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Recent Developments in Latin American Intellectual Property Law: The Venezuelan Response to Andean Pact Decision 313

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RECENT DEVELOPMENTS IN LATIN AMERICAN INTELLECTUAL PROPERTY LAW: THE VENEZUELAN RESPONSE TO ANDEAN PACT DECISION 313

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The more I admire the excellence of the federal Constitution of Venezuela, the more I am convinced of the impossibility of its application to our state.¹

I. INTRODUCTION

HOLA is an internationally recognized weekly magazine that has circulated in Venezuela for forty years.² In 1971, *HOLA*'s publisher, Compañía Mercantil Anónima *HOLA*, S.A. of Madrid (*HOLA* S.A.), registered "*HOLA*" as a trademark in Venezuela through a Venezuelan attorney/industrial property agent.³

In the early 1980s, a large Venezuelan publishing group, Bloque de Armas, attempted to acquire the exclusive rights to distribute *HOLA* in Venezuela.⁴ Rebuffed by both the Madrid publisher and its Venezuelan distributor, in 1985, Bloque de Armas attempted to register the trademark "*HOLA* EASA," to begin publishing its own magazine.⁵ The Venezuelan Industrial Property Registry rejected the application, recognizing the current registration of the *HOLA* trademark.⁶

Undaunted, Bloque de Armas enlisted the services of the same industrial property agent who previously registered the *HOLA* trademark.⁷ With his assistance, Bloque de Armas gained trademark rights to *HOLA* EASA on January 20, 1992.⁸ Bloque de Armas then petitioned the First Labor Court of the Fourth Instance to prohibit the circulation of *HOLA* in Venezuela on grounds that its continued circulation hurt the Venezuelan employees of *HOLA* EASA.⁹ The court granted Bloque de Armas' request that same day, and the Sixth Superior Labor Court ratified it within twenty-four hours.¹⁰ In addition, the 37th Penal and Patrimony Safeguard

1. Simón Bolívar, Address Delivered at the Inauguration of the Second National Congress of Venezuela in Angostura (Feb. 15, 1819), in *SELECTED WRITINGS OF BOLÍVAR* 179 (Harold A. Bierck, Jr. ed., 1951).

2. John Sweeney, *The HOLA Trademark Piracy Scandal: A Tale of Double-Dealing Lawyers, Judicial Terrorism, and Incompetence and Corruption at the Development Ministry*, *VENECONOMY MONTHLY*, July 1992, at 11.

3. *Id.* at 12.

4. *Hola Scandal Brews*, *BUS. LATIN AM.*, Aug. 24, 1992, at 291.

5. *Id.*

6. Sweeney, *supra* note 2, at 12.

7. *Id.*

8. *Id.*

9. *Id.* at 13.

10. *Id.*

Court placed HOLA S.A. under summary investigation.¹¹ As a result of these injunctions, *HOLA EASA* replaced *HOLA* on Venezuelan newsstands.¹²

HOLA S.A. formally asked the Registrar of Industrial Property to nullify the HOLA EASA trademark.¹³ In its memorandum, HOLA S.A. based its request on the Venezuelan 1955 Industrial Property Law,¹⁴ administrative law, and consumer protection theory.¹⁵

One month later, the head of the Industrial Property Registry rejected the arguments of HOLA S.A. and upheld both trademarks.¹⁶ The case created an international scandal. The Registrar resigned, the attorney general investigated the penal court judge who issued the injunction, and the King of Spain spoke with Venezuelan President Pérez concerning HOLA S.A.'s victimization.¹⁷

The *HOLA* scandal is one recent example of the lax intellectual property protection in Venezuela. Intellectual property¹⁸ is a major component of international economics.¹⁹ It is particularly important to Latin American countries because it offers the opportunity to transform them from lesser developed to developed ones.²⁰

Since World War II, Latin American countries have considered technology transfer²¹ both a potential cure-all for un-

11. *Id.*

12. *Hola Scandal Brews*, *supra* note 4, at 291.

13. Request from Cecilia Acosta Mayoral and Flavio Chávez B. to Dr. Thaimy Márquez, Registrar of Industrial Property, (June 3, 1992) [hereinafter Request to Registrar of Industrial Property] (on file with the *University of Miami Inter-American Law Review*).

14. *Ley de Propiedad Industrial de 1955* [1955 Industrial Property Law] (Venez.), translated in 21 JOHN P. SINNOTT, *WORLD PATENT LAW AND PRACTICE*, at V-1 (1992).

15. Request to Registrar of Industrial Property, *supra* note 13. The brief argued that the 1955 Industrial Property Law aims to protect not merely trademarks, but the consuming public as well.

16. Resolution No. 59 of the Venezuelan Registry of Industrial Property, July 20, 1992 (on file with the *Inter-American Law Review*).

17. John Sweeney, *The Hola Trademark Piracy Scandal (Part II)*, *VENECONOMY MONTHLY*, Nov. 1992, at 22; Sweeney, *supra* note 2, at 13.

18. Intellectual property has two main areas: industrial property (inventions, trademarks, and industrial designs), and copyright (protection of expression). ROBERT P. BENKO, *PROTECTING INTELLECTUAL PROPERTY RIGHTS, ISSUES, AND CONTROVERSIES* 2-3 (1989).

19. Frédéric Benech, *La place du droit de la propriété intellectuelle dans le droit international économique*, 22 *REV. GÉN. 423*, 423 (1991).

20. See Richard N. Brown, *The Little Recognized Connection Between Intellectual Property and Economic Development in Latin America*, 22 *INT'L REV. INDUS. PROP. & COPYRIGHT L.* 348, 348 (1991).

21. Technology transfer is "the process by which science and technology are diffused

derdevelopment and a source of international economic inequity.²² Latin American intellectual property law reflects this ambivalence in its efforts to attract beneficial technology without concurrently securing protection for intellectual property rights.

Part II of this Comment reviews the theories and events which formed the backdrop for the creation of rules for Latin American intellectual property. Part III discusses Andean Pact (ANCOM) technology transfer laws, including ANCOM's recently adopted Decision 313. Part IV focuses on the corresponding laws of Venezuela, an ANCOM member, and reviews Venezuela's schizophrenic approach to Decision 313. Part V analyzes the systemic barriers to effective enforcement of intellectual property rights in Venezuela and argues that merely promulgating stricter laws will not ensure a higher level of intellectual property protection. Part VI uses the rubric of a bazaar to illustrate the decision-making process in technology transfer negotiations and then reviews the formation of policy-making elitist groups in Venezuela. This Comment proposes that Venezuela will provide the heightened intellectual property protection within ANCOM Decision 313 only if policy-makers conclude that the advantages of participation in international free trade agreements outweigh the short-term benefits of lax intellectual property enforcement.

II. LATIN AMERICAN INDUSTRIAL PROPERTY LAW: AN HISTORICAL PERSPECTIVE

Before 1929, Latin American economic development depended almost entirely on exports of raw materials.²³ The global depression of 1929 highlighted this dependence on exports.²⁴ Latin American governments responded by adopting import-substitution policies, which required foreign capital and technology.²⁵ This created

throughout human activity." David M. Haug, *The International Transfer of Technology: Lessons that East Europe Can Learn from the Failed Third World Experience*, 5 HARV. J.L. & TECH. 209, 211 (1992) (citing Harold Brooks, *National Science Policy and Technology Transfer*, in NATIONAL SCIENCE FOUNDATION, CONFERENCE ON TECHNOLOGY TRANSFER AND INNOVATION (1966)).

22. See Carlos M. Correa, *Transfer of Technology in Latin America: A Decade of Control*, 15 J. WORLD TRADE L. 388, 390 (1981).

23. See ALAN GILBERT, *LATIN AMERICA* 18-21 (1990).

24. *Id.*

25. *Id.* One commentator defines technology as "anything, tangible or intangible, that could contribute to the economic, industrial, or cultural development of a country, whether or not that technology is presently available to the country." Haug, *supra* note 21, at 211.

a new form of dependency.²⁶

To combat this, "dependency" theories²⁷ of the 1960s suggested industrialization and regional economic integration as key instruments in Latin American economic development.²⁸ Disciples of dependency theory considered technological change integral to economic development.²⁹ Latin American theorists and politicians, in contrast, viewed reliance on foreign technology as a defining trait of their dependency.³⁰

Technology transfer was not the developing countries' panacea. Multinational corporations used their stronger bargaining positions to negotiate agreements incorporating restrictive clauses, producing yet another form of dependency: "technological colonialism."³¹

In the early 1970s, North-South relations were among the prominent issues of international economic and political negotia-

Another defines technology that is bought and sold as:

1. Capital goods including machinery and productive systems.
2. Human labor, usually skilled manpower, and management specialized scientists.
3. Information of both technical and commercial character, including that which is readily available and that subject to proprietary rights and restrictions.

