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The Andean Subregional Air Transport Integration System

by

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the Requirements for the Degree Master of Laws.

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A Nathalie, con admiración.
Por tu infinito amor y comprensión.

A Fabrizio, Claudio y Aldo,
quienes conforman mi inspiración.

ABSTRACT

Member Countries of the Andean Community (ANCOM) have established a supranational legal regime applicable to intra and extra-subregional air transport activities: the Andean Subregional Air Transport Integration system. This regime was established by Decisions 297 and 320 and was based on the Colombia-Venezuela Bilateral Air Transport Agreement. It revolutionizes the staus quo regarding air transport. The new regime adopts the principles of multiple designation of air carriers, free determination of frequencies and capacities for scheduled air services performed with the Subregion, and complete liberalization for non-scheduled air services. It creates an "Andean subregional market" and promotes the establishment of a "common" position for negotiating intra and extra-subregional fifth freedom.

Member Countries and consumers have benefitted from the air transport integration process by increasing the capacity as well as the number of frequencies and routes. Nevertheless, Member Countries have been unresponsive in updating their bilateral agreements vis-á-vis the regime set by Decisions 297 and 320. In some cases, Member Countries have been applying national laws and procedures, as well as the terms contained in the former bilateral agreements, over the new supranational regime. This situation makes the application and healthy development of the Andean Subregional Air Transport Integration process difficult.

In order to avoid these difficulties, Member Countries shall apply the supranational principles contained in Decisions 297 and 320 and update their bilateral agreements. Members shall also concentrate on promoting healthy air transport competition by instituting a Code of Conduct, which shall be enforced by a supranational and independent "ad hoc" body. The procedures set thereby for settling differences regarding the application of the rules contained in Decisions 297 and 320 and in the Code of Conduct shall be expeditious.

Member Countries and the "ad hoc" tribunal shall be able to react to the anomalies verified within the Subregion regarding air transport. Accordingly, the supranational authorities shall set up a database containing information regarding bilateral agreements,

air carriers performance, financial and economic information, pricing, routes and other characteristics related to air transport.

Member Countries shall promote and encourage the cross relation between subregional air carriers, to take advantage of having an "Andean market" and to rationalize the costs and investment of the subregional air transport infrastructure and operation.

Résumé

Les Pays Membre du Pacte Andin ont établi un régime legal supranational applicable aux activités de transport aérien dans la Subrégion et entre la Subrégion et autres pays : le système d'Intégration Subrégional du Transport Aérien. Ce régime a été établi par les Décisions 297 et 320, et fondé sur l'accord bilatéral entre la Colombie et le Venezuela. Ce régime adopte les principes de désignation multiple, libre détermination de la capacité et des fréquences pour les vols réguliers effectués dans la Subrégion et libéralise les vols non-reguliéres effectués dans la Subrégion. Ce régime crée un "marché Andin Subrégional" et stimule l'établissement d'une position commun vis-à-vis de les négociations avec tiers.

Les Pays Membre et les consommateurs ont bénéficié de ce procès d'intégration par la augmentation du nombre de fréquences et routes. Cependant, le Pays Membre n'ont pas mis au jour ces accords bilatéraux comme démandé par la Décision 297 et 320. Dans certain cas, les Pays Membre appliquent encore les lois et procédure nationaux, ainsi que les accords bilatéraux non modifié. Cette situation menace l'application et développement du processus d'intégration aérien.

Pour éviter ces difficultés, les Pays Membre doivent appliquer les principes supranationaux établis par les Décisions 297 et 320 et mettre à jour ses accords bilatéraux. Ils doivent se concentrer dans la promotion d'une saine compétition et créer un Code de Conduite, lequel devra être administré par un organisme supranational et indépendant. Ce Code devra aussi établir une procédure rapide pour régler tous les différends concernant le régime d'intégration Subrégional aérien.

Les Pays Membre devront établir une base de données contenant tous les accords bilatéraux et information concernant les routes, fréquences, prix, information financière et économique et toute autre information associé a cette activité, pour réagir contre toute anomalie vérifié. Les Pays Membre doivent promouvoir et encourage les relations commerciales entre les lignes aériennes de la Subrégion, pour profiter du "marché Andin" et rationaliser les opérations, coûts et les investissements de l'infrastructure aérienne subrégional.

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INTRODUCTION

The nature of air transport activities is global in the sense that it is the only means of transportion that may reach the furthest point in the earth in the shortest time. Yet, it has been an activity regulated by principles based on nationality and national laws (e.g., national ownership of aircraft or airlines) that refrains it from being global. We may call this "the rubber band" effect. However, substantial changes in the economic, legal and political domains in different parts of the globe have significantly changed the way countries envision air transport.

Parallel to this situation, we find countries using another method for improving and enhancing their national economy: by creating or improving their political, economic, financial and social relations with like-minded countries through the process known as "integration". These countries will establish supranational institutions and regulations applicable to all parties and aimed towards a closer and interdependent relation.

This is the case with the Andean Community (ANCOM). Created at the end of the sixties and stagnated through the seventies and part of the eighties, it has received a tremendous impulse in the last ten years. In the field of air transport, the ANCOM has gone the extra mile by setting the Andean Subregional Air Transport Integration Policy as part of a major process advanced by its Members. This is the subject of our thesis.

In **Chapter I**, we will describe the origins of the present public international air transport regulation which is based on the principles set in the Chicago Convention. Also we will define the concepts of Multilateralism, Plurilateralism, Regionalism and Bilateralism since these concepts are related to the Andean Subregional Air Transport Integration Policy.

Due to the lack of information about the ANCOM in the English language, the author will briefly explain in **Chapter II** the origins of the integration process of the

ANCOM and the present supranational legal regime applicable to Member Countries. This explanation will serve as reference and also show the supranational character of the Andean Subregional Air Transport Integration system.

Chapter III describes and analyzes the Subregional Air Tansport Integration system and institutions as they are applicable today. Further, the author examines the results of the air transport integration process in this subregion.

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CHAPTER I

MULTILATERALISM vs. BILATERALISM: FORMS AND NEW TRENDS OF AIR TRANSPORT AGREEMENTS

Part A. Concepts Pertaining to our Research

We would like to begin by defining the four leading concepts involved in our research and their applications to civil air transport. Further, we will describe the development and scope of these concepts and apply them to the subject of our research in the subdivisions that follow this introductory section.

1. Multilateralism

ICAO has defined "*multilateral regulation*"[1] as regulation undertaken jointly by three or more States, within the framework of an international organization and/or a multilateral treaty or agreement, or as a separate specific activity, which may be broadly construed to include relevant regulatory processes and structures, outcomes or outputs written as treaties or other agreements, resolutions, decisions, directives, or regulations, and the observations, conclusion, guidance and discussions of multinational bodies, both intergovernmental and non-governmental. A trilateral (that is between three States) is equally multilateral as is a *global multilateral agreement* which involves all or almost all the nations in the world (e.g., an agreement reached and ratified by members of the

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[1] Working Paper for the World-Wide Air Transport Conference on International Air Transport Regulation: Present and Future (Montreal, 23 November - 6 December 1994) International Civil Aviation Organization AT Conf/4-WP/5 [hereinafter ***AT Conf/4-WP/5***] at 3.0.

United Nations or ***ICAO***).[2] The goal of multilateral regulation in the air transport field is, for the most part, the conclusion, implementation, or continuance of common arrangements or regulations on matters of interest to the various parties[3]."

We may find different types of multilateral agreements relating to international aviation relations for the exchange of traffic and other rights. For example, *Global Multilateralism* allows parties to exchange their rights within a global context and hold the agreement open further to all sovereign States.[4] A minimum number of States must sign and ratify the agreement for it to enter into force. After adopting such agreements, parties would, normally, offer national treatment to airlines operating in their territories and, most probably, would be restricted to the first four freedoms, leaving the fifth freedom to be subject to bilateral negotiation[5].

Another form of multilateralism is *Plurilateralism*. This is an agreement undertaken jointly by two or more States to regulate certain matters within their interest. Applied to air transport, a *Plurilateral Air Transport Agreement* (***PATA***)[6] may begin and

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2 B.D.K. Henaku, *Regionalism in International Air Transport Regulation* (Leiden: Koma Publishers, 1993) at 7. [hereinafter ***Henaku***].

3 ***AT Conf/4- WP/5***, *supra*, note 1.

4 ***Henaku***, *supra*, note 2 at 29. The best examples of "global" multilateralism are the *Chicago Convention, the Two, and the Five Freedoms Agreements* signed at the ***Chicago Conference*** (See *infra*, page 9ff). *The* ***Chicago Convention*** could almost be termed "universal" in view of its membership (183 States) J. Gunther, *"Multilateralism in International Air Transport"*, 1994 19:I Ann. Air & Sp. L. at 260 [hereinafter ***Gunther***].

5 ***Henaku***, *supra*, note 2 at 30. Ideally all five freedoms should be part of the package. However, one recognizes that the major differences for reaching any agreement in respect to multilateralism resides on the exchange of the fifth freedom.

6 This term is used by Prof. H. Wassemberghh. See H. Wassemberghh, "*The Future of Multilateral Air Transport Regulation in the Regional and Global Context*" (1983) 8 Ann. Air & Sp. L. at 263 and "*Toward a Flexible Worldwide Framework*

come into effect by signing a bilateral agreement, which will then be open for signature to other parties. To become Party to the agreement, parties must be ready to commence an "offer and request" negotiation situation whereby they accept the regulatory arrangements and the liberalization characteristics built into the ***PATA***. This is an expanding agreement that does not require a minimum number of signatures or adherents to come into effect.[7] This concept is based on the principles of international air transport liberalization and is initiated by a minority of like-minded States[8]. Usually, parties will sign a ***PATA*** where they exchange third and fourth freedoms and leave the fifth and further freedoms for bilateral negotiation[9]. These countries may be located in the same region but this is not a *conditio sine qua non* for entering into the agreement.

2. Bilateralism

Bilateral regulation is regulation undertaken jointly by two parties, most typically by two States, although one or both parties might also be a group of States, a supra-national body (i.e., a community or other union of States acting as a single body under authority granted to it by the member States), a regional governmental body or even two airlines (for example, in the determination of capacity or prices). The goal of bilateral regulation in the international air transport field is typically the conclusion, implementation, or continuance of some kind of intergovernmental agreement or understanding concerning transport between the territories of the two parties"[10]. These Bilateral Air Transport Agreements (***BATA***) are considered international law agreements

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for Air Transport: An Anatomy of Airline Regulation" (1989) 2 LJIL [hereinafter ***Wassembergh***] at 144.

7 ***Gunther***, *supra*, note 4 at 262.

8 ***Wassembergh***, *supra*, note 6 at 144.

9 ***Henaku***, *supra*, note 2 at 33.

10 ***Henaku***, *supra*, note 2 at 20.

as dictated by the *Vienna Convention on the Law of Treaties*[11] relating to trade. They are concluded between the governmental authorities of two States and regulate the performance of air services between their respective territories[12]. The denomination and ratification and/or implementation may vary from one State to the other[13].

3. Regionalism

Regionalism also embraces the elements stipulated in ***multilateralism*** but is limited to a specific geographic context[14]. Normally, ***regionalism*** will occur between neighboring countries, or between countries belonging to a specific geographical area. Here, certain countries conclude a multilateral air transport agreement or arrangement intended to govern air transport operations within the boundaries of (and in some cases outside) that continent or subcontinent.[15] An example of this is the framework created within the Andean Pact countries by ***Decision 297***,[16] which has liberalized air transport activities within the sub-region.

Agreements signed under this attribute are multilateral agreements but "...they would be better defined as ***regionalism*** to differentiate them from multilateralism which

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11 *Vienna Convention on the Law of Treaties*, 1155 UNTS 331.

12 P.P.C. Haanappel, *"Bilateral Air Transport Agreements 1913-1980"* (1979) 5 The Int'l Trade Law J. at 241.

13 J. Gertler, *"Bilateral Air Transport Agreements; Non-Bermuda Reflections"* (1976) 42 J. Air L. & Com. at 779, 806ff.

14 ***Gunther***, *supra*, note 4 at 261.

15 ***Henaku***, *supra*, note 2 at 7.

16 ***Decision 297***, *Gaceta Oficial del Acuerdo de Cartagena*, year VIII, No. 82, 12 June 1991 [hereinafter ***Decision 297***] (see Chapter III).

is global in scope and cuts across geographical and political boundaries."[17] We are able to differentiate between geographically-based regionalism and regionalism based on a certain market (although the former is the rule). An example of this kind of regionalism was the *ECAC-US MOU*[18] (no longer in force) whereby the Members, lying on two sides of the Atlantic Ocean, regulated the North Atlantic tariffs.

Countries belonging to a regional agreement may decide to harmonize their air transport policies and/or exchange air traffic rights on a multilateral basis. This policy may be part of a major economic cooperation framework, where interchanging air traffic rights or giving national treatment to foreign airlines may be one of the constituent elements negotiated as part of a major trade package.

A regional air transport agreement within countries involved in a major integration process would more easily achieve this goal than others because of their global, political and economic harmonization process and organization. They may set up a supranational infrastructure with the power to deal with specific issues Parties agree upon. The regulation adopted by the supranational bodies regarding those issues is binding to Member Countries and prevails over national laws. We find examples of this structure within the *European Union* and the *Andean Pact* experiences.

