financial or insurance institutions. *Id.* The public deed that formalizes the merger agreement must include the approval of the Superintendency of Industry and Commerce or the Superintendency of Banking. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* The transfer of real property can be executed either in a merger public deed or in a separate public deed. *Id.* Article 14.1 of the Colombian Tax Statute governs the tax effects of mergers. *Id.*

204. *Id.* at 20-21. If any transaction results in 10% or more of the capital stock of a financial or insurance institution being held by an individual or corporation, the transaction must be approved by the Superintendency of Banking. *Id.*

205. *Id.* at 21. Resolution 1242 of 1993 issued by the Superintendency of Securities governs public offerings. *Id.* Under Resolution 1242, any transaction involving the sale of publicly traded stock in an amount of P$500,000 or more must occur through one of the Colombian stock exchanges. *Id.*

206. *Id.*

the official gazette of the stock exchange.[207]

F. *Taxation*

In general, income tax in Colombia is 35% as of January 1996.[208] Dividends paid by a Colombian entity to a foreign person or corporation not domiciled in Colombia are subject to a withholding tax of 7% in 1996.[209] Dividends paid to national investors are not included in income tax in order to avoid double taxation, unless the dividends were not subject to a tax before being issued by a company.[210] If the dividends of the shareholder are capitalized, the withholding tax does not apply.[211] Also, the shares or quotas representing the capitalization shall remain in the name of the investor for at least five years, or if they have been sold, the income derived from the sale shall be reinvested in Colombia for at least five years.[212]

Currently, profits of foreign branches are subject to a remittance tax of 7%.[213] Additionally, the sale of goods and services is subject to a value added tax (VAT) of 16%.[214] Exports are exempt from the VAT, and a rebate is available if the good purchased becomes a cost or expense of the final sale.[215] Capital goods, whether bought locally or imported, are subject to the tax.[216]

All agreements or documents that create, modify, or terminate an obligation are subject to a stamp tax, which is 0.5% of the contract's value.[217] The stamp tax does not apply to exports of goods that are manufactured locally.[218] Local governments levy an industry and com-

207. *Id.*

208. Lizarralde, *supra* note 96. Due to complaints of the frequency of changing tax rates, COINVERTIR has proposed an optional plan allowing foreign firms to pay at a fixed rate of 35% in return for a guarantee that the firms would be exempt from any tax hikes for the next 10 years. *Congress Weighs Tax Freeze for Investors*, LAGNIAPPE LETTER, Sept. 29, 1995, at 4. Firms may opt out of the plan at any time but would not be able to join again. *Id.*

209. Cárdenas-Martínez & Llano-Ferro, *supra* note 85, at 17. However, distributions and proceeds from the sale of investments earned by foreign portfolio funds are tax exempt. Urrutia-Valenzuela, *supra* note 81, at 13.

210. Cárdenas-Martínez & Llano-Ferro, *supra* note 85, at 17.

211. *Id.*

212. *Id.*

213. Urrutia-Valenzuela, *supra* note 81, at 14. Technical services rendered abroad by a foreign corporation in Colombia are exempt from income and remittance taxes. *Id.* Technical services rendered in Colombia by foreign companies are subject to income tax. *Id.*

214. Lizarralde, *supra* note 96. Previously, the VAT had been 14% and was to be reduced to 12% in 1997. Urrutia-Valenzuela, *supra* note 81, at 14; *see Columbia*, BUS. LATIN AM., *supra* note 22, at 4 (predicting the VAT would rise to 16% in order to support new social programs).

215. Urrutia-Valenzuela, *supra* note 81, at 14.

216. *Id.* ("VAT is considered part of the price to be depreciated.").

217. *Id.*

218. *Id.*

merce tax on the sale and distribution of goods and services.[219] The tax is calculated on the business' gross sales.[220] Depending on the municipality and the type of business activity, rates range from 0.6% to 1%.[221]

G. *Labor Code*[222]

In order for a contract of employment to exist there must be three elements: the employee must offer his or her services personally, the employee must be subordinate to the employer in regard to the manner, time, and amount of work allocated, and the employee must receive a salary in return for services rendered.[223] The contract may be oral or written.[224] Furthermore, the duration may either be for a fixed term,[225] an indefinite term,[226] for a specific project,[227] or for temporary or casual work.[228]

Employment begins under a trial period, which may not be longer than two months and must be agreed to in writing, during which time either party may terminate the contract without notice to or indemnity from either.[229] After the trial period, termination of employment may be caused by either party, so long as it is for a reason codified in Article 620 of the Labor Code.[230] Also, the contract will terminate upon the death of the employee, mutual agreement, expiration of the agreed term, completion of the activity or work for which the contract was made, liquidation or closure of the company, and suspension of work by the employer for more than 120 days.[231]