H. Ledin, *Methods of Transfer*, in *TECHNOLOGY TRANSFER PRACTICE OF INTERNATIONAL FIRMS* 12 (Frank R. Bradbury ed., 1978).

26. GILBERT, *supra* note 23, at 21.

27. Dependency theory posits that Latin America's underdevelopment is due to socio-economic factors. It also asserts that the colonial structure of world capitalism caused Latin America to become economically, politically, and culturally dependent on foreign powers. See ANDRE GUNDER FRANK, *LATIN AMERICA: UNDERDEVELOPMENT OR REVOLUTION*, at ix-x (1969).

Dependency theory suggests that while foreign investment in Latin America promotes industrialization, it creates continued dependence on foreign corporations and capital-providers, leading to:

1. displacement of national entrepreneurs;
2. preemptive financing (local interests are less likely than foreign interests to get commercial financing);
3. unequal bargaining positions;
4. restraints on transfer of technology;
5. increased balance of payments problems.

See Joseph J. Jova, *Private Investment in Latin America: Renegotiating the Bargain*, 10 TEX. INT'L L.J. 455, 470-73 (1975).

28. Allan Preziosi, *The Andean Pact's Foreign Investment Code Decision 220: An Agreement to Disagree*, 20 U. MIAMI INTER-AM. L. REV. 649, 653 (1989).

29. Haug, *supra* note 21, at 217-18.

30. Dale B. Furnish, *The Andean Common Market's Common Regime for Foreign Investments*, 5 VAND. J. TRANSNAT'L L. 313, 332 (1972).

31. Haug, *supra* note 21, at 218.

tions.³² Demands for a New International Economic Order (NIEO) dominated many conferences,³³ with technology transfer representing an essential element of the NIEO.³⁴ NIEO advocates criticized the international intellectual property system, claiming that (i) intellectual property rights created monopolies, causing technology to be unjustly expensive; (ii) knowledge and technology were the common heritage of mankind; and (iii) development of less-developed countries (LDCs) was in the global interest.³⁵

Further, policy-makers in LDCs saw no correlation between intellectual property protection and national technological or economic sectors' advancement.³⁶ They hoped that strict regulation, rather than protection, of technology transfer would prevent overdependence on foreign capital.³⁷

Acting on these theories, many Latin American countries substantially reformed their laws to limit the protection of intellectual property.³⁸ Generally, they sought to improve the commercial conditions of agreements (particularly those concerning price), eliminate restrictive practices, and unpack the various components included in technology transfers.³⁹ Specifically, the new regimes' goals included (i) redefinition of the concept of "invention"; (ii) heightened conditions for patent exploitation; (iii) elimination of import monopolies granted to patentees; and (iv) lower patent protection in areas such as pharmaceuticals and energy.⁴⁰

The global economic downturn of the 1970s thwarted the hopes of the NIEO movement.⁴¹ By 1976, two years after the

32. JAGDISH N. BHAGWATI, *DEPENDENCE AND INTERDEPENDENCE* 13 (1985); see also Carlos Mouchet, *Some Notes on Copyright in Latin America*, 7 COPYRIGHT 223 (1971).

33. Some examples include the Sixth Session of the United Nations General Assembly of 1974 (adopting the Declaration and Programme of Action on the Establishment of a New International Economic Order) and The Conference on International Economic Cooperation of 1974 (the so-called North-South Conference). See generally CHARLES A. JONES, *THE NORTH-SOUTH DIALOGUE: A BRIEF HISTORY* 56-57 (1983).

34. Haug, *supra* note 21, at 219.

35. BENKO, *supra* note 18, at 28.

36. See Le-Nhung McLeland & J. Herbert O'Toole, *Patent Systems in Less Developed Countries: The Cases of India and the Andean Pact Countries*, 2 J.L. & TECH. 229, 231 (1987).

37. See Mark B. Baker & Mark D. Holmes, *An Analysis of Latin American Foreign Investment Law: Proposals for Striking a Balance Between Foreign Investment and Political Stability*, 23 U. MIAMI INTER-AM. L. REV. 1, 17-19 (1991).

38. See Correa, *supra* note 22, at 388.

39. *Id.* at 392.

40. *Id.*

41. See JAMES F. PETRAS, *LATIN AMERICA: BANKERS, GENERALS, AND THE STRUGGLE FOR*

United Nations General Assembly approved the Declaration and Programme of Action on the Establishment of a New International Economic Order,⁴² the NIEO was moribund.⁴³ By the early 1980s, the South's unified voice had degenerated from "solidarity and confrontation" into a "frustrated Southern monologue."⁴⁴

The late 1980s brought fundamental change to Latin American political and economic planning. Protectionist policies gave way to free trade and economic liberalism.⁴⁵ This new outlook was a response to international trends toward regional free trade, exemplified by the Enterprise for the Americas Initiative (EAI),⁴⁶ NAFTA, MERCOSUR, and the consolidation of the European Common Market.⁴⁷ Nearly all Latin American countries have signed bilateral agreements with the United States under the EAI.⁴⁸ Further, the United States considers intellectual property rights protection a prerequisite for participation in free trade agreements.⁴⁹ Similarly, all EAI agreements' preambles and appendixes mention intellectual property.⁵⁰

The 1990s began with major changes in Latin American intellectual property legislation. During the previous decade, only six countries changed their intellectual property laws; in 1991 alone, nine altered or planned to modify their laws.⁵¹ These changes

SOCIAL JUSTICE 75 (1986).

42. G.A. Res. 3201 (S-VI), 6 U.N. GAOR, Supp. (No. 1), U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715 (1974).

43. Haug, *supra* note 21, at 220.

44. BHAGWATI, *supra* note 32, at 49.

45. See Gary C. Hufbauer et al., *Options for a Hemispheric Trade Order*, 22 U. MIAMI INTER-AM L. REV. 261, 268 (1991); see also Stephen Graham, *Free Trade in the Americas: A New Engine for Growth*, BUS. LATIN AM., Oct. 26, 1992, at 373-74.

46. The Enterprise for the Americas Initiative, a broad socio-economic program proposed by President Bush, seeks to create a free trade zone encompassing the entire Western hemisphere while encouraging democratic governments and market-oriented planning. See Hufbauer, *supra* note 45, at 264-65.

47. See generally *id.* at 269. Other forces prompting liberal approaches to intellectual property protection are increased foreign debt and decreased direct foreign investment. See Carlos Primo Braga, *The Developing Country Case for and Against Intellectual Property Protection*, in STRENGTHENING PROTECTION OF INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES: A SURVEY OF THE LITERATURE 69-72 (World Bank Discussion Paper No. 112, 1990).

48. *Enterprise for the Americas: Vision and Reality*, in NORTH-SOUTH ISSUES (Univ. of Miami North-South Ctr.), July 1992, at 4 [hereinafter *Enterprise for the Americas*].

49. See *Trade Report Sounds Warning on Intellectual Piracy*, AM. BANKER-BOND BUYER, Apr. 6, 1992, available in LEXIS, Nexis Library, AMBANK File.

50. See *Trade Favors are Incentive for Tougher Standards*, LAGNIAPPE LETTER, Aug. 21, 1992, available in LEXIS, Nexis Library, LAGLTR File.

51. *Intellectual Property Protection in South America*, INT'L BUS. DAILY, Dec. 24, 1991, available in LEXIS, Nexis Library, BNAIBD File.

evinced governmental attempts to improve their economies through intellectual property legislation.⁵²

On April 7, 1991, under the auspices of the EAI, Venezuela signed a bilateral framework agreement with the United States.⁵³ The United States and Venezuela have also established a formal business council under EAI.⁵⁴ While recent free trade talks between Venezuela and the United States included negotiations of a possible intellectual property treaty,⁵⁵ on April 29, 1992 the United States Trade Representative placed Venezuela on its "watch list" of intellectual property offenders.⁵⁶

Free trade is now the impetus behind development of Latin American intellectual property regimes. These countries are responding to two primary forces: the "carrot" and the "stick." A chance to participate in the movement toward regional agreements is the "carrot" of free trade. The threat of punitive trade sanctions represents the "stick."⁵⁷

III. INTELLECTUAL PROPERTY RIGHTS AND THE ANDEAN PACT

The Agreement of Andean Subregional Integration of May 26, 1969⁵⁸ created the Andean Common Market.⁵⁹ Bolivia, Colombia, Ecuador, Peru, and Venezuela are its current members.⁶⁰

52. *Id.*

53. *Framework Accord is Signed with US*, LAGNIAPPE LETTER, Apr. 19, 1991, available in LEXIS, Nexis Library, LAGLTR File.