In **Chapter II** of the present work we will describe the concepts and evolution of the integration process and, finally, will deal with the specific case of the *Andean Pact* regime defined by the ***Cartagena Agreement***. In **Chapter III** we will describe the specific case of the *Andean Pact* States and their *Sub-Regional Air Transport Integration Process* defined by ***Decision 297***.

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17 ***Gunther***, *supra*, note 4 at 262.

18 *Memorandum of Understanding on North Atlantic Scheduled Air Transport between European Civil Aviation Commission (ECAC) States and the U.S.*, no longer in force.

4. *Sovereignty*

Sovereignty "... is a fundamental concept of international law denoting the supreme undivided authority possessed by a State to enact and enforce its law with respect to all persons, property, and events within its borders."[19] It is the benchmark of the international personality of an entity seeking a status legally equal to other members of the community of nations.[20]

Regarding the application of this concept to our subject, every State has complete and exclusive sovereignty over the air space above its territory. This principle was laid down in the *Convention for the Regulation of Aerial Navigation* [hereinafter ***Paris Convention***][21] and reaffirmed in the ***Chicago Convention.***[22] In this respect, Article 1 of the ***Paris Convention*** is purported to be a definitive declaration of established international customary law whereby the signatories recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

However, as already described, the international air law conventions have had the effect of limiting the absolute excercise of state sovereignty over the airspace above its territory. For example, under the framework of the agreements signed at the ***Chicago Conference***, parties agree that all civil aircraft of Contracting States engaged in non-

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19 R. Bledsoe & B. Boczek, *The International Law Dictionary* (Santa Barbara U.S.: ABC-CLIO, 1987) [hereinafter ***IL Dictionary***] at 55.

20 *Ibid.*

21 Article 1 of the *Convention for the Regulation of Aerial Navigation*, signed on 13 October 1919 in Paris.

22 *Convention on International Civil Aviation*, ICAO Doc. 7300/6 [hereinafter ***Chicago Convention***]. This convention has been accepted by 183 States and ratified as the framework for air transportation and cooperation.

scheduled international air services[23] have the right to fly across its territory without landing and to land for non-traffic purposes related to its activity (fuel, technical reparations and so on), without obtaining prior permission[24].

We will now briefly describe the evolution of the present multilateral air transport regime in relation to the concept of State sovereignty and its consequences.

Part B. The Evolution of Multilateralism in Air Transportation

1. The Legal Regime Governing Air Transport Prior to the Chicago Conference[25] and the Concept of Sovereignty.

The problem of the legal condition of the atmosphere started at the begining of this century, when flights were flown across the territory of another country by using objects heavier than air. The potential (and actual) use of this mean for war purposes, made necessary for States to regulate air transport based on the concept of sovereignty.

Some authors claimed that, before this time, the legal condition of the atmosphere was seen as part of private law rather than of public law. They sustain that in those days the concept of "air" had a two-tier condition: on one hand it was considered a "thing" and, on the other, the "vertical limit of land property."[26]

On the othe hand, we find a different perspective for the categorization of the legal

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23 Article 5 of the ***Chicago Convention.***

24 These are known as "technical freedoms"" and are different from "commercial freedoms" which are described in the ***Five Freedoms Agreement.*** Contracting States which subscribed to the ***Five Freedoms Agreement*** also recognized these "technical freedoms" for scheduled air services (see *infra*, note 52)..

25 Conference on Civil Aviation, held at Chicago in November-December 1944.

26 T. Ballarino, *Diritto Aeronautico* (Milan: Giuffré editore, 1983) [hereinafter ***Ballarino***] at 26.

regime applicable to the atmosphere coined by Professor John Cobb Cooper. Professor Cooper considered that the regime applied to airspace was not limited to the private domain but to public law. Accordingly, the regime of airspace dates back to Roman times and was based on the concept of State sovereignty,[27] predating for many centuries the discovery of the art of flight. In his dissertation on the origin of the maxim *"cujus est solum ejus est usque ad coelum,*[28] Professor Cooper concluded that, ever since, States have claimed, held, and, in fact, exercised sovereignty in the airspace above their national territories. This conclusion was based mainly on the analysis of the role played by the Roman State in protecting public and private rights. According to Prof. Cooper, the State could not have assumed jurisdiction to lay down certain rules binding its citizens unless it had in fact exercised sovereignty in its airspace.[29]

As time passed, the *ad coelum* formula was reinterpreted in different legal systems, never to be taken literally, to express complete ownership of land and the right to its superadjacent airspace to the extent necessary or convenient for the enjoyment of life. The owner of land owns as much of the airspace above him as he uses, but only so long as he uses it.[30]

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27 "*Backgrounds of International Public Air Law*" (1965) Yearbook of Air and Space Law 8-9 (1965) at 35. To the roman jurists there was no dispute in considering air as *naturali iure omnium communis.* The principle *cuius est solum ejus est usque ad coelum coelum* expresses the absolute characteristic -including the sense of height- of the right of property.

28 "He who owns the soli, or surface of the ground, owns or has an exclusive right to everything which is upon or above it to an indefinite height".

29 J.C.C. Cooper, *"State Sovereignty Vs. Federal Sovereignty of Navigable Airspace"* (1948) 15 Journal of Air Law & Commerce at 27-31. See also T. Abeyratne, "*Philosophy of Air Law*" (1992) 37 Am. J. of Jurisp. 135ff [hereinafter ***Abeyratne***].

30 ***Abeyratne***, *supra*, note 29 at 137.

However, the international regime applicable to air transport and based on State sovereignty over its air space was developed in this century. With the aircraft's development and the potential danger to the security of States that could be caused through its use, it was imperative that public international law take over the rights related to airspace. In fact, in August 1904, the shooting down of the German balloon *Tschudi* and other similar incidents[31] defined this predicament. At this time, the concept of State sovereignty over the airspace above its territory, as it is understood and applied today emerged.

This principle constitutes the fundamental basis on which the present international legal regime for international air transport is supported, be it unilateral, bilateral, or multilateral and, in this case, regional or global in scope.[32] States would have to initially agree on this subject to grant to other States the right to enter the airspace of one another. Different theories in respect to the relation of States concerning the exercise of its sovereignty over the airspace above its territory have arisen. A brief description of some of these theories are outlined below.

a) **Theory of Unlimited Freedom:** Based on the comparative study made by authors defending the international character of the sea. They thought that considering navigation on the airspace on an unlimited basis would benefit the international community as it did with the freedom of the sea[33]. They also based "unlimited freedom of the air" on the fact that the air is undivisible horizontally or vertically. With the passing of time, the danger to the State's security, if the principle of "unlimited freedom" was

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31 V. Gunatilaka, *Problems of Air Space Sovereignty in the Seventies* (LL.M. Thesis, Institute of Air & Space Law, McGill University, Montreal, 1972) [unpublished] at 7.

32 ***Abeyratne***, *supra*, note 29 at 135.

33 ***Ballarino***, *supra*, note 26 at 32.

applied, made this theory unapplicable[34].

b) **Theory of Unlimited Sovereignty:** In contrast to the theory described above, this theory confers to the State full and exclusive exercise of sovereignty over its territory, excluding any claim that may arise from any other States.[35] Thus, no aircraft from another State may fly over or land in another State's territory without explicit permission.

c) **Intermediate Theories:** There are several theories between these two radical doctrines, which would try to conciliate the State's pretensions and the achievement of an efficient air navigation system. Some examples will follow.

c.1) **Air Freedom Restricted by Some Special Rights:** A significant role in the development of this theory was played by the French jurist, Paul Fauchille.[36] His pioneering studies in raising the question of the legal status of airspace served as incentive for the adoption of the present concept. Fouchille considered *"air"* as free, physically incapable of appropriation because it cannot be actually and continuously occupied[37]. Thus, there can be no sovereignty on the air. This freedom can only be limited to the necessary rights required in the interest of national self-preservation[38].

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34 *Ibid.*

35 *Ibid.* The Roman principle refered to is *dominos soli est dominos usque ad sidera et usque ad inferos.*

36 L. Kuhn, *"The Beginning of an Aerial Law"* (1910) 4 Am J. Int'l L. at 111; also P. Fauchille, *"Régime Juridique des Aérostat"* (1910) Revue Générale de Droit International Public at 414.

37 This is substantially the same argument raised by Hugo Grotius in his work *"De Jure Praede"* in Ch.XII title *"Mare Liberum"*, in favor of the freedom of the seas (cited in N.M. Matte, *Traité de Droit Aerien-Aéronautique* (Pedone: Paris, 1964) at 95).

38 This theory was adopted by the Institute of International Law in 1906 (see J.F. English, *"Air Freedom; The Second Battle of the Books"* (1931) 2 J. Air L. &

As a starting point, Fouchille stated that each sovereign right comes from the capacity to exercise them over its possessions. Thus, the owner of the land can exercise its ownership rights only to the height set by its building capacities. Above this limit the atmosphere is free. In France, the highest building during Fouchile's time was the Eiffel Tower. Thus, the maximum limit to exercise the right of sovereignty was 300 meters[39]. He also instituted a security zone over the 300 meters - 1500 meters - where each State could exercise certain controlling activities, like customs and the avoidance of hostile acts.[40]

This theory was strongly criticized because it was unclear who would define and determine the measures to be taken by a subjacent State to maintain its security and protect persons and their properties: the subjacent State on its own sole authority and discretion?; and, if this was the case, to what extent?[41]

c.2) **Theory of Limited Sovereignty:** Under this theory States exercise the right over the atmosphere above its territory. It flows from the doctrine of State consent whereby each state may accept limitations on its sovereign powers by conceding certain restrictions set by international law and by virtue of decisions rendered by international organizations of which the State is a member.[42] The extent of this right is limited in favor of air traffic, provided it meets certain internationally recognized requirements. [43]

Com. at 361 .

39 330 meters with the radio station.

40 W. Wagner, *International Air Transport as Affected by State Sovereignty* (Brussels: Établissements E. Bruyland, 1970) at 9-31. See also ***Ballarino***, *supra*, note 26 at 33.

41 ***Ballarino***, *supra*, note 23 at 32.

42 ***IL Dictionary***, *supra*, note 19 at 55 .

43 *Ibid.* at 33.

The last theory was widely accepted and implemented by most of the States. In fact, following this principle, in November-December 1944, a group of States met in Chicago to set up the framework for the new air transport order during what is known as the ***Chicago Conference***. As a result a convention was signed: The *Convention on International Civil Aviation* or ***Chicago Convention***.[44] At this time, the Contracting States recognized "...that every State has complete and exclusive sovereignty over the airspace above its territory."[45] Furthermore, Article 6 confirmed this principle by requiring State "permission" for scheduled operations, to be performed by other States in the airspace over the territory of another State.[46] Nevertheless, in Article 5 of the ***Chicago Convention***, Contracting States conceded certain restrictions and agreed to grant "technical freedoms" to non-scheduled air transport services without the necessity of obtaining prior permission.

A short description of the ***Chicago Conference***, and the aftermath related to our research, will follow.

2. *Multilateralism Vs. Bilateralism; the Cleavage of the Chicago Convention*

As we described above, the principle of State sovereignty was widely recognized and reproduced in the ***Chicago Convention***. We also highlight that the said Convention requires that States need to obtain permission from the other States to perform any scheduled air transport operation in the airspace over their territory (Article 6). But the Convention did not solve the troublesome situation of how to set the procedure for granting "permission" for any scheduled or non-scheduled civil air operation; nor did it

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44 See *supra*, note 22.

45 ***Chicago Convention***, Article 1.

46 *Ibid.*

prevent the implementation of a multilateral exchange of traffic rights.[47] Consequently, States may choose any procedure for granting this permission.[48]

One of the results of the *Conference* was the issuing of two other documents to try to rectify this problem: the *International Air Services Transit Agreement*[49] or the "***Two Freedoms Agreement***" and the *International Air Transport Agreement*[50] or the "***Five Freedoms Agreement***." The former was less successful than the ***Chicago Convention***, but also widely accepted and ratified. The other was not successful at all and is not in force, proving the impasse suffered by the ***Chicago Conference*** in the light of granting economic rights.

At this point, what we call "the cleavage of the ***Chicago Conference***," occurred: Some Countries were supporting the liberal approach of multilateral granting of traffic rights, like the U.S.; others were more conservative, requiring a case by case approach where each party would negotiate its rights, thus promoting a bilateral system.

The first two freedoms of the air were extensively but not universally accepted on

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47 P.P.C. Haanappel, "*Multilateralism and Economic Bloc Forming in International Air Transport*" (1994) 19:I Ann. Air & Sp. L. at 291 [hereinafter ***Haanappel***].

48 "...[I]n exercise of their sovereign rights, States can opt for any ... means of granting the said permission as long as it promotes international cooperation and the orderly development of the aviation industry" (***Henaku***, *supra*, note 2 at 20). Also ***Haanappel***, *supra*, note 47 at 282.