If the employer terminates without cause, the employer must pay the employee a cash indemnity.[232] Columbia has four salary[233] systems:

219. *Id.*
220. *Id.*
221. *Id.*
222. The Labor Code codifies "the minimum rights and guarantees of an employee which are mandatory in every contract." CONINVERTIR, COLOMBIA: LABOR LAW 3 (Mar. 1995), *available from* Colom. Gov't Trade Bureau. Parties to employment contracts may not contract around rights guaranteed by the Labor Code nor may an employee waive any legal right or benefit within the Labor Code. *Id.*
223. *Id.*
224. *Id.* A written contract is recommended. *Id.*
225. *Id.* There is no minimum term, however, the maximum term is three years. *Id.*
226. *Id.* at 4.
227. *Id.*
228. *Id.* The maximum term for this type of contract is one month. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* (This list is not exclusive.).
232. *Id.* at 5.
233. Salary does not include voluntary payments made by the employer, including occasional bonuses, the proceeds of profit sharing, and sums of money for the employee to be able to do his or her work, such as travel allowances, fares, and entertainment expenses.

National Minimum Monthly Salary (NMMS),[234] salary in cash,[235] salary in kind,[236] and integrated salary.[237] In addition to their ordinary salary, employees receive social benefits unless the employee is paid an integrated salary.[238] Social benefits include a severance benefit,[239] a mandatory service bonus,[240] shoes and clothing,[241] paid holidays,[242] and a transport subsidy.[243]

Colombia's social security system (ISS) covers sickness, occupational accident, and death.[244] ISS also provides for old age and disability pensions, as well as benefits for the survivors of a deceased employee or pensioner.[245] Private entities manage pension funds and other health-related services.[246] All employers must register their employees with the ISS or any private entity of the employee's choice to provide sickness, disability, and survivor benefits.[247] An employer who fails to link the employee with such services is directly liable for the risks that would have been cov-

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Id. at 6.

234. *Id.* The law requires an official minimum salary for a 48-hour work week. *Id.* The National Labor Council determines the minimum salary each year. *Id.* For 1995 the NMMS was Col$118,633.50 or approximately US$140. Employers and employees may agree on any salary level at or above the NMMS, unless there is a higher minimum set by a collective bargaining agreement or by a court of arbitration. *Id.*

235. *Id.* Salary in cash may be in pesos or dollars, but if stated in dollars, the employee may require payment in pesos at the rate of exchange on the date of payment. *Id.*

236. *Id.* This may be paid in the form of clothing, meals, housing, and other items agreed upon by the parties; however, the value of payments made as salary in kind may not be more than 50% of the total salary or 30% of the NMMS. *Id.*

237. *Id.* The agreed salary includes all special payments and benefits, except holidays. *Id.* In order for an employee to qualify for this form of payment, the employee must earn 10 or more NMMS, and the benefits factor of the arrangement may not be less than 30% of the total paid by the employer. *Id.*

238. *Id.* at 7.

239. *Id.*

240. *Id.* Employers with permanent payrolls are required to pay 15 days' salary for each semester worked or in proportion for any length of service over three months. *Id.* Employees forfeit the right to this bonus if they are dismissed for cause. *Id.*

241. *Id.* Any employer with at least one permanent employee must provide a pair of shoes and a set of work clothes every four months to his or her employees who have a salary of two NMMS or less. *Id.*

242. *Id.* at 8. Employees are entitled to 15 working days' paid holiday for each full year of work. *Id.*

243. *Id.* All employees who earn two NMMS or less are entitled to a transport subsidy, which is set by the government each year. *Id.* In 1995, the transport subsidy was 10,500 Columbian pesos a month (about US$13). *Id.*

244. *Id.* at 9.

