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International Environmental Harmonization - Emergence and Development of the Andean Community

Victor Tafur-Dominguez

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INTERNATIONAL ENVIRONMENTAL HARMONIZATION—EMERGENCE AND DEVELOPMENT OF THE ANDEAN COMMUNITY

Victor Tafur-Domínguez†

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"Then we will climb Chimborazo and plant on its snow-covered peaks the tricolor of an America that is forever great, united and free," he concluded. Those who heard him in Casacoima also thought he had lost his mind, and nevertheless it was a prophecy fulfilled in every detail in less than five years.¹

I. INTRODUCTION

Simon Bolivar envisioned an Andean Community of Nations in the early 1800's.² He assumed this would be a natural process for those nations he drove to independence from Spanish rule.³ The first attempted integration process called "Great Colombia," was established in 1819 between Venezuela, Ecuador and Colombia.⁴ This union failed to include Chile, Peru and Bolivia and lasted only a few years.⁵ After 1830, each of these "Great Colombia" countries followed their own path towards development as independent nations.⁶ Bolivar hoped that the constitutions he helped form for each of these countries would lead to greater shared economic and political strength.⁷ Instead,

¹ 1 GABRIEL GARCÍA MÁRQUEZ, *THE GENERAL IN HIS LABYRINTH* 256 (Edith Grossman, trans., Penguin Books 1991) (1928).

² Simon Bolivar had several plans to integrate Latin America. He proposed a Confederation of nations, extending from Mexico to Chile and Argentina. When his proposed Confederation failed, he focused on the Andean Nations and the "Great Colombia" was created. See Jose Garica-Belaunde, *El Sueño de Bolivar: De La Federación de Los Andes a La Comunidad Andina*, at <http://www.comunidadandina.org/document/estu/garcia/27-9-00.htm> (last visited Oct. 26, 2000).

³ See DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPIRE OF ITSELF* 73 (Univ. of Cal. Press 1993).

⁴ See *id.*

⁵ See *id.*

⁶ See *id.* When the Great Colombia dissolved in 1830, Bolivar went into voluntary exile to Europe. He died on December 17, 1830 near Santa Marta, (Colombia) on the Caribbean en route to the ship that would take him to Europe. See *id.* He had lived just long enough to see the complete disruption of Gran Colombia and to pen one final cry of despair: "He who serves a revolution ploughs the sea." *Id.*

⁷ See *id.*

these very constitutions, combined with desires for national autonomy, would drive these countries apart.⁸

Andean integration efforts first reappeared in 1969 when a group of South American countries signed the framework treaty that created the Cartagena Agreement, also known as the Andean Pact.⁹ The Cartagena Agreement was instituted with the participation of Bolivia, Colombia, Ecuador, Peru and Chile.¹⁰ Venezuela became a party to the Cartagena Agreement in 1973.¹¹ The main purpose of the Cartagena Agreement was to establish a customs union in the region within ten years.¹²

The emergence of new challenges stemming from global trade and regional integration brought the need for both institutional and policy reforms to the Cartagena Agreement. Institutional reforms were accomplished through the Protocol of Trujillo and policy reforms were accomplished through the Protocol of Sucre.¹³ The Trujillo amendments to the Cartagena Agreement made the Andean community a sub-regional organization with international legal status.¹⁴ This sub-regional or-

⁸ See BUSHNELL, *supra* note 3, at 73.

⁹ See *Chronological Sequence of Events* (May 26, 1969), at <http://www.comunidadandina.org/english/who/crono/htm> (last visited Oct. 12, 2000). [hereinafter Time Line].

¹⁰ See *id.* On October 30, 1976 Chile withdrew from the Cartagena Agreement. Recently, Bolivia joined the southern group MERCOSUR, without losing its membership in the Andean Community. See *id.*

¹¹ Venezuela joins the Cartagena Agreement on February 13, 1973. See *id.*

¹² See *id.*

¹³ See Decision 406: Codification of the Andean Subregional Integration Agreement, Presentation (Jun. 25, 1997), available at http://www.comunidadandina.org/english/andean/ande_trieb1.htm. (last visited Oct. 12, 2000) [hereinafter Decision 406]. On March 1996, the Andean Presidents during the Eighth Presidential Council held in Trujillo, Peru signed the Trujillo Protocol. It replaced Chapter II of the Cartagena Agreement and requested that the Commission adopt a codified text through a Decision. See *id.* at Presentation. In compliance with this mandate the Commission of the Andean Community, in its Eighty-seventh Special Term held in Quito, Ecuador on June 25, 1997, approved Decision 406. See *id.* The codified text includes the original Cartagena Agreement and its respective modifying instruments: The Additional Instrument for accession of Venezuela (1973); the Protocol of Lima (1976); The Protocol of Arequipa (1978); the Protocol of Quito (1987), and the Protocol of Trujillo. See *id.* The Sucre Protocol was executed June 25, 1997. See Time Line, *supra* note 9; see also Sucre Protocol (Jun. 25, 1997), available at http://www.comunidadandina.org/english/andean/ande_trieb4.htm (last visited Oct. 12, 2000) (It should be noted that some parts of the Sure Protocol are pending ratification) [hereinafter Sucre Protocol].

¹⁴ See Decision 406, *supra* note 13, at art. 48.

ganization comprised of Bolivia, Colombia, Ecuador, Peru and Venezuela created the bodies and institutions later known as the Andean Integration System (AIS).¹⁵ In 1996, the Andean Pact was officially changed to Community of Andean Nations (CAN) or also known as Andean Community.¹⁶ The Sucre policy reforms, for their part, extended the scope of integration beyond pure trade and economic issues to include social and environmental issues.¹⁷

These changes to the model spurred integration and made liberalization of trade in the sub-region possible by adopting a common external tariff. These changes were also aimed at strengthening the Andean legal system, through the adoption of new provisions that would promote a sense of supra-nationality.¹⁸ In 1993, a Free Trade Zone was created among Bolivia, Colombia, Ecuador, and Venezuela.¹⁹ A common external tariff became effective on February 1, 1995, at an average level of 13.6% with a 20% limit.²⁰ In addition, on April 16, 1998, the Andean Community and Mercosur signed a framework agreement for the creation of a Free Trade Zone, which became effective January 1, 2000.²¹ In 1998, the Andean Community approved a General Framework of Principles and Provisions for

¹⁵ The Andean Integration System (AIS) is the series of bodies and institutions created to assist the Andean sub-regional integration. *See Bodies and Institutions*, available at <http://www.comunidadandina.org/english/bodies.htm> (last visited Oct. 29, 2000) [hereinafter AIS]; *see also* Decision 406, *supra* note 13, at art. 6. The Protocol of Trujillo has required that the references "Commission of the Cartagena Agreement", "Board of the Cartagena Agreement", "Court of Justice of the Cartagena Agreement" and "Cartagena Agreement Law" be substituted with "Commission of the Andean Community", "General Secretariat of the Andean Community", and "Andean Community Law." *See id.*

¹⁶ *See id.* at art. 5.

¹⁷ *See id.* The Agreement, art. 1, as amended states: "The objective of this Agreement is to promote the balanced and harmonious development of the Member Countries under equitable conditions, through economic and social integration and cooperation". *See id.* at art. 1.

¹⁸ *See id.* at art. 3. In 1999 the Andean Community grouped a population of over 111 million people with a gross domestic product of approximately 272 billion dollars. *See* Andean Community General Secretariat, *Who Are We?*, at <http://www.comunidadandina.org/english/who.htm> (last visited, Oct. 29, 2000) [hereinafter CAN].

¹⁹ Peru temporarily suspended its obligations under the Liberalization Program on August 27, 1992. *See* Time Line, *supra* note 9.

²⁰ *See id.*

²¹ Mercosur group of Argentina, Brazil, Uruguay and Paraguay create a common-market. *See Legal Protection of the Environment in the Mercosur: The Green*

Liberalizing Trade and Services in the Andean Community, which will allow for the free circulation of goods and services by the year 2005.²² The Andean Community also participated with a single voice in the negotiations for the Free Trade Area of the Americas (FTAA).²³

Although environmental issues played a significant role during the early stages of the Cartagena Agreement, they were not included in the original framework of the Cartagena Convention.²⁴ This was surprising, since one of the most notable aspects of the Andes is the presence of natural resources. These resources stand out because of their exploitation potential and "not for their quantity like those of Amazonia."²⁵ The Andes has been and continues to be the original source of many widely

Challenge on the Road to a Common Market, in 29 INTERNATIONAL COUNCIL OF ENVIRONMENTAL LAW 42 (1999).

²² See Decision 439: General Framework of Principles and Rules and for Liberalizing the Trade in Services in the Andean Community, art. 1 (Jun. 11, 1998), available at <http://www.comunidadandina.org/english/Dec/D439e.htm> (last visited Oct. 12, 2000) [hereinafter Decision 439].

²³ See *id.* In March 1998 the Andean Community participated for the first time with a single voice in the negotiations of Free Trade Area of the Americas (FTAA).