49 Signed at Chicago on 7 December 1944, *ICAO, Policy and Guidance Material on the Regulation of Intemational Air Transport, ICAO Doc. 9587 (1992).*

50 Signed at Chicago on 7 December 1944, *U.S. Dept. of State Publication 2282,* in 18:II (1993) An. of Air & Space Law at 99. To date only 13 countries have ratified this agreement.

a multilateral basis at the ***Chicago Conference*** through the ***Two Freedoms Agreement*** .[51] Thus, the main reliance between States for granting these freedoms of the air has been through the *Bilateral Air Transport Agreements* (***BATA***). ***BATA*** were (and still are) one of the States' alternatives used for regulating economic aspects of international air transport. This was not an obligation or necessity but rather a possibility created by Article 6 of the ***Chicago Convention.***[52]

Since it was already clear during the ***Chicago Conference*** that the multilateral attempt for granting economic rights would not succeed, the ***Conference*** proposed a "temporary" framework be used on a bilateral basis *known as "Standard Form of Bilateral Agreements for the Exchange of Commercial Rights of Scheduled International Air Services.*[53] This document would serve to "...exchange all five freedoms of the air for scheduled international air service, but according to a route schedule/annex to be agreed upon, on a case-by-case basis, by the two governments involved."[54] We may consider the construction of the text as "liberal" in the sense that it did not cover the exchange of traffic rights or other elements of economic importance.[55] Moreover, the text remained silent with respect to tariffs, capacity and frequency to be applied to routes.[56] It also

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51 104 States are party to this agreement, but the largest Countries (Russia, Canada, China, Brazil, Indonesia) are not. These Countries amount to an important geographic extension in key portion of the globe, compelling other Countries to enter into bilateral negotiations to acquire these rights.

52 ***Haanappel,*** *supra,* note 47 at 280, 291.

53 7 December 1944, *ICAO Doc. 2187.* This standard form has been modified by ***ICAO*** as guidance to States in *ICAO Doc. 9228-C/1036* [hereinafter ***Chicago Standard***]

54 ***Haanappel,*** *supra,* note 47 at 289.

55 *Ibid.*

56 P.P.C. Haanappel, *"Bilateral Air Transport Agreements"* (1979) 5 The Int'l Trade Law J. at 246.

contains the rule of substantial ownership and effective control of the airline(s) by nationals of the State of registration.[57]

The ***Chicago Standard*** was scarcely used and was later replaced by the *Bermuda Agreement* Standard. This is a type of bilateral agreement formulated in 1946 between the U.S.A. and the U.K. in Bermuda,[58] the pattern of which has been followed by many States for bilateral agreements. The general effect of this ***Bermuda Agreement*** is that, for operating air services over some routes, as specified in the Annex, each party grants to the designated air carriers of the other the right to use airports and facilities on these routes, right of transit, or stops for non-traffic purposes, and of commercial entry and departure for international traffic of passengers, cargo and mail. The exercise of these rights is subject to some general principles laid down in the Final Act, with the objective being to exclude unfair competition and the effect being to limit to a large extent the full Five Freedom rights.[59]

Although the Bermuda Standard has become the pattern for other bilateral agreements throughout the world, some differences have developed which distinguish the new models from the old. In this respect we find the *"liberal"* bilateral model[60] and the *"restrictive"* bilateral model. The former would be more liberal in respect to prices (less governmental approval for tariffs) and capacity (free determination). The latter would be

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57 ***Haanappel*** *supra*, note 47 at 289.

58 Air Service Agreement between the United States of America and the United Kingdom of Great Britain and Nothern Ireland, signed at Bermuda on 11 February 1946, (U.S. Treaty and other International Act Series No. 1507).

59 C.N. Shawcross et al., *Shawcross and Baumont on Air Law*, 4th ed. (London: Butterworths, 1977) at 276-281.

60 An example is the *Bilateral Agreement between Colombia and Venezuela*, signed on 8 April 1991, in force since 7 July 1991 and registered with ***ICAO*** under No. 3682.

more conservative in respect to capacity, replacing the *ex post facto* governmental review of the Bermuda Standard by governmental predetermination of capacity[61].

Thus far, bilateral agreements have been the basis for the granting of traffic rights. Despite the fact that States choose bilateral agreements as the form for granting these rights, some authors consider bilateral regulations to be a "provisional measure."[62] This is shown in many bilateral air transport agreements, by such provisions as:

> "This Agreement shall continue in force until such time as it may be amended, or superseded by a general multilateral air convention"

Under this clause, parties to bilateral agreements have "kept the door open" for a multilateral agreement.[63] On the other hand, the framework established by the ***Chicago Conference*** does not prevent the establishment of a multilateral agreement for granting economic rights related to air transportation. In fact, it is the spirit of the said conference to promote it. This was confirmed by the ***Two***[64] and the ***Five Freedoms***[65] Agreements issued by the ***Conference*** and reflected in regional agreements dealing with certain domains related to air traffic.

Finally, to complete the spectrum regarding economic regulation of air services,

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61 ***Haanappel***, *supra*, note 47 at 292.

62 ***Henaku***, *supra*, note 2 at 22.

63 *Ibid.* ***Henaku*** cites the provision as being similar to Article 10 of the ***Chicago Standard*** and Article 11 of the *Strasbourg Standard Clause*, *ICAO DOC. 7977*, ECAC/3-1 (1959) at 37ff.

64 See *supra*, note 49.

65 See *supra*, note 50.

the *International Air Transport Association* (***IATA***) was formed. This association was established under the initiative of the airline representatives attending the ***Chicago Conference***. The main function of it is to set up and promote a multilateral pricing system for international air transport.[66]

3. New Trends on Commercial Air Transport Agreements

Two well-differentiated positions were upheld during the ***Chicago Conference*** regarding the options for granting commercial air transport rights. On one hand we find those that promoted an open multilateral agreement for granting commercial rights (mainly the U.S.); on the other, those that supported a moderate case-by-case (bilateral) negotiation framework (like the U.K.). The former developed an enormous and unique air transportation capacity during World War II. The other was devastated during the war and was not ready for that kind of negotiation.

Today, the same scheme is still in place: on one side we find a group, lead by the U.S., promoting a global multilateral scheme for granting commercial rights, and on the other a group that prefers a more conservative approach, looking for a layout that would protect their interests. The air transport industry in the U.S. has developed significantly during the last two decades, making their air carriers the strongest player in the international fora, endorsed by a weighty air traffic market. They also have a robust aircraft industry.

Last year we celebrated the 50th anniversary of the ***Chicago Conference.*** The main text resulting from the said Conference, the ***Chicago Convention,*** is an example of the success of multilateral will for the promotion of cooperation among nations and peoples of the world in the field of air law. Unfortunately, this success only applies to the

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66 ***Haanappel, supra,*** note 47 at 281.

technical field of air navigation. As we already have shown, regarding the multilateral exchanges of traffic rights, the Conference was not successful. Consequently, States had to regulate (and negotiate) their traffic rights through *bilateral agreements.*

This two-tier regime has been in place ever since. Thirty years ago Professor Bin Cheng stated that it appears that "...bilateralism and not multilateralism will remain the order of the day for some time to come."[67] In fact, no major changes have occurred during the last three decades in this field. It appeared that the status quo would never change until two important factors entered the scene of air transport activities. Firstly, the passing of the Air Transport Deregulation Act of 1978 in the U.S. and, secondly, the further development of the European Community into the European Union. These developments occurred in different regions, but it should be recognized that air transport activities in those regions amount for a very important volume of the overall international activities in this field. Furthermore, the developments described above directly affected Latin American countries, since their relations with the U.S., Canada and European countries are the most important in terms of air transportation.

Therefore, a general concern about the future of air transportation under the bilateral system has increased during the past fifteen years, gaining momentum in 1992 with the *ICAO WORLDWIDE AIR TRANSPORT COLLOQUIUM* held in Montreal between the 6 and 10 April 1992. During this Colloquium, the opinions of the air transport leaders and experts were divided. Some of them expressed that "...the bilateral system as established in the Chicago Convention has served us well for many years. [T]he question now arises if there are developments in international aviation which force us to have a critical look at the bilateral system and to consider if a basic overhaul of the

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[67] B. Cheng, *The Law of International Air Transport* (London: Stevens & Sons, 1962) at 231.

regulatory framework is necessary."[68] Another expressed that, "...even if we assume that the bilateral system was in some sense flawed . . . measures should be taken to correct those flaws rather than to discard the system altogether."[69] Moreover, it was said that " . . . the bilateral system has contributed greatly to the development of international air service . . . The basic aim of the bilateral system is to secure equal rights in air transport for both nations . . . The bilateral system . . . remains important to developing nations[70] . . . "

On the other hand, another recognized that the bilateral regime " . . . has resulted in an international marketplace that has not been fully exploited."[71] They recognized the benefits of multilateralism and cited few examples of ongoing multilateral processes as the new trends in air transportation. G.W. Thompson, Chief of Manchester Airport (U.K.) affirmed that " . . . [for the past forty years bilateral negotiations have been conducted on the basic premise that each country sought to safeguard the interests of its own national airline . . . national airline interests are not unimportant . . . they are just one part of the negotiation equation. Regions are increasingly recognizing the need for a wider canvas to paint the air transport negotiations . . . " The increase for regional integration and the promotion of new regional groups . . . are providing evidence of the evolution to a new multilateral regime.[72]

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68 Karel Van Miert, Commissioner for Transport, Commission of the European Communities, 30 May 1991, Brussels in *ICAO WATC- 1.2 14/2/92* at 1.

69 *Ibid.* Susumi Yamaji, Chain-nan, Japan Airlines, 14 November 1991, New York.

70 *Ibid.* Taiji Kameyama, Senior Vice President, International Affairs & Relations, All Nippon Airways, 30 May 1991, Brussels.

71 *Ibid.* Congressman James L. Oberstar, Chairman, Subcommittee on Aviation, U.S. House of Representatives, 20 June 1991, Brussels.

72 *Ibid.* at 3.

We recognize that another specific way of achieving *Multilateralism* in this area is through *Regionalism* as has been confirmed by the ***EU*** and the ***Andean Pact*** countries. Recent attempts at regionalism in Europe, Africa, the Pacific and Latin America (specifically in the Andean Pact region) can dramatically reduce the dominant role played by bilateralism in international aviation relations. We believe that regional agreements are, for the time being, not substituting the bilateral regime, but rather supplementing bilateral agreements whereby parties show their political will to further their integration process.

Finally, there are other multilateral organizations who consider that air transport shall be under a different umbrella than the one already established. We will briefly describe these positions and the models implemented.

3.1. Global Multilateral Fora

Multilateralism in air transport has been (and still is) an important issue whether it is discussed or concretized on an international or regional basis. Different multilateral organizations have dealt with this issue from different perspectives. On one hand, ***ICAO*** has organized different 'conferences' , 'panels' and 'groups of experts' to address this issue. Some of these conferences have dealt with problems related to air transport.[73]

Recently, in November 1994, ***ICAO*** convened a Conference[74] to deal with the issue of air transport regulation and the proposed alternatives. It was global in nature

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[73] They dealt with the distinction between scheduled and non-scheduled air services, computer reservation systems, rates, capacity and air fares.

[74] Conference held in November and December 1994 for the occasion of the celebration of the fiftieth anniversary of the ***Chicago Conference*** (*World-Wide Air Transport Conference on International Air Transport Regulation: Present and Future* - Montreal, 23 November - 6 December 1994) [hereinafter ***Air Transport Regulation Conference***].

and the participants evaluated the present and new trends in worldwide regulatory commercial regimes. As pointed out by Professor Haanappel, some reasons for the latest interest in multilateral air transport are the following: there is a certain feeling that bilateralism is improper for the further liberalization of international air commerce, and that a new multilateral agreement will create additional commercial opportunities for airlines.[75]

On the other hand, ***ICAO*** is not the only multilateral organization promoting a new multilateral regime. The *General Agreement on Tariffs and Trade* (***GATT***)[76] endorsed a parallel multilateral agreement on trade in services *(General Agreement on Trade in Services* - ***GATS)***[77] whereby ***GATT*** principles[78] would apply to some aspects of air transport.[79] Furthermore, as mentioned by Professor Haanappel, the *Organization for*

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75 ***Haanappel***, *supra*, note 47 at 303.

76 *Contracting Parties to the General Agreement on Tariffs and Trade*, signed on 30 October 1947 (1948) 55 UNTS 194. The institutional framework of ***GATT*** has changed to the new *World Trade Organization* (***WTO***) formalized in the *Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations*, signed at Marrakesh on 15 April 1994.

77 This was part of the *Uruguay Round of Multilateral Trade Negotiations* (see *supra*, note 76).

78 ***Haanappel***, *supra*, note 47 at 303. The provisions are: most-favoured nation treatment (Art. II), transparency (Art. II), increasing participation of developing countries (Art. IV), monopolies and exclusive service suppliers (Art. VIII), subsidies (Art. XV), market access (Art. XVI), and national treatment (Art. XVII).

79 *Idem.* at 307. Professor Haanappel indicates that there are different regimes to be applied to air transport services: "[t]he GATS Annex on Air Transport Services applies to scheduled, nonscheduled, and ancillary services, but the GATS liberalisation measures only apply in three areas: - aircraft repair maintenance services (except line maintenance); - the selling and marketing of air transport services, including market research, advertising and distribution (but not the pricing of air transport services); and - computer reservation system (CRS) services."

Economic Cooperation and Development (***OECD***) is also considering the possibility of getting involved with air transport matters.[80] Finally, Professor Haanappel gave a warning message to States about the opportunity for giving ***ICAO*** the management over this matter, by making the ***ICAO*** *Fourth Air Transport Conference* a success. "If not, discussions on the liberalization of air transport services might move away from ***ICAO***, which for fifty years has been the privileged worldwide forum for any air transport discussions, to other fora, certainly "respectable" and experienced ones, but nevertheless general trade fora unlike the specialized civil aviation body that is ***ICAO.***[81]

Unfortunately, the *1994* ***ICAO*** *Conference* was not a success in this regard. During the Conference, participants did not reach any agreement at all on how and whom should take care of commercial air transport issues. However, the Conference succeeded in giving the floor to participants and government representatives to state their views regarding the alternatives so far proposed and implemented.