245. *Id.*

246. *Id.* All employers must register with a family co-operative, which gives employees access to health services, training, recreation, and cash subsidies for children under legal age. *Id.*

247. *Id.*

Florida Journal of International Law, Vol. 9, Iss. 3 [1994], Art. 6

ered.[248]

With respect to collective rights, the right to associate is protected by law for employees, employers, and the self-employed.[249] There are four types of unions: company,[250] industry or sector,[251] professional,[252] and general.[253] There is a minimum requirement of twenty-five employees or five independent employers to form any union.[254]

Employees may make collective claims for disputes, whether unionized or not.[255] The parties may negotiate without the intervention of the Ministry of Labor for up to twenty calendar days, which may be extended for another twenty calendar days.[256] If an agreement is reached, it is written in a Collective Agreement for unionized employees or in a Collective Pact for non-unionized employees.[257] If no settlement is made, the employees can choose to strike or seek arbitration.[258] If a strike lasts more than sixty days, the dispute automatically passes to arbitration,[259] and the findings of the arbitration tribunal are final and binding on all parties.[260]

H. *Privatization*

One of the main initiatives by the Colombian government to implement *Apertura* came in the form of privatization.[261] Privatization was seen as a vehicle for increasing the flow of money to the government in order to pay for needed social reform and reducing the fiscal deficit.[262] Latin American governments have seen privatization as a way to cut down on inefficient government corporations, increase competition, and increase the technology offered in various areas in which the government previously had

248. *Id.*
249. *Id.* at 12.
250. *Id.* (formed by individuals working in different professions or occupations within the same company).
251. *Id.* (formed by employees working for different companies in the same industry or sector).
252. *Id.* (formed by employees practicing in the same profession or specialty).
253. *Id.* (formed by employees working in different or unrelated professions).
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. Article 333 of the Colombian Constitution of 1991 states that the government should limit its intervention in the economy. Monica Ramirez-Gil, *Colombia*, PRIVATIZATION IN LATIN AMERICA (LATINFINANCE Suppl.), Mar. 1994, at 64.
262. *Id.; see* PEACEFUL REVOLUTION, *supra* note 9, at 35.

monopolies.[263]

Colombia has various strategies for privatization. One is to allow private sector companies to provide public services, and therefore, directly compete with state-owned companies.[264] Another is to allow joint ventures within the public sector in order to develop infrastructure.[265] A third strategy is to allow state-owned companies to be purchased on the stock market, which is known as the Martillo policy.[266] Others strategies include partial sales to reduce government participation in a sector[267] and concessions.[268] Privatization has occurred and will continue to occur in the banking and finance industry, telecommunications,[269] the electric sector, road construction, railroads and ports, hotels, mines, and gasoline and pipeline concessions.[270] Overall, privatization strategies potentially could net the Colombian government well over US$3.4 billion.[271]

IV. ANALYSIS OF ECONOMIC POLICY

Over the past five years, Colombia has made the legal reforms discussed above: a new constitution; foreign investment reform; foreign exchange reform; an increase in free trade; reforms to the Code of Commerce, Tax Code, and Labor Code; and efforts to privatize state owned companies. In the short term, it seems that *Apertura* has been a success.[272] Real Gross

263. *See generally* Jerry Haar, *Economic Developments in Latin America*, 8 FLA. J. INT'L LAW 192, 200-06 (1993).

264. Ramirez-Gil, *supra* note 261, at 64 (*e.g.*, social security and health).

265. Jose Luis Suarez Parra, *Colombia: A Corporate Finance Update*, CORPORATE FINANCE IN LATIN AMERICA DIRECTORY 1994 (LATINFINANCE Suppl.), Dec. 1993, at 81, 82. This can be implemented through two types of agreements: Build, Own, Operate, and Maintain (BOOM) or Build, Operate, Maintain, and Transfer (BOMT). *Id.*

266. *Id.* The Colombian government implemented this policy when it privatized Banco de Colombia. *Id.*

267. Ramirez-Gil, *supra* note 261, at 64. (*e.g.*, the railroads).

268. *Id.* (*e.g.*, granted in the cellular telephone industry).

269. John Miller, *Colombia Eyes Private Cash for TELECOM's Industry*, Reuters Fin. Rep., Sept. 11, 1995, *available in* LEXIS, News Library, FINRPT File. "'The telecommunications sector is without a doubt one of the fastest-growing and most attractive sectors.'" *Id.* (quoting Julio Molano Gonzalez, President of Colombia's state-owned company TELECOM). The Samper administration wants to offer national long-distance service by 1997 and international long-distance concessions by 1998. *Id.* Private long-distance companies can offer TELECOM equipment and financial services in the meantime. *Id.* One hurdle that remains before TELECOM can be privatized is the renegotiation of a union contract with the workers. *Id.*

270. *Colombia*, BUS. LATIN AM., *supra* note 22, at 4.

271. *Colombia Economy: 4-Year Plan Hinges on Foreign Investment*, Global Fin. Markets, May 12, 1995, *available in* LEXIS, News Library, EIUVW File [hereinafter *Columbia Economy*].

272. Banco Ganadero, *Making Strides: Colombia's Financial Sector Forges Ahead*, LATIN AMERICAN MONEY MARKETS 1995 (LATINFINANCE Product Suppl.), Jan.-Feb. 1995, at 18.