²⁴ Among the regional programs that emerged from the Cartagena Agreement, mention can be made of the following:

- The Rural Environment Development Program, which was in effect until 1986. It focused on rural protection in the Andes, river basin management, and the drawing up of policies and instruments to guide the selection of transfer of technologies for the rural areas.
- The Andean Program for Forestry Development provides for regional inventories, for development of policies to repopulate forests with native species, and for strategies for sustainable exploitation and training programs.

Another activity within the framework of the Cartagena Agreement was the organization of a working group to analyze the issue of access to genetic resources.

In the framework of the bilateral agreements, a number of successful experiments have taken place, among which mention may be made of:

- The Overall Bi-national Master Plan for the Lake Titicaca Basin is a basin comprised of water resources in Lake Titicaca, the Desaguadero River, Lake Poopo and Lake Salar (the TDPS System). It is a project developed by the Governments of Bolivia and Peru, with the support of the European Union, to adopt mechanisms for the development of the basins.
- The Vicuña Conservation Program was designed to promote conservation of these mammals that are typical of the central and south Andean region. The program also provides for breeding and restocking of lamoids in order to maintain genetic quality, particularly for llamas and alpacas.

²⁵ LATIN AMERICAN AND CARIBBEAN COMMISSION ON DEVELOPMENT AND ENVIRONMENT, DAWN IN THE ANDES 18 (2^d ed. 1997) [hereinafter DAWN IN THE ANDES]. See *infra* Part II.B for a discussion of genetic material in Latin America.

cultivated plants. Among the most widespread food crops that originated in the Andes are potatoes, corn and tomatoes.²⁶ The value of these natural resources is multiplied by potential contributions they can make to agriculture and medicine.²⁷ Bolivia, Colombia, Ecuador, Peru and Venezuela have developed a geographical²⁸ and cultural heritage²⁹ shaped by the Andes mountains. Almost forgotten is the fact that these countries are also part of the Amazon dominium, the main watershed of the Amazon River Basin.³⁰

²⁶ The International Potato Centre (IPC) was established in 1971. For the conservation of numerous species of wild potato, to preserve potato (*Solanum*) genetic resources, the IPC has assembled more than 15,000 samples of them, including more than 3,600 different varieties of eight cultivated species. The IPC also conserves 1,567 samples of wild potatoes for 12 countries in the American continent, representing 128 different species of potatoes. See DAWN IN THE ANDES, *supra* note 25, at 23.

²⁷ The Act of Cartagena, from the eleventh meeting of the Andean Presidential Council in May 1999, issued the following declaration about the environment: The Andean sub-region is one of the world's best endowed regions and the Member Countries of the Andean Community possess 25% of the planet's biological diversity. This biological heritage is one of our major strong points and represents a source of opportunities for our countries' development. For that reason, we reaffirm that its conservation, recovery and sustainable use require the adoption of concerted Community policies and strategies that will contribute to the intensification and perfection of the Andean integration process and promote the equitable distribution of its benefits.

XI Andean Presidential Council, Act of Cartagena, available at http://www.comunidadandina.org/english/documen/act_n1.htm (last visited Oct. 12, 2000) [hereinafter XI Act].

²⁸ The Andes forms a continuous axis, stretching over more than 7,000 kilometers, linking together various regions, from the Equator, the Tropic of Capricorn, and almost to Antarctica. See DAWN IN THE ANDES, *supra* note 25, at 13. The effects of altitude in the Andes also have a decisive impact on those various regions, altering climate categories and creating contrasting landscapes. Bolivia, Colombia, Ecuador, Peru and Venezuela are among the countries with the most biodiversity of the planet. See *id.* at 14.

²⁹ The cultural heritage of the Andes is a composite of the indigenous peoples, particularly the Incas, and the Spanish urban network formed in the region. "By 1550 the first Spanish urban network had formed in the Andean Region, and it underwent no major change until the second half of the nineteenth century. The network comprised the viceroys' capitals of Lima and Bogotá, with Quito as seat of the Royal Tribunal, the international trading ports of Cartagena and El Callao and the regional ports of Guayaquil and Santa Marta, the royal mines at Potosí and smaller centers like La Paz, Cochabamba, Cuenca and Popayán". *Id.* at 56; see generally BROOKE LARSAON & OLIVIA HARRIS, *ETHNICITY, MARKETS AND MIGRATION IN THE ANDES* (Duke University Press 1995).

³⁰ The Amazon is the largest river basin in the world and the greatest tropical rain forest. The Amazon River basin is comprised of nine South American coun-

Contrary to popular belief, the Amazon region comprises a great number of different ecosystems, extending eastwards to the Andes and including the Orinoco river basin between Colombia, Brazil, Venezuela and the Tocantins River in North-eastern Brazil.³¹ The result is an area of highly diversified flora and fauna comprised of what scientists today believe is the Amazon region's greatest value to mankind. With the exceptions of Lake Titicaca, between Peru and Bolivia, and the Amazon River basin, few particular ecosystems or waterbodies are common to several Andean countries.³² For the most part (under these circumstances), environmental concerns have been "local." Nevertheless, given the achievements obtained during the integration process of the Cartagena Agreement, the new community model with its redefined legal system, and the early steps in reshaping the process, indicate that environmental harmonization will be a key issue in the Andean integration process. Environmental harmonization will help to further unite and strengthen these Andean nations.

Part II of this article will provide a background for the AIS and its organizations, including the legislative and judicial impacts of these organizations in the issue of environmental harmonization. Part III will analyze the policies for environmental harmonization in the Andean Community. Part IV will describe the formation and importance of the Amazon Cooperation Treaty in the implementation of environmental harmonization. Part V will discuss current harmonization trends in the Andean Community, and lastly Part VI of this article will provide con-

tries, including the Andean countries, Brazil, French Guyana, Guyana, and Suriname (an area of 7.5 million km²). It covers roughly half of the territory of Peru, a third of Bolivia, Ecuador and Colombia, and about a quarter of Venezuela. These countries could in fact be called Andean-Amazon countries for they contain the main watershed of the Amazon River. See *MANAGEMENT OF LATIN AMERICAN RIVER BASINS: AMAZON, PLATA, AND SAO FRANCISCO* 4-5 (Asit K. Biswas et al. eds., 1999) [hereinafter *AMAZON*].

³¹ See *id.* at 5.

³² Another exception, the long-standing dispute over the use of the Rio Lauca, has led Bolivia to sever diplomatic relations with Chile. Other rivers form the boundaries among Andean countries in isolated areas. Their importance has not yet emerged. See Alfred M. Duda, *Addressing Global Environment Issues Through a Comprehensive Approach to Water-Resources Management: Perspectives from the Sao Francisco and Plata Basins*, in *AMAZON*, *supra* note 30, at 305.

cluding thoughts on the issue of environmental harmonization in the Andean Community.

II. THE AMERICAN INTEGRATION SYSTEM: IT'S ORIGIN AND COMPOSITION

A. *The Andean Community*

The Andean Community is intended "to promote the balanced and harmonious development of Member Countries³³ under equitable conditions, through economic and social integration and cooperation."³⁴ The regional integration process gradually created a Latin America's common market, aimed at improving the position of the Andean Community in the international economic context.³⁵ The Cartagena Convention, as amended, impelled the integration process on two main issues: balanced and harmonious development, or sustainable development, and the principle of solidarity among the Andean countries.³⁶ These principles are invoked in the declaration of purpose and are expressly included in Article 2 of the Cartagena Convention.³⁷

In addition, the Convention calls for a "gradual harmonization of economic and social policies and the approximate standardization of national laws in regard to matters of concern, including the preservation of natural resources and the environment."³⁸

³³ See Decision 406, *supra* note 13. The member countries are Colombia, Venezuela, Ecuador, Peru and Bolivia [hereinafter Member Countries]. See *id.*

³⁴ See *id.* at art. 1.

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.* Declaration of goals and principles states (that these countries are): "Determined to attain such goals by creating an integration and cooperation system that tends towards a balanced, harmonious, and shared economic development of their countries." See Decision 406, *supra* note 13, at art. 2. Article 2 further provides: "Balanced and harmonious development shall lead to a fair distribution, among the Member Countries, of the benefits derived from integration so as to reduce existing differences among them. The results of such process shall be evaluated periodically, bearing in mind, among other things, their effects on the growth of each country's total exports, the behavior of its trade balance with the Sub-region, the evolution of its gross national product, the creation of new jobs, and the formation of capital." *Id.*

³⁸ *Id.* Article 3 of the Agreement states the mechanisms, as follows:

To fulfill the objectives of this agreement, the following mechanisms and measures, among others, shall be employed:

B. *The Origin of The Andean Integration System*

The Cartagena Agreement amended through its respective protocols establishes the legal and institutional framework for the Andean integration process.³⁹ The new Andean Community started operating on August 1, 1997 with a General Secretariat, whose headquarters are located in Lima (Peru), as its executive body.⁴⁰ The Andean Presidential Council and the Council of Foreign Ministers were formally established as policy-making bodies. The legislative roles of the councils were comprised of the Trade Ministers, which was later broadened to include Ministers of other sectors. The Andean Parliament and the Andean

a) The gradual harmonization of economic and social policies and the approximation of national laws in regard to pertinent matters;

b) Common industrial policies, the intensification of the sub-regional industrialization process, the implementation of industrial policies, and other forms of industrial integration;

c) A more advanced schedule of trade liberalization than the commitments derived from the Treaty of Montevideo 1980;

d) A Common External Tariff, preceded by the adoption of agricultural and agro-industrial sectors;

e) Programs that accelerate the development of agricultural and agro-industrial sectors;

f) Channeling of internal and external resources to the Sub-region to finance those investments that are needed in the integration process;

g) Physical integration; and

h) Preferential treatment given to Bolivia and Ecuador.

In addition to the mechanisms set out above, the following economic and social cooperation policies shall be carried out jointly:

a) External actions in the economic field, in subjects of common interest;

b) Programs to promote scientific and technological development;

c) Border integration policies;

d) Programs in the area of tourism;

e) Policies for the use and preservation of natural resources and of the environment;

f) Programs in the services sector;

g) Social development programs; and

h) Policies in the social communications field.

Id. at art. 3.

³⁹ See Decision 406, *supra* note 13, at art. 7. Article 7 states: "The purpose of the System is to allow an effective coordination between the bodies and institutions that compose it, in order to deepen Andean sub-regional integration, to promote its external presence and to consolidate and strengthen actions related to the integration process." *Id.*

⁴⁰ See Time Line, *supra* note 9.

Court of Justice were also adjusted for the new community approach.⁴¹

C. *The Executive Tasks of the AIS*

1. *Andean Presidential Council*⁴²

Andean Presidential Council (APC) is the highest executive body of AIS.⁴³ The APC is responsible for issuing guidelines for Andean integration.⁴⁴ The bodies and institutions of the system implement these guidelines.⁴⁵ APC is comprised of the Presidents of the Member Countries.⁴⁶ The APC has a Chairman who represents the Andean Community at the highest executive political level. The Chairman holds the position for a term of one calendar year, after which time the position is rotated successively.⁴⁷ The APC meets regularly once a year and may meet in special sessions any time it deems it is advisable.

2. *General Secretariat of the Andean Community*

The General Secretariat of the Andean Community is the executive body of the Andean Community (the General Secretariat).⁴⁸ Commencing on August 1, 1997, the General Secretariat assumed the functions of the Board of the Cartagena

⁴¹ See Treaty Creating the Court of Justice of the Andean Community, available at http://www.comunidadandina.org/english/andean/ande_trie2.htm. (last visited, Oct. 29, 2000) [hereinafter Cochabamba Protocol]. The Cochabamba Protocol signed May 1996 in the City of Cochabamba (Bolivia) amended the Treaty Creating the Court of Justice of the Cartagena Agreement (1979) to create the Court of Justice of the Andean Community. See *id.* The Additional Protocol signed in Sucre (Ecuador) April 23, 1997 adjusting the Andean Parliament is still pending ratification by the Andean countries. See Sucre Protocol, *supra* note 13.

⁴² See generally *Andean Presidential Council*, available at http://www.comunidadandina.org/english/bodies/bodies_1.htm (last visited Oct. 29, 2000) [hereinafter APC].

⁴³ See Decision 406, *supra* note 13, at art. 11.

⁴⁴ See *id.*

⁴⁵ See *id.* Article 12 of Decision 406 outlines the Andean Presidential Council's responsibilities. See *id.*

⁴⁶ See APC, *supra* note 42.

⁴⁷ See Decision 406, *supra* note 13, at art. 14. The position of Chairman is filled, successively and in alphabetical order, by each one of the Member Countries. See *id.*

⁴⁸ See generally *General Secretariat of the Andean Community*, at http://www.comunidadandina.org/english/bodies/bodies_4.htm. (last visited Oct. 29, 2000) [hereinafter Secretariat].

Agreement.⁴⁹ The General Secretariat is under the direction of a Secretary General, elected by a consensus of the Andean Council of Foreign Minister (ACFM).⁵⁰

The General Secretariat's main functions are to administer the process of Andean sub-regional integration, maintain permanent links with the Member Countries, and maintain relations with the executive bodies of other regional integration and cooperation organizations.⁵¹ "The General Secretariat expresses itself through Resolutions."⁵² The General Secretariat operates on a permanent basis and has its permanent headquarters in Lima, Peru.⁵³

D. *The Legislative Tasks of the AIS*

1. *Commission of the Andean Community*

The Commission of the Andean Community (CAC) is the main policy-making body of the AIS.⁵⁴ The CAC is made up of a representative from each Member Country of the Andean Community and shares its legislative role with the ACFM.⁵⁵ The CAC makes, implements and evaluates Andean sub-regional integration policy in the areas of trade and investment, through the adoption of Decisions in coordination with the Andean Council of Foreign Ministers.⁵⁶ The CAC is also responsible for the implementation of guidelines for the APC and the coordination of joint positions of the Member Countries in international events and negotiations in these areas.⁵⁷ Furthermore, the

⁴⁹ See *id.* The Board of the Cartagena Agreement was the implementing body under the Cartagena Agreement (Andean Pact). The board was eliminated by Decision 406. See Decision 406, *supra* note 13.

⁵⁰ See Decision 406, *supra* note 13, at art. 20(b).

⁵¹ See *id.* at arts. 30-34.

⁵² See *id.* at art. 29.

⁵³ See *id.* at art. 31. The position is held for a five-year period and may only be re-elected once. See *id.*

⁵⁴ See generally *Commission of the Andean Community*, at http://www.comunidadandina.org/english/bodies/bodies_3.htm (last visited Oct. 29, 2000) [hereinafter CAC].

⁵⁵ See Decision 406, *supra* note 13, at art. 21. "Each Government shall accredit a head of delegation and a deputy." *Id.*

⁵⁶ See Decision 406, *supra* note 13, at art. 22(a).

⁵⁷ See *id.* Some functions overlap with the Andean Council of Ministers of Foreign Affairs. The Commission has the responsibility to take necessary measures to accomplish the objectives of the Cartagena Agreement, to carry out the Guidelines of the Andean Presidential Council to approve and evaluate budgetary

CAC has the duty to harmonize the economic policies of the Member Countries and to consider regulations for the coordination and development of harmonization policies.⁵⁸

The CAC meets three times a year at the headquarters of the General Secretariat. The Chairman of the CAC is a representative of the country serving as Chair of the APC.⁵⁹ The CAC adopts Decisions by an affirmative vote of the absolute majority of Member Countries unless the matter is included in the list of important issues, under Annex I, Annex II, Annex III for Bolivia and Ecuador, and Industrial Development Programs and Projects. In these special cases the CAC adopts its Decisions by affirmative votes with no negative votes being casted.⁶⁰

2. *Andean Council of Foreign Ministers*⁶¹

The ACFM is an executive team, made up of the Ministers of Foreign Affairs of the Member Countries. The ACFM is responsible for making and carrying out the Andean Community's foreign policy.⁶² ACFM may sign treaties, covenants, and agreements on global foreign policy and cooperation issues with third party countries, groups of countries, or with international organizations.⁶³ The ACFM also coordinates the joint positions of the Member Countries in international negotiations.⁶⁴

The ACFM issues Declarations and Decisions. The Declarations are non-binding statements, while the Decisions are legally binding and governed by the Charter of the Court of Justice of the Cartagena Agreement.⁶⁵ Both the Declarations and the Decisions must be adopted by consensus.⁶⁶ The Deci-

issues, and to submit for consideration to the Andean Council of Foreign Affairs the proposed Regulations of the General Secretariat. *See id.*

⁵⁸ *See id.* at art. 25.

⁵⁹ *See id.* at art. 24. Article 24 states "Attendance at Commission meetings shall be compulsory and failure to attend shall be considered an abstention." *Id.*

⁶⁰ *See* Decision 406, *supra* note 13, at art. 26.

⁶¹ *See generally Andean Council of Foreign Ministers*, at http://www.comunidadandina.org/english/bodies/bodies_2.htm (last visited Oct. 12, 2000) [hereinafter ACFM].

⁶² *See id.*

⁶³ *See* Decision 406, *supra* note 13, at art. 16(d).

⁶⁴ *See id.* at art. 16(e).

⁶⁵ *See generally* ACFM, *supra* note 61.

⁶⁶ *See* Decision 406, *supra* note 13, at art. 17.

sions, therefore, are part of the Andean Community law.⁶⁷ The ACFM also elects the Secretary General, who evaluates the performance of the General Secretariat, and considers the initiatives and proposals submitted to it by the Member Countries or the General Secretariat.⁶⁸

3. *The Andean Parliament*

The Andean Parliament is the legislative body of the AIS.⁶⁹ The Andean Parliament's mission is to represent the people of the Andean Community.⁷⁰ Presently, the Andean Parliament is comprised of representatives of the national congresses; however, in five years, its members will be elected by a direct and universal vote in accordance with the Additional Protocol, signed in April 1997.⁷¹ The Andean Parliament's functions are to participate in the legislative process by drafting provisions of common interest to the Andean Community.⁷²

The Andean Parliament also promotes legislative harmonization in the Member Countries and coordinates relations with the parliaments of the Andean countries and of third party countries.⁷³ The Andean Parliament was created on October 25, 1979.⁷⁴ In April 1997 the Andean Parliament also adopted the Protocol modifying its Charter and an Additional Protocol on Direct and Universal Elections.⁷⁵ These protocols consolidate the position of the Andean Parliament as the deliberative organ of the Andean Community.⁷⁶

E. *Court of Justice of the Andean Community*

The Court of Justice of the Andean Community (CJAC) is the judicial body of the Andean Community.⁷⁷ The CJAC is

⁶⁷ See *id.*

⁶⁸ See *id.* at art. 20.