3.2. Renewed Bilateralism[82]

For some countries the present status of air traffic (bilateral) negotiation and granting procedures are inappropriate. Sometimes, this negotiation system may be cumbersome and very expensive. Yet, it may also appear to be the most innocuous solution when parties, with different degrees of economic development, convene in exchanging traffic rights.

To increase the benefits of the present bilateral system and face the new trends in global multilateral agreements regarding traffic rights, we find some countries entering

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80 ***Haanappel,*** *supra*, note 47 at 310.

81 *Ibid.*

82 *Ibid.* This term is used by Professor Haanappel.

bilateral agreement negotiations with a more "liberal" approach[83]. Some of these agreements served as basis for a multilateral approach to commercial air transport regulation. In fact, the *US-The Netherlands* ***BATA*** has been structured as a ***PATA***, whereby new parties may enter the agreement.

On the other hand, in case parties adopt a limited multilateral structure, whereby the agreements are steered to achieve or enhance existing economic block groups, the possibility for accomplishing a global multilateral air transport agreement will be considerably reduced. In fact, as soon as a block is formed, another one will be created to protect its own interest and so on. Consequently, the relations between these groups will be based on bilateral agreements, where each party will be composed of several countries (or airlines). We may denote this situation as a "renewed" bilateral structure, where the basis for negotiating will is founded on a multilateral agreement or structure.[84]

We may also find these kinds of "renewed" bilateral arrangements or agreements between air carriers. Through them, parties will try to improve their size, scope and network coverage. Some examples are: code sharing, joint ventures, selective interlining, blocked space agreements, marketing agreements, franchising, mergers and takeovers[85].

3.3. Multilateral Economic Block Forming

Very often air carrier agreements are supported by bilateral or multilateral agreements between governments. Clearly, an agreement may be effortlessly reached between air carriers of countries forming an economic block (or with a special air

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83 I.e., the *Chile-U.S.* (not registered with ***ICAO***), *Colombia-Venezuela* (registered with ***ICAO*** No. 3682 and *US-The Netherlands* (not registered with ***ICAO***).

84 I.e., a negotiation table between the ***EU*** and another country, or even between ***EU*** and the ***ANCOM*** Countries.

85 ***Haanappel***, *supra*, note 47 at 311.

transport agreement), since their partial or entire economic relations are jointly regulated following common aims. For example, franchising, code sharing or even mergers and takeovers of air carriers, will be more easily achieved between countries belonging to the ***EU*** or to the ***Cartagena Agreement*** than between others.

On the other hand, despite the existence of strong regional economic and political agreements, there are bilateral air transport agreements that give more privileges to one party than to the others. Taking the example of the *U.S- The Netherlands* ***BATA***,[86] we share Professor Hannappel's opinion in the sense that the agreement will definitively hamper the ***EU***'s attempts to construct a common air transport policy concerning third countries and may create internal conflicts since it enables United States-Europe traffic to be diverted via Amsterdam.[87]

Further, we may also encounter examples where "liberal" bilateral agreements set the principles for a limited "liberal" multilateral agreement. This is the case with the bilateral signed between Colombia and Venezuela which predates ***Decision 297,*** whereby some benefits conferred to each other were extended to the other ***ANCOM*** Countries.

In any event, the implementation of both regimes (limited *multilateralism* and *"liberal" bilateral agreements*) may steer towards economic block forming which could either be seen as "defensive," endangering the possibility of reaching a global multilateral agreement in air transportation, or perpetuating the *status quo* conducted by a "modified" bilateralism.

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86 This agreement signed by both governments, supports the commercial arrangement established between KLM Royal Dutch Airlines and Northwest Airlines (idem. at 313).

87 ***Haanappel***, *supra*, note 47 at 314.

3.4. Other Successful Intra-regional Multilateral Air Transport Agreements

Multilateralism cannot be qualified as the improper forum for achieving commercial agreements regarding air transportation. For many years authors,[88] and even the ***ICAO** Assembly* in 1953,[89] expressed a belief that this should be the method to be used for exchanging commercial rights. This has not always been the case since several successful multilateral agreements have been concluded and carried out. The restrictive characteristic is such that agreements were limited in scope to certain areas of the world, and sponsored by regional multilateral air transport organizations. These agreements are not directed to economic block forming as an offensive or defensive instrument against another[90].

Professor Haanappel divides these agreements into: a) those that codify existing *bilateral practices,* and b) *agreements creating some form of liberalization where bilateral agreements or unilateral State practices were held to be too restrictive*[91] . In the former we find the *Standard Clauses for Bilateral Agreements* of 1959, concluded by the European Civil Aviation Conference ***(ECAC)***[92], and the *Multilateral Agreement on the Procedure for the Establishment of Tariff for Scheduled Air Services*[93], signed at Paris on 10 July 1967, which provide ECAC Member States with uniform principles and procedures regarding tariff establishment and supported the IATA conference machinery.

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88 For example Prof. Haanappel highlights this issue issue and further recalls that ***ICAO*** restarted its interest on commercial multilaterism around 1975 and organized three Conferences (1977, 1980 and 1985) (see ***Haanappel,*** *supra*, note 47 at 302ff).

89 See ***ICAO*** *Circ. 63-AT/6 (1962)* at 116.

90 ***Haanappel,*** *supra*, note 47 at 293.

91 *Ibid.*

92 *Ibid.* at 101.

93 *ICAO Doc. 8681.*

Examples of the latter are the *Multilateral Agreement on Commercial Rights of Non-scheduled Air Services in Europe*[94], concluded by ECAC Member States, signed at Paris on 30 April 1956, which established the policy that aircraft engaged in non-scheduled commercial flights within Europe that do not harm their scheduled services may be freely admitted; the *Multilateral Agreement on Commercial Rights of non-Scheduled Air Services among the Association of South-East Asian Nations (ASEAN)*[95], signed at Manila on 13 March 1971, which liberalized non-scheduled air services within the subregion; various pricing and capacity liberalization resulting from the 1982 *ECAC Report on Competition in Intra-European Air Services*[96] ; *the Yamoussouko Declaration on A New African Air Transport Policy*[97], signed by the Ministers of Civil Aviation of the African States in October 1988, which established an eight-year three-phase program for the integration of African airlines and guidelines for cooperation in the air transport field (traffic rights, costs and tariffs) among States in Africa; and ***Decision 297*** of the *Commission of the Cartagena Agreement* to implement the Act of Caracas signed in May 1991 and approved by the presidents of the five Andean Pact countries (Bolivia, Colombia, Ecuador, Peru and Venezuela), which established the Andean Subregional Air Transport Integration policy for this subregion. The latter is the subject of this thesis and is further described and analyzed in Chapter III.

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94 *ICAO Doc. 7695.*

95 Not registered with ***ICAO***.

96 ***ECAC Doc. No. 25***, containing the *International Agreement on the Procedure for the Establishment of Tariff for Intra-European Scheduled Air Services* signed by ***ECAC*** members in Paris on 16 June 1987, which provided uniform principles and procedures for the establishment of tariffs and which introduced the zone system of tariff regulations, and the *International Agreement on the Sharing of Capacity on Intra-European Scheduled Air Services* by ECAC States signed at Paris on 16 June 1987, which provided uniform principles and procedures for the sharing of capacity on intra-European scheduled services and which introduced a zonal scheme of capacity sharing.

97 October 1988, *ECW/TCEC/TR/AIR/V/3.* Text in ***Henaku***, *supra,* note 2, Appendix V.

CHAPTER II

THE INTEGRATION PROCESS AND THE ANDEAN GROUP

Since this thesis deals with the ***ANCOM*** Air Transport Integration process, we find necessary to show the origins of the integration process, its structure and the decision-making process. This chapter briefly describes these elements.

PART A.- WAYS AND FORMS OF INTEGRATION

1. - *Introduction*

Different geographies, uneven distribution of natural resources, population and technical knowledge as well as other political, economic and social characteristics have pushed nations to look toward closer economic relations to satisfy human needs. Economic integration has become the logical response to cope with this varying distribution of resources and create a broader market.

In the seventeenth century, mercantilism, derived from the economic structures of feudalism, helped to eliminate trade barriers and accelerate the formation of Nation-States. Industrialization was developed under this new scheme, and was followed by a period of protectionism which enabled the development of the "internal" industrial capacities.

When the new industrialized Nation-States (for example, the United States and the United Kingdom) solidified their industrial capacities, they pressed for commercial expansion and suppression of trade barriers. Other European countries followed the "internal" industrial development schemes, formulating trade barriers to protect their newborn industries. The consequence of this system was the "great depression of the

1930's."[1]

The economic crisis during the 1930's and the aftermath of World War I determined that new economic relations would exist and a need for openness was required, but in a limited manner. This was the begining of the bilateral negotiation structure, based on the *quid pro quo* formulae. In spite of the fact that this form of agreement is still in use today, the structure adopted by its practise was no longer seen as a solution that satisfied the new trends in international economic relations. An "alternative" scheme, where more parties were involved, had to be established.

After World War II a new form of multilateral cooperation was set up. It followed directives given by international organizations[2] regarding certain products and/or forms of trade[3]. These forms of cooperation are still in existence today and are used as the basis for the further development of multilateral relations[4].

Some countries realized the need to further develop the structure set up by multilateral agreements to be able to reach true economic, social and political development. These countries also understood that a "limited" multilateral agreement would be easier and faster to achieve if they created parterships with kindred States. Together they would find common solutions applicable to broader areas, sharing both the costs and benefits. They

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1 Instituto Interamericano de Estudios Jurídicos Internacionales, *Derecho de la Integración Latinoamericana* (Buenos Aires: Depalma, 1969) at 5. [hereinafter ***Integracion Latinoamericana***].

2 Organizations such as the *League of Nations* (which later became the *United Nations -UN-*), the *General Agreement on Tariffs and Trade (GATT)* (see *infra*, footnote 11), the *International Monetary Fund (IMF)* and the *International Bank for Reconstruction and Development (IBRD)* or *World Bank.*

3 ***Integración Latinoamericana***, *supra*, note 1 at 4.

4 The ***GATT*** structure formed the basis for the present *World Trade Organization (WTO)* and its operating agreements.

could even create supranational institutions to develop and enforce new rules in the newly-created jurisdiction. This process became known called ***integration***[5].

Two types of *integration* can be defined: *Economic Integration* and *Political Integration.* The *first* refers to the process by which two or more countries abolish trade barriers existing between them, harmonizing their economic policies, and thereby establishing an economic common space to ease free movement of goods, services, persons and capital. The common space results from adding up the territory of each participating member.

Political Integration refers to the process by which two or more countries create common supranational institutions to regulate the relationship. The members transfer some sovereign competencies and faculties to these supranational institutions who pass mandatory rules binding the integrated States and their respective populations.[6]

Despite this classification, we may consider *integration* to include both forms, requiring different degrees of compromise. *Integration* is a political condition based on economic matters. Furthermore, a greater degree of *integration* may be achieved if cultural and social relations are profound.[7]

Finally, the *Interamerican Development Bank* ***(IDB)*** defines *Integration* as "the juridical status by which States hand over some sovereign prerogatives to form an area where

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5 ***Integración Latinoamericana,*** *supra,* note 1 at 5.

6 IFEDEC, *La Decisión: Aportes para la Integración Latinoaméricana,* Colección Seminarios (Caracas: IFEDEC, 1987) at 29 [hereinafter ***La Decisión***].

7 *Ibid.* at 7. For more on the subject see B. Balassa, *"Hacia una Teoria de la Integración Económica,"* in Integración de América Latina (Mexico: Fondo de Cultura Económica, 1964) [hereinafter ***Balasa***]. Also R. Tamames, *Formación y Desarrollo del Mercado Común Europeo* (Mexico: Fondo de Cultura Económica, 1965) [hereinafter ***Tamames***].

persons, goods, services and capital would have freedom of movement and would receive the same treatment by harmonization of policies, under a supranational aegis."[8]

2. - ***Forms of Economic Integration***

There has been no agreement among authors regarding the forms and levels of *integration*[9]. Nevertheless, we will describe some forms of economic integration in order to show the level of "*integration*" chosen by the members of the ***Andean Pact.***

For this purpose, we may distinguish five different degrees under the "theory of economic integration": the ***Commercial Preference Zone,*** the ***Free Trade Area,*** the ***Custom Union,*** the ***Common Market*** and the ***Economic Community***, moving from the lowest to the highest level of compromise. It must be said that these forms of *integration* are not established purely as defined here, nor do they have a sequential order.[10]

2.1. - ***Commercial Preferences Zone (CPZ)***: A ***CPZ*** is established when two or more countries exchange certain advantages or privileges (i.e., tariff reductions). The most common instrument used is the *"regional preferencial tariff"* which consists of a rebate exchanged by the members as opposed to tariffs charged to third countries.[11]

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8 International Development Bank, *Factores para la Integración de América Latina* (Mexico: Fondo de Cultura Económica, 1966) at 46.

9 See ***Balasa***, *supra*, note 7 at 35. The author divides it into **Free Trade Zone, Custom Union, Commom Market, Economic Union** and **Total Economical Integration**. R. Tamames says that before the **Free Trade Zone** comes the **Custom Preference Zone** (see ***Tamames***, *supra*, note 7 at 56).