54. See *Enterprise for the Americas*, *supra* note 48, at 4.

55. *Venezuela and the United States Hold Preliminary Free Trade Talks*, NOTIMEX MEXICAN NEWS SERVICE, Aug. 19, 1992, available in LEXIS, Nexis Library, NOTIMX File.

56. Paul Verna, *RIAA, Paraguay, El Salvador Menace Copyright Owners*, BILLBOARD, May 9, 1992, at 8.

57. Under section 301 of the U.S. Trade Act of 1974, as amended by the 1988 Trade Act, intellectual property protection is a condition for the granting of GSP (general system of preferences) benefits. 19 U.S.C. § 2411 (1988). See R. Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223, 224 (1989).

58. Agreement on Andean Subregional Integration, opened for signature May 26, 1969, translated in 8 I.L.M. 910 (1969) [hereinafter Cartagena Agreement].

59. ANCOM was a result of the 1960s Latin American economic integration movement. See Roberto Danino, *The Andean Code After Five Years*, 8 LAW. AM. 635, 636 (1976). It was a subregional group of the Latin American Free Trade Association (LAFTA), whose goal was the establishment of a regional free trade area. For a general history of Latin American economic integration see ALBERT S. GOLBERT & YENNY NUN, *LATIN AMERICAN LAWS AND INSTITUTIONS* (1982).

60. Chile was an original member but dropped out in 1976. Preziosi, *supra* note 28, at 650 n.2. Venezuela took part in the ANCOM framework negotiations, but did not sign the Cartagena Agreement. 8 I.L.M. 910 (1969). Venezuela eventually agreed to join ANCOM on

ANCOM aimed to promote member countries' development through economic integration and creation of a common market with a single external tariff.⁶¹ ANCOM's charter called for coordination of economic and social policies and the unification of domestic laws.⁶² While the Latin American Free Trade Association's (LAFTA) objective was mainly trade liberalization through tariff reductions, ANCOM covered all aspects of regional economic activity through the creation of a common market.⁶³ In the intellectual property area, the Andean Pact Commission had power to create a uniform regulation of trademarks, patents, licenses, royalties, and foreign investment.⁶⁴

A. Subregional Import-Substitution: ANCOM Decision 24

ANCOM was adverse to intellectual property protection from its inception.⁶⁵ In 1970 ANCOM passed Decision 24,⁶⁶ regulating foreign investment and technology transfer.⁶⁷ Technology transfer was the most complex area covered by this legislation.⁶⁸ Decision 24 was the "cornerstone of the original integration scheme"⁶⁹ of ANCOM, and one of its most notorious features.⁷⁰

Realizing that most technology transfers related to equity investments and were not merely licensing agreements, the drafters of Decision 24 linked foreign investment controls with technology transfer policies.⁷¹ The preamble reiterated language from

February 13, 1973, and became a full member on January 1, 1974. 12 I.L.M. 344 (1973).

61. Cartagena Agreement, *supra* note 58, arts. 1-3.

62. *Id.*

63. See Lloyd Pike, *The Andean Foreign Investment Code: An Overview*, 7 GA. J. INT'L & COMP. L. 656, 658 (1977).

64. Cartagena Agreement, *supra* note 58, art. 27.

65. Richard N. Brown, *Guarding Your Company's Bright Ideas*, BUS. VENEZ., May 1992, at 33.

66. *Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses and Royalties*, Decision 24 of Nov. 30, 1976, Commission of the Cartagena Agreement, translated in 16 I.L.M. 138 (1977) [hereinafter Decision 24].

67. Susan C. Fouts, *The Andean Foreign Investment Code*, 10 TEX. INT'L L.J. 537 (1975).

68. Furnish, *supra* note 30, at 330.

69. John R. Pate, *Andean Group: Commission Decision 220 Replacing Decision 24, The Common Foreign Investment and Technology Licensing Code*, 27 I.L.M. 974, 974 (1988).

70. Decision 24 directly influenced other Latin American intellectual property regimes, including Argentina, Mexico, and Brazil. See James Leavy, *Latin American Laws on Transfers of Technology*, 3 INTER-AM. LEGAL MATERIALS 353, 369 (1987).

71. John R. Pate, *The Andean Common Market*, in TECHNOLOGY TRANSFER: LAWS AND

ANCOM's Declaration of Bogotá⁷² that proposed the adoption of "standards that [would] facilitate the use of modern technology without limiting the market for products manufactured with foreign technical assistance, and the coordination of foreign investments with general development plans."⁷³ The Decision made foreign technology policy subservient to the goal of regional integration.

With Decision 24, ANCOM redefined the basis of the North-South relationship.⁷⁴ Rather than attract foreign capital by offering special privileges to multi-national corporations (MNCs), Decision 24 attempted to attract foreign capital on the basis of mutual benefits arising from Latin American economic integration.⁷⁵ The Decision had four basic purposes: (i) to exclude foreign investments from key sectors of the market economy; (ii) to reduce foreign participation in local companies to minority positions; (iii) to diminish reliance on foreign technology while stimulating the development of local technology; and (iv) to avoid competition among ANCOM members when offering incentives to foreign investors.⁷⁶ Decision 24 also incorporated a "fade-out" provision designed to convert foreign investments into national ownership.⁷⁷

Predictably, developed countries were critical of this approach and complained that the new laws were unduly restrictive.⁷⁸ They

PRACTICE IN LATIN AMERICA 59 (Beverly May Carl ed., 1978); see also Baker & Holmes, *supra* note 37, at 8-10.

72. Declaration of Bogotá, Aug. 16, 1966, translated in INSTRUMENTS OF ECONOMIC INTEGRATION: LATIN AMERICA AND THE CARIBBEAN 149 (1975). The Declaration memorialized discussions among Colombia, Chile, Venezuela, Ecuador, and Peru concerning goals of Latin American development. See GOLBERT & NUN, *supra* note 59, at 263.

73. Decision 24, *supra* note 66, pmbi.

74. See Ricardo Borzutzky, *Decision 24 of the Cartagena Agreement: Analysis of the Andean Approach to Technology Transfer*, in TECHNOLOGY TRANSFER AND DEVELOPMENT: AN HISTORICAL AND GEOGRAPHIC PERSPECTIVE 197 (Robert E. Driscoll & Harvey W. Wallender III eds., 1974).

75. *Id.*

76. *Id.*

77. Preziosi, *supra* note 28, at 657-58.

78. See John E. Dull, *Transfer of Technology to Latin America: A U.S. Corporate View*, in TECHNOLOGY TRANSFER AND DEVELOPMENT: AN HISTORICAL AND GEOGRAPHIC PERSPECTIVE 261, 275 (Robert E. Driscoll and Harvey W. Wallender III eds., 1974). Dull reports:

I have heard it said that Latin American businessmen need these tight regulations to strengthen their bargaining position. I detect in this some feeling of inherent inferiority, but I don't believe it for a moment. Those of you who have negotiated with Latin American businessmen know very well that they can conduct as tough negotiations and drive as hard bargains as anyone else.

I submit that what is really needed is the creation of an open atmosphere for true arms-length negotiations in which both the buyers and sellers can obtain

argued that adequate economic incentives were necessary for technological advancement and that monopoly rights be enforced to ensure adequate compensation for private innovation.⁷⁹ Foreign corporations protested that the new laws failed to accommodate industry differences, reduced flexibility, and frustrated profit maximization.⁸⁰

Decision 24 proclaimed that "national enterprises must have the best possible access to modern technology,"⁸¹ while maintaining that it was "necessary to establish efficient mechanisms and procedures for the production and protection of technology in the territory of the subregion and to improve the terms under which foreign technology is acquired."⁸²

To achieve its goals, Decision 24's authors relied on the basic mechanics of registration and disclosure.⁸³ The Decision called for each Member to create a Competent National Authority (CNA), whose approval was necessary for any contract involving technology transfer.⁸⁴ Each country's CNA would decide whether the imported technology would make an "effective contribution"⁸⁵ to ANCOM goals.⁸⁶ A central ANCOM organ, The Subregional Office of Industrial Property, would coordinate technology policies between members.⁸⁷

Decision 24 outlawed the use of restrictive clauses in technology agreements by ANCOM members.⁸⁸ It also barred, except in

what they need.

Id.

79. See BENKO, *supra* note 18, at 28.

80. Dull, *supra* note 78, at 275; see also FRANKLIN TUGWELL, *THE POLITICS OF OIL IN VENEZUELA* 15 (1975).

81. Decision 24, *supra* note 66, declaration 6.

82. *Id.*

83. Furnish, *supra* note 30, at 330.

84. Decision 24, *supra* note 66, art. 18.

85. *Id.*

86. *Id.*

87. *Id.* art. 54.

88. Article 20 barred the following clauses:

- a) clauses obligating the recipient of technology to acquire from a specific source raw materials, intermediate products, capital goods, other technologies, or permanent employees, except in exceptional cases;
- b) clauses allowing the seller of technology the right to set resale prices of products manufactured using the technology;
- c) clauses containing restrictions regarding the volume and structure of production;
- d) clauses prohibiting the use of competitive technology;
- e) clauses establishing purchase options for the technology supplier;

exceptional cases, the inclusion of any clauses which prohibited or limited exports of products manufactured with licensed technology.⁸⁹ It allowed no limitations which interfered with ANCOM members' trade or exports of similar products to third-party countries.⁹⁰

B. ANCOM Decisions 84 and 85

In 1974, ANCOM addressed the issues surrounding technology and industrial property in Decisions 84⁹¹ and 85.⁹² Decision 84 proclaimed that technological dependency existed, and that this dependency generated serious negative effects.⁹³ It also declared the need for a regional policy of technological development.⁹⁴

Decision 85 dealt with specifics of industrial property law. Chapter I covered patents, Chapter II industrial drawings and models, and Chapter III trademarks. Decision 85 prohibited the granting of patents for (i) inventions contravening public order; (ii) vegetable varieties, animal races, and processes for obtaining vegetables and animals; (iii) pharmaceutical products, medications, beverages and foods for human or animal consumption; and (iv) inventions affecting the development of ANCOM members' procedures or products.⁹⁵

f) clauses obligating the technology purchaser to provide the technology supplier with any inventions or improvements gained through use of the purchased technology;

g) clauses requiring royalty payments for unworked patents;

h) any other equivalent clauses.

Decision 24, *supra* note 66, art. 20; see also Robert J. Radway, *Venezuela: Certain Legal Considerations for Doing Business*, 8 CASE W. RES. J. INT'L L. 289, 303 (1976).

89. Radway, *supra* note 88, at 303.

90. *Id.*

91. *Decision on the Basis for A Subregional Technological Policy*, Decision 84, Commission of the Cartagena Agreement, GRUPO ANDINO, Separata No. 28, pp. 1-11, June 1974, translated in 13 I.L.M. 1478 (1974) [hereinafter Decision 84].

92. *Decision on Industrial Property*, Decision 85, Commission of the Cartagena Agreement, GRUPO ANDINO, Separata No. 28, pp. 12-22, June 1974, translated in 13 I.L.M. 1489 (1974) [hereinafter Decision 85].

93. Decision 84, *supra* note 91, pmb1.

94. *Id.*

95. Decision 85, *supra* note 92, art. 5.

C. Coming Full Circle: The Quito Protocol and ANCOM Decisions 220 and 291

The Quito Protocol⁹⁶ represented the fourth major modification to the Cartagena Agreement.⁹⁷ Unlike previous amendments,⁹⁸ which were limited to issues of membership and timetables, the Quito Protocol provided for "fundamental, substantive reforms in the Andean integration program."⁹⁹ It recognized a change in the economic and political environments of ANCOM countries and allowed greater flexibility in the ANCOM integration scheme.¹⁰⁰

The Protocol's objectives for technology transfer were:

- a) creation of subregional capabilities responsive to the challenges of the scientific-technological revolution;
- b) contribution of science and technology to the conceptualization and execution of strategies and programs for Andean development; and
- c) utilization of the mechanisms of economic integration to stimulate technological innovation and productive modernization.¹⁰¹

On May 18, 1987, the Presidents of the ANCOM countries approved Decision 220.¹⁰² Decision 220 replaced Decision 24 as ANCOM law for technology and foreign investment.¹⁰³ Similar to the Quito Protocol, Decision 220 recognized that Decision 24's poli-

96. Quito Protocol Amending the Cartagena Agreement, May 12, 1987, *reprinted in* ACUERDO DE INTEGRACION SUBREGIONAL, REGIMEN DE CAPITALS EXTRANJEROS Y OTRAS DECISIONES 34 (1990) [hereinafter Quito Protocol].

97. See John R. Pate, *Andean Pact: Official Codified Text of the Cartagena Agreement Incorporating the Quito Protocol*, 28 I.L.M. 1165 (1989).

98. The others were:

1. Final Act of the Negotiations between the Commission of the Cartagena Agreement and Venezuela for Adherence to the Agreement, Feb. 13, 1973, *translated in* INSTRUMENTS OF ECONOMIC INTEGRATION: LATIN AMERICA AND THE CARIBBEAN 219 (1975).

2. Lima Protocol Amending the Cartagena Agreement on Andean Subregional Integration, Oct. 30, 1976, *translated in* 16 I.L.M. 1585 (1976).

3. Protocol of Arequipa, *reprinted in* JORGE MARIO EASTMAN, *EL PACTO ANDINO, AYER Y HOY* 137 (1982).

4. *Decision Terminating the Membership of Chile*, Decision 102 of Oct. 30, 1976, Commission of the Cartagena Agreement, *noted at* 16 I.L.M. 235 (1976).

99. Pate, *supra* note 97, at 1165-66.

100. *Id.*

101. Quito Protocol, *supra* note 96.

102. *The Common Foreign Investment and Technology Licensing Code*, Decision 220 of May 11, 1987, Commission of the Cartagena Agreement, *translated in* 27 I.L.M. 978 (1988) [hereinafter Decision 220].

103. See Pate, *supra* note 69, at 974.

cies had failed to achieve national economic development goals.¹⁰⁴ Decision 220 reversed the binding norms of Decision 24 and allowed each ANCOM member to draft its own regulations for foreign investment and technology.¹⁰⁵

Decision 220 preserved most of Decision 24's regulations prohibiting restrictive clauses in technology agreements.¹⁰⁶ However, it notably permitted remittance of royalties to foreign parent companies or affiliates who made "intangible technological contributions."¹⁰⁷ Such contributors were defined as "resources derived from the technology, such as trademarks, industrial models, technical assistance, and technical know-how, patented or not, which can be presented in the form of objects, technical documents, or instructions."¹⁰⁸

In replacing Decision 220 with Decision 291¹⁰⁹ in March 1991, ANCOM returned to its prior liberal policies of foreign investment and technology transfer existing before Decision 24.¹¹⁰ The only obligatory norms of technology transfers articulated in Decision 291 concerned licenses. Licenses had to be registered and could not prohibit exports of goods produced with licensed technology to ANCOM members or prohibit export of similar products to third countries.¹¹¹

104. See *id.* listing the following factors:

1. Decision 24 was an obstacle to foreign investment, technology, and credit flows;
2. Decision 220 recognized that ANCOM members failed to follow Decision 24 because they did not find it in their best interest;
3. While Decision 24 was a linchpin of ANCOM's original integration policy, it was possible to have a viable regional scheme without a uniform foreign investment and technology policy.

105. Preziosi, *supra* note 28, at 668.

106. Decision 220, *supra* note 102, arts. 18-20.

107. *Id.* art. 21.

108. *Id.*

109. *Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties*, Decision 291 of Mar. 21, 1991, Commission of the Cartagena Agreement, GACETA OFICIAL DEL ACUERDO DE CARTAGENA, Year VIII, No. 80, Apr. 4, 1991, at 44, translated in 30 I.L.M. 1288 (1991).

110. See John R. Pate, *Andean Group: Commission Decision 291*, 30 I.L.M. 1283 (1991).

111. *Id.*

D. ANCOM's New Industrial Property Law: Decisions 311 and 313

The ANCOM Presidents met in Cartagena, Colombia during December 3 through 5, 1991 to sign Decision 311.¹¹² That Decision embodied a new ANCOM industrial property law.¹¹³ Decision 313¹¹⁴ swiftly superseded Decision 311.