Domestic Product (GDP)[273] growth has been consistent: 3.8% in 1992;[274] 5.3% in 1993;[275] 5.7% in 1994;[276] between 4.8%[277] and 5.0% estimated in 1995;[278] and 4.5% estimated in 1996.[279]

Also, inflation has decreased from 32.4% in 1990 to 22.59% in 1994.[280] Unemployment has decreased from 10.5% in 1990 to 8.9% in 1994.[281] Foreign investment funds continue to increase, and Colombia's exports are increasingly diverse.[282] However, certain exports still cause Colombia trouble. The oil[283] and drug industries continue to increase the

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273. Gross domestic product (GDP) is "the total market value of all final goods and services produced within a given period of time by factors of production located within the country regardless of who owns them." KARL E. CASE & RAY C. FAIR, PRINCIPLES OF MICROECONOMICS 592 (1989). Gross national product (GNP) is "the total market value of all final goods and services produced within a given period by factors of production owned by the country's citizens." *Id.* Consider, after noting the GDP growth rate for Colombia from 1993-95, whether the GNP growth rate would be higher, the same, or lower. Since most of Columbia's ecomonic growth has been due to foreign investment, especially in the oil industry, the GNP growth rate may not be as high as the GDP, meaning Colombian nationals may not be owning most of the wealth produced in their country.

274. U.S. DEP'T OF STATE, COUNTRY REP. ON ECON. POL'Y & TRADE PRAC., REPORT SUBMITTED TO THE HOUSE COMM. ON FOREIGN AFF., HOUSE COMM. ON WAYS & MEANS, SENATE COMM. ON FOREIGN REL., & SENATE COMM. ON FIN., 104th Cong., 1st Sess. 347 (Feb. 1995) [hereinafter 1995 REPORT].

275. *Id.*

276. *Columbia*, BUS. LATIN AM., *supra* note 22, at 4.

277. *Id.*

278. *Andean Region: Colombia, An Expanding Economy*, INSTITUTIONAL INVESTOR, June 1995, at 9.

279. *Columbia*, BUS. LATIN AM., *supra* note 22, at 4. The Colombian Office of the President estimates that for 1997 and 1998 the GDP growth rate will be 5.4% and 6.3%, respectively. *Colombia: A Socially Conscious Brew*, *supra* note 23, at 3.

280. Banco Ganadero, *supra* note 272, at 18.

281. *Id.* Unemployment in the major cities, however, went from about 7% at the end of 1994 to about 9% by mid-1995. *Columbia*, BUS. LATIN AM., *supra* note 22, at 5.

282. *Columbia*, CROSSBORDER MONITOR, *supra* note 22, at 3. Colombia's exports are mainly petroleum, coffee, coal, ferronickel, bananas, flowers, chemicals and pharmaceuticals, textiles and garments, gold, sugar, cardboard containers, printed matter, cement, plastic resins and manufactures, and emeralds. BUREAU OF PUBLIC AFFAIRS, *supra* note 20, at 1.

283. Colombia has large oil fields in Cuisana and Cupiagua, which are being developed by British Petroleum (BP) in partnership with Triton Energy Corp., Total, S.A. of France and Ecopetrol, Colombia's state-owned oil company. *High Royalties, Taxes Make for Risky Business in Oil-Rich Colombia*, OIL DAILY, Jan. 3, 1995, at 6. Despite the US$7 billion investment by the consortium, the Colombian government takes about 85% of the value of each barrel pumped. *Id.* The oil industry as a whole does not consider Colombia a competitive market because of the high percentage of the value taken from each barrel. *Id.*

As a result, the Colombian government has tried to make concessions in order to attract more companies to explore for oil in Colombia. *Id.* at 7. Ecopetrol has exclusive exploration rights and invites private companies to share in those rights by covering 50% of the cost of exploration. *South America: Foreign and Private Investment Needed*, WORLD OIL, Aug. 1995, at 52. In an effort to attract more investment in exploration, Ecopetrol has changed the exploration contracts to include: (1) renegotiation with any of the partners who wish to continue exploring a field, (2) allowing companies with a stake in a dying field to exchange flow of dollars into the Colombian economy elevating the exchange rate and hurting Colombia's ability to export other products.[284] The drug trade brings in an estimated US$1 billion a year.[285]

Apertura also has had a significant effect on several agricultural industries because of the removal of entry barriers.[286] Carlos Naranjo, an agricultural engineer at the Universidad de Caldas, argues that the removal of barriers and the lowering of subsidies in the agricultural sector hurts Colombia because the U.S. market for high-demand agricultural products remains protected by subsidies.[287] The result is cheap imports of staple products while Colombian farmers are forced to grow low-demand, high-priced exotic fruits to gain profitable entry into the United States.[288]

Since it is very difficult for Colombian farmers to break into the subsidized markets, growing drug crops becomes more attractive. The appreciation of the peso due to oil and drug money makes it even harder to break into subsidized markets. This situation provides Colombian farmers strong monetary incentives to grow marijuana, coca, and poppies. The United States responds by demanding that Colombia increase its effort in prosecuting the drug trade and eradicating drug crops.[289] The United States also threatens to remove the preferences Colombian exports receive under the Andean Trade Preference Act, which could affect Colombia's ability to raise external financing for the new Social Leap program. President Samper proposed this program to modernize the Colombian infrastructure.[290]

These actions by the United States will only make the drug trade a more lucrative alternative to legitimate industry. An already financially pinched farmer will find it even more profitable to grow illicit crops if the United

its stake in the field's oil production, and (3) the introduction of share-risk contracts in which an exploration stake in a field that is later declared commercial can be converted into a share of production. Gilles Castonguay, *Colombia Changes Rules on Investment in Oil Sector*, Reuters Money Rep., Sept. 26, 1995, *available in* LEXIS, News Library, MONRPT File; *see Industry: Colombia's New E&P Terms "Inadequate,"* OIL & GAS J., Oct. 9, 1995, at 33; Sarita Kendall, *Economic Prospects Closely Linked*, FIN. TIMES, Oct. 9, 1995, at III-3 (regarding the oil industry in Colombia).

284. Stephen Fidler, *Colombian Victor Will Face Fall-Out from Oil Boom*, FIN. TIMES, May 31, 1994, at 6; *see President Addresses Congress, supra* note 20.

285. *New Government Will Inherit Old and New Problems*, LAGNIAPPE LETTER, Oct. 29, 1993, at 5.

286. *Id.* (noting that tobacco and cotton industries have done the worst). *See generally* GENTIL ROJAS LIBREROS, COMERCIO, APERTURA Y DESAROLLO AGRICOLA EN COLOMBIA [COMMERCE, APERTURA, AND AGRICULTURAL DEVELOPMENT IN COLOMBIA] (1992).

287. Carlos Naranjo, *La Apertura Económica y el Agro*, *in* NEOLIBERALISMO Y SUBDESAROLLO: UN ANÁLYSIS CRÍTICO DE LA APERTURA ECONÓMICA 96, 126 (El Áncora eds., 1992).

288. *Id.*

289. *Country Outlook: Colombia*, EIU INVESTOR LATIN AM., Mar. 27, 1995, *available in* LEXIS, News Library, CURNWS File.

290. *Id.*; *infra* text accompanying notes 315-16.

States closes its market to Colombian products. Also, inhibiting external financing of Colombia's Social Leap plan will only lead to greater instability because of the Marxist guerrillas, who continue to fight within the interior mountainous regions of Colombia and increasingly cooperate with the drug traffickers in exchange for money.[291]

Colombia has attempted to breakup the drug trade, but due to the high demand for drugs in Europe and the United States, even as one drug trafficker is imprisioned several more step in to fill the void.[292] Despite the arrest of several leaders of the Cali cartel and the death of the leader of the Medellín cartel, commentators believe smaller cartels are already establishing profitable trade operations, including a resurgent Medellín Cartel.[293] The drug trade also destroys the Colombian legal system. This is shown each time leaders of the drug cartels are captured, and their pay offs to thousands of politicians and public officials are uncovered.[294]

Political scandal even reaches the highest public office. President Samper, who has vigilantly prosecuted drug leaders, has been accused of indirectly taking campaign money from the Cali cartel.[295] Whether the scandal is a mere political ploy[296] or the sobering reality of ostrich-like politics in Colombia, Colombia's short-term credibility has been affected, with financing for the Social Leap probably jeopardized, and U.S. foreign aid reduced through decertification.[297] However, the long-term economic outlook, despite the scandal and decertification, seems favorable.[298]

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291. Robert Gelbard, Assistant Secretary of State for Int'l Narcotics Matters, *The White House: Press Briefing by Gelbard, Newcombe, Ward, & Clark*, M2 Presswire, Oct. 25, 1995, *available in* LEXIS, Market Library, IACNWS File.

292. *Colombia: Country Update*, EIU ViewsWire, Sept. 13, 1995, *available in* LEXIS, World Library, EIUVW File.

293. *Id.*

294. Gelbard, *supra* note 291.

295. *The Stick, Then the Carrot*, ECONOMIST, Mar. 30, 1996, at 46; Cathleen Farrell, *New Colombian President to Slow Economic Reform*, CHRISTIAN SCI. MONITOR, Aug. 9, 1994, at 7.

296. Farah, *supra* note 35, at A25.

297. *Columbia*, BUS. LATIN AM., *supra* note 22, at 4. The general results of decertification on Colombia have been to cut off categories of assistance such as most forms of aid under the Foreign Assistance Act, the Arms Export Control Act, and financing through the Export-Import Bank and OPIC. INCSR BRIEFING, *supra* note 50. The United States also must vote against any loans to Colombia in most of the multilateral development banks. *Id.* However, counternarcotics and humanitarian aid are not affected. *Id.* Neither trade benefits under the Andean Trade Preference Act nor insurance coverage under OPIC has been cut off because of decertification. *Id.*

298. Allen, *supra* note 22; *see Motes, Beams, and Drugs*, ECONOMIST, Mar. 9, 1996, at 18 (calling for Samper's resignation as a solution to the crisis and for the benefit of Colombia and arguing that the U.S. government has hinted that if Samper resigns, Colombia will be certified or given a national security waiver); *see also* Guillermo Perry Rubio, Colombian Minister of Finance, *Fiscal Reality*, ECONOMIST, Apr. 27, 1996, at 6, 8 (arguing that prudent economic policies implemented under *Apertura* will continue and have not been reversed due

Many in Colombia feel it is the demand that drives the drug industry, and if Colombia stops trading in narcotics, it will just be at another country's gain and a loss of huge profits. Of course, the drug trade perverts Colombian society.[299] The violence causes millions to live in fear both in Columbia and abroad. The drug trade exports a harmful product that affects the lives of millions of people around the world. Even so, economic threats will not solve the problem.

A better approach would be for the United States and international organizations to concentrate more on eliminating the demand for drugs.[300] This would allow the market to wean the Colombian economy off of the drug trade as the decreasing demand for drugs also would reduce the profitability of drug trafficking. Furthermore, as Colombia benefits from a open economy, it also becomes dependent on the free market for continued growth.

Increased interdependence provides incentives for cooperation between countries in solving problems. Keeping markets open allows incentives for the Colombian people to participate in legitimate opportunities rather than in industries that create negative productivity. The only way to continue to increase those incentives is by following through with *Apertura* and the Social Leap programs and increase the standard of living of the Colombian people in order to replace the financial attraction of the drug trade.

A major criticism of the economic and constitutional reforms in Columbia has been that they are theoretical without a real impact on the Colombian people.[301] Human rights, some argue, have not gotten any better under the current legal reforms.[302] For example, since 1988, ten people are killed every day for political reasons.[303] Additionally, Marxist

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to the scandal). *But see The Stick, Then the Carrot, supra* note 295, at 46 (arguing Samper is reversing *Apertura* little by little to gain badly needed support among domestic industries suffering under foreign competition).

Some analysts feel that Colombia's long-term economic outlook is unaffected by the current scandal and decertification, but believe Colombia is becoming increasingly ungovernable and this could affect foreign investment even more. *Colombia's Guerrillas Flourish as Its President Fades*, ECONOMIST, May 11, 1996, at 37 [hereinafter *Columbia's Guerrillas*].

299. *See* Gelbard, *supra* note 291.

300. *See generally* SAM STALEY, DRUG POLICY AND THE DECLINE OF AMERICAN CITIES (1992); Kevin B. Zeese, *Drug War Forever?*, *in* SEARCHING FOR ALTERNATIVES: DRUG CONTROL POLICY IN THE UNITED STATES 251-68 (Melvyn B. Krauss & Edward P. Lazear eds., 1991).

301. Farrell, *supra* note 295, at 7.

302. *Id. See generally* WOODROW WILSON INT'L CENTER FOR SCHOLARS, COLOMBIA: HUMAN RIGHTS AND THE PEACE PROCESS (1995).