10 In fact the Treaty of Rome of 1957 (European Economic Community , 1957, 298 UNTS 14) which institutes the ***European Economic Community (EEC)***, contains elements that characterize free trade zones, custom unions, common markets and economic communities.

11 See ***Integración Latinoamericana***, *supra*, note 1 at 8. These commercial preferences are against the *"Most Favored Nation Clause"* (***MFNC***) contemplated in Article I of the General

2.2. - ***Free Trade Zone (FTZ):*** Here, tariffs and other custom restrictions between Member Countries are eliminated. It is not only a tariff's rebate, as in ***CPZ,*** but also the elimination of quantitative restrictions. Nevertheless, each Member Country keeps its commercial tariff and financial autonomy with respect to countries not belonging to the ***FTZ.***[12]

FTZ could face certain problems. For example, a Member Country with lower tariffs than the others can import some goods from third countries and re-export them to the rest of the ***FTZ*** members, thereby weakening the association. To avoid such situations the association establishes "*rules of origin.*" Under these rules, goods which are the object of free trade have to have "originated" in a member country. Also, they must contain substantial aggregated value from the region. The non-fulfilment of this condition carries the exclusion of the goods from the exemption or tariff rebate.[13]

2.3. - ***Custom Union*** (***CU***): Involves the gradual elimination of tariffs and other trade restrictions between Members, as in ***FTZ,*** but also adopts a common external tariff vis-à-vis third countries.[14] This form of integration has always been seen as transitory to a more

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Agreement on Tariffs and Trade (*Contracting Parties to the General Agreement on Tariffs and Trade*, signed 30 October 1947 [heinafter ***GATT***] whereby any rebate, advantage or commercial privilege given by a signatory country to another, is automatically extended to the rest of the signatories. The only exception to the prohibition of trade preferences is when two or more countries form a *free-trade area* or a *custom union*. Another exception to this rule is given by GATT in 1979 and is called the *Habilitation Clause* (*Protocol 1979*, and *Supplemental Protocol*, Tokyo Round, 1 January 1980) by which there are excepted from the application of the *MFN* clause the "general" or "regional" agreements celebrated by developing countries to mutually reduce or eliminate their tariffs. It was possible to constitute the ***Latin American Integration Agreement*** (**LAIA**) (see *infra*, page 15) based on the "*Habilitation Clause*".

[12] ***Integración Latinoamericana,*** *supra,* note 1 at 9.

[13] *Ibid.*

[14] ***La Decision*** , *supra,* note 6 at 33.

profound stage. The freedom of trade leads to the need for agreements in other fields (i.e. monetary, fiscal, social) and on transportation in a more intense way than in a ***FTZ.***[15] It is necessary that Member Countries harmonize their national policies, otherwise the ***CU*** would slowly stagnate due to the diversity of national regimes.[16]

2.4. - ***Common Market*** (***CM***): This level consists of the elements of a ***CU*** and includes the free circulation of persons, services and capital[17]. ***CU*** is a more advanced stage of integration than ***FTZ*** and ***CU***, which only comprise the free circulation of goods[18]. The definition and scope of ***CM***s are conventional. Its contents will be established by the parties depending on the objective of the treaty that creates the CM. The best examples of ***CM***s are the former *European Economic Community* (***EEC***), the *Central American and Caribbean Community* ***(CARICOM)*** and the *Andean Community* (***ANCOM***).

2.5. - ***Economic Community (EC)*** or ***Economic Union***[19]: ***EC*** is considered to be the highest level of economic integration. It is the next step following ***CM*** by which economic, agricultural, industrial, social, monetary and fiscal policies are harmonized and coordinated. Sometimes certain portions of these policies are unified. Harmonization is established by community or supranational bodies. These bodies also guarantee the fulfilment of the

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15 See *A League of Nations Contribution to the Study of Customs Union Problems* (New York: United Nations, 1947).

16 ***Integración Latinoamericana***, *supra*, note 1 at 12.

17 ***Balassa***, *supra*, note 7 at 7.

18 ***Integración Latinoamericana***, *supra*, note 1 at 13. Notwithstanding this, in some cases the term "common market" is used differently. For example the ***European Community of Iron and Coal*** is based, among other things, on a "common market"; but this community did not establish an "external common tariff". Here, "common market" is not related to "custom union" as defined. Furthermore, the ***Central America Common Market (CARICOM)*** established the "Common Market" as a previous stage to "Custom Union" (***Integración Latinoamericana***, *supra*, note 1 at 14).

19 Also known as ***Economic Association*** and ***Total Economic Community***.

regulations on these matters.[20] The best example is the *European Community*, presently known as the *European Union*.[21]

PART B.- SOURCES OF THE ANDEAN LEGAL SYSTEM

1.- ***Introduction.***

During the 1950's Latin American countries decided to attain greater economic development. To achieve this, they realized that they had to develop local industries and cease import substitution. The main restraint to its developement was the limited internal market of each country and industrial competition from the international market. The most developed countries of the region[22] renounced attaining industrial development based solely on their internal markets.[23] These countries realised that regional economic integration seemed to be the right solution to this problem.[24] Among other positive results, it would imply a broader market, protected from the rest of the world. It would also put together a greater amount of money for internal and external investment (higher investment could be shared among more partners). Consequently, the process of import substitution would be

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20 ***Integración Latinoamericana***, *supra*, note 1 at 14.

21 *Treaty on European Union*, 7 Febreaury 1992, European Doc. No 1759/60, in force since 15 November 1993.

22 This is the case for Argentina, Mexico and Brasil.

23 An alternative to this restraint was to penetrate the market of industrialized countries. But, under the empoverished conditions of the industry of the time, this was considered an impossible task.

24 At the same time, in 1956, ten European countries successfully reached an agreement creating the European Community under the Treaty of Rome (see *supra*, note 10).

achieved faster since this would be done on a regional rather than a national basis.[25]

The initial steps toward integration were made during the 1950's, but only in 1960 was the first legal framework created. Since then, four different systems of integration have been set up in Latin America, each of them with different levels of success.

The first concrete framework was the *Latin American Free Trade Agreement* (***LAFTA***).[26] ***LAFTA*** tried to progressively eliminate barriers to interregional trade without applying a common external tariff or adopting important political coordination measures.[27]

The second system corresponds to the creation of subregional common markets such as the *Andean Group*, the *Caribbean Community and Common Market*, and the *Central America Common Market*. These markets were "real" custom unions operating on a more homogeneous integration level.

The third group is represented by the *Latin American Integration Association* ***(LAIA)***.[28] The framework of ***LAIA*** was formed by multilateral negotiations based on previous bilateral agreements and substitutes ***LAFTA***. The operational structure of this agreement could be compared to the ***GATT***,[29] but on a regional scope.

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25 Banque Interamericaine de Development, *Progress Economique et Social en Amerique Latine: La Integration Economique* (Washington: BID, 1984) at 18. [hereinafter ***BID***]

26 ***Montevideo Treaty***, Signed in Montevideo (Uruguay) on 18 February 1960. The Treaty was signed by Argentina, Brasil, Chili, Mexico, Paraguay, Peru and Uruguay. Four other countries adhered to it: Ecuador and Colombia in 1961, Venezuela in 1966 and Bolivia in 1967. [hereinafter ***Montevideo Treaty 1960***]

27 ***Integración Latinoamericana***, *supra*, note 1 at 422.

28 See *infra*, page 15.

29 ***BID***, *supra*, note 25 at 20.

The fourth level is the common market agreements signed between two or more countries. This is the case with the bilateral agreement signed between Venezuela and Colombia.[30]

2.- ***Sources of the Andean Group***

2.1.- The ***Latin American Free Trade Agreement (LAFTA)***

In 1960, the general acceptance of economic integration as a means for progress and development convinced the parties to sign ***LAFTA***, also known as the ***Montevideo Treaty 1960***. In a long-term perspective, the Treaty's goals were the creation of a Common Market and, further, a Customs Union.[31] ***LAFTA*** established a period of twelve years within which parties were encourage to eliminate their trade barriers using a product-by-product negotiation process, and preserve their customs relations concerning third-party countries. Ultimately, the goal was to establish a free trade area. To achieve these goals, two principles were to be used in the negotiations: the principle of *Reciprocity*[32] and the principle of the *Most Favoured Nation*[33] (***MFN***) by which each member had to give to the rest the advantages given to third countries (signatories of the Treaty or not).

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30 *Contracting States on the General Agreement on Tariff and Trade*, signed in Geneva in 1947 (complete).

31 ***Montevideo Treaty 1960***, *supra*, note 26, Preamble and Article 54. See also *Resolution 100(IV)* of the Montevideo Conference 1960.

32 In cases of non-reciprocity, the party affected could claim indemnization (***Montevideo Treaty 1960***, articles 10 and 13). Nevertheless, the parties could give preferencial treatment to relatively less-developed countries (*Ibid.*, Chapter VIII). The Treaty did not establish a list of countries which were considered as such, but the economic indicators of that time demonstrated that Bolivia, Ecuador, Paraguay and Uruguay could belong to that list (***Integración Latinoamericana***, *supra*, note 1 at 338-350).

33 Article 8, ***Montevideo Treaty 1960***. See M. Vieira, "*La Clausula de la Nación Más Favorecida y el Tratado de Montevideo*" (1965) IV Anuario Uruguayo de Derecho Internacional.

Despite the economic rationale of this proposal and the good intentions of the parties, it was possible from the outset to detect obstacles and deficiencies. Parties considered the integration process to be import substitution rather than a promotional instrument for regional development. The legal body itself was conceived as a way to institute and rule partial reduction of trade barriers. In fact, it did not foresee any mechanism to guarantee equal distribution of cost and advantages produced by the consequential greater flow of commerce. Nor did it envision any instrument to regulate the regional multilateral industrial investment or to harmonize internal monetary policies.[34]

Also, despite the special measures provided by the ***Montevideo Treaty 1960*** described above, Member Countries with an advanced level of development[35] did not provide to less developed Members a fair share in the advantages derived from the free trade area established.[36]

Although certain trade barriers were overcome, the products negotiated within the Treaty were those that already were part of regional trade. Here, the Treaty served to consolidate and increase the trade of already traditional products rather than develop new markets.[37]

Limitations and contradictory internal interests fully stopped the process initiated by ***LAFTA*** and convinced certain Members to institute a different integration model in order to progressively achieve economic development. Here we find the main economic grounds

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[34] ***BID***, *supra*, note 25 at 19

[35] Such as Argentina, Brazil and Mexico.

[36] ***BID***, *supra*, note 25 at 19-20. For more on the participation of these countries in the integration process, see *Los Paises de Menor Desarrollo Económico Relativo a la Integración Latinoamericana* (Santiago: CEPAL, 1974) E/CN.12/774.

[37] *Ibid.* at 20.

for the countries of the Andean region to create a subregional group composed by relatively like-developed fewer members.

The ***LAFTA*** was further replaced by the *Latin American Integration Association* in 1980.

2.2.- The ***Latin American Integration Association (LAIA)***

Article 61 of the ***Montevideo Treaty 1960*** establishes the examination of its results by Contracting Parties following the twelve-year period. From the results of the evaluation, members will adapt the organization to the new stage of economic integration (in case it is needed). *The Caracas Protocol*[38] extends this period and tries to revitalize the integration process by revising ***LAFTA***'s structure.

The dissatisfaction with the integration process established under ***LAFTA*** during the 1970's pushed parties to look for a new structure; a new stage of integration. This negotiation period culminated in June 1980 with the *XIX Extraordinary Conference* held in Acapulco, where the final agreements were attained. Later, on 12 August 1980 at Montevideo, these agreements were considered and approved by ***LAFTA***'s *Ministers of External Affairs Council.*[39]

As a result, a new treaty was endorsed, leading to the replacement of ***LAFTA*** by the *Latin American Integration Association* (***LAIA***)[40] in 1981. That same day, the *Board* passed

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[38] ***La Decision***, *supra*, note 6 at 174 (It refers to ***Resolution 370*** of the XVIII ***LAFTA*** *Conference*).

[39] *Ibid* at 174.

[40] Hereinafter ***Montevideo Treaty 1980***.

nine *Resolutions* regulating the transitional period and setting up the new mechanisms. ***LAIA*** abandons the old objective of ***LAFTA*** for establishing a *free trade area.* Also, it eliminates all compromises on temporal and quantitative goals[41]. Instead, ***LAIA*** adopts very pragmatic and flexible systems, having the *common market* as the ultimate goal.[42] Unfortunately, the juridical and economic structure defined by the ***Montevideo Treaty 1980*** would not let members reach a higher stage than an *"economic preferential zone".*[43]

3.- ***The Andean Group and the Cartagena Agreement***

The Andean countries are geographically connected and economically interdependent. All of them were members of ***LAFTA.*** They shared the view that it was difficult to attain the objectives under the integration structure provided by ***LAFTA,***[44] and that a new form of integration would have to be found. They wanted to take advantage of their experiences from ***LAFTA***, and overcome its lacunae.[45]

In August 1966, under the initiative of the former Colombian President Carlos Lleras Restrepo, the Presidents of Colombia, Chile and Venezuela, and the Personal Representatives of the Presidents of Ecuador and Peru, met in Bogota in order to set the basis for a new sub-

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41 ***La Decision***, *supra,* note 6 at 174.