1. Patents

Decision 313 provides for fifteen-year patent grants with a possible one-time extension of five years, conditioned on working the patent.¹¹⁵ Patents on models of utility are available for ten-year periods,¹¹⁶ and for eight-year periods on industrial designs.¹¹⁷ The patent holder must ensure the patent's exploitation in an ANCOM state.¹¹⁸ Notably, Decision 313 continues to bar patents for pharmaceuticals that the World Health Organization (WHO) lists as essential medicines.¹¹⁹ Further, member states may bar patentability for pharmaceuticals absent from the WHO list for no more than ten years after the Decision's passage.¹²⁰ Pharmaceutical patents receive no transitional protection.

2. Trademarks

Decision 313 provides for the registration of trade and service marks.¹²¹ Non-registrable marks include those intrinsic colors and marks which may confuse consumers as to the product's place of origin.¹²² Notorious marks receive protection subject to reciproc-

112. *Common Regime of Industrial Property*, Decision 311, Commission of the Cartagena Agreement, GACETA OFICIAL DEL ACUERDO DE CARTAGENA, Year VIII, No. 96, Dec. 12, 1991, translated in 5 INTER-AM. LEGAL MATERIALS 174 (1992).

113. Franklin Hoet Linares, *Venezuela: A New Era of International Trade and the Emerging Regime Governing Intellectual Property*, L/TECH., 4th Qtr., 1991, at 1, 7.

114. *Common Regime of Industrial Property*, Decision 313, Commission of the Cartagena Agreement, GACETA OFICIAL DEL ACUERDO DE CARTAGENA, Year IX, No. 101, Feb. 16, 1992, at 1, translated in 32 I.L.M. 182 (1993) [hereinafter Decision 313].

115. *Id.* art. 30.

116. *Id.* art. 56.

117. *Id.* art. 64.

118. *Id.* art. 37.

119. *Id.* art. 7(d).

120. *Id.* trans. prov. 3.

121. *Id.* art. 71.

122. *Id.* art. 72.

ity.¹²³ ANCOM members may join international conventions, which was not possible under ANCOM Decision 85.¹²⁴

3. Obligatory Licenses

Licensees must exploit the patent within two years following the license concession.¹²⁵ Decision 313 permits compulsory licensing, but allows each Member to establish its own legislation.¹²⁶ Interested parties may obtain a compulsory license where attempts at contractual licensing under "reasonable conditions"¹²⁷ prove fruitless and one of the following conditions exists:

- a) insufficient production of the invention in the Member state where the party requested a license;
- b) failure to distribute, market, or import the patented product sufficiently to satisfy market requirements in the Member state where the party requested the license;
- c) suspension of working the patent for more than one year.¹²⁸

In addition, CNAs may grant compulsory licenses to avoid market abuses in accord with pertinent subregional rules and national laws.¹²⁹

4. General Provisions

Decision 313 permits each ANCOM member to provide greater intellectual property protection than the ANCOM decision.¹³⁰ It binds the ANCOM countries to exchange information concerning patents granted or rejected,¹³¹ and allows members to share expert evaluators' services.¹³²

IV. VENEZUELAN INTELLECTUAL PROPERTY LEGISLATION

This Comment now turns to domestic legislation that Vene-

123. *Id.* art. 73.

124. *See* Brown, *supra* note 65, at 36.

125. Decision 313, *supra* note 114, art. 46.

126. *Id.* art. 49.

127. *Id.* art. 41.

128. *Id.*

129. *Id.* art. 42.

130. *Id.* art. 118.

131. *Id.* art. 32.

132. *Id.* art. 28.

zuela promulgated to realize the over-arching goals of ANCOM. While tracing the development of Venezuela's written laws, the true effect of laws such as Decision 24 and its progeny, and their application in Venezuela in particular, must be seen not by reference to the rules themselves, but to their interpretation and application.¹³³

A. Venezuelan Adoption of ANCOM Decision 24: Decrees 63 and 64

The Venezuelan 1955 Industrial Property Law¹³⁴ provides for grants of patents and trademarks. Patents are available for inventions, improvements, industrial models or drawings, and patents of introduction.¹³⁵ Non-patentable items include: pharmaceuticals; methods of working or manufacture; and inventions contrary to national laws, public order, or national security.¹³⁶

The Venezuelan Congress ratified Decision 24 at the same time it approved Venezuela's formal entry into ANCOM.¹³⁷ Most commentators postulated that Venezuela would enforce the provisions of Decision 24 leniently within its own domestic legal system.¹³⁸ However, the 1973-74 rise in world oil prices changed matters considerably.¹³⁹ OPEC's success radically altered the balance of North-South economic relations, causing an increase in Venezuela's oil revenues.¹⁴⁰ Venezuela's increased revenues enabled it to

133. See EDUARDO ARROYO TALAVERA, ELECTIONS AND NEGOTIATION: THE LIMITS OF DEMOCRACY IN VENEZUELA 1958-1981, at 331 (1986); see also the *HOLA* example, *supra* text accompanying notes 2-17.

134. 1955 Industrial Property Law, *supra* note 14.

135. *Id.* art. 5.

136. *Id.* art. 15.

137. Law Approving the Cartagena Agreement, GACETA OFICIAL EXTRA. No. 1,620, Nov. 1, 1973 (Venez.); see also Fouts, *supra* note 67, at 544.

138. Fouts, *supra* note 67, at 550.

139. *Id.*

140. OPEC's success changed the tenor of the North-South relationship by:

1. creating the idea of "commodity power," which threatened developed countries with the possibility that commodities other than oil could be cartelized. This produced a perception of greater transactional equality and allowed LDCs to enter into negotiations more powerfully;
2. convincing the North that the South had this power;
3. focusing world attention on commodity power;
4. allowing the South to include other issues in the negotiating process (e.g., trade, currency issues, and aid).

See BHAGWATI, *supra* note 32, at 41-43. For an extensive discussion of Venezuelan oil, OPEC, and North-South relations see LUIS VALLENILLA, OIL: THE MAKING OF A NEW ECO-

purchase the required technologies outright and apply Decision 24 stringently.¹⁴¹

Venezuela implemented Decision 24 with Decrees 62¹⁴² and 63¹⁴³ in April 1974. Decree 62 reserved certain industries for national companies.¹⁴⁴ Decree 63 provided that Decision 24 and Decree 63 govern trademark, patent, licensing, and royalty (as well as foreign investment) contracts.¹⁴⁵ It also created the Superintendency of Foreign Investments (SIEX) to administer Decision 24 and to serve as Venezuela's Competent National Authority.¹⁴⁶ SIEX was responsible for maintaining a registry for approval of contracts¹⁴⁷ and creating an Advisory Committee to evaluate technology transfer agreements.¹⁴⁸ The Superintendent of Foreign Investments chaired the committee, and its members were representatives of the Ministry of Finance and Development, the Central Office of Coordination and Planning, the Central Bank of Venezuela, and the Institute of External Commerce.¹⁴⁹ In short, technocrats, who adapted investment and technology agreements to reach goals of national economic development, managed SIEX.¹⁵⁰

Decree 63 required SIEX approval of all contracts involving trademarks, patents, or technology importation.¹⁵¹ The Decree also mandated registration of all documents concerning:

1. the grant of use or authorization for trademark exploitation;
2. the grant of use or authorization for exploitation of inventions, improvements, models, and industrial designs;
3. furnishing technical know-how through plans, diagrams, instructive models, instructions, formulas, specifications, training, and any other means;

NOMIC ORDER: VENEZUELAN OIL AND OPEC (1975).

141. See John R. Pate, *Venezuela: New Foreign Investment and Licensing Regulations and Related Documents*, 26 I.L.M. 760 (1987); see also Robert J. Radway & Franklin T. Hoet Linares, *Venezuela Revisited: Foreign Investment, Technology, and Related Issues*, 15 VAND. J. TRANSNAT'L L. 1, 17 (1982).

142. Decree 62, GACETA OFICIAL EXTRA, No. 1,650, Apr. 29, 1974 (Venez.), translated in 13 I.L.M. 1220 (1974).

143. Decree 63, GACETA OFICIAL EXTRA, No. 1,650, Apr. 29, 1974 (Venez.), translated in 13 I.L.M. 1221 (1974).

144. Decree 62, *supra* note 142, art. 1.

145. Decree 63, *supra* note 143, art. 1.

146. *Id.* art. 3.

147. *Id.* art. 9.

148. *Id.* art. 10.

149. *Id.* art. 11.