303. Farrell, *supra* note 295, at 7. Amnesty International claims that the Colombian government has not faced up to the role of the government's armed forces and police in political killings. Fidler, *supra* note 284, at 6.

guerrillas, the narcotics trade, and kidnappings continue to plague Colombia and scare away foreign investors.[304] Also, Colombia's real per capita GDP[305] continues to be low: US$1307 in 1992; US$1431 in 1993; and US$1562 in 1994,[306] showing that the wealth may not be spreading throughout all sectors of the economy. Some commentators note that capital flowing into South America tends to be short term, having little effect on long-term growth and having little ability to seep into the economy to poorer sectors.[307]

Colombia has attempted to keep foreign investment funds in its economy for the long-term in order to raise its foreign reserves and spread the wealth into the lower classes. One mechanism to achieve long-term investment is to make short-term foreign loans inefficient by requiring them to be paid through deposits to the Central Bank.[308] Another way is to require the income derived from sold securities to be reinvested in Colombia for five years.[309] Because of these long-term policies, commentators predict that a Tequila Effect crisis, with foreign investors pulling funds out of Colombia all at once, will not occur as it did in Mexico.[310]

However, merely because there is money in the economy does not mean it will trickle to the bottom. The *Apertura* program has been criticized for its lack of representation of labor interests. Libardo Botero, an economist from the Universidad de Antioquia, argues that *Apertura*, in one broad sweep, did away with the most important protection for the labor sector.[311]

Botero goes further, stating that a purpose behind the reforms was to allow businesses, especially multinationals searching for foreign markets and lower costs of production, to exploit Colombia's labor sector through low wages.[312] The labor reforms currently in place have had little effect on the workers' standard of living because there is a high job turnover, and therefore, many employees never vest because they do not meet the

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304. *See Columbia*, BUS. LATIN AM., *supra* note 22, at 4; Farrell, *supra* note 295, at 7.

305. Figures are in millions of U.S. dollars. 1995 REPORT, *supra* note 269, at 347.

306. *Id.* In 1992, Chile's per capita GDP was US$1220, Mexico's US$3683, South Korea's US$6793, and the United States US$23,300. Banco Ganadero, *supra* note 272, at 18.

307. Siegfried Marks, *Economic Developments in Latin America*, 8 Fla. J. Int'l L. 197, 197-200 (1993).

308. Urrutia-Valenzuela, *supra* note 81, at 13. Here a short-term foreign loan means a loan for less than five years or a loan that requires 40% of the principal to be repaid within the first five years. *Id.*

309. Cárdenas-Martínez & Llano-Ferro, *supra* note 85, at 17.

310. Stephen Fidler, *Short Term Prospects Seem to Be Good*, FIN. TIMES, Oct. 9, 1995, at III-2; Gerry Straub, *Financing Mining Projects in Emerging Countries*, MINING J., Sept. 29, 1995, at 25.

311. Libardo Botero, *Apertura Económica y Reforma Laboral*, *in* NEOLIBERALISMO Y SUBDESAROLLO: UN ANÁLYSIS CRÍTICO DE LA APERTURA ECONÓMICA, *supra* note 287, at 43.

312. *Id.* at 43-44.

requirement of continuous work for several years.[313] Furthermore, the U.S. State Department reports that minimum wage and age laws go unenforced in about twenty-five percent of the work force.[314]

In response to the criticisms that *Apertura* is not reaching all of the Colombian people, President Samper has proposed a four-year plan called the Social Leap to modernize Colombia's infrastructure with the help of private investment.[315] Unfortunately, the plan is threatened by the political scandal involving President Samper.[316] Not only does the drug industry and pressure from abroad threaten to increase drug problems, but they also threaten the funding necessary to spread the benefits of *Apertura* to the lower classes, which is an important step in Colombia's development.[317] If the lower classes do not feel the benefits of *Apertura*, the Marxist message of nationalization of the means of production preached by the guerrillas will become increasingly popular.[318]

Colombia is correctly attempting to provide meaningful opportunities for its citizens that will undermine the power of the guerrillas. Hindering Colombia's ability to modernize its infrastructure will only cause greater internal instability and expose the foreign investments that are already there to risks of expropriation without compensation. The solution is to continue implementing *Apertura* and the Social Leap in order to allow the benefits of an internationalized economy to spread throughout the entire Colombian economy.

Colombia's privatization policy also has received some criticism. Mainly, commentators argue that removing a public monopoly and replacing it with a private monopoly does not help the economy.[319] Jorge Child, a professor of law at the Universidad Nacional de Colombia, argues that the state through intervention in the economy, could control programs to reorganize the distribution of wealth. Professor Child concludes that because the state is divesting through privatization, the free market and foreign investors will control distribution within the Colombian economy.[320]

313. *Id.* at 46-47.

314. 1995 REPORT, *supra* note 269, at 353. Worker rights and conditions are better in sectors of U.S. investment than worker rights in other sectors of the Colombian economy. *Id.*

315. *Colombia Economy*, *supra* note 271. The plan will invest in public works programs and modernizing the telephone, energy, and transportation sectors. *Colombian Infrastructure: Move to Modernise*, INVESTOR LATIN AM., Jan. 30, 1995, *available in* LEXIS, News Library, CURNWS File.

316. *Columbia*, BUS. LATIN AM., *supra* note 22, at 4.

317. Robert J. White, *Latin American Reform Is a Race Against Time*, STAR TRIB. (Minneapolis, Minnesota), Dec. 15, 1994, metro ed., at 27A.

318. *See id.*; *Colombia's Guerrillas*, *supra* note 298, at 37.

319. Botero, *supra* note 311, at 55; Haar, *supra* note 263, at 202.

320. Jorge Child, *Apertura y Privatización, in* NEOLIBERALISMO Y SUBDESAROLLO: UN ANÁLYSIS CRÍTICO DE LA APERTURA ECONÓMICA, *supra* note 287, at 63, 77.

Furthermore, state plans to privatize by selling shares to workers will have little effect on the poorest workers who will be unable to purchase shares.[321]

These criticisms seem very apt in light of Colombia's motive for privatizing, that is, to increase the public purse and offset decreasing tax income from the dismantled trade barriers.[322] However, Colombia has not had a garage sale approach toward all of its state-owned companies.[323] Several industries have been opened to joint venture approaches, which even though they do not allow for competition, do increase the availability of technological advances to Colombian society.[324] Also, concessions are subject to the competition of other private bidders before being completely turned over to private companies.[325]

Overall, commentators who criticize *Apertura*, whether for its lack of representation of working class and farming interests or for the shortsightedness of privatization, stress that the economic gains must spread through the entire country or Colombia will continue to risk instability.[326] Colombia has made great efforts to become part of the international economy and integrate with the rest of Latin America. It also has made attempts to spread the wealth to the lower classes, disarm the guerrillas, and undermine the drug trade, all while walking a macroeconomic tightrope by staving off an appreciating peso and higher priced exports in the face of a booming oil sector, which could cool off by the turn of the century.[327]

The United States, instead of threatening to make matters worse, must continue to cooperate with the Colombian government, especially after Colombia's recent successes. In light of the last five years, there is a great deal of optimism in and for Colombia. However, turmoil and political scandal continue to bring Colombia to the brink of danger. Following through with current plans at least will allow Colombia, armed with the optimism of a growing economy, to fight the threat of long-term crisis at the hands of social instability and drug trafficking.

V. CONCLUSION

In the late 1980s Latin American countries began to open their economies in competition for foreign capital. Colombia, in conjunction with

321. *Id.* at 77.
322. PEACEFUL REVOLUTION, *supra* note 9, at 35.
323. *See supra* notes 264-70 and accompanying text for further discussion on privatization strategies.
324. *See* Suarez Parra, *supra* note 265, at 82.
325. *See* Ramirez-Gil, *supra* note 261, at 64-65.
326. White, *supra* note 317, at 27A.
327. Fidler, *supra* note 310, at III-2.

a new constitution, enacted reforms to its economy, hoping to increase imports, exports, and the flow of foreign capital, as well as make international business easier to compete in Colombia. As a result of foreign investment reforms, increased trade cooperation, and legal reforms in the Colombian Code of Commerce, the Tax Code, and the Labor Code, Colombia's economy has been growing steadily, inflation is decreasing, and unemployment is falling.

However, *Apertura*'s real effects are masked by the heavy inflow of oil and drug money. Also, *Apertura* has negatively affected or virtually destroyed industries and farmers who were once surrounded by the walls of protectionism. Furthermore, the increased wealth from this economic growth has not reached the poorer sectors of the economy and the drug traders and leftist guerrillas continue to hamper Colombia's image. Overall, the message from the working class and farming sectors is clear, the wealth gained from *Apertura* must spread through the entire country, or Colombia will remain a captive of foreign interests, leftist guerrillas, and drug traders.

Colombia is clearly benefiting in the short term from *Apertura*. It will be some time before the clear legacy of *Apertura* develops. In the meantime, Colombia's most difficult test is still to come. It must give all its citizens the benefits of *Apertura* while maintaining the incentives for foreign investors to take part in Colombia. In order to do that, Colombia will have to deal with the drug trade, curb violence, and increase the wealth and opportunity of the lower classes. If Colombia fails, it will become a second class Latin American country, dealing with internal struggles and the backlash from *Apertura*'s lost gamble. If Colombia succeeds, and decades of economic stability show that it probably will, it can continue as a leader in South America and increase its role in developing healthy and cooperative economies, while at the same time helping to create a successfully integrated hemisphere.