42 ***Montevideo Treaty 1980***, *supra*, note 40, Article 1 *in fine.*

43 ***La Decision***, *supra*, note 6 at 174. The constitution of an *"economic preferencial zone"* is possible because of the modification of ***GATT*** rules in the Tokyo Rounds (see *supra*, note 11)

44 "The countries that composed the *Andean Community (ANCOM)* were those considered medium and small sized countries within ***LAFTA***. They verify after five years that the small benefits resulting from the ***Montevideo Treaty 1960*** were shared mainly by the three big countries (Argentina, Brasil and Mexico), and that this situation would hardly change given the treaty structure: exclusively a free-trade zone based on market mechanism. This structure automaticaly discriminated the feeble one" (***La Decision***, *supra,* note 6 at 291).

45 ***Integración Latinoamericana***, *supra,* note 1 at 351-361.

regional agreement. At the end of the meeting, they promulgated the *Bogota Declaration*.[46] There, it was established that the formation of this group was envisaged within the framework of ***LAFTA*** and as a "...means to attain a harmonious and balanced development of the region..."[47]

Following this declaration, another statement was proclaimed: the *Declaration of the Presidents of the Americas*.[48] This document clarified any doubt about the compatibility of the new agreement (the ***Cartagena Agreement***) with ***LAFTA***. Then, the Council of Ministers of ***LAFTA*** promulgated several resolutions to provide a legal basis for the establishment of subregional agreements within the framework of ***LAFTA***.

Given this legal framework, the Andean Countries of Bolivia, Colombia, Chile, Ecuador and Peru signed, on 26 May 1969, the ***Cartagena Agreement***,[49] which gave birth to the *Andean Community* (***ANCOM***).[50] In 1973 Venezuela adhered to this Agreement and in 1976 Chile withdrew from it.[51]

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[46] *Bogota Declaration of 1966*. Bolivia adhered to the Declaration on 18 August 1967. In this Declaration various subjects were treated apart from the intention of concluding a new integration agreement. They established a common position on the promotion of world peace; they support that democracy, human rights and economic and social development were essential conditions to guarantee freedom and welfare. See also F. Orrego Vicuña, *"The Dynamics of the Subregional Agreements within the LAFTA Movement"*. Conference at the Institute of International Studies (Stanford: 9-11 May 1968).

[47] *Ibid.*

[48] *Declaration of the Presidents of the Americas*, signed in Punta del Este, Uruguay. For more on the subject, see ***Integración Latinoamericana***, *supra*, note 2 at 174-185.

[49] Signed in the city of Cartagena de Indias (Colombia) on 26 May 1969 [hereinafter ***Cartagena Agreement***]

[50] Also known as ***Andean Pact***, ***Andean Group*** or ***Andean Community*** [hereinafter ***ANCOM***].

[51] ***La Decision***, *supra*, note 6 at 292.

On 9 July 1969 the Permanent Executive Committee of ***LAFTA*** declared the ***Cartagena Agreement*** compatible with the ***Montevideo Treaty 1960***,[52] and consequently, gave its approval to its constitution.[53]

The ***Andean Group*** initiative is based on the following:

a) To constitute a conscientious global plan of mutual regional trade.

b) To progressively establish external common tariffs.

c) To equitably share the cost of regional investment programs.

d) To harmonize internal economic policies, including foreign investment.

e) To give special treatment to the two less developed countries of the region, Bolivia and Ecuador, which will be authorized to carry out the policies in a decelerated way.[54]

3.1.- *Andean Group Structure and Bodies*

The institutional richness of the ***ANCOM*** is that it forms a 'real' supranational Andean integration system. ANCOM is compounded by several supranational organs, some of them established by the ***Cartagena Agreement***. They can be divided, according to their functions, into *Organs of Consultation and Decision Making, Organs of Coordination and Counselling* and *Autonomous Institutions*. These two segments work in a closely related and dependent way. ***ANCOM*** also has created ***Autonomous Institutions***, and develops ***Instruments*** and

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[52] For an in-depth analysis on this subject see E.Cardenas and F.Peña "*Los Acuerdos Subregionales y el Tratado de Montevideo*" (pag.124-142) and "*Sistematización de la Estructura Juridica del Acuerdo de Cartagena*" (143-184) in *La Dimensión Juridica de la Integración*, Instituto para la Integracion Latinoamericana (Banco Interamericano del Desarrollo: Buenos Aires, 1973)

[53] *Resolution 179* in F.V. Garcia-Amador, *The Andean Legal: a New Community Law* (New York: Oceana Publications, 1978) at 7.

[54] As we can see, they have tried to correct what they considered ***LAFTA***'s defaults. See *supra*, page 12.

Mechanisms to achieve the goals and objectives formulated within the framework of Andean Integration.

3.1.1.- ***Organs of Consultation and Decision Making***

3.1.1.1.- ***Meeting of the Presidents of ANCOM Members***:

This mechanism was not contemplated in the ***Cartagena Agreement*** but is the supreme body and the real source of general policies. It is the "fuel" that drastically energizes the integration process, as we will describe further.

3.1.1.2.- ***The Commission***:

Created by the ***Cartagena Agreement,*** the ***Commission*** is the principal body of the Agreement, consisting of plenipotentiary representatives from the government of each ***ANCOM*** member (Article 6). It has an exclusive legislative capacity over the subjects of its competence (*ibid.)* However, the general policy orientations are established by the ***Meeting of the Presidents***. The States' interests are duly represented in the ***ANCOM*** Organs. Here the principle of legal equality is applied, and is reflected in the ***Commission***'s composition on the rule: "one country, one vote.[55]"

The Commission rules the ***ANCOM*** members through ***Decisions*** (Article 6), which are adopted by a two-thirds majority.[56] These ***Decisions*** bind all members from the date of

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[55] ***Decision 6/69***, Article 22.

[56] *Ibid.* See also ***Cartagena Agreement***, Article 11. This general rule admits of some important exceptions for which unanimous agreement is required: in respect of matters listed in Annexes I and II to the ***Cartagena Agreement***, the ***Commission*** reaches its decisions by a qualified two-thirds majority, provided that no negative vote has been cast by a Member Country (Article 11). In respect to matters listed in Annex II, however, when a negative vote has been cast the matter is referred back to the ***Board*** (see, *infra*, page 22), which, within two to six months, must resubmit its proposal to the ***Commision***. The amended proposal can be

their approval[57] and are applicable from the date of their publication in the *Official Gazette of the Cartagena Agreement.*[58]

The ***Commission*** also has the following functions: it formulates general policies set by the ***Cartagena Agreement*** and sanctions necessary measures to achieve the goals set thereby (Article 7-a); approves rules to make the coordination of development plans possible and harmonize economic policies of the members (Article 7-b); appoints and removes members of the ***Board***[59] (Article 7-c); delegates its attributions on the ***Board*** when it considers it convenient (Article 7-e); approves, does not approve or amends the ***Board***'s propositions (Article 7-f); make proposals to members concerning modifications to the ***Cartagena Agreement*** (Article 7-j).

The ***Commission*** has to consider the exceptional situation of Bolivia and Ecuador and give them preferential treatment.[60] It promotes concerted actions from the members concerning their international trade problems and their participation in international economic organizations (Article 8).

The presidency of the ***Commission*** is shared among Member Countries by turn, in

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approved by two-thirds of the Member Countries, provided there is no negative vote other than that of the Country which previously opposed the proposal (Article 11-b). Lastly, in respect to certain matters listed in Annex III, an affirmative vote by one of the two smaller countries, Bolivia or Ecuador, is requiered (Article 11-c). This special procedure, which offers an additional guarantee to the least developed countries of the Andean region, exists to fulfill the aims and provisions of the Agreement (chap. XIII) which institutes preferential treatment in favor of Bolivia and Ecuador.

57 ***Cartagena Agreement***, Article 2.

58 *Ibid.*, Article 3.

59 See *infra*, page 22.

60 Chapter VIII of ***Cartagena Agreement.***

alphabetical order (Article 9). They meet three times per year (*Ordinary Meetings*), and when the President of the ***Commission*** invokes for *Extraordinary Meeting* as per a petition coming from any Member Country or by the ***Board*** (Article 10).

3.1.1.3.- ***The Board***:

Created by the ***Cartagena Agreement***, the ***Board*** is also considered to be "principal" organ, just like the ***Commission*** (Article 5). In essence, it is a community institution and technical in nature. The ***Board*** insures the collective control of ***ANCOM***'s communitary organs and their administration (Article 13). Its members, who are three in number (Article 13), must be nationals of a Latin American country[61] (Article14). They are appointed by the ***Commission*** by unanimous vote, for a term of three years. Under Articles 13 and 14 of the ***Cartagena Agreement***, they may act only in the interest of the subregion as a unit and are collectively answerable to the ***Commission***. The Agreement guarantees the independence of the ***Board***.

Among others functions, the ***Board*** directs the Permanent Secretariat and the community administration (Article 15-i). It ensures that the Agreement is carried out and that the ***Commission***'s decisions are complied with (Article 15-a); proposes to the ***Commission*** ways to ease or accelerate the integration process to achieve the Agreement's goals (Article 15-c); studies and proposes measures to convey the principle of preferential treatment to Bolivia and Ecuador (Article15-d); annually evaluates the attainment of the Agreement's objectives, taking into special account the Principle of Equitable Share of Integration Benefits, and proposes to the ***Commission*** corrective measures (Article15-f); carries out technical studies requested by the ***Commission*** (Article15-g); executes attributions when delegated to do so by the ***Commission*** (Article15-h); and maintains contact with the Governments of the Member Countries (Article15-i).

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[61] Not only nationals of the ***ANCOM*** Member Countries.

3.1.2.- ***Organs of Coordination and Counseling:***

3.1.2.1.- The ***Consulting Committee*** is the organ through which members have close relations with the ***Board.*** It is composed by representatives of Member Countries (Article 19). The ***Committee*** advises the ***Board.*** It also presents reports when required, and analyzes the ***Board's*** propositions before the ***Commission*** considers them (Article 21).

3.1.2.2.- The ***Economic and Social Advisory Committee***, is formed by business and union representatives of the ***ANCOM*** members to obtain their active participation (three representatives of each group). It advises the ***Board*** or gives opinions on certain aspects of the integration, when required to do so by the ***Board*** (Article 22).

3.1.2.3.- The ***Councils*** are created by decisions of the ***Commission*** to recommend ways to harmonize and coordinate economic and social policies. They cover different areas, such as: investment and monetary plans, financing, tax policies, business, tourism, land-and-cattle, social and health matters, and physical integration and statistics.

3.1.3.- ***Autonomous Institutions***:

3.1.3.1.- ***The Andean Development Corporation (ADC)***:

The ***ADC*** was formed before the ***Cartagena Agreement*** was passed, in February 1968[62] as an independent body. As an international body, it benefits from tax exemptions.[63] The main functions of ***ADC***, as established by the constitutional ***Convention***, are: identifying

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[62] The ***ADC*** has its origins in the ***Bogota Declaration of 1966*** (see *supra*, note 46) It was created as an public international legal body by a Convention signed on 7 February 1968 (in *Régimen de Integración Económica* (Bogota: Legislación Económica, 1993)[hereinafter ***Legislación Económica***] at 745.

[63] *Ibid.*

investment opportunities in the region; giving technical and financial assistance to multinational projects; obtaining and giving financing; and guaranteeing loans given by third parties. The ***Convention*** contemplates the participation of the ***ADC*** in the organization and modernization of businesses, and its participation in the venture as a partner. ***ADC*** has to consider the special cases of Ecuador and Bolivia to equitably distribute the financing resources.

3.1.3.2.- ***Social Covenants:***

3.1.3.2.1.- The ***Andres Bello Covenant (ABC)*** was signed on 31 January 1970.[64] ***ABC*** aims to accelerate the general development of its members by promoting a better knowledge of the common Latin American cultural heritage, in particular cultural features of each Member Country. ***ABC*** encourages the effective defense of cultural and moral values and unites efforts in the field of education. Special consideration is given to science and technology.

The institutions of ***ABC*** are the *Meeting of Ministers of Education,*; the *Board* (an auxiliary technical organ that is the supreme authority) consisting of the educational planning chief of each *ANCOM* member, and the *Permanent Executive Secretariat* sitting in Bogotá. ***ABC*** also embodies rules to achieve educational, scientific and cultural integration.[65]

3.1.3.2.2.- The ***Hipólito Unanue Covenant (HUC)***, signed in June 1971, contains programs to: solve subregional health problems through projects of health-personnel training; improve labor environment problems; develop the chemical-pharmaceutical industry; and enhance the health conditions in national frontier regions.

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[64] It was ratified by Bolivia, Colombia, Chile, Ecuador, Peru, Venezuela, Panama and Spain.

[65] *Carta Informativa Oficial de la Junta del Acuerdo de Cartagena*, No 11 (Lima, 1972) at 2; and J.J.Caldera, *Estudio sobre el Pacto Andino* (Caracas: Cordiplan, 1971), Annex, at 107-117.