150. See Radway & Hoet Linares, *supra* note 141, at 16.

151. Decree 63, *supra* note 143, art. 54.

4. furnishing basic, detailed engineering for manufacturing plants;
5. technical assistance in all forms;
6. administrative services.¹⁵²

Contract documents had to contain detailed information,¹⁵³ and SIEX could define restrictive clauses which would void registration.¹⁵⁴ Decree 63 also obligated foreign technology suppliers to train national personnel.¹⁵⁵

B. Augmenting Decision 24: Decrees 746 and 2442

ANCOM's initial basic technology regulations were Decisions 24, 84, and 85.¹⁵⁶ These regulations created a minimum intellectual property regime, freeing each country to adopt more restrictive national legislation.¹⁵⁷

Venezuela never adopted Decision 85.¹⁵⁸ Instead, it created tighter technology transfer controls with Decrees 746¹⁵⁹ and 2442.¹⁶⁰ While the difference was small, Venezuela believed it necessary to promulgate its own explicit regulations in certain areas.¹⁶¹ Decree 746 increased the number of restricted clauses in technology agreements.¹⁶² Decree 2442 specified the required registration

152. *Id.* art. 55.

153. *Id.* art. 56.

154. *Id.* art. 57.

155. *Id.* art. 58.

156. See Pate, *supra* note 71, at 62.

157. *Id.*

158. Brown, *supra* note 65, at 33.

159. Decree 746, Apr. 28, 1974, GACETA OFICIAL, No. 30,635, Mar. 1, 1975 (Venez.), translated in TECHNOLOGY TRANSFER, LAWS AND PRACTICE IN LATIN AMERICA, *supra* note 71, at 272.

160. Decree 2442, Nov. 8, 1977, GACETA OFICIAL EXTRA., No. 2,100, Nov. 15, 1977 (Venez.), translated in TECHNOLOGY TRANSFER: LAWS AND PRACTICE IN LATIN AMERICA, *supra* note 71, at 274.

161. Pate, *supra* note 71, at 67.

162. Among the clauses banned were those that:

- a) prohibited the manufacture or sale of products made with the technology once the contract was terminated;
- b) prohibited the use of know-how acquired through the contracted technology after termination of the contract;
- c) prohibited the use of similar like commercial trademarks once the contract was terminated;
- d) imposed a designated system of quality control.

Decree 746, *supra* note 159, at 272-73.

documents¹⁶³ and information,¹⁶⁴ defined a "technological contribution,"¹⁶⁵ allowed SIEX to monitor execution of all registered contracts,¹⁶⁶ and excluded additional restrictive clauses.¹⁶⁷

C. Liberalization: Decrees 1200 and 727

In July 1986, Venezuela began to liberalize its technology transfer and foreign investment regime by issuing Decree 1200¹⁶⁸—the most thorough repudiation of Decision 24 by any ANCOM member.¹⁶⁹ Decree 1200 loosened regulations on technology transfer, contemporaneously adopted tax and foreign exchange policies, and continued to suppress technology transfer benefits for foreign technology providers.¹⁷⁰

Decree 727¹⁷¹ completed Venezuela's reversal of its previous restrictive technology transfer and foreign investment policies.¹⁷² Its passage was due to Decision 220 and the new economic liberalism of Venezuelan President Pérez, who realized that Venezuela, to develop more rapidly, required substantial foreign investment and technology.¹⁷³

Decree 727's central objective was to assure foreign investors and technology suppliers of greatly reduced governmental restraints. Chapter XII, on the importation of technology and patent and trademark exploitation began: "All contracts . . . for the importation of technology and on the use and exploitation of patents and trademarks, regardless of the nature thereof, are hereby authorized."¹⁷⁴ The Decree reduced technology licensing restrictions and eliminated governmental discretion involving contractual

163. Decree 2442, *supra* note 160, art. 64.

164. *Id.* art. 65.

165. *Id.* art. 68.

166. *Id.* art. 70.

167. *Id.* art. 73.

168. Decree 1200, July 16, 1986, GACETA OFICIAL EXTRA., No. 3,881, Aug. 29, 1986, translated in 26 I.L.M. 763 (1987).

169. Pate, *supra* note 141, at 761.

170. *Id.* at 762; see also Claudio Costa, *La Disciplina dei Contratti di Trasferimento di Tecnologia in Venezuela dopo l'Emanazione del Decreto N. 1200 del 16 Luglio 1986*, 28 DIRETTO COMUNITARIO E DEGLI SCAMBI INTERNAZIONALI 470, 486 (1989).

171. Decree 727, Jan. 18, 1990, GACETA OFICIAL, No. 34,397, Jan. 26, 1990 (Venez.), translated in 29 I.L.M. 278 (1990).

172. John R. Pate, *Decree No. 727 on Foreign Investment, Technology Licensing and Foreign Credit Regulations*, 29 I.L.M. 273, 273 (1990).

173. *Id.* at 275.

174. Decree 727, *supra* note 171, art. 62.

agreements. Decision 727 simplified the law by stating that the only banned restrictive clauses in technology transfer contracts were (i) those contemplated in Decision 220 or other national laws and (ii) those determined by the President.¹⁷⁵

D. Venezuela and ANCOM Decision 313

There is considerable doubt over whether Decision 313 is yet law in Venezuela.¹⁷⁶ Until Decision 313 is formally adopted, the earlier 1955 Industrial Property Law remains in force.¹⁷⁷ The Venezuelan College of Patent and Trademark Agents (COVAPI) maintains that Decision 313 took effect in Venezuela on February 14, 1992, the date it was signed.¹⁷⁸ In June 1992, the Venezuelan Registrar of Patents and Trademarks claimed that "Decision 313 is in effect, but we are not applying it."¹⁷⁹

The Venezuelan *Gaceta Oficial* published Decision 313 on August 5, 1992.¹⁸⁰ In October 1992, the Venezuelan Industrial Property Registrar and Attorney General claimed that Decision 313 became effective in Venezuela upon publication.¹⁸¹ A treatise lists Decision 313 as current Venezuelan Law.¹⁸² Yet, lawyers conduct litigation using the 1955 law.¹⁸³

On November 17, 1992, La Cámara de Laboratorios Venezolanos (LAVES), a trade group for Venezuelan pharmaceutical interests, brought suit, challenging the adoption of Decision 313.¹⁸⁴ The Venezuelan Supreme Court asserted jurisdiction, under its power

175. *Id.* art. 67.

176. See Sweeney, *supra* note 17, at 22; see also Thomas L. Hughes, *Industrial Property Law Modified*, INT'L FIN. L. REV., Oct. 1992, at 41.

177. John Wade, *Venezuela: New Law Tackles IP Pirates*, BUS. LATIN AM., Aug. 24, 1992, at 285, 290-91.

178. See Brown, *supra* note 65, at 33.

179. Richard N. Brown, *Venezuela's New Trademark Law: Decision 313 of the Andean Pact*, TRADEMARK WORLD, June 1992, at 23.

180. Decision 313, Common Regime of Industrial Property, GACETA OFICIAL EXTRA. No. 4,451, Aug. 5, 1992 (Venez.).

181. See Hughes, *supra* note 176, at 41.

182. See TRADEMARKS THROUGHOUT THE WORLD, at V-7 (Nancy H. Morowitz ed., 4th ed. 1993).

183. For instance, litigation in the *HOLA* case, *supra* text accompanying notes 2-17, is based on the 1955 Law of Industrial Property.

184. Brief of LAVES to the Venezuelan Supreme Court requesting the nullification of the Executive act of publication of Decision 313 [hereinafter LAVES Brief] (on file with the *Inter-American Law Review*).

to nullify unconstitutional executive acts.¹⁸⁵

LAVES challenged the adoption of Decision 313 on the grounds that the Decision (i) violated specific articles of the Venezuelan Constitution and (ii) disregarded Venezuelan reservations to ANCOM supranationality.¹⁸⁶

LAVES based its constitutional attack on the right to property,¹⁸⁷ the right to intellectual property,¹⁸⁸ and separation of powers.¹⁸⁹ It claimed adoption would violate procedures for reforming existing laws,¹⁹⁰ contending that Decision 313's grant of patents to pharmaceuticals on the WHO list constituted an unconstitutional modification.¹⁹¹

The suit also charged that Decision 313's adoption violated Venezuela's entrance to ANCOM¹⁹² and approval of the creation of the ANCOM Court of Justice.¹⁹³ This charge was rooted in the treaty creating the ANCOM Court of Justice.¹⁹⁴ That treaty stated that decisions of the ANCOM Commission were effective when published in the ANCOM *Gaceta Oficial*, unless the decision provided for a later date.¹⁹⁵ Venezuela made reservations to these powers, upon joining ANCOM, by declaring "the decisions of the Commission of the Cartagena Agreement that modify Venezuelan law, or within the competency of the Legislature, must be approved by a law of the Congress."¹⁹⁶ Venezuela used that same language when it approved the ANCOM Court of Justice.¹⁹⁷ The Ven-

185. CONST. VENEZ. art. 215.

186. LAVES Brief, *supra* note 184, at 2.

187. CONST. VENEZ. art. 99.

188. *Id.* art. 100.