⁶⁹ See Andean Parliament, at http://www.comunidadandina.org/english/bodies/bodies_5.htm (last visited Oct. 29, 2000) [hereinafter Andean Parliament].

⁷⁰ See *id.*

⁷¹ See Decision 406, *supra* note 13, at art. 42.

⁷² See Andean Parliament, *supra* note 69, at art. 42.

⁷³ See Decision 406, *supra* note 13, at art. 43.

⁷⁴ See Andean Parliament, *supra* note 69.

⁷⁵ See Sucre Protocol, *supra* note 13.

⁷⁶ See Decision 406, *supra* note 13, at art. 42; see also Andean Parliament, *supra* note 69.

⁷⁷ See *id.* at art. 40.

comprised of five Judges, each representing one of the Member Countries.⁷⁸ Judges are appointed to a six-year term and may be re-elected for a single term.⁷⁹

The CJAC has jurisdiction over the Member Countries.⁸⁰ The CJAC ensures the legality of Andean Community provisions through nullity actions; it also interprets Andean Community laws to ensure that they are applied uniformly in the territories of the Member Countries.⁸¹

On May 28, 1996, the Cochabamba Protocol was approved.⁸² This protocol modifies the CJAC's charter, which provided the CJAC with new functions.⁸³ These new functions included hearing actions with regard to an omission or failure to act, to act as Arbitrator, and jurisdiction in labor actions. This instrument became effective on August 25, 1999, when its process of ratification was concluded, and will play a vital role in determining the harmonization and environmental protection in the Andean community.⁸⁴

The Member Countries signed the Court of Justice Treaty in 1979.⁸⁵ The first part of the Treaty establishes what is called the "Legal System of the Andean Community", which is made up of the Cartagena Agreement, its Protocols and Additional Instruments, the Treaty creating the Court of Justice; Decisions of the Andean Council of Foreign Ministers and the CAC; the resolutions of the General Secretariat of the Andean Community;

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ *See id.* at arts. 40-41; *see also* Cochabamba Protocol, *supra* note 41, at arts. 5-11. Judges are appointed by unanimous decisions of the Plenipotentiary Representatives accredited for that purpose, from slates of three candidates submitted by each Member Country. Judges are appointed for a six-year term, renewed in part every three years, and eligible to be re-elected once. *See id.*

⁸¹ *See id.*

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *See id.* The jurisdictional function within the integration process is assigned to the CJAC. The General Secretariat is in charge of the administrative investigation (also known as the pre-litigation phase) to determine whether State parties are responsible for non-compliance, and of monitoring the Andean judicial system to ensure that it remains consistent. *See* Cochabamba Protocol, *supra* note 41, at arts. 5-11.

⁸⁵ *See* Time Line, *supra* note 9. The Treaty Creating the Court of Justice was signed May 28, 1979. On May 19, 1983 the Treaty went into effect (after ratification process). *See id.*

and Complimentary Agreements the Member Countries sign amongst themselves.⁸⁶

The Court of Justice Treaty also establishes the supra-national characteristics of the community provisions, namely their direct application (horizontal and vertical) and immediate effectiveness in the Member Countries.⁸⁷ As a result, decisions of the ACFM, the CAC, and the resolutions of the General Secretariat do not require ratification by national parliaments in order to become operative. They become effective on the date of their publication in the Cartagena Agreement's Official Gazette, and become binding on both Andean governments and Andean citizens.⁸⁸

The Court of Justice Treaty further establishes the general obligation of Member Countries to take any necessary measures to ensure compliance with the rules and regulations that constitute the judicial system of the Cartagena Agreement.⁸⁹ Member Countries cannot adopt or implement any measure that is not in accord with provisions established by the Court of Justice Treaty or that hinders their application in any way.⁹⁰

Today, the Court has jurisdiction over a number of actions including nullification, non-compliance, pre-trial interpretation, and omissions. In the first case, the Court is responsible for nullifying decisions made by the ACFM, the CAC and Resolutions of General Secretariat, which violate the provisions of the Andean Community's judicial system. This nullification jurisdiction also applies to decisions challenged by a Member Country (provided that the decision was not adopted with that country's affirmative vote), ACFM, the Commission, the General Secretariat, or any person (including corporations) whose rights or interests are affected or injured.⁹¹ This action must be brought within two years following the date that the decision or

⁸⁶ See Cochabamba Protocol, *supra* note 41, at art. 1.

⁸⁷ See *id.* at arts. 2-3. Decisions become binding as of the date they are published in the Official Gazette of the Agreement. When their text so stipulates, Decisions must be incorporated into national law through an express act stipulating the date they will enter into effect in each Member Country. See *id.*

⁸⁸ See *id.* at art. 2-3.

⁸⁹ See *id.*

⁹⁰ See *id.* at art. 4.

⁹¹ See Cochabamba Protocol, *supra* note 41, at arts. 17-19.

resolution became effective.⁹² Filing a nullification action does not affect the validity of the challenged provision.⁹³ The CJAC may, however, at the request of the petitioner, order temporary suspension (or other cautionary measures) if such action has a potential of causing irreparable harm.⁹⁴

A non-compliance action involves an allegation stating that a Member Country is not in compliance with its obligations under the provisions of the Andean judicial system.⁹⁵ The General Secretariat must first institute administrative proceedings in the pre-litigation or administrative phase before a non-compliance action may be brought before the CJAC.⁹⁶

On August 25, 1999, the non-compliance amendments were ratified.⁹⁷ These amendments allow any person or corporation to appeal directly to the CJAC if a Member Country does not comply with Andean provisions.⁹⁸ This right to appeal is contingent upon the completion of aforementioned pre-litigation proceedings before the General Secretariat.⁹⁹

Decision 425 of the ACFM contains the regulations for the administrative proceedings of the General Secretariat.¹⁰⁰ The regulations stipulate that the General Secretariat must, by administrative initiative or at the request of a Member Country or a citizen, send its written observations to the Member Country allegedly failing to comply with Andean provisions.¹⁰¹ The Gen-

⁹² See *id.* at art. 20. (Even if the two-year period has expired either of the parties to a litigation brought before national judges or courts can petition those judges or courts to declare that the Decision or Resolution is inapplicable to the specific case, in accordance with article 17. Upon the filing of the petition to declare inapplicability, the national judge shall submit an inquiry to the Court of Justice of the Andean Community regarding the legality of the Decision, Resolution or Agreement. It shall then suspend the process until receipt of the Court's ruling, which the national judge must apply in her ruling.)

⁹³ *Id.* at art. 21.

⁹⁴ See *id.*

⁹⁵ See *id.* at art. 23.

⁹⁶ See *id.* at arts. 23, 24.

⁹⁷ See generally Cochabamba Protocol, *supra* note 41.

⁹⁸ See *id.*

⁹⁹ See *id.* at art. 25.

¹⁰⁰ See Decision 425: Reglamento de Procedimientos Administrativos de la Secretaría General de la Comunidad Andina (Procedural Guidelines for the General Secretariat, trans. by author) (Dec. 14, 1997), available at <http://www.comunidadandina.org/normativa/dec/d425.htm> (last visited Nov. 15, 2000) [hereinafter Decision 425].

¹⁰¹ See *id.*

eral Secretariat must also set a deadline for the country's answer.¹⁰² Upon receiving that answer, or at the expiration of the deadline, the General Secretariat should go on the record with a justified opinion. Regardless of the opinion or whether or not it was even issued, the right to appeal to the CJAC commences upon the earlier of the answer's deadline or receipt of answer.¹⁰³

Under the prejudgment interpretation procedure, national judges trying a case in which a provision of the Andean judicial system applies, may request the interpretation of the CJAC with regard to the content and scope of that provision.¹⁰⁴ Upon receipt of the interpretation, the national judges should then, in conformity therewith, weigh the facts and settle the dispute.¹⁰⁵ The aim of this mechanism is to ensure that Andean provisions are applied uniformly throughout the territory of the Member Countries.¹⁰⁶

The Cochabamba Protocol also established a new legal recourse for cases of omission or failure to act, under which the ACFM, the CAC, the General Secretariat, and any persons or corporation may request the Court's verdict, if one of those community entities fails to carry out an activity for which it is expressly responsible under the Andean Community's judicial system.¹⁰⁷ It also gives the CJAC the jurisdiction to settle via arbitration any disputes that may arise as a result of the application or interpretation of contracts or agreements signed between bodies and institutions of the AIS or between the latter and third parties, if the parties so agree.¹⁰⁸ The CJAC and the General Secretariat may also settle, via arbitration, any disputes citizens may submit to them regarding the application or interpretation of private contract provisions that are regulated by the Andean Community's judicial system.¹⁰⁹ In addition, the Cochabamba Protocol gives the CJAC the jurisdiction to try labor disputes that arise in AIS's institutions.¹¹⁰

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.* at arts. 32-34.

¹⁰⁵ *See id.* at art. 35.

¹⁰⁶ *See Cochabamba Protocol, supra* note 41, at art. 36.

¹⁰⁷ *See id.* at art. 37.

¹⁰⁸ *See id.* at art. 38.

¹⁰⁹ *See id.* at art. 39.

¹¹⁰ *See id.* at arts. 1, 40.

The following are two illustrations of the CJAC's failure to grant nullification. First, on the April 27, 1992, a Colombian citizen presented the CJAC a request to nullify the Act of Baritone and the decisions that followed its adoption.¹¹¹ The CJAC denied this request. It noted that the CJAC is only competent to revise the decisions of the commission and the resolutions of the Secretariat General.¹¹² Second, on the May 28, 1992, the Court declared the nullification demand presented by a Colombian company inadmissible because it failed to show that the norm "will be applicable and will cause harm" pursuant to article 19 of the Treaty creating the CJAC.¹¹³

F. *Other Andean Commissions*

In June 1998 the Andean Committee of Environmental Authorities (CAAAM) was organized.¹¹⁴ CAAAM's mission is to advise and support the General Secretariat on environmental issues as well as monitoring, implementing, and enforcing environmental Decisions and complementary provisions.¹¹⁵

1. *Corporación Andina de Fomento*

Bolivia, Chile, Colombia, Ecuador, Peru and, Venezuela signed the Charter of the Corporación Andina de Fomento (CAF) on February 7, 1968.¹¹⁶ These countries subsequently formed the Andean Group.¹¹⁷ The agreement became effective on January 30, 1970. The CAF commenced operating on June 8, 1970.¹¹⁸ Today, CAF is a financial institution composed of

¹¹¹ See *Providencia emitida por el Tribunal de Acuerdo de Cartagena* (April 27, 1992), available at <http://www.comunidadandina.org/normativa/sent/PV-27-IV-92-G108.HTM> (last visited Nov. 20, 2000).

¹¹² See *id.*

¹¹³ *Providencia emitida por el Tribunal de Acuerdo de Cartagena* (May 28, 1992), available at <http://www.comunidadandina.org/normativa/sent/PV-28-V-92-G110.HTM> (last visited Nov. 20, 2000).

¹¹⁴ See *Decision 435: Comité Andino de Autoridades Ambientales (CAAAM)* (Andean Committee of Environmental Authorities, trans. by author) (Jun. 11, 1998), available at <http://www.comunidadandina.org/normativa/dec/d435.htm> (last visited Oct. 21, 2000) [hereinafter CAAAM].

¹¹⁵ See *id.*

¹¹⁶ See generally *Andean Development Corporation (CAF)* (Feb. 7, 1968), at http://www.comunidadandina.org/english/bodies/inst_3.htm (last visited Oct. 21, 2000) [hereinafter CAF].

¹¹⁷ See *id.*

¹¹⁸ See *id.* (Its headquarters are located in Caracas, Venezuela).

Latin American and Caribbean shareholders, whose mission is to support a sustainable development of the shareholder-countries and to raise funds for financial services in the region.¹¹⁹ The CAF promotes trade and investment, acts as a financial intermediary, backs structural reform processes, finances the development of the productive infrastructure, and helps to consolidate national and Andean capital markets.¹²⁰

2. *The Latin American Reserve Fund*

The other financial institution of the AIS is the Latin American Reserve Fund (FLAR).¹²¹ The purpose of FLAR is to promote the process of the Andean Community by providing assistance with the balance of payments and to "support the balance of payments of Member Countries by granting loans or guaranteeing loan from other lenders."¹²² FLAR helps to harmonize the countries' exchange, monetary and financial policies. It also improves the investments terms of international reserves made by the Member Countries.¹²³

There are other inter-governmental institutions that were created to compliment integration efforts in economic and trade sectors. For example, the Andrés Bello Agreement was created to promote educational, technological, and cultural integration; the Hipólito Unanue Agreement supports the countries' efforts to improve their peoples' health; and the Simón Rodríguez Agreement promotes social and labor integration.¹²⁴ In addition, the José Celestino Mutis program was created in 1983 to address agriculture, food supply, and environmental protection.¹²⁵ Its implementation has not been as successful as the other programs.

¹¹⁹ See *id.*

¹²⁰ See *id.* (CAF has an authorized capital of 2.5 billion dollars.)

¹²¹ See *Latin American Reserve Fund* (FLAR), at http://www.comunidadandina.org/english/bodies/inst_4.htm (last visited Oct. 21, 2000) [hereinafter FLAR].

¹²² See *id.* at Objectives.

¹²³ See *id.*

¹²⁴ See *Social Conventions*, at http://www.comunidadandina.org/english/bodies/inst_6.htm (last visited Oct. 21, 2000) [hereinafter Social Conventions].

¹²⁵ See Decision 182: Sistema Andino "José Celestino Mutis" sobre agricultura, seguridad alimentaria y conservación del ambiente (Andine System "Jose Celestino Mutis" regarding agriculture, security of food sources and environmental conservation, trans. by author) (Jul. 25, 1983), available at <http://www.comunida->

Other institutions aimed at promoting integration of trade and economics are the Andean Business Advisory Council and the Andean Labor Advisory Council. These two institutions act as advisory institutions to the AIS. They are comprised of high-level delegates chosen directly by the representative organizations in the business and labor sectors of each of the Member Countries.¹²⁶

III. POLICY HARMONIZATION AND THE ENVIRONMENT

Economic policy harmonization is the basic mechanism of the Andean integration process. It has evolved progressively by establishing a framework for the formation of an enlarged regional market.¹²⁷ Although the CAN has approved only a few decisions in the area of environmental harmonization, those few have been well implemented. These decisions include foreign trade instruments and policies, investments, intellectual property or copyrights, genetic resources, and agricultural policies.¹²⁸

In attempting to establish a common market by the year 2005, CAN has established harmonization policies, which include macroeconomic policy coordination, intellectual property, investments, and double taxation.¹²⁹ Common sectarian policies, for example, are in effect for the automobile sector and the agricultural sector.¹³⁰

dandina.org/normativa/dec/d182.htm (last visited Oct. 12, 2000) [hereinafter Decision 182].

¹²⁶ See Decision 406, *supra* note 13, at art. 44. See generally *Andean Business Advisory Council*, at http://www.comunidadandina.org/english/bodies/inst_1.htm (last visited Oct. 21, 2000) [hereinafter *Andean Business*].

¹²⁷ See Decision 406, *supra* note 13, at arts. 50-56.

¹²⁸ See Decision 291: Regime for Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties (Mar. 28, 1991), available at <http://www.comunidadandina.org/english/Dec/d291.htm> (last visited Oct. 12, 2000) [hereinafter Decision 291]; Decision 391: Common Regime on Access to Genetic Resources (Jul. 2, 1996), available at http://www.comunidadandina.org/english/Dec/d391_5.htm (last visited Oct. 12, 2000) [hereinafter Decision 391]; Decision 439, *supra* note 21; Decision 486: Common Intellectual Property Regime (Sept. 14, 2000), available at <http://www.comunidadandina.org/english/Dec/D486e.htm> (last visited Nov. 13, 2000) [hereinafter Decision 486]. (Decision 486 replaced Decision 344).

¹²⁹ See generally Decision 291, *supra* note 128.

¹³⁰ The Andean Common Agricultural Policy (ACAP) today encompasses the Andean Agricultural health system, the Andean Price Bands System and the System of Indicators of Support for the Agricultural Sector.

A. *Common Industrial Property Regime*

The Common Industrial Property Regime (CIPR) in the Andean Community regulates the issuing of trademarks and patents.¹³¹ The CIPR also protects industrial secrets, designations of origin, and unfair competition.¹³² CIPR was approved on September 15, 2000 through the passage of Decision 486.¹³³ CIPR became effective on December 1, 2000; it replaces Decision 344, which had been in effect since 1993.¹³⁴ The changes to Decision 344 are a direct response and adherence to stipulations dictated by the World Trade Organization (WTO) on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹³⁵

The new CIPR incorporates all the substantive aspects of TRIPS, such as national treatment, most-favored-nation treatment, and border control measures to help control piracy.¹³⁶ In addition, the changes incorporated into CIPR are intended to increase expeditious and transparent procedures for trademark registration of patent licenses. A provision was included to grant extra protection to natural resources, genetic resources, and resources created by Indian and Afro-American communities.¹³⁷

Patent protection had been previously extended to medicines, with the exception of those on the World Health Organization (WHO) list of essential medicines. Products that are not subject to patent, in addition to the pharmaceutical products on the WHO's list of essential medicines, include inventions that threaten the public order or morals, the health of man and animal, and environmental and plant conservation.¹³⁸ This category also encompasses animal breeds and species along with the biological procedures for obtaining them, and inventions concerning the component elements of the human body and genetic identity.¹³⁹

¹³¹ See Decision 486, *supra* note 128.

¹³² See *id.* at arts. 113-115, 201-223, and 237.

¹³³ See *id.* at art. 245-256.

¹³⁴ See *id.* at art. 274.