HUC's supreme authority is the *Meeting of Health Ministers.*[66]

3.1.3.2.3.- The ***Simon Rodriguez Covenant (SRC)*** was signed in August 1973. ***SRC*** objectives are: improving living and working conditions; improving the use of the working force; harmonizing working and social legislation; and elaborating and proposing programs for labor migration within the sub-region. ***SRC*** supreme authority is the ***Conference of Ministers of Labor***, with a ***Permanent Secretariat*** in Quito (Ecuador).[67]

3.1.3.2.4.- The ***José Celestino Mutis System (JCMS)*** was created by a ***Commission*** Decision,[68] as a plan of integration reorientation, to foster agricultural development, protect the environment, and increase food supply. ***JCMS*** also carries out a joint program of agricultural research and technology transfer. Its supreme authority is the ***Commission*** integrated by the *Ministers of Agriculture* of ***ANCOM*** members.

3.1.3.3.- *Asociación de Empresas Estatales de Telecomunicaciones del Acuerdo Subregional Andino (Association of State Telecommunication Enterprises of the Cartagena Agreement (ASETA)*

ASETA is composed of five telecommunication enterprises[69] of ***ANCOM*** members: ***ENTEL*** (Bolivia), ***TELECOM*** (Colombia), ***IETEL*** (Ecuador), ***ENTEL*** (Peru) and ***CANTV*** (Venezuela). It was established in 1974 to develop studies and conclude agreements to

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[66] See ***La Decision***, *supra*, note 6 at 313.

[67] *Idem.*

[68] ***Decision 182*** of the ***Commission***. The creation of this system differs from the others which were created by Covenants. In 1976 at the meeting of the ***Ministers of Agriculture*** held in Quito (Ecuador) the ***Andean Agricultural Development Program*** was formulated. Twenty-two resolutions aimed to integrate the Andean agricultural sector were approved.

[69] When ***ASETA*** was created, all the telecommunication enterprises were state-owned. By now some of them are partially or fully owned by privates.

promote understanding and beneficial use of telecommunication services, and to ease the regional integration of the ***ANCOM*** members[70]. They are also in charge of the development of the Andean satellite project called ***CONDOR***[71].

3.1.3.4.- The ***Andean Council (AC)*** was created in November 1979 by the Presidents of ***ANCOM*** members to achieve political cooperation, coordinate external policies, and give general orientation through economical integration. ***AC*** consists of the ***Ministers of Foreign Affairs*** of ***ANCOM*** members. They meet once a year, or whenever they consider it necessary. They coordinate the integration process and formulate a common external policy

3.1.3.5.- The ***Andean Parliament*** (***AP***) was instituted by a treaty signed by the ***Ministers of External Affairs*** of the ***ANCOM*** members in October 1979. It was created as a mechanism to promote political cooperation in the sub-region. The ***Parliament*** competencies are to help the promotion and orientation of the integration process; and examine the integration process and suggest measures that will guide legislators of ***ANCOM*** members to carry out proper instruments. ***AP*** is integrated by five representatives elected by the Congresses of each ***ANCOM*** member[72].

3.1.3.6.- The ***Andean Court of Justice*** (***ACJ***) was created by a ***Treaty*** in May

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[70] ***La Decision***, *supra*, note 6 at 315.

[71] See S. Ospina, *Project CONDOR: An Analysis of Feasibility of a Regional Satellite System for the Andean Pact Countries*, (LL.M., Institute of Air & Space Law, McGill, 1988) [unpublished].

[72] ***La Decision***, *supra*, note 6 at 316. It was expected that in ten years from the date of the ***Treaty*** (1979) the representatives of ***AP*** would be elected by universal and direct votation. This has not happen, but we may see this as a willing for achiving an even stronger political relation and to deepen the integration process.

1979[73] and is considered as the Main Organ of the Cartagena Agreement.[74] It began operating in February 1985. The ***ACJ*** was created to guarantee the strict compliance of the compromises arising from the Cartagena Agreement legal framework. The ***ACJ*** functions are to resolve disputes arising from the carrying out of the integration process; interpret community legislation; and control the legality of the community acts. The *Court* has jurisdiction over the Member Countries when they fail to fulfil their obligations under the Community law.[75] The Court is formed by five judges, who have to be nationals from each Member Country (Article 7). They are appointed for a term of six years (Article 9).

3.2.- *The ANCOM Decision-Making Process*

3.2.1.- *Distribution of power*:

The functions and the importance of the bodies of the ***Cartagena Agreement*** have already been described in previous pages. Here, we will depict the way all the functions, attributions and powers are used.

The central machinery of the ***Agreement*** consists of the ***Board-Commission*** tandem. The other bodies, described as councelling, have essentially (as already stated) advisory functions. As a rule, a proposal by the ***Board*** is to be found at the basis of ***Decisions*** on

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[73] ***Andean Court of Justice Treaty***, signed in May 1979 [hereinafter the ***Treaty***]. This ***Treaty*** results from a proposal (No. 43) presented by the ***Board***.

[74] ***Integración Económica***, *supra*, note 67 at 729.

[75] See Y. Rangel, *The Court of Justice of the Andean Group*, (LL.M., Institute of Comparative Law, McGill University, 1980). [hereinafter ***Rangel***] The ***Treaty*** is very important since it establishes the Andean Community as an independent legal order. Also, it expressly restrains the sources of law within the Community to the ***Cartagena Agreement***, its ***Protocols and Additional Instruments; the Andean Court Treaty; the Decisions*** of the ***Commission;*** and the ***Resolutions*** of the ***Board*** (Article 1)

important questions.[76]

3.2.2.- ***The Decision-Making Process:***

3.2.2.1.- ***Origins***: The beginning of the decision-making process is found in different sources. It is usually initiated by the ***Board*** within the framework of the obligation and time-table laid down by the ***Agreement.***[77] The process is also begun by the Governments through the ***Meeting of the Presidents,***[78] or formulated by the *Ministers of Foreign Affairs*[79] or other competent *ministers* during their meetings.[80] Initiatives can also come from the *Consulting Committees*[81], *Councils*;[82] or from various meetings of national officials, experts or professional organizations.

The proposals have to be considered and then formulated by the ***Board***, independently from whoever originates it.

3.2.2.2.- ***The Formulation Stage***: The ***Board*** is responsible for this stage. In agreement with the ***Commission***, the ***Board*** prepares an annual work programme which

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[76] More than twenty articles of the ***Cartagena Agreement***, relating to basic matters, provide for the procedure whereby the ***Board*** proposes and the ***Commission*** decides. We find some examples on this issue in Articles 27, 28, 29, 33, 35, 38, 39, 46-52, 66, 70, 74 and 89.

[77] See articles in previous note.

[78] See *supra*, page 20.

[79] See *supra*, ***Andean Council*** at 47

[80] Through the meetings contemplated in the ***Social Covenants*** (see *supra*, page 26).

[81] I.e., the ***Economic and Social Committee*** (see *supra*, page 24).

[82] For example the ***Monetary Council*** (see *supra*, page 24).

includes the drafting of the various decisions or proposals.[83]. It can always consult the ***Commission*** at this preparatory stage.[84]

Preliminary work enables the ***Board*** to prepare an initial draft which is then discussed by the *Committee of Government Experts*. The discussion and negotiation process begins, whereby each delegation tries to give maximum weight to their own views. At a certain point, the Governments are asked to give their national position, while the ***Board*** seeks to emphasize the regional interest. The national position can be complemented by visits of the representatives of the ***Board*** to the the Member Countries.

On the basis of all this information, the ***Board*** prepares its proposal. The ***Board*** retains full power to determine the proposal's final form.

3.2.2.3.- ***The Board-Commission Dialogue***: At this stage, two possible situations may occur: the *first* is when a proposal is based on a consensus of the government experts.[85] In this case the ***Commission*** endorses the proposal. The *second* arises when the government experts have not been able to reach an agreement. Negotiations then begins by the ***Commission***. In this case, each representative seeks to determine the possible margin of negotiation and agreement.

Negotiation within the ***Commission*** is often supplemented by bilateral contact between Member Countries, or between a country and the ***Board***. These contacts enable the

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[83] ***Cartagena Agreement*** Article 15-f.

[84] This procedure has not often been used because Governments express national viewpoints through experts. On the other hand, it is more likely that the ***Board*** commissions an independent or an international expert to do the study. This was the case of the Meeting of Experts held in June 1972 to consider the possibility of establishing a jurisdictional organ (see ***Rangel***, *supra*, note 75 at 22).

[85] For example a non-contested list for agricultural products.

Board to discuss the differences between the views of Member Countries and amend its proposal if necessary. Under the ***Cartagena Agreement***, the ***Board*** has a strong tool: its proposal can only be amended by the ***Commission*** with a unanimous vote (Article 11).

3.2.3.- ***Andean Pact Instruments***[86]

According to Luis Carlos Sachica, an economic integration process requires the existence and operation of an autonomous legal framework (the ***ANCOM*** legal framework), with an autonomus organization to enforce it (the ***Commission*** and the ***Board***), and an effective legal control mechanism (the ***Andean Court of Justice***).[87] The Andean legal framework may be classified into *primary Andean law* and *secondary Andean law*. The former will be composed of the ***Cartagena Agreement*** and the ***Andean Court of Justice Treaty***. The latter consists in the ***Commission***'s ***Decisions***, the ***Board***'s ***Resolutions*** and the ***Andean Court of Justice Decisions***.[88] Member Countries are obliged to take all the measures required to insure the fulfillment of the ***Cartagena Agreement*** regulations and not to take any measure against such regulations in a way that may obstruct its application.[89] All the other regulations (***Instructions***, ***Authorizations***, ***Reccommendations***, ***Opinions***) are not binding.

3.2.3.1.- ***Decisions***: Article 6 of the ***Cartagena Agreement*** establishes that "the ***Commission*** will express its will by ***Decisions***. These are binding instruments to all

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[86] See ***Rangel, supra,*** note 75 at 30ff. Regarding the entry into force, in principle these instruments take effect immediatly after the ***Commission*** passes and publishes. However, unless otherwise required, on certain occasion Member Countries pass a national decree to publicize, giving the original date of entry to force.

[87] L.C. Sachica, *Derecho Comunitario Andino* (Témis: Bogota: 1990) at 89, cited in ***Integración Económica***, *supra*, note 67 at 728.

[88] *Ibid.* at 728

[89] ***Andean Court Treaty***, *supra*, note 73, Article 5.

ANCOM members from the date of approval.[90] The Decisions are directly applicable to Member Countries from the date of publication in the Official Gazette of the Cartagena Agreement, unless an ulterior date is indicated.[91] When expressly indicated, Decisions may require incorporation to the national legal framework, indicating the date of entry to force.[92] The Decisions are adopted with two-thirds of affirmative votes.[93]

3.2.3.2.- ***Resolutions***[94]: When acting as a decision-making body, the ***Board*** passes ***Resolutions*** which are binding. This binding effect may concern a single State on a particular subject or all ***ANCOM*** members. The ***Board*** expresses its will unanimously (Article 17).

3.2.3.3.- ***Instructions***: The ***Cartagena Agreement*** establishes that the ***Commission*** can give ***Instructions*** to the ***Board*** in order to carry out certain tasks (Article 7-d).

3.2.3.4.- ***Authorizations***: The ***Board*** can, for example, ***authorize*** the adoption of safeguard measures.

3.2.3.5.- ***Recommendations, Views and Opinions***, can also be issued by all the institutions described.

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90 *Ibid.* Article 2.

91 *Ibid.*, Article 3.

92 *Ibid.*

93 ***Cartagena Agreement***, Article 11.

94 The ***Andean Court Treaty*** is silent as to the legal nature of the acts of the ***Board***. It only mentions that the ***Board's Resolutions*** will "enter into force on the date and under the conditions established in the regulations" of this organ (Article 4). On 13 March 1970, the ***Commission*** passed ***Decision No. 9***, whereby it established the formal requirements that the ***Resolution*** should follow to enter into force (***Decision No.9***, Article 13 of Chapter V).

3.2.3.6.- The ***Andean Court Decisions*** are limited to verifying the non-fulfilment of the obligations of the defendant State. The ***Andean Court Treaty*** provides that only ***Decisions*** of the ***Commission*** and ***Resolutions*** of the ***Board*** may be subject to an action for annulment (Article 17). These decisions are binding on that State and have to be implemented within a period of three months following notification (Article 25).

CHAPTER III

THE ANDEAN SUBREGIONAL AIR TRANSPORT INTEGRATION

1. Introduction

New trends in air transportation have encouraged Andean countries to combine efforts and policies to improve their role in the new international aero-commercial order. In response to these trends and based on their economic integration process, the *Andean Aeronautical Authorities Committee* (***AAAC***)[1], composed by the implementing bodies of air policy and regulation in each Member Country, met in Caracas (Venezuela) in November 1990[2] to propose and establish the Andean subregional air transport integration. After having diagnosed the Andean transportation problem, they agreed to put the idea of an "Open Skies"[3] arrangement before the Presidents of the Member Countries of the ***Cartagena Agreement*** at their next meeting[4].

As a result of this meeting, the five Presidents of the Andean countries decided

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1 See *infra*, page 88.

2 *Resolution CAAA No II-1*, "*Andean Air Transport Policy*", 14-16 November 1991.

3 The term "Open Skies" has been often used to qualify this air transport integration process. We do not believe it amounts to the said term, but certainly describes the notion. Moreover, this term is used in the Preamble of ***Decision 297***, but the Decision's title is "*Andean Subregional Air Transport Integration.*" We use the term "Open Skies" when indicated in the original text. ***Decision 297*** published in *Gaceta Oficial del Acuerdo de Cartagena*, year VIII, No. 82 (Lima, 12 June 1991) [hereinafter ***Decision 297***], full text published in English in *ICAO Document WATC-2.5*.