189. Implicated in the suit are CONST. VENEZ. art. 118 (each governmental branch has its separate function with all cooperating to reach state goals), art. 119 (usurped power is ineffectual and null), and art. 138 (legislative power is carried out by Congress). LAVES Brief, *supra* note 184, at 22.

190. CONST. VENEZ. art. 177.

191. LAVES Brief, *supra* note 184, at 24.

192. Law Approving the Cartagena Agreement, GACETA OFICIAL EXTRA., No. 1,620, Nov. 1, 1973 (Venez.).

193. Law Approving the Treaty Creating the Court of Justice of the Cartagena Agreement, GACETA OFICIAL EXTRA., No. 3,216, July 7, 1983 (Venez.).

194. Treaty Creating the Court of Justice of the Cartagena Agreement, *translated in* 18 I.L.M. 1203 (1979).

195. *Id.* art. 3; *see also* Pate, *supra* note 69, at 975.

196. Law Approving the Cartagena Agreement, *supra* note 192, art. 1 (author's translation). In Spanish: "las decisiones de la Comisión del Acuerdo de Cartagena que modifiquen la legislación venezolana, o sean materia de la competencia del Poder Legislativo, requieren la aprobación mediante Ley, del Congreso de la República."

197. Law Approving the Treaty Creating the Court of Justice of the Cartagena Agree-

ezuelan Supreme Court upheld those reservations' constitutionality in 1990.¹⁹⁸

Until Venezuela resolves Decision 313's applicability, it will continue to maintain an inadequate system of intellectual property protection. Venezuela's ambivalence has already hurt its reputation in the international business community.¹⁹⁹ Venezuela can only anticipate further deterioration of its reputation until a more definite position on Decision 313 is secured.

V. ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN VENEZUELA

Enforcement is an integral component of intellectual property regimes,²⁰⁰ and enforcement of existing Venezuelan intellectual property law is ineffectual.²⁰¹ Of fifty thousand patents registered during a period of thirty-nine years, Venezuela has enforced only three.²⁰² The *HOLA* scandal dramatically illustrates this absence of legal protection for trademarks.

Venezuela does not lack legal provisions to protect intellectual property rights. The Venezuelan Constitution creates a right to protection for patents, copyrights, and trademarks.²⁰³ In theory, this right combined with remedies in the Civil Code relating to unjust enrichment²⁰⁴ could create an action for unfair competition.²⁰⁵ An injunction is theoretically possible under the Civil Procedure Code.²⁰⁶ Venezuelan penal law provides for prison terms of one month to a year for intellectual property violations.²⁰⁷ In addition, the 1955 Industrial Property Law provides a similar prison term for trademark or patent infringement.²⁰⁸

ment, *supra* note 193, art. 2.

198. Judgment of July 10, 1990 (José Guillermo Andueza), Corte Suprema de Justicia de la Nación, — Fallos — (Venez.) (on file with the *University of Miami Inter-American Law Review*).

199. See Sweeney, *supra* note 2, at 14.

200. See Franklin Hoet Linares and Alain Coriat, *Efectividad de los Derechos de Propiedad Intelectual en Venezuela*, in *DERECHO DE LA PROPIEDAD INDUSTRIAL* 277 (1989).

201. See Carlos E. Acedo Sucre, *Algunos Aspectos de la Propiedad Intelectual en Venezuela*, 43 *REV. FAC. DERECHO* 13, 15 (1991) (Venez.).

202. Brown, *supra* note 20, at 355.

203. CONST. VENEZ. art. 100.

204. Cód. Civ. arts. 1184, 1185 (Venez.).

205. Hoet Linares & Coriat, *supra* note 200, at 282.

206. *Id.*

207. Cód. PEN. arts. 338-40 (Venez.).

208. 1955 Industrial Property Law, *supra* note 14, arts. 98-100.

The level of intellectual property protection a plaintiff receives depends on whether the action is brought in a civil, criminal, or administrative tribunal.²⁰⁹ Criminal litigation is slow and ineffective.²¹⁰ In addition, the movant in a criminal suit may encounter a countersuit for damages.²¹¹

Civil procedures may not comport with United States concepts of fairness.²¹² A report on foreign intellectual property protection compiled by the United States Trade Commission²¹³ cited Venezuela for inadequate criminal penalties, inadequate civil remedies, lack of seizure and impoundment remedies, lack of compulsory process and/or discovery, and inadequate training and resources for enforcement.²¹⁴

The Venezuelan Constitution provides private enterprise a wide range of rights.²¹⁵ The absence of legal protection for trademarks lies not in the absence of constitutional protection and remedies, but in the fact that they are under-enforced.²¹⁶ Rather than regulating justice, constitutions in Venezuela have been political expedients.²¹⁷ Due to socio-political forces, the phrase, "*la Constitución sirve para todo*,"²¹⁸ describes Venezuelan constitutional law.

While having tremendous potential, the Venezuelan Constitution may inhibit, rather than aid, the process of heightened intellectual property protection. Corporations receive constitutional protection only if they conform to national goals.²¹⁹ Until intellectual property protection is a national objective, the Constitution will serve the agenda of groups such as LAVES, rather than those lobbying for enhanced intellectual property rights.

209. Hoet Linares & Coriat, *supra* note 200, at 278.

210. *Id.*

211. *Id.* at 283.

212. See Richard N. Brown, *Nonuse Cancellation of Used Trademarks in Venezuela*, 17 CAL. WEST. INT'L L.J. 349 (1987).

213. FOREIGN PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND THE EFFECT ON U.S. INDUSTRY AND TRADE, REPORT TO THE UNITED STATES TRADE REPRESENTATIVE, INVESTIGATION NO. 332-245, UNDER SECTION 332(g) OF THE TARIFF ACT OF 1930, USITC Pub. 2065, (1988).

214. *Id.* at 3-10.

215. See, e.g., CONST. VENEZ. art. 68 (right to use organs of administrative justice to defend private rights), art. 96 (freedom of entrepreneurial activity), art. 98 (private enterprise is protected by the State), and art. 99 (right to own private property).

216. See Richard V. Campagna, *Constitutional and Administrative Rights of Private Enterprise in Venezuela and Their Protection*, 16 INT'L LAW. 541, 542 (1982).

217. See Miriam Kornblith, *The Politics of Constitution-Making: Constitutions and Democracy in Venezuela*, 23 J. LATIN AM. STUDIES 61, 62 (1991).

218. *Id.* In English, the phrase is: "The Constitution serves any purpose." *Id.* at 62 n.5.

219. CONST. VENEZ. art. 72.

As for civil and criminal penalties, the outlook is bleak. Perhaps the greatest barrier to effective intellectual property rights enforcement is the failure of the Venezuelan judiciary to acknowledge that there is a problem.²²⁰ This lack of consciousness is exacerbated by a shortage of intellectual property lawyers, a situation common to Latin America.²²¹ In addition, budgetary constraints create problems ranging from poorly staffed registries and inadequate translations,²²² to a lack of access to courts.²²³

VI. ANALYSIS

Decision 313 provides a foundation for improved intellectual property protection in Venezuela. While not granting the degree of protection desired by some interests, particularly foreign pharmaceutical manufacturers, it does allow for a level of intellectual property protection sufficient to satisfy the *quid pro quo* to participate in liberalized trading regimes and bilateral trade agreements.

Will Venezuela utilize Decision 313 to transform its reputation as a "free-rider" into one of international cooperation? To do that, Venezuelan policymakers must balance the interests of short-term profit maximization afforded by weak national intellectual property laws against the more nebulous, less quantifiable long-term benefits of a more rigorous intellectual property regime. This section uses the metaphor of a bazaar to illustrate the decision-making process, and looks at the sectors of Venezuelan politics most able to bring about enforcement of Decision 313.

A. *Intellectual Property Decision-Making in Venezuela: A "Bazaar" Situation*

Opportunity for increased trade is the most attractive feature of stronger intellectual property rights in Venezuela. Just as these perceived opportunities were an integral component of North-South relations during the commodity-power era of the 1970s, the perceived benefits of free trade might equally induce increased intellectual property protection.

220. Hoet Linares & Coriat, *supra* note 200, at 278.

221. See Brown, *supra* note 20, at 350 (stating there are no more than fifty full-time intellectual property lawyers in any Latin American country).

222. Sucre, *supra* note 201, at 17.

223. See MARIOLGA QUINTERO TIRADO, JUSTICIA Y REALIDAD: UN ENFOQUE ANALÍTICO DE LA ADMINISTRACIÓN DE JUSTICIA EN LA VENEZUELA CONTEMPORÁNEA 173 (1988).

While once seen as separate domains, international trade and intellectual property are now perceived as interrelated.²²⁴ When ANCOM enacted Decision 311, for example, it also passed more trade liberalization reforms in two days than it had in the previous twenty-two years.²²⁵ Venezuela's approach to Decision 313 reflects not merely a selection of national intellectual property laws, but also an aspect of international economic policy. Venezuelan policy toward Decision 313 must weigh the benefits of free trade and technology transfer against the short-term benefits of lax intellectual property protection.

Technology transfer negotiations between Latin America, developed countries, and multinational corporations (MNCs) are analogous to "bazaar" behavior.²²⁶ Technology is one of those rare products with a marginal cost of zero; once created, no further costs of production are incurred.²²⁷ This affords tremendous latitude in bargaining because of the difference between the high cost of development of technology and the low marginal cost of its sale.²²⁸

MNCs are interested in profit-maximization,²²⁹ and base their transfer of technology decisions on financial and investment criteria.²³⁰ Latin American countries, suffering a perceived inferiority of bargaining position in technology transfer negotiations,²³¹ have attempted to increase their bargaining power in technology transfer

224. See Gadbow, *supra* note 57, at 226-29.

225. Laurie MacNamara, *Andean Region Makes Integration Effort*, BUS. AM., Mar. 23, 1992, available in LEXIS, Nexis Library, BUSAMR File.

226. See Brian G. Brunsvold, *Negotiation Techniques for Warranty and Enforcement Clauses in International Licensing Agreements*, 14 VAND. J. TRANSNAT'L L. 281, 285 (1981) (describing licensing agreement negotiations as "Indian blanket technique," whereby the licensor's request for payment is much higher than the amount it will accept); see also Jova, *supra* note 27, at 455 (describing Latin American transfer of technology negotiations as a bargain/compact).

227. Lawrence F. Ebb, *Transfers of Foreign Technology in Latin America: The Birth of Antitrust Law?*, 43 FORDHAM L. REV. 719, 728 (1975).

228. *Id.*

229. See Homer O. Blair, *Technology Transfer as an Issue in North/South Negotiations*, 14 VAND. J. TRANSNAT'L L. 301, 306-07 (1981).

230. See R. Seymour, *Patents and the Transfer of Technology*, in TECHNOLOGY TRANSFER PRACTICE OF INTERNATIONAL FIRMS 36 (Frank R. Bradbury ed., 1978) (suggesting that MNCs' technology transfer decisions are not a "capitalist-contrived plot suggested by some Third World nations," but the necessary result of pressures that shareholders seeking profit maximization place on corporate managers).

231. William S. Barnes, *Technology Rules in Latin America: A Study in Comparative Law*, 3 B.C. INT'L & COMP. L. REV. 1, 2 (1979).

negotiations with MNCs by using state intervention.²³²

The rhetoric surrounding North-South relations in the area of technology transfer is comparable to the colorful language of a bazaar. Technology transfer is labeled "the most critical instrument"²³³ for socioeconomic development, possessing a "fundamentally unique character,"²³⁴ equivalent to "the genetic code . . . of all mankind."²³⁵ Meanwhile, trade groups in developed countries describe Latin American intellectual property regimes as "semi-nationalization."²³⁶

The bazaar metaphor illuminates present-day Venezuelan technology transfer negotiations and intellectual property policy formation. The metaphor may be applied both to rule promulgation and ineffective enforcement of intellectual property rights. If and when Venezuelan policymakers believe they will gain from the "bargain" of free trade and bilateral agreements, they will supply the effective intellectual property protection which licensors desire. Similarly, if licensors decide that the cost of continued ineffective intellectual property law, with no end in sight, cancels any profits gained from access to Latin America,²³⁷ they will forego technology transfer agreements altogether. Formal adoption of Decision 313 would enhance the goal of free trade built on bilateral cooperative agreements.

B. Policy-Making in Venezuela: Venezuelan Elites

Access to government power is the cornerstone of Venezuelan politics.²³⁸ Beginning in the Betancourt administration of the late 1950s, the Venezuelan government began to deliberately forge channels of communication with interest groups.²³⁹ This alliance between government and the private sector became institutionalized under the label of *concertación*.²⁴⁰

232. Correa, *supra* note 22, at 391.

233. Barnes, *supra* note 231, at 10.

234. Surenda J. Patel, *The Technological Transformation of the Third World: Main Issues for Action*, in UNCTAD AND THE SOUTH-NORTH DIALOGUE, THE FIRST TWENTY YEARS 124, 125 (Michael Zammit Cutajar ed., 1985).

235. *Id.*

236. Ebb, *supra* note 227, at 720.

237. Latin American countries' bargaining power lies in access to markets, cheap labor, and raw materials. See Ebb, *supra* note 227, at 728.

238. JOSÉ ANTONIO GIL YEPES, *THE CHALLENGE OF VENEZUELAN DEMOCRACY* 147 (1981).

239. *Id.* at 184.

240. TALAVERA, *supra* note 133, at 278.

The government created quasi-governmental policy-making groups known as "plural bodies"²⁴¹ and filled them primarily with businessmen.²⁴² Few lawyers were chosen to sit on these groups.²⁴³ This absence of legal perspectives in major policy-making groups may present a barrier to change in Venezuela's intellectual property climate because Latin American businessmen currently give little regard to trademark and patent systems.²⁴⁴

The incestuous relationship between the Venezuelan government and those Venezuelan elites capable of capital formation represents another barrier to intellectual property changes. The majority of capital in Venezuela is concentrated in a few powerful families.²⁴⁵ Members of these families have held important roles in government, including the Ministries of Finance and Development.²⁴⁶ The *HOLA* case illustrates the power of such positions and their importance to intellectual property issues. The Minister of Development has played such a key role in the scandal that he is now known throughout the world as "the *HOLA* minister."²⁴⁷

If it were true that the Venezuelan techno-bureaucracy looks to maintain the status quo,²⁴⁸ then the prospects for increased intellectual property protection in Venezuela would be slim. While one commentator suggests that Venezuelan policymakers have supplanted grand schemes of development in favor of pragmatic solutions,²⁴⁹ this can cut two ways. Is it more pragmatic to strive for enhanced intellectual property protection or to maintain the status of an intellectual property "free-rider"?

VII. CONCLUSION

Decision 313 offers the possibility of improved intellectual property protection—an essential component of participation in free trade agreements between developed countries and Latin America. It also provides Venezuela with the chance to affirma-

241. *Id.* at 319.

242. *Id.* at 306-18.

243. *Id.*

244. See Brown, *supra* note 20, at 350.

245. See TALAVERA, *supra* note 133, at 322-24.

246. *Id.* at 324-25.

247. Sweeney, *supra* note 17, at 22.

248. See ISABEL LICHA, *TECNO-BUROCACIA Y DEMOCRACIA EN VENEZUELA 1936-1984*, at 77 (1990).

249. YEPES, *supra* note 238, at 148.

tively express to the international community its commitment to increased intellectual property protection.

Commentators and some lawyers in Venezuela recognize the connection between the opportunity for free trade and intellectual property protection.²⁵⁰ Venezuelan reaction to Decision 313 has been ambivalent, however, and a stable intellectual property regime remains a chimera. The *HOLA* scandal illustrates this instability. Venezuela must decide. It can either provide stable intellectual property protection or become a pariah excluded from international free trade.

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250. See Ruth De Krivoy, *Una estrategia común es lo que requiere el país*, EL NACIONAL, Aug. 3, 1992, at 36 (Venez.); Pedro Miguel Reyes, *El Poder Judicial en una economía liberada*, EL NACIONAL, Aug. 3, 1992, at 102; Fanny Pérez V., *Venezuela se expone a sanciones comerciales en EUA*, EL UNIVERSAL, May 21, 1992, at 2-4 (Venez.); Hoet Linares, *supra* note 113, at 12.

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