¹³⁵ See *id.*

¹³⁶ See Decision 486, *supra* note 128, at arts. 1-3, 250-256.

¹³⁷ See *id.* at art. 3.

¹³⁸ See *id.* at art. 14.

¹³⁹ See *id.* at arts. 14-21.

Article 14 of Decision 486 empowers Member Countries to issue patents for inventions of both products and procedures in all technological fields, provided that they are new, contain an element of invention, and may be put to industrial use.¹⁴⁰ Decision 486 sets the duration of the patent at twenty years as of the patent application date.¹⁴¹ Title VI regulates trademarks; it establishes the necessary mechanisms for ensuring the existence of identical trademarks in the Andean sub-region.¹⁴² In accordance with the Common Regime for the Protection of the Rights of Creators of Plant Varieties, Decision 486 also incorporates provisions, which prohibit registering trademarks in the name of a protected plant variety or its derivatives.¹⁴³

The Common Regime for the Protection of the Rights of Creators of Plant Varieties states that any person in the Andean sub-region, who creates or obtains a new variety of plant by applying scientific knowledge will enjoy the exclusive right to produce and market that plant for a period of fifteen to twenty-five years, depending on their species.¹⁴⁴

The competent authorities in each of the Andean Member Countries recognize and guarantee those rights by issuing a Creator's Certificate.¹⁴⁵ In order for a plant variety to gain protection, it must have certain basic characteristics: it must be new, different, homogeneous, and stable. "New" means the variety cannot have been exploited commercially.¹⁴⁶ "Different" means that it must be clearly distinguishable from any other known variety at the time the application is submitted.¹⁴⁷ "Homogeneous" means that the essential characteristics must be

¹⁴⁰ *See id.*

¹⁴¹ *See id.* at art. 50.

¹⁴² *See* Decision 486, *supra* note 128, at arts. 134-174. A trademark may be registered for a period of ten years from the date of issue. The trademark registration may be automatically renewed for subsequent ten-year periods without need for any proof of use. In addition, the common regime establishes adequate and effective protection for authors and other holders of rights of works in the literary, artistic, or scientific fields. *See id.*

¹⁴³ *See* Decision 345: Common Provisions on Protection of Rights for Creating New Plant Varieties (Oct. 20-21, 1993), *available at* <http://www.comunidadandina.org/NORMATIVA/DEC/D345.HTM>, art. 10 (last visited Oct. 12, 2000)[hereinafter Decision 345].

¹⁴⁴ *See id.* at arts. 2, 4, 21.

¹⁴⁵ *See id.* at art. 1.

¹⁴⁶ *See id.* at arts. 8-9.

¹⁴⁷ *See id.* at art. 10.

sufficiently uniform.¹⁴⁸ "Stable" means that its essential characteristics must remain unchanged from generation to generation as well as at the end of each particular reproduction, multiplication, or propagation cycle.¹⁴⁹ To obtain the Creator's Certificate, a person must also invest scientific expertise, develop the plant variety in a homogeneous and distinguishable manner, and keep it unchanged over time.¹⁵⁰ Only then can the new plant adopt an appropriate generic name.¹⁵¹

One of the problems with granting benefits to those who have created new plant varieties by applying scientific knowledge is the possible discrimination against traditional farmers and Indian communities.¹⁵² To address this concern, Decision 345 provides for two protective mechanisms. First, Article 30 empowers States to declare free use of the protected variety for reasons of natural security or public interest.¹⁵³ Second, Article 26 suggests that if an individual shows and reserves for his own use, or sells as raw material or food, the product obtained by growing the protected variety, do not encroach upon the rights of the creator.¹⁵⁴ A producer who engages in subsistence farming, therefore, does not have to pay royalties.¹⁵⁵

B. *Common Regime on Access to Genetic Resources*

Directive 391 on Genetic Resources is the centerpiece of environmental regulation in the Andean countries.¹⁵⁶ In 1996, the CAC approved the Common Regimen Access to Genetic Resources.¹⁵⁷ This approval guarantees the fair and equitable participation of the Andean community countries in genetic resources.¹⁵⁸

In June 1992, the Agreement on Biological Diversity was ratified and legalized by the Member Countries in Rio de

¹⁴⁸ See *id.* at art. 11.

¹⁴⁹ See Decision 345, *supra* note 143, at art. 12.

¹⁵⁰ See *id.* at art. 4.

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *id.* art. 30.

¹⁵⁴ See *id.*

¹⁵⁵ See Decision 345, *supra* note 143, at art. 26.

¹⁵⁶ See Decision 391, *supra* note 128.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

Janeiro.¹⁵⁹ The agreement embodies the principle that there should be sovereignty over the use and development of resources, a principle upon which Decision 391 is based.¹⁶⁰ There are four general purposes behind Decision 391. First, it is to regulate access to genetic resources. Second, it is to establish the conditions for just and equitable participation in the benefits of access to genetic resources. Third, it seeks to lay the foundation for recognition and valuation of genetic resources and their by-products. Fourth, it seeks to strengthen the negotiating capacity of the Member Countries.¹⁶¹

One of the objectives behind Directive 391 is to recognize the historic contribution made by the native, Afro-American, and local communities to biological diversity. The member countries possess a "valuable biological and genetic heritage that should be preserved and developed on a sustainable basis."¹⁶² Decision 391 expressly recognizes the rights of native, Afro-American and local communities to their traditional know-how innovations and practices with regard to genetic resources and their by-products. Directive 391 also seeks to conserve these historic contributions by these communities.¹⁶³

Prior to the approval of Decision 391 in July of 1996, access to Andean genetic resources was unrestricted.¹⁶⁴ As a result, origin countries could not obtain a fair share of the economic benefits it produced and little or nothing went to the traditional communities responsible for improving that heritage.¹⁶⁵ Upon the passage of Decision 391, those wishing to use and develop the active principles of the plants and microorganisms (especially the pharmaceutical and world food industries) must first

¹⁵⁹ See *id.* at arts. 5-6.

¹⁶⁰ See *id.* at art. 3. Article 3 states: "This Decision is applicable to genetic resources for which the Member Countries are the countries of origin, to their by-products, to their intangible components and to the genetic resources of the migratory species that for natural reasons are found in the territories of the Member Countries." *Id.*

¹⁶¹ See Decision 391, *supra* note 128, at art. 2. (Article 2 discusses the Purpose and Aims of Decision 391).

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

secure the necessary authorization and sign an access contract with the State.¹⁶⁶

In addition, Decision 391 contains provisions to facilitate technological training, research, development, and transfers. Decision 391 also establishes a procedure for accessing genetic resources and provides for sanctions of unauthorized access activities. Lastly, it ordered the establishment of an Andean Committee on Genetic Resources.¹⁶⁷

C. *Common Agriculture Policy and Protection of the Environment*

The underlying purpose of the Andean common agricultural policy is to strengthen health activities for the protection of agriculture and the environment.¹⁶⁸ A series of community policy instruments were implemented to promulgate the environmental protection. One of such instruments was the Andean Agricultural Health System (Decisions 328 and 436, and the Resolutions thereof).¹⁶⁹ The Andean Agricultural Health System establishes the principles, criteria, and procedures for protecting plant and animal health and facilitating trade of these products.

During the tenth Andean Presidential Council, held in Guayaquil in April 1998, the CAC together with the Ministers of Agriculture were instructed to finish harmonizing legislation on health and plant health registration.¹⁷⁰ The CAC and the Ministers of Agriculture have taken steps towards that end. Decision 454 provides mechanisms, programs and methods of

¹⁶⁶ See *id.* at arts. 16-40, 41-44.

¹⁶⁷ See Decision 391, *supra* note 128, at art. 51.

¹⁶⁸ See Decision 436: Norma Andina Para el Registro y Control de Plaguicidas Químico de Uso Agrícola (Jun. 11, 1998) (Andine Norm for the Registration and Control of Chemical Pesticides and Agricultural Use, trans. by author), available at <http://www.comunidadandina.org/NORMATIVA/DEC/D436.HTM> (last visited Oct. 21, 2000) [hereinafter Decision 436].

¹⁶⁹ See *id.*; see also Decision 328: Andean Agricultural and Livestock Health (Oct. 21-22, 1992), available at <http://www.comunidadandina.org/english/Dec/d328e.htm> (last visited Oct. 21, 2000) [hereinafter Decision 328].