4 Presentation by M. Donato at the World-Wide Air Transport Colloquium (Montreal, 6-10 April 1992), *ICAO WATC-2.19* at 2.

at La Paz (Bolivia)[5] to adopt an "Open Skies Policy" as proposed by the ***AAAC***, based on the Venezuela-Colombian initiative as reflected in the bilateral agreement signed by both countries.[6] For this purpose, the ***Board*** was commissioned to propose[7] the text to be adopted and implemented on the "*Subregional Air Transport Integration Policy*", which was further analyzed and approved at the following Presidential Meeting.

The ***AAAC*** held its Second Meeting at Lima in March 1991, endorsing the political will expressed by the Presidents of each country at their IV Andean Presidential Council for adopting the "Open Skies" policy.[8] The *Andean Subregional Air Transport Integration Policy* was further approved by the ***Commission*** in its 63rd Extraordinary Session, under ***Decision 297*** on 16 May 1991.[9] This Decision entered into force on 12 June 1991.[10]

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5 *Acta de la Paz*, signed at La Paz (Bolivia); *IV Andean Presidential Council*, 29 and 30 of November 1990; full text in *Profundizacion de la Integracion Andina* (Lima: Junta del Acuerdo de Cartagena, 1991) (Hereinafter ***Profundizacion***) at 107. See also *Annexo al Acta de La Paz* in ***Profundizacion*** at 121.

6 *Bilateral Air Transport Agreement signed by Colombia and Venezuela* 8 May 1991, in force since 7 July 1991. Register with ICAO under No 3682. This agreement is characterized as being "liberal."

7 See ***Profudización***, *supra*, note 5 at 113. The Proposal from the ***Board*** came under *Resolution* 234/Rev.1.

8 This Recommendation was supported by the First Extraordinary Meeting of Ministers of Transport, Communications and Public Works of the Member Countries of the Cartagena Agreement, held in Caracas, Venezuela, on 13 and 14 May 1991 (*Resolution I-RE.123*).

9 ***Decision 297***, Sixty-third Extraordinary Session of the Commission, 16 May 1991, Caracas (Venezuela).

10 Article 21 of ***Decision 297*** reads as follows: "This Decision shall take effect on the day of its publication in the Gaceta Oficial of the Cartagena Agreement."

At their Fifth Meeting,[11] the Andean Presidential Council, among other issues related to the subregional integration process, confirmed ***Decision 297***[12] as follows:

> *"4. Transport and Communications*
>
> *a) Approve the decision to establish an "Open Skies" area in which all the freedoms of the air would be granted unrestrictedly at an intra-subregional level to the airlines of Member Countries. Urge the national airlines of the Member Countries to form a consortium before their integration.*
>
> *b) Decide that Member Countries will grant each other fifth freedom traffic rights for scheduled flights and will establish the necessary conditions for non-scheduled passenger flights between countries in the subregion and third countries.*
>
> *These rights will be granted under the conditions agreed to in bilateral or multilcteral negotiations which should start, and if possible, be completed by 31 December 1992, maintaining the principle of equity and subject to adequate compensation arrangements."*

A description and analysis of ***Decision 297*** system follows.

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11 Held in Caracas (Venezuela) on 17 and 18 May 1991 [hereinafter ***Act of Caracas***].

12 Following the ***ANCOM*** rules ***Decision 297*** was already passed and in force. The confirmation made by the Presidents of the Andean Countries is a re-assurance gesture made by Parties to show goodwill for the further negotiations to come. In this case the re-negotiation of bilaterals between the members (Article 7), especially in the case of the negotiation of fifth freedoms (Articles 5 and 6).

2. *Legal Framework of the Liberalization of the Andean Pact Air Transport Activity*

2.1. The Andean Pact Rules: Supranationality

The regime established by the ***ANCOM***[13] is supranational in nature. Within the communitary framework established by the ***Cartagena Agreement***, the ***Decisions*** taken by the ***Commission*** bind Member Countries from the date of their approval,[14] and are applicable from the date of their publication in the *Andean Pact Official Gazette*.[15] There is no need to pass an internal law to make the ***Decisions*** valid, unless the same text provides for it.[16]

Member Countries also have the duty to take all the necessary measures to insure the fulfillment of the rules forming the legal framework of the ***Cartagena Agreement***.[17] Legal control, over the non-performance of the rights and obligations defined by Decisions is on the ***Board*** and, in case of no response, it will be on the ***Andean Court of Justice***.[18] Any party that considers that another did not perform the obligations established by the ***Decision*** may require the *Court* to examine the case and

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13 The ***ANCOM*** was set by the ***Cartagena Agreement***, see, *supra*, page 38.

14 Article 2 of the ***Andean Court of Justice Treaty***, signed in Cartagena on 13 May 1979.

15 *Ibid.*, Article 3. In the case of ***Board***'s ***Resolutions***, it will enter into force on the date indicated in its rules and under the conditions established therein (Article 4).

16 *Ibid.*, Article 3.

17 *Ibid.*, Article 5.

18 See *supra*, page 48.

to direct the other party to act accordingly.[19]

As we can see, the regime established by the ***ANCOM*** is supranational since it has various bodies that issue different level of legislation binding all Member Countries: a legislative body (the ***Commission***) to issue regulations, an executive body (the ***Board***) to administer the organization and enforce the ***Decisions*** and ***Resolutions*** emanating from the differents bodies, and a judicial body (the ***Andean Court of Justice***) to control the application of the laws emanating therefrom. Therefore, the regime set by ***Decision 297*** is supranational, having a higher rank than national legislation.

2.2. - The Basis for Decision 297: The Bilateral Air Transport Agreement (BATA) Signed Between Colombia and Venezuela[20]

In the ***Act of La Paz***[21] and in the Preamble of ***Decision 297***, the Presidents of the Andean countries entrusted the ***Board*** to make a proposal on the liberalization of air transport in the Andean Subregion, *based on the Colombia-Venezuelan initiative*. This ***BATA*** contains all the elements needed to be qualify as an "Open Skies" agreement. For the sake of completeness and to understand the basis of ***Decision 297***, we will describe this ***BATA*** and highlight the characteristics included therein.

The Colombia-Venezuelan ***BATA*** is one of the agreements entered into by both parties as part of a major economic bilateral cooperation and integration process. Agreements on free movement of persons, goods and capitals have also been signed as

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19 *Ibid.*, Article 23ff.

20 See *supra*, note 6.

21 See *supra*, note 5.

part of this "general" process[22]. Since the creation of these major agreements, an extraordinary movement of goods and persons was expected.[23] A fast and efficient common air transport policy, based on cooperation and technical harmonization, had to be developed to keep pace with this fast economic development (Article 14). The ***BATA*** was the solution that best fit the political will and the economic need. Also, the terms contained therein reflect its importance for the achievement of the goals set by both parties.

This initiative confirms our belief that an "Open Skies" ***BATA*** may have a greater possibility of being adopted if a major economic integration process initiates it. Moreover, the same principle applies to "liberal" multilateral air transport agreements like ***Decision 297***. The Preamble of the ***BATA*** states these objectives and underlies these goals.

2.2.1.- Preamble

Since the movement of persons and goods would be significantly increased, an

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22 O. L. Gonzalez Parra, also highlights the fact that the ***BATA*** and the Andean Pact Liberalization Policy reflects the air transport deregulation process that the Colombian Government started four yeas ago, reducing its intervention in the field to the implementation of the control mechanisms that will assure the security and efficiency of air transport. The Government reduced control over operation permits, routes and tariffs, to increase the number of airlines and, consequently, the capacity offer, in "*Una Visión Retrospectiva del Transporte Aéreo Internacional en el Grupo Andino y en América Latina*," (Board of the Cartagena Agreement, Dept. of Physical Integration: Lima, 1994) [hereinafter ***Visión Retrospectiva***]

23 During the Second Colombia-Venezuela Integration Encounter held in Caracas, 1-5 May 1995, it was highlighted that the commercial interchange between these two countries has been 2.400 million U.S. dollars. In 1991 it only reached 750 million U.S. dollars (Internet service: Notiexpress, 08/05/95 - Electronic Journal, Caracas (Venezuela).

agreement liberalizing the air transport industry was essential. Until that time, the routes and frequencies served by the airlines of both countries would not have not satisfied the new flow of persons and goods to either party. The new ***BATA*** provides the framework necessary to promote development of air transport which enhances the economic expansion of both parties and, on a more global consideration, stregthens their international cooperation in this field.

In the second part of the Preamble, both parties affirmed that they wish to apply the principles and provisions of the ***Chicago Convention***, which were ratified by both parties.[24] Finally, they expressed the desire to organize themselves on a free market access regime to achieve effective integration in the field of international air transport.

2.2.2.- Operating Rights and Conditions

Regarding operating rights and conditions for scheduled air transport services, Article 2(1) lists the rights, or freedoms of the air, that the parties exchanged: first (a), second (b) third and fourth (c) and fifth (d) freedoms. In section 2(2) parties stated that the designated airlines can exploit these rights without any limitation with respect to freedoms of the air, frequencies, capacities, routes and time schedules if the airlines satisfy the technical and security requirements that will allow its operation. Regarding schedules, the airport operating conditions will also be considered. Section 2(3) establishes that routes and timetables be supplied to the Aeronautical Authorities at least thirty days before its entry into force.

2.2.3.- Designation, Multiple Designation and Exploitation

The exploitation of the rights granted by the ***BATA*** may commence at any time

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[24] Colombia ratified the ***Chicago Convention*** on 31 October 1947 and Venezuela adhered to it on 1 April 1947.

if the parties have followed this procedure regarding the designation of airlines:

1) The Contracting Party shall submit a list of one *or more* (multiple) designated airlines in writing to the other Party (Article 3(1)).

2) The Contracting Party granting the rights prescribed in Article 2 will give to the designated airlines the respective operating permit (Article 3(2)) within a period not superior to thirty days from the date in which the requesting Contracting Party submitted in writing the list of one or more designated airlines (Article 3(3)).

The multiple designation, as described here, is a revolutionary rule. In fact it is an uncommon precept used in ***BATA***.

2.2.4.- Substantial Ownership and Effective Control

Regarding the approval of the designated air carrier by the other party, the Contracting Party has the right not to approve the designation of an airline made by the other Contracting Party or to revoke the operating permit granted to a designated airline, when the substantial ownership and effective control of the said airline will not be in the hands of the Contracting Party that has done the designation or in the hands of its nationals (Article (3(4)). There is no definition of substantial ownership and effective control included within the text.

2.2.5.- Revocation, Limitation or Suspension of the Permit

Apart from the revocation described above, any Contracting Party may revoke, suspend or limit by setting up new conditions, the operating permit granted according to Article 3(2) if the air carrier has not respected its laws and regulations or has not complied with the provisions of this agreement or with the obligations imposed on it by the agreement. This right can only be exercised after the consulting procedure provided by Articles 11 and 12 has been satisfied, unless an immediate suspension of the service

is imposed to avoid further infraction of the laws or regulations (Article 4).

2.2.6.- Tax and Other Exemptions

Airport use taxes and any other national tax rates related to the use of air transport facilities to be paid by the designated air carriers cannot be higher than those paid by national air carriers for the performance of similar international air services (Article 5). Also, designated air carriers will be exempted from taxes applied to fuel, oil, spare parts and any other supplies needed for the performance of air transport services described in the ***BATA*** (Article 6(2)(3)). For scheduled international air service, each Contracting Party will grant the other the right to obtain fuel under the same conditions as applied to national air carrier (Article 6(1)). These exemptions may be subject to national procedures, regulations and conditions based on reciprocity (Article 6(6)).

Those passengers in transit through the territory of any of the Contracting Parties will be subject only to simplified control measures and the baggage and cargo in transit will be exempted from taxes and other similar burdens (Article 15(c))

2.2.7.- Airworthiness Certificates and other Licenses

Regarding the Airworthiness Certificates, Fitness Certificates and the Pilots' Licenses in force, issued or ratified by a Contracting Party, they will all be accepted as valid for the performance of the air services found in the ***BATA*** by the other party if such certificates or/and licenses were issued conforming to the standards set by the ***Chicago Convention*** (Article 7).

2.2.8.- Determination of Tariffs

The ***BATA*** establishes the elements to be considered when setting the tariffs: the costs of service exploitation, a reasonable benefit and the technical and economic characteristics of each route (Article 9(1)). There is no definition for "reasonable benefit"[25] nor is the extension for interpreting "the costs of service exploitation"[26] indicated. It only instructs the respective authorities to apply the rule of "country of origin" while a common tariff policy is set (Article 9(2)).

2.2.9.- Representations

Regarding airline employees, designated airlines are allowed to keep and use their own personnel for services in airports and cities located in the territory of the other Contracting Party where the said airlines will keep representations (Article 10(1)). All the employees will be subject to the national laws of the Contracting Party where the said representation will be located (Article 10(1)).

2.2.10.- Modifications of the BATA and Dispute Settlements

Parties' Aeronautical Authorities shall keep interchanging opinions with each other whenever they consider it necessary to reach a close cooperation and understanding of the application of the ***BATA***. But in the case that an understanding cannot be reached, Article 11 contemplates the procedure for modifying the rules set

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25 Reasonable profit could now be less than 1%. In other industries the return could be 5% or more (See H. Lapointe, *Regional Open Skies Agreements: Law and Practice*, LL.M. Institute of Air & Space Law, McGill University, