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David J. Padilla

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I. INTRODUCTION

This article will give a brief overview of the origins of the different indigenous American integration movements and will explain the respective methods of resolving legal disputes which arise from time to time within the context of the different communities. Further, this article will contrast the different methods of solving legal disputes in American communities, with the primary vehicle for dispute resolution in the European Economic Community (EEC),[1] namely, the Court of Justice. Later, some observations will be set forth which attempt to explain to some degree, the difference between the EEC and the American communities in this respect. Finally, discussion will be directed to models that have been suggested by several Latin American commentators regarding the creation of new means of settling legal disputes in the economic integration area.

Without regard to the United States, the EEC is the best known and, in many ways, the most advanced social, political, and economic integration experiment of its kind. Still, the EEC is far from being the only regional integration movement launched within the last twenty-five years. At this time, a number of similar movements have been initiated in the Western Hemisphere and many of these have spawned intracontinental and intraregional submovements.

The adoption of integration measures has been inspired by the economic success of the United States, and more specifically, by that of the EEC. Recognizing the advantages to be derived from economic and financial coordination, and appreciating the increasingly complex and interdependent character of the modern world economy, each movement has, in varying degrees, imitated the European and North American integrational models. Accordingly, this has led to the creation of both intergovernmental, political, and regional technical institutions designed to set and establish policies, plans, priorities, and

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1. The EEC was established by the Treaty of Rome in 1957. 298 U.N.T.S.4.

methods of implementation and enforcement. The largest of these, in geographic terms, is the Latin American Free Trade Association (LAFTA), created in 1960.

A free trade association has as its purpose the elimination of internal trade barriers, tariff and non-tariff, among its member states.[2] Although this goal of internal free trade represents an important step in the economic integration process, it fails to approach the creation of a customs union, much less a true common market. A customs union comprehends a free trade association, but goes a long step further, by creating a common external tariff barrier.[3]

Another indigenous integration movement set in motion in the early 1960's is the Central American Common Market (CACM). Except for the interruption caused by hostilities between Honduras and El Salvador in 1969, and for several years thereafter, this effort has resulted in a dramatic increase in intramarket trade, although critics have pointed out that the benefits have been to some extent skewed in their distribution.

The last area in the New World to attempt economic integration has been the Caribbean region. Numerous island states and several small South American countries, in a common decision to reap the potential benefits of integration, banded together to form the Caribbean Free Trade Association (CARIFTA).

Special problems, not uncommon to neighboring South and Central American countries, confronted the Caribbean community of states. One such problem was the dependency of national economies on the export of one or two cultural products or primary raw materials. Subject to market forces beyond their influence, the fortunes of these states have historically ebbed and flowed in line with larger world market forces, making for an uneven pattern of development.

Another peculiar characteristic of states in the Caribbean region is their recent independence from European colonialism. After centuries of relations with Great Britain, France, and the Netherlands, these mini-states have become very aware of the relative impotency of small states, generally less developed, standing alone in a world of finite resources.

Within CARIFTA, several of the larger and relatively more advanced states, with the hopes of speeding up the integration process,

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2. F. ROOT, INTERNATIONAL TRADE AND INVESTMENT: THEORY, POLICY, ENTERPRISE 378 (1973).

3. *Id.*

formed a successor organization, the Caribbean Community (CARICOM), in 1973. At present, the CARICOM membership includes many of the smaller, less developed states.

Each movement derives its legitimacy from guiding multilateral treaties which set objectives, establish the philosophy of the particular movement, create the institutions for the accomplishment of its goals, and limit their respective parties' powers within the framework of the movement.

These various constitutive charters represent momentous steps forward in the field of international cooperation, insofar as they imply voluntary yielding of traditional sovereign powers by parties. Nevertheless, tension between nationalist interests and regional goals naturally continues to play a crucial role in the life of these relatively new movements.

As in the domestic life of a state, disputes of a legal nature occur in the international relations of a government and the nation it represents. Interpretation of the different treaties and protocols, as well as of the various directives, orders, and regulations made under their auspices, make for chronic problems which must be addressed and resolved if the larger objectives of the movements are to be attained.

II. LAFTA

The Latin American Free Trade Association (LAFTA) was founded in February 1960, and has as its aim the creation of a Latin American Common Market. Its members include all of the Spanish-speaking countries of South America, as well as Brazil and Mexico. LAFTA was established by the Treaty of Montevideo, which calls for a system of tariff reductions to help increase intra-association trade, and to aid in the economic and social development of its member countries.[4] Originally, the elimination of tariff and other trade barriers was to have been accomplished by 1973, but this target date has been extended to 1980.

Given the special problems of certain relatively less developed countries, namely Paraguay, Ecuador, Bolivia, and to some extent, Uruguay, more favorable terms were provided in the Treaty of Mon-

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4. Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association, signed at Montevideo, Uruguay, February 18, 1960, I.R.I.E.A.L. 287, I.R.E.I.L.A. 207 [hereinafter cited as Treaty of Montevideo].

tevideo for these states. Although thousands of tariffs have been reduced or eliminated altogether, and intraregional trade has grown greatly, the wide disparity of development among the members, notwithstanding the special treatment provided for some, has caused serious problems in LAFTA's efforts to create a true free trade area.