¹⁷⁰ See X Consejo Presidencial Andino, Acta de Guayaquil (April 4-5, 1998) (X Andean Presidential Council, Act of Guayaquil, trans. by author), available at <http://www.comunidadandina.org/document/actas/guayaquil.htm> (last visited Nov. 13, 2000).

achieving harmonization in plant and animal health and trade under WTO rules.¹⁷¹

Prior to Decision 454, the regulation of agriculture, food supply and protection of the environment was controlled by Decision 182, which was implemented in July of 1983 and is commonly referred to as "Jose Celestino Mutis."¹⁷² The concerns that prompted the implementation of Decision 182 are still present today, mainly food shortage. Due to the limited financing of agricultural development, there is a food crisis in the Member Countries.¹⁷³ To offset low food production, the sub-region appeals to external sources in increasingly great proportion.¹⁷⁴ Decision 182 was intended to harmonize agricultural use and the preservation of the environment and to maintain the potential of renewable natural resources.¹⁷⁵

Decision 182 pioneered the rational use and conservation of resources, particularly in areas that had been or could have been affected by the expansion of agricultural frontiers such as forest reserves and river basins.¹⁷⁶ It proposed to organize a program of joint investigation and the exchange of agricultural technology. The Decision also sought to develop and coordinate actions to favor the use and rational management of the natural resources.¹⁷⁷ Finally, the decision called for joint action for utilization and conservation of the forests and the hydrologic, biologic and related natural resources, as the patrimony of the future and current generations.¹⁷⁸

Article 15 of Decision 182 sets forth the basic objectives for the conservation of the Andean environment.¹⁷⁹ The first objective was to establish mechanisms for the use and rational managing of soils, forests, fauna, and flower. The second objective was to protect the environment through rational management

¹⁷¹ See Decision 454 (May 4, 1999), available at <http://www.comunidadandina.org/NORMATIVA/DEC/D454.HTM> (last visited Oct. 12, 2000) [hereinafter Decision 454].

¹⁷² See Decision 182, *supra* note 125. (José Celestino Mutis was the scientist that led the first botanical expedition in South America in 1783).

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* at art. 1.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.* at art. 8.

¹⁷⁸ See Decision 182, *supra* note 125, at art. 2.

¹⁷⁹ See *id.* at art. 15.

of river basins, forests, and wetlands. The third objective was to increase environmental education programs in relationship to soil conservation problems, conservation of renewable natural resources, as well as increased population participation in conservationist practices. The fourth objective was to accomplish agreements among two or more countries for the protection and the development of the river basins, including reforestation programs and other activities that contribute to the better use of the natural resources. The last objective was to establish systems and agreements for the protection and defense of maritime areas against pollution and the conservation of their biological resources.¹⁸⁰

D. Andean Agricultural Phytosanitary System

The progress of the sub-regional integration, with the consolidation of the enlarged market through the creation of the Free Trade Zone and worldwide globalization, led to sanitary and phytosanitary measures in transactions involving plant and livestock products.¹⁸¹ This created the need to adjust the Andean Agricultural Health System in order to keep health measures from becoming concealed obstacles to trade, while enabling them at the same time to protect the sub-region's agriculture. These adjustments brought forth the adoption of Decision 328. Decision 328 incorporates the WTO's Agreement on Sanitary and Phytosanitary Measures.¹⁸²

¹⁸⁰ See *id.*

¹⁸¹ See generally Decision 328, *supra* note 169.

¹⁸² See *id.* Other Decisions related to the agricultural health system include: Decision 253: Programa Andino de Prevención, Control y Erradicación de las Moscas de Frutas (Sept. 11-12, 1989) (Andean Program to Prevent Fruit Flies, trans. by author), available at <http://www.comunidadandina.org/normativa/dec/d253.htm> [hereinafter Decision 253]; Decision 255: Programa Subregional Andino de Erradicación de la Fiebre Aftosa (Sept. 11-12, 1989) (Andean Program for Eradication of "Aftosa" Fever, trans. by author), available at <http://www.comunidadandina.org/normativa/dec/d255> [hereinafter Decision 255]; Decision 256: Programa Andino de Desarrollo Rural (Sept. 11-12-1989) (Andean Program for Rural Development, trans. by author), available at <http://www.comunidadandina.org/normativa/dec/d256.htm> [hereinafter Decision 256]; Decision 418: Expedición de Registro o Inspección Sanitaria (Jul. 30, 1997) (Sanitary Registration, trans. by author), available at <http://www.comunidadandina.org/normativa/dec/d418.htm> [hereinafter Decision 418]; Decisions 454: Lineamientos para la negociación multilateral sobre la agricultura en la Organización Mundial del Comercio, la armonización de derechos consolidados y contingents arancelarios, y la coordinación ante dicha organización

Decisions 328 and 436 are two key decisions on the issue of Andean agriculture and health. Decision 328 updates the Andean agricultural health system and Decision 436 adopts the sub-regional provisions on the registration and control of chemical insecticides for agricultural use.¹⁸³ In addition, in an effort to facilitate trade, the application of these community provisions seek to protect the sub-region from the possible effects of plagues and disease that could be spread through trade flow among the Andean countries and with third party countries.¹⁸⁴

National provisions, including Decrees, Conventions, Ministerial Resolutions and Agreements are registered into the Andean Registry.¹⁸⁵ The registration of national provisions into the sub-regional registry is an ongoing process, subject to remittance by the national legislation and acceptance by the other Member Countries and the General Secretariat for application to trade within the sub-region.¹⁸⁶ It is essential for a national provision to be entered into the sub-regional registry, if it is to be invoked for purposes of trade among the Member Countries.¹⁸⁷ It is through sub-regional registration that the principles of transparency and equivalence of the WTO Agreement on Sanitary and Phytosanitary measures were instituted.¹⁸⁸

The General Secretariat of the Andean community is recognized by the Food and Agriculture Organization's (FAO) International Convention on Plant Health Protection as the Sub-regional Agricultural Health Body. They maintain collaborative relationships with the other regional agricultural health organizations and with the WTO international guiding bodies on

en material de productos agropecuarios entre los Países Miembros (May 4, 1999) (Harmonization and coordination of agriculture products, trans. by author), *available at* <http://www.comunidadandina.org/normativa/dec/d454.htm> (last visited Nov. 20, 2000); and Decision 483: Normas para el registro, control, comercialización y uso de Productos Veterinarios (Jun. 8, 2000) (Community rules for registration, control, use and commerce of Veterinary Products, trans. by author), *available at* <http://www.comunidadandina.org/normativa/dec/d483.htm> (last visited Nov. 20, 2000).

¹⁸³ See Decision 328, *supra* note 169, at art. 1-2.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *id.* at arts. 10-24

¹⁸⁷ See *id.* at art. 12.

¹⁸⁸ See *id.*

sanitary and Phytosanitary measures, as well as with Inter-American Institute for Cooperation on Agriculture (IICA).¹⁸⁹

IV. THE TREATY FOR AMAZONIAN COOPERATION

Another way in which international environmental harmonization can be reached in the Andean Region, while extending to the whole Amazon Region is through the Treaty for Amazonian Cooperation (TCA). Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela signed the TCA on July 3, 1978 in the city of Brasilia.¹⁹⁰ The TCA's purpose is the conservation and sustainable development of the Amazon River basin.¹⁹¹

TCA created the Amazon Cooperaton Council (the Council).¹⁹² Diplomats representing each country form the Council.¹⁹³ The Council's responsibilities are to supervise the compliance of TCA's goals and to promote bilateral, and multi-lateral studies and projects.¹⁹⁴ Each Member State is responsible for the implementation of the treaty within its own territory. The position of Pro Tempore Secretariat is assigned on a rotating basis to the Ministers of Foreign Affairs.¹⁹⁵ A group of special commissions deal with problems on science and technology (CECTA), the environment (CEMAA), indigenous affairs (CEAIA), health (CESAM), transport, infrastructure and communications (CETICAM), tourism and education (CETURA).¹⁹⁶ The TCA was designed to meet the challenges of the Amazon Region. Member Countries are encouraged to take joint actions based on dialogue and exchange of information, to

¹⁸⁹ The Agriculture Institute sponsored by The Organization of American States. See Organization of American States, available at <http://www.oas.org> (last visited Nov. 20, 2000).

¹⁹⁰ Tratado de Cooperacion Amazonica, July 3, 1978, reprinted in INTRODUCCION AL DERECHO AMBIENTAL (Luis Fernando Macias Gomez ed., 1998) [hereinafter TCA].

¹⁹¹ B. Braga, E. Salati, & H. Mattos de Lemos, *Sustainable Water-Resources Development of the Amazon*, in AMAZON, *supra* note 30, at 42-3.

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *id.* at art. 20.

¹⁹⁶ See *id.* These special commissions were created during the different annual meetings of the Council and meet separately. See generally AMAZON, *supra* note 30.

adopt common technical cooperation policies, to use and conserve natural resources, and to execute projects together.

The future of the TCA can be summarized as follows:

There are still, however, huge important challenges ahead. The future of the Amazon region, a subject on which there persists certain difference, must be gradually approached while the experience of horizontal cooperation continues to be consolidated. The result of this process based on dialogue and exchange of information, should have a favorable impact on the adoption of common policies regarding technical cooperation, the use and conservation of natural resources and the implementation of projects. Gradually, the result should be universal agreement on criteria and concepts, in order to arrive at a system of physical data acceptable to all for understanding the complex character of biological diversity as a trans-border phenomenon.¹⁹⁷

In this sense, TCA is a vehicle equipped with political and technical devices, as well as relevant legal instruments, that will enable it to debate and promote the rationalization of policies, the formulation of projects and the adoption of common positions and proposals.

TCA will shortly install a Permanent Executive Secretariat of the treaty in Brasilia. A working group was established to prepare a proposal to be submitted to the competent bodies. The change of status of the Secretariat entails a modification in the text of the treaty, and therefore needs execution and ratification by each member state. This amendment will provide for the coordination of all the separate actions currently in progress and will allow for further development legal provisions.

V. DISCUSSION OF CURRENT HARMONIZATION TRENDS IN THE ANDEAN COMMUNITY

International environmental harmonization is the new approach of Andean towards the protection of the environment. This has been a two-part process. First, CAN accomplished a new framework for sub-regional integration, which promotes supra-nationality. This result was achieved in three separate steps. First, by amending the Cartagena Agreement to create

¹⁹⁷ Manuel Picasso Botto, *The Amazon Cooperation Treaty: A Mechanism for Cooperation and Sustainable Development in Management of Latin American River Basin*, in *AMAZON*, *supra* note 30, at 92.

the Andean Community and the Andean Integration System of bodies and institutions. Secondly, they granted new jurisdiction to the Court of the Andean Community over non-compliance and pretrial interpretation. Lastly, they established a direct vote for the Andean Parliament. CAN also adopted two major pillars for environmental protection: the Common Regime on Access to Genetic Resources for the protection of biodiversity and the Common Agricultural Phytosanitary System related to trade issues.

The new CAN, apart from a macroeconomic policy harmonization is required to establish a Common Market by the year 2005. This goal is based on the principle of balanced and harmonious community development. This goal requires harmonizing community policies and strategies on sustainable development and environmental management. An environmental harmonization strategy to complement the other projects the Andean Community is another important step towards the unification.¹⁹⁸

The guidelines on environmental policy issued in the XI Andean Presidential Council¹⁹⁹ are illustrative of where the process is heading. A general mandate entrusted the Environmental Ministers of the Member States to continue their work in harmonizing Community policies on sustainable development and environmental management in the regional and extra-regional spheres.

In addition, the collective Ministers of Foreign Affairs, together with the Environmental Ministers, were commissioned both to coordinate a joint Andean position with regard to the Protocol on Biodiversity and to support the CAF initiative to launch a Latin American Carbon Program.²⁰⁰ Furthermore, the Environmental Ministers, have been addressing growing con-

¹⁹⁸ The Andean Committee of Environmental Authorities (CAAAM), formed in June 1998, has the mission of advising and supporting CAN General Secretariat on environmental issues, as well as monitoring, implementing and enforcing environmental decisions and complementary provisions. See CAAAM, *supra* note 114.

¹⁹⁹ See XI Act, *supra* note 27.

²⁰⁰ See CAF, *supra* note 116. LACP was established with the support of the Center for the Sustainable Development of the Americas (CSDA). Its objective is to support the participation of the shareholder countries in the development of the emerging carbon market. This objective would be consistent with the United Nations' Framework Convention on Climate Change (UNFCCC). See <http://www.caf.com> (last visited Oct. 23, 2000).

cern regarding techniques used by petroleum companies exploiting crude oil in the Amazon Region.²⁰¹ The use of modern machinery has caused and continues to do great damage to the environment in the upper Amazon, particularly to the east of Ecuador and the surrounding areas.²⁰² Furthermore, CAAAM recently rejected the use of "fursarium oxysporum" fungus as a means to eradicate illegal crops in the Member Countries.²⁰³ CAAAM's rejection is a response to an initiative by the United States and the United Nations Drug Control Programme (UNDCP).²⁰⁴

Another interesting approach taken by these countries is that they are building the sub-regional environmental system upon other major environmental treaties. The Andean countries each acknowledge that they are signatories of international environmental treaties and will enforce them in the sub-region. Among those international environmental treaties ratified by the Member Countries are: Convention of the Protection of Wetlands (Ramsar, 1971), Convention of World Heritage (Paris, 1972), Endangered Species (CITES, Washington, D.C., 1973), Convention of Ship Pollution (MARPOL, London, 1978)²⁰⁵, Law of the Sea (UN, Montego Bay, 1982),²⁰⁶ Convention of Protection of the Ozone Layer (Vienna, 1985), Hazardous Waste Movement (Basel, 1989), Convention on Biological Diversity (Rio de Janeiro, 1992), and the Convention on Climate Change (Rio de Janeiro, 1992).²⁰⁷

²⁰¹ See *Andean Environment Conference Opens in Quito*, XINHUA NEWS, available at <http://www.xinhua.org/english/htm/enews.htm> (last visited Nov. 13, 2000).

²⁰² See *id.* (Ecuador's Minister of the Environment, Yolanda Kakabadse said that the techniques used by petroleum companies to exploit crude and the application of sophisticated mechanisms have done a lot of damage to the environment. A conference was held in Quito in July 1999, to discuss the issue).

²⁰³ See Declaration by the Andean Committee of Environmental Authorities, available at <http://www.comunidadandina.org/english/documen/D8-9-00.htm> (last visited Nov. 13, 2000).

²⁰⁴ See *id.*

²⁰⁵ See generally *id.*

²⁰⁶ Bolivia did not ratify the Convention of Ship Pollution because it does not have any access to oceans.

²⁰⁷ See LEKSHMAN GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER, SUPPLEMENT OF BASIC DOCUMENTS 183 (2d ed., 1999); see also ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW 26 (West Pub. Co. 1995).

There is some question about what further steps are required to implement the environmental plan in the community. Some authors propose the enactment of an Andean region community Environmental Framework Law.²⁰⁸ This proposal would implement the decision by CAN to adopt a sustainable regional development strategy. The purpose of this proposal is to establish principles and guidelines for a unified policy action regarding the environment.²⁰⁹

The Act of Lima, enacted at the XII meeting of the APC held in June 2000, sets forth guidelines establishing an Andean common market.²¹⁰ These guidelines implement common foreign policy, social agendas, and harmonization of macroeconomic targets. The Act of Lima also states that a meeting of high-level national environmental authorities must convene in the years 2000-2001 to discuss regional actions that will promote environmental conservation and regional development.²¹¹

The proposed framework law could begin by restating some of the principles of the Declaration of Rio. For example, it could restate the principles regarding sovereignty over natural resources; regarding relocation of harmful activities; regarding notification of environmental incidents and natural disaster; regarding information and reports of environmental effects on trans-boundary pollution; regarding indigenous people; and regarding solution of controversies.²¹² Additionally, the framework law could incorporate the environmental treaties ratified by all Andean countries. It could clarify the concepts of global environment and sustainable development and make it mandatory for governmental authorities to include environmental impact statements in specific actions. Finally, several key

²⁰⁸ See Eloisa Trélez Solís, *Propuesta hacia una Ley Marco Ambiental Andina* 132, in 1 LEGISLACIÓN Y GESTIÓN AMBIENTAL EN LOS PAÍSES ANDINOS, VISIÓN INTEGRAL Y ANÁLISIS POR PAÍSES, (Centro Interdisciplinario de Estudios sobre el Desarrollo Latino Americano- Fundación Konrad Adenauer Stiftung ed., 1997).

²⁰⁹ TCA is a very flexible instrument, which makes it adaptive to new purposes and strategies in the task of saving the environment of Amazonia while at the same time remaining responsive to social realities in the region.

²¹⁰ See XII Consejo Presidencial Andino, Acta de Lima (XII Andean Presidential Council, Act of Lima, trans. by author), available at <http://www.comunidadandina.org/document/actas/act10-6-00.htm>, (last visited Oct. 21, 2000).

²¹¹ See *id.*

²¹² See Trélez Solís, *supra* note 208, at 19-22.

environmental principles could be included: the precautionary principle; the principle of prevention of contamination; the principle that the polluter pays; the principle of compatibility with sustainable development; and the principle of participation from the community in decisions with environmental effects.²¹³

It is important to specify natural resources that may be subject to communitary planning and administration under the proposed framework. River basins that serve as national boundaries or cross national boundaries, shared lakes, groundwater plant species and adjacent forests, and marine waters are among the resources that could be regulated in this way.

The objectives of the proposed framework law are the preservation, defense, enforcement, and enhancement of the environment with an eye towards the sustainable development of the region. Several mechanisms could be included: Land use and Planning; sustainable exploitation of resources; protection of water resources; educational programs; and information systems. In addition, the proposed framework law could seek to address common ways for measuring natural resources and pollution rates, market instruments for pollution control, and to regulate hazardous substances.

The key issue, however, should be to encourage and facilitate enforcement of environmental law and regulations at every level in the Andean Community. The Andean countries have developed comprehensive and sophisticated laws regarding environmental and natural resource protection over the last twenty-five years. Focusing on implementation and enforcement should be the main purpose of every effort resulting from the trend to harmonize environmental standards through the Andean region.

VI. CONCLUSION

CAN remains politically driven and vulnerable to political changes in the Member Countries. There is also overlapping between the functions of the Commission and the Council of Foreign Ministers. Notwithstanding, the bodies and institutions of the AIS are gaining strength by the implementation of common market services. When the common market is

²¹³ See *id.* at 10, 15-16.

achieved and the Andean Parliament becomes an independent and deliberative and controlling body for the system, the Andean Community will have a strong basis to fulfill its objectives. For such purpose, environmental harmonization should be implemented to ensure the harmonious development of the entire Andean region. Finally, CAN has the stewardship of the upper Amazon region. The upper Amazon region requires CAN's immediate attention and further integration in the system for Amazonian cooperation.