The principal institutions of LAFTA and their functions are as follows:

A. *The Council of Foreign Ministers,* the supreme organ of LAFTA, meets regularly and makes all important policy decisions related to regional integration.[5]

B. *The Conference of Contracting Parties* is made up of the national delegations which meet annually to adopt decisions requiring joint resolution, to carry forward the process of integration, to elect the officers of the Standing Executive Committee, and to set the Association's annual budget.[6]

C. *The Standing Executive Committee* consists of a representative of each member state and is the permanent organ of LAFTA. Its functions include the duty to suggest initiatives, make studies and reports on past accomplishments, and apply for technical assistance grants.[7]

D. *The Secretariat* provides the technical and administrative expertise for LAFTA, under the direction of an Executive Secretary, who is elected by the members of the Conference.[8]

E. *The Special Commission of Jurists* renders legal opinions on judicial problems referred to it by the Council or the Conference.[9]

It should be noted that LAFTA, in accordance with the Treaty of Montevideo, possesses a legal personality and, specifically, has the power to contract, acquire, and dispose of property, institute legal proceedings, and hold funds of any currency.[10]

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5. Creation of the Council of Ministers of Foreign Affairs of the Latin American Free Trade Association, Res. 117 (V), 5th Regular Sess., Montevideo, Uruguay, December 30, 1965; Protocol Institutionalizing the Council of Ministers of Foreign Affairs of the Latin American Free Trade Association, signed at Montevideo, Uruguay, December 12, 1966. I.R.I.E.A.L. 399, I.R.E.I.L.A. 318.
6. Treaty of Montevideo, Arts. 34 and 35.
7. *Id.* Arts. 39 and 40.
8. *Id.* Art. 41.
9. Resolution 165 (CM-I/III-E).
10. Treaty of Montevideo, Art. 47.

Dispute Settlement

With respect to the resolution of legal disputes, the Treaty of Montevideo is silent. Nevertheless, from the outset, the contracting parties were aware of this problem and in December 1964, the Conference, by Resolution 102, resolved to order the Executive Committee to study and prepare a proposed protocol dedicated exclusively to providing mechanisms for the resolutions of legal controversies.

In September 1967, the resultant Protocol for the Settlement of Disputes was signed at Asunción, Paraguay.[11] The Protocol calls for negotiations between parties in the event of a dispute, with the official cognizance of the Standing Executive Committee. Agreements arrived at by direct negotiations are, however, binding upon the parties.[12] In the event such negotiations fail to result in a settlement of the dispute, either party may submit the matter to the Arbitration Court, which shall be composed of one arbitrator and one alternate designated by each signatory to the treaty of Montevideo, both of high professional and high moral standing.[13] Signatories of the Protocol shall be subject to the compulsory jurisdiction of the Arbitration Court in all cases arising out of matters stemming from the application of the Treaty of Montevideo and its Protocols, as well as resolutions and decisions emanating from its agencies. As to other matters of dispute, jurisdiction may be voluntarily accepted by the parties.[14]

When a dispute occurs, the parties are to name, by common accord, three arbitrators from the total number nominated by the governments. If these parties fail to agree on three arbitrators within thirty days, the arbitrators shall be designated on the basis of a rotation system, in the order of the names as they appear on the List of Arbitrators.[15] Provision is also made in the Protocol for legal representation, written and oral proceedings,[16] the site of the hearings,[17] and disqualification of arbitrators.[18] Decisions of the Arbitration Court must be in writing, and majority holdings are final. Written dissents must also be placed on the record.[19] Arbitral awards are

11. Protocol on the Settlement of Disputes, signed at Asuncion, Paraguay, September 2, 1967, I.R.I.E.L.A. 498.
12. *Id.* Ch. II, art. 4.
13. *Id.* Ch. III, arts. 9-15.
14. *Id.* Ch. IV, art. 16.
15. *Id.* Ch. IV, art. 18.
16. *Id.* Ch. IV, art. 20.
17. *Id.* Ch. IV, art. 21.
18. *Id.* Ch. IV, art. 19.
19. *Id.* Ch. IV, arts. 28 and 29.

final and binding and have the force of *res judicata.*[20] Failure to execute an award by the losing party will justify economic reprisals in the form of limited or suspended concessions for the national schedules of the affected parties.[21]

Generally speaking, the Protocol on the Settlement of Disputes drawn at Asunción is very similar to the protocol to the Treaty of Rome creating the EEC's Court of Justice.[22] There are, however, a number of very important differences. First, the LAFTA Protocol does not contemplate the standing of natural or juridical persons before the Arbitral Court. In addition, there is no provision in the LAFTA Protocol similar to Article 177 of the Treaty of Rome, which allows interlocutory appeals from national courts to the Court of Justice on issues involving interpretation of EEC law.[23] Finally, the LAFTA Court does not sit permanently.

It should be noted that before the LAFTA Protocol was signed, a provisional method of dispute settlement was provided for in Resolution 126 of the Conference of Capital Contracting Parties. This Resolution provided for the referral of controversies to the Special Commission of Jurists where negotiations, and subsequent conciliation efforts by the Standing Executive Committee, had failed.[24] Unfortunately, this technique proved to be of limited utility since the Special Commission could only take cognizance of a case where the Standing Executive Committee unanimously decided to bring it to the Special Commission's attention. Hence, a built-in veto by the parties themselves hampered whatever potential for usefulness the Special Commission of Jurists might have had in its arbitral role.[25] Moreover, it was never clear that a holding of the Special Commission would have had any effect.

Neither the LAFTA Protocol on the Settlement of Disputes, nor the prior provisional method of referring cases from the Standing Executive Committe to a Special Commission of Jurists has proven to be an adequate institutionalization of the dispute settlement process. The Protocol entered into force May 1971, with its fifth deposit of

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20. *Id.* Ch. IV, art. 30.
21. *Id.* Ch. IV, art. 34.
22. Protocol on the Statute of the Court of Justice, DOCUMENTS FOR EUROPEAN COMMUNITY LAW 36 (1976).
23. Treaty Establishing the European Economic Community, DOCUMENTS FOR EUROPEAN COMMUNITY LAW 72 (1976).
24. Resolution 126 (CM-I/III-E).
25. *Id.*

ratification. To date, only seven states—Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, and Uruguay—have ratified the Protocol. More importantly, the mechanism of the Arbitral Court, an *ad hoc* body, has never been used, in spite of numerous important controversies arising out of the interpretation and application of LAFTA law.[26]

As a practical matter, actual cases have been resolved through direct negotiations between the parties. While this type of conflict settlement is unobjectionable from a certain point of view, it obviously does not provide for the orderly and progressive development of Association jurisprudence. The net result, according to Professor Francisco Orrego-Vicuña of the University of Chile, has been "a substantial weakening of the rule of law in the process of (LAFTA) integration."[27]

III. The Andean Pact

In 1969, the South American countries lying along the Andean *cordillera* decided, despite their LAFTA membership, to form a subregional integration movement aimed at the building of a customs union.[28] The Andean Subregional Group, composed initially of Chile, Bolivia, Perú, Ecuador, and Colombia, came into existence with the final ratification of the Cartagena Agreement, which created the nascent common market known as the Andean Pact, a market where the free flow of goods, capital, and labor would be permitted throughout the subregion.[29] Since its inception, Venezuela has adhered to the Agreement, while Chile has denounced it and withdrawn from the Pact.[30]

The boldest step taken by the Andean Group has been the establishment of a common external tariff and the promulgation of a common investment code designed to provide the less developed member states with some leverage vis-á-vis the large transnational companies, which historically have played an important role in their respective economies. The Cartagena Agreement also provides for

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26. *Id.*

27. Orrego-Vicuña, *Economic Integration in Latin America: A Comparative Interlude*, European Community Law and Institutions in Perspective 470 (1976).

28. Cartagena Agreement, May 26, 1969, 8 I.L.M. 910 (1969) [hereinafter cited as Cartagena Agreement]. For a Spanish text see Compilación de Documentos Relacionados con el Acuerdo de Cartagena 67 (1975).

29. Root, *supra* note 2, at 378.

30. Vargas-Hidalgo, *An Evaluation of the Andean Pact*, 10 Law. Am. 401 (1978).

special treatment of Bolivia and Ecuador, the Group's least developed states.[31]

The principal institutions created to guide the Group's collective efforts and their functions are outlined below:

A. *The Commission*, composed of one representative of each government, is the supreme organ of the Group. It is responsible for setting Group policy, approving procedures for the coordination of national plans, and harmonizing national economic policies. In addition, the Commission appoints the members of the Board and instructs them, and sees to it that the provisions of the Agreement and the LAFTA Treaty of Montevideo are faithfully carried out.[32]

B. *The Board* is the technical organ of the Group and is composed of three members appointed by the Commission for three-year terms. Its mandate is to examine questions of common interest and make proposals to the Commission, taking into account the benefits to be gained from a regional point of view. In formulating proposals, the Board may recommend regulations for the Commission's consideration. This power of initiative, comparable to that of the EEC's Commission, is an important aspect of the Board's responsibilities. The Board's tasks also include an annual evaluation of the effectiveness of the Group's efforts in light of the Agreement's objectives.[33] Finally, the Board acts as a secretariat for the Commission by hiring technical experts capable of the sophisticated assignments which it must carry out.

C. *The Advisory Committee* acts as a clearing house for Board proposals before they are sent to the Commission. The Committee, composed of delegations of member states, meets with the Board at the latter's request and generally assures close cooperation between the Board and the member governments.[34]

D. *The Social and Economic Advisory Committee* is made up of representatives from the industrial and labor sectors of member states. Input by this Committee seeks to incorporate the point of view of the different economic groups within the respective nations, as the Andean Group strives to arrive at policies satisfactory to all members and their citizens.[35]

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31. Cartagena Agreement, Ch. XIII, art. 91.
32. *Id.* Ch. II, § A, arts. 6 and 7.
33. *Id.* Ch. II, § B, arts. 13-18.
34. *Id.* Ch. II, § C, arts. 19-21.
35. *Id.* Ch. II, § C, art. 22.

A tentative progress report on the success of the Andean Pact shows that intraregional trade has increased dramatically and continues to rise. Moreover, despite the setbacks suffered by the withdrawal of Chile, tariff barriers continue to be reduced and conformance to schedules and Pact law regarding the implementation of a common external tariff has been forthcoming.[36]

Dispute Settlement

When a dispute arises between member states, certain steps are to be taken towards the resolution of differences. The first step is direct negotiation between the parties to the dispute. Where direct negotiation fails, the Commission may intervene by exercising its good offices and taking other informal measures. If these measures fail to resolve the parties' differences, then the Commission must make formal efforts at conciliation.[37]

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

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

In reality, reliance has been placed on informal methods, although the Pact's Commission is more actively involved than the Standing Executive Committee of LAFTA. Still, the need for a central court for the Andean Group is even greater than that of LAFTA, since its aims and its constitutive treaty are more ambitious and more

36. Orrego-Vicuña, *supra* note 27, at 475.
37. Cartagena Agreement, Ch. II, § D, art. 23.

complex than those of LAFTA. The classical separation of powers found in most democratic institutions is absent here, as there is no central court and the Commission, which is the legislative and most political branch, also acts as the peacemaker and unofficial adjudicator.

In the words of Professor Orrego-Vicuña:

> The experience derived from the few years the Agreement has been functioning has shown that these mechanisms for the solution of controversies are impractical insofar as they fail to respond to the true legal needs of the integration process. In the first place, they do not provide for a permanent legal function, in circumstances where the volume and importance of subregional law fully warrant it. In the second place, they fail to insure a uniform interpretation of the legal regime, a need palpably demonstrated by the problems which arose in connection with the adoption of Decision 24, regarding treatment of foreign capital, particularly in the case of Chile, and above all, Colombia, problems which probably could have been avoided had there been a formal opinion by a subregional judicial organ.[38]

An even more glaring inadequacy of the current system is the total lack of recourse on the part of private citizens and businesses which are often directly affected by measures adopted by the Commission.

Recently, the establishment of an Andean Tribunal, remedying many of these inadequacies, seems virtually certain.[39] This body is more thoroughly discussed below.

IV. The Central American Common Market

The General Treaty of the Central American Common Market (CACM), which came into force in 1961, was formulated under the aegis of the Organization of Central American States (ODECA).[40]

The CACM has five member countries: Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica. The General Treaty provides

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38. Orrego-Vicuña, *La Creación de un Tribunal de Justicia en el Grupo Andino*, 8 Derecho de la Integración 37 (1974). This and subsequent translations are the author's own.

39. Integración Latinoamericana, October 1978, at 39, 42 (1978).

40. Charter of the Organization of Central American States, signed at Panama City, Panama, December 12, 1962, House Comm. on Inter-American Relations, A Collection of Documents . . . Pertaining to-Inter-American-Affairs, 93rd Cong., 1st Sess., 303, 303-307 (1973).

for the elimination of all internal trade barriers, and, to date, almost all such barriers have been removed. Moreover, a uniform external tariff on approximately eighty-seven percent of the items on the regional customs classification list has been set. Intraregional trade expanded greatly during the CACM's first decade—from $34 million in 1960 to $274 million in 1971.[41]

The states within CACM have faced some difficult problems, both naturally and artificially created. In 1971, Honduras and El Salvador cut diplomatic relationships with each other due to hostilities erupting because of the so-called Soccer War.[42] Although the "War" lasted only five days, relations between the two countries are only now being normalized. Nicaragua suffered a calamitous earthquake in 1972,[43] while much of Guatemala was flattened by another earthquake three years later.[44] At the present time, Nicaragua is in the midst of civil war.[45] Notwithstanding these events which obviously have taken their toll on the CACM's momentum, this regional integration effort still continues to progress, although not as rapidly as its founders had hoped.

The principal institutions created under the General Treaty, and their functions, are outlined below:

A. *The Economic Council,* composed of the Ministers of Economy of the member-countries, meets periodically in one of the five member-countries' capital cities to set economic guidelines for the Common Market.[46]

B. *The Executive Council* is charged with implementing measures to carry out the General Treaty. It is composed of one delegate from each member state. The Council decides on a case-by-case basis whether a given resolution will be approved.[47]

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41. Orrego-Vicuña, *supra* note 27, at 468.

42. The 1969 conflict is known as the "Soccer War" because it was set off by a riot following a heated soccer match between teams from Honduras and El Salvador. *See* LATIN AM. INDEX, November 16-30, 1977, at 88.

43. *City Dies in a Circle of Fire: Managua Earthquake*, TIME, January 8, 1973, at 24.

44. Wilde, *Guatemala: Earthquake and Afftermath*, CHRISTIAN CENTURY, March 31, 1976, at 310.

45. 46 LATIN AM. ECON. REPORT, October 20, 1978 at 323.

46. General Treaty of Central American Economic Integration, signed at Managua, Nicaragua, December 13, 1960, I.R.I.E.A.L. 24, I.R.E.I.L.A. 23 [hereinafter cited as General Treaty].

47. *Id.* Ch. 9, arts. XXI and XXII.

C. *The Permanent Secretariat* serves both Councils and provides the technical staff necessary to carry out research studies and economic evaluations.[48]

D. *The Central American Bank for Economic Integration* helps finance and promote integrated, economic growth. Loans are made only to member states.[49]

Dispute Settlement

Article XXVI of the General Treaty provides that signatory states shall seek to settle all disputes in an amicable fashion, invoking the assistance of the Executive Council or Economic Council, as the case may warrant. If, however, agreement cannot be reached in this manner, the Article prescribes arbitration. The Arbitral Tribunal is to be chosen from a list of three arbitrators selected from each member state's highest courts. Thereafter, the Secretary General of the organization of Central American States (ODECA) draws one name by lot from each of the member states' candidates. Decisions of the Tribunal are *res judicata* and must be made by at least a majority vote.[50]

As early as 1907, efforts have been made to establish a Central American Supreme Court. Under the Charter of ODECA, such a Court was eventually brought into existence. It should be noted that several of ODECA's organs also serve as organs of the CACM. In theory, the Court of Justice could serve as a forum for the purpose of litigating disputes arising under the CACM General Treaty. Article 14 of the Charter of ODECA provides that the Central American Court of Justice shall be made up of the Presidents of the Judiciaries of each of the member states. Article 15(a), which defines the competence of the Court, has proven to be the weak spot for the effective use of the Court. That Article states, *inter alia:*

> The functions of the Central American Court of Justice are: (a) to decide the conflicts of a legal nature which arise among the Member States and *which later agree to submit to it.* (Emphasis added.)

As a practical matter, this defeasance condition has rendered the Court of Justice sterile. The two primary mechanisms for the resolu-

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48. *Id.* Ch. 9, arts. XXIII and XXIV.

49. Agreement Establishing the Central American Bank for Economic Integration, signed at Managua, Nicaragua, December 13, 1960, I.R.I.E.A.L. 143, 149. *See also* General Treaty, Ch. 7, art. XVIII.

50. General Treaty, Ch. 10, art. XXVI.

tion of legal disputes connected with the movement toward Central American integration and arbitration, under Article XXVI of the General Treaty, and the Court of Justice, under the ODECA Charter are total failures; not a single case has ever been adjudicated by either body.

The vacuum left in their place is actually being filled by the decision-making of the Executive Council. For instance, in 1965, upon complaints presented by Costa Rica and El Salvador against Guatemala's Decree Law No. 355, which imposed unlawful import duties on products made in the complaining states, the Executive Council resolved that the Guatemalan law was illegal and the Secretary General was charged with taking steps to persuade the sister Republic of Guatemala to annul its Decree Law inasmuch as it was prejudicial to achieving free trade in Central America.[51] Guatemala abided by the decision.[52]

In another case, El Salvador complained that Guatemala's sanitation laws regarding the importation of salt were unreasonable. In that instance, the Executive Council, by Resolution No. 57, held that any attempt by one member state to obstruct free trade from another was illegal, and that sanitation standards acceptable in a given state were *ipso facto* sufficient to satisfy similar standards of any other member state. Once again, Guatemala complied with the resolution of the Executive Council.[53]

While these cases were not decided by a duly constituted court of law, they do show that there is a tendency on the part of CACM's organs to penetrate the exclusive sovereignty of its member states in the area of lawmaking. Although there has been a predisposition on the part of the respective governments to respond favorably to the community's organs, the dispute-solving process is still overly reliant on bilateral negotiations and political compromise. At the same time, the standing of the natural or corporate person is ignored. A body of community law as such has not emerged and to that extent there is less certainty than might be hoped for on the part of the business sector. National judiciaries, too, are at a loss for guidance from a centralized, authoritative interpretation of community law.

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51. INSTITUTO INTERAMERICANO DE ESTUDIOS JURIDICOS INTERNACIONALES, DERECHO COMUNITARIO CENTROAMERICANO—ENSAYO DE SISTEMATIZACION 365 (1968).

52. *Id.*

53. *Id.* at 367.

V. CARIFTA-CARICOM

The Caribbean Free Trade Association (CARIFTA) was the precursor of the Caribbean Community (CARICOM). Founded in 1968, it was originally composed of eleven members, all Caribbean island states except for Guyana. Belize subsequently adhered to the Charter in 1970. CARIFTA's principal goal was the gradual elimination of internal tariff and non-tariff barriers. The Caribbean Development Bank was established to provide funds and technical assistance to member states (and a number of nonmember associated states) in their respective development programs.[54]

On July 14, 1973, the four most advanced members of CARIFTA—Trinidad and Tobago, Barbados, Guyana, and Jamaica—established CARICOM as a successor to CARIFTA.[55] Eight additional members have since joined CARICOM.[56] CARICOM came into existence under the aegis of the CARIFTA convention in the same fashion that the Andean Group was formed out of LAFTA. The constitutive agreements which brought CARICOM into existence are the Treaty establishing the Caribbean Community, and the Annex to that Treaty, which actually created the terms of reference for the Caribbean Common Market.[57]

Although the primary objective of CARICOM may be seen as full economic integration, that is by no means its only goal. CARICOM is also involved in coordinating such services as health, education, industrial relations, and communications, as well as formulating a common foreign policy.[58]

Given its relatively recent origin, it is a bit premature to try to characterize the success of this movement. Three of its member states (the exception being Jamaica) have proven oil reserves, with the promise of the discovery of additional oil, and all of its members have considerable hard mineral wealth. Despite this great promise, political-ideological differences between Jamaica and Guyana on the

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54. Agreement Establishing the Caribbean Free Trade Association, signed at Antigua, April 30, 1968, 7 I.L.M. 935 (1968) [hereinafter cited as Georgetown Accord].

55. Treaty Establishing the Caribbean Community (Georgetown Accord), signed at Port of Spain, Trinidad and Tobago, July 4, 1973, 12 I.L.M. 1033 (1973).

56. Those other members are: Antigua, Belize, Dominica, Grenada, Monserrat, St. Kitts/Nevis/Anguilla, St. Lucia, and St. Vincent.

57. Annex, The Caribbean Common Market, UNCTAD/B/609/Add. 1 (Vol. 1), Aug. 24, 1976, at 6 [hereinafter cited as Annex].

58. *A Word About the Caribbean Integration Movement*, 1 CARICOM BULL. 5 (1978).

one hand, and Belize and Trinidad on the other, could hamper harmonious cooperation in the integration field.[59]

The main institutional organs of CARICOM and their functions are:

A. *The Conference of Heads of Government* sets policy objectives, issues directives to the Council, and represents the Community for treaty-making purposes.[60] CARICOM enjoys legal personality within the terms of its constitutive agreements.[61]

B. *The Common Market Council,* composed of a representative of each member state, is the principal organ of the Common Market, as distinct from CARICOM. Its chief responsibility is to see to the implementation of the Treaty and Annex, as well as to expedite the creation of a true Common Market. As with its European and Andean counterparts, the Common Market Council of CARICOM has an initiating and research function, though subject to the ultimate decision-making authority of the Conference of Heads of Government.[62]

Dispute Settlement

In the field of dispute settlement, the Common Market Council, in a manner similar to its Latin American equivalents, plays an important role. Article 7 of the Annex states that, among other things, the Council is responsible for the following:

> (b) Insuring the efficient operation and development of the Common Market including the settlement of problems arising out of its functioning;
> (d) receiving and considering references alleging breaches of any obligations arising under this Annex and deciding thereon.

Article 11 of the Annex, entitled "Disputes Procedure within the Common Market," holds that if any member state believes that it is being deprived of any benefit to which it is entitled or any objective of the Common Market is being frustrated by a delinquent state and no solution has been found between the parties, it may present the matter to the Common Market Council. The Council is bound to investigate the matter, and may, on the motion of one of the disputants or *sua sponte,* refer the matter to an Arbitral Tribunal.

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59. Georgetown Accord, Arts. 6-8.
60. *Id.* Art. 20.
61. Annex, Arts. 5-7.
62. *Id.* Art. 11.

Additionally, the Council may make recommendations to the disputants and, should compliance not be forthcoming, may authorize sanctions in the form of reciprocal suspension of privileges against the offending party. A party disputant may also request an interim remedy pending a decision by the Council or the Tribunal. Such prejudgment remedies could take the form of an injunction where something akin to irreparable harm can be shown.[63]

Article 12 of the Annex sets forth the rules of arbitration. Each member state nominates two qualified candidates from a list of arbitrators maintained by the Secretary General. In case of a dispute, each party designates an arbitrator from the Secretary General's list who, in turn, can select a third arbitrator from the same source. Where the first two arbitrators cannot agree, the Secretary General may fill the third vacancy.

The tribunal sessions are *ad hoc* and the arbitrators may establish their own procedure, hearing the parties' views by oral or written argument or both. Failure to comply with an arbitral award gives rise to the suspension of certain benefits enjoyed under the Treaty and the Annex.[64]

To date, arbitration has not been used in dispute settlement. As with the other integration movements in the hemisphere, the CARICOM governments have shown a decided preference for bilateral settlement of problems, at times invoking the mediating assistance of the Common Market Council.

The same general conclusions noted earlier regarding the deficiencies of these dispute settlement provisions might be repeated here. Natural and legal persons have no standing, and political compromise prevails in place of true juridical rigor.

These integration movements, while notably successful in many areas, have shown remarkable resistance to establishing a centralized court system comparable to the EEC Court of Justice. Such a centralized court system would be capable of deciding legal controversies in a more consistent and universal manner, and under the framework of procedures currently in the books but scarcely in use.

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63. *Id.* Art. 12.
64. Orrego-Vicuña, *supra* note 27, at 31.

VI. Some Tentative Observations and Proposals for the Future

The instruments which establish the superstructures for the different integration movements are, by and large, the products of economists. This group of specialists tends to concentrate on the economic and financial aspects of its creations; this emphasis, however, has proven to be somewhat utopian. In considering the establishment of central market courts, economic drafters and planners feared that the practical and tangible problems of reducing and eliminating trade barriers and of stimulating the free movement of goods, capital, and labor, might have given rise to a plethora of legal holdings. Given the fear of the national-law bias of lawyers in their respective countries, it seems likely that a certain amount of anti-lawyer and anti-legalism sentiment played a role in the conscious decisions of the economic draftsmen to de-emphasize the roles of lawyers and courts in the integration process.[65] Barbados Ambassador McComie succinctly expressed this sentiment when he stated: "the question is whether we should have [dispute settlement] mechanisms at all, that is to say, whether the establishment of dispute settlement mechanisms will induce more disputes."[66]

A similar attitude is expressed in the belief that integration movements are and must be dynamic and fluid, and that therefore, traditionally conservative legal institutions do not provide the best answers to legal disputes.[66] Other commentators on the subject share the view expressed by Guatemalan Professor A. Molina Orantes when he said: "the important thing is to come up with preventive measures . . . . One should stress conciliation as a process."[68]

A sentiment common to all countries is their jealous attitude in matters that might threaten their traditional sovereign prerogatives. In the case of the Latin American countries, the memory of the Monroe Doctrine "Gunboat Diplomacy," and frequent foreign interventions in the latter part of the nineteenth and early twentieth centuries has formed nationalistic suspicions against outside agencies, whatever their origins. These attitudes have given rise to legal principles such

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65. *Colloquium on Certain Legal Aspects of Inter-American Cooperation*, 5 GA. J. INT'L & COMP. L. 158 (1975).

66. Jimenez, *Sobre la Justicia en la Integración Regional*, REVISTA DE CIENCIAS JURIDICAS, UNIVERSIDAD DE COSTA RICA 285 (1972).

67. *Colloquium on Certain Aspects of Inter-American Cooperation, supra* note 65, at 160.

68. *Id.* at 147.

as the Calvo Doctrine, which holds that a foreign entity doing business in a Latin American state shall be subject to local laws and shall only have recourse to that state's courts for redress of its grievances.[69] This principle is a reaction against years of intervention which has taken many forms (some less than praiseworthy), on the part of the United States and certain European powers.

For the Caribbean states, the realities of colonialism are still fresh in the memories of most citizens, and the governments and nationals alike are understandably sensitive in matters that may touch upon their independence.

Another explanation which cannot be overlooked is the traditional emphasis in Latin American diplomacy, in general, and Latin American domestic relations, in particular, on the political approach to problem-solving. In part, this stems from the fact that, with few exceptions, the executive branches of government have tended to overshadow the other branches, particularly, the judiciary. While most Latin American constitutions provide for the separation of powers and a system of checks and balances, in practice, these devices are not operative. The executive branches of the various governments show a marked preference for resolving disputes bilaterally or by invoking the assistance of representatives of other executive branches. The suspicion that law and lawyers take too long, cost too much, and in the end, threaten the independence of the different governments, is a palpable bias that must be overcome if the process of resolving disputes on more than an *ad hoc* political basis is to become institutionalized.

There *is* a strong preference on the part of the Latin American to avoid the frank hostilities inherent in the courtroom battle. This point of view cannot be measured in a concrete empirical manner; notwithstanding, it seems to this writer to be an element which should not be ignored. Moreover, in the early days of the different integration movements, there was a spirit of optimism and fraternity which might have been threatened by crude litigation in contrast to the more gentlemanly art of negotiation and compromise. Finally, with the exception of the ill-fated 1907 Court of Justice of Central America, the individual has never been a proper subject of international law in Latin American legal practice. This will change soon, however, when an Inter-American Human Rights Court comes into existence.

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69. Guier, *La Justicia en el Mercado Común Centroamericano*, 6 REVISTA DE CIENCAS JURIDICAS, UNIVERSIDAD DE COSTA RICA 7 (1965).

At a time of increased concern about the protection of individual rights, the conservative inclinations of many states and its jurists are obviously impeding reluctant governments from submitting to the jurisdiction of supranational institutions.[70] In spite of this state of affairs and this panoply of political, cultural, and legal attitudes, there is a formidable body of thought in the various states of the hemisphere which is actively promoting the establishmnt of an international "community" court of law designed to deal with legal disputes, provide uniformity, and give some measure of protection and guidance to citizens and governments alike, as the various integration experiments mature and move forward.

A case in point is the current move to establish an Andean Tribunal.[71] In 1971, the Commission of the Andean Group, at its Sixth Special Session, directed the Board to carry out the necessary preliminary study for such a tribunal; the matter was to be taken up again in 1972.[72] The Board, responding to the Commission's directives, requested reports from international specialists as well as national authorities on the subject. In June 1972, a meeting of experts was held, which included the participation of Professor Gerard Olivier, Deputy General Director of the Legal Service of the European Community, and Doctor Pierre Pescapore, a judge on the European Court.[73]

On the basis of the meeting's findings and the various studies, the Board prepared a Draft Treaty designed to create an Andean Community Court. In its general configuration, the court would closely resemble its European counterpart, except that its membership would consist of only three eligible nationals from any Latin American state. Similarities with the European Court of Justice include the privileged status accorded judges, the high moral and intellectual attainment required of candidates, and the prohibition against outside employment, except in the case of academic pursuits.[74] The Court, as contemplated in the Draft Treaty, would be permanent and its jurisdiction would relate exclusively to matters arising out of the Andean Community. In drafting the proposed Treaty, the Board ex-

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70. INTEGRACIÓN LATINOAMERICANA, *supra* note 39.
71. R.F.V. GARCÍA-AMADOR, EL ORDENAMIENTO JURIDICO ANDINO 101 (1977).
72. *Id.* at 101-102.
73. *Id.* at 102-103.
74. Orrego-Vicuña, *supra* note 27, at 39.

pressly recognized that the LAFTA Protocol for the Settlement of Disputes was inadequate for the purposes of the Andean Group.[75]

In terms of power, the proposed court could nullify the acts of the other two principal community organs. The bases for such nullification would exist: 1) where an organ violated the terms of the Treaty of Cartagena, or 2) where an organ abused its power by an *ultra vires* act.[76]

An important aspect of the Treaty is the right of the individual to apply to the court. Thus, natural or juridical persons could challenge the legality of an act or decision of the Commission or the Board, and similarly, one community organ could sue another.[77] States, too, would have the right to sue and could be sued. All of these jurisdictional characteristics of the proposed Andean Court closely resemble those of the European Court of Justice. Another remedy available to all potential parties-litigants would be an action akin to mandamus, whereby a party might compel another to carry out an obligation established by community law.[78] Finally, Draft Treaty Article 24 provides for a system of pre-judicial determinations similar to those permitted under Article 177 of the Treaty of Rome.[79]

The treaty will probably be signed during the course of 1979. It is unlikely that the creation of an Andean Tribunal will cause deeply seated prejudices to shift in favor of a general trend to set up multinational courts. Still, it is a first step of much importance, and the example it sets will certainly be noticed by the rest of the Latin American community.

The second area where serious efforts have been made to create a community court is in Central America. At the Second Central American Juridical Congress celebrated at San Jose in 1964, several national delegations recommended the creation of a permanent court. The Costa Rican delegation, citing the example of the EEC Court of Justice, called for the creation of a similar institution.[80] The Guatemalan delegation went even further in proposing a Central American Court of Justice which would enjoy mandatory jurisdiction

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75. *Id.* at 40.
76. *Id.* at 41.
77. Cardenas, *Metodos de Solución de Controversias Comerciales Internacionales*, 8 DERECHO DE LA INTEGRACIÓN 103 (1975).
78. INTEGRACIÓN LATINOAMERICANA, *supra* note 39.
79. Orrego-Vicuña, *supra* note 27, at 31.
80. Guier, *supra* note 69, at 12.

over any type of international dispute in the area, including all cases involving alleged violations of human rights, as well as legal disputes arising out of the integration process.[81] Despite the different proposals put forth favoring the establishment of such a court, no action on the part of the institutions of the CACM has taken place.

The most practical proposal yet put forth was made by Licenciado Rolando Soto Jimenez, Professor of Economic Law at the University of Costa Rica. Professor Soto proposes that a "Superior Court," composed of one judge from each Central American state, be appointed by the Executive Council. The Court would be competent to hear cases involving the application and interpretation of the General Treaty. As in the case of the European Court, before a party could appeal from a national court to the Superior Court, he would be obliged to exhaust the national procedure provided for in his country of origin.[82] Notwithstanding this provision, however, an interlocutory appeal like that provided for in Article 177 of the Treaty of Rome would be permitted.[83] As may be seen in the few provisions mentioned here, Professor Soto's proposal is very similar to the Andean Draft Treaty and takes its inspiration from its model in Europe.

The great achievements of the European Community, especially in the area of resolving legal disputes, have not gone unobserved in South and Central America. However, with the limited exception of the proposed Andean Tribunal, these ideas have thus far failed to overcome strong national resistance. There is an enlightened body of thought which continues to press for the realization of true community courts of justice.

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81. Jimenez, *supra* note 66, at 294.
82. *Id.* at 302-303.
83. *Id.* at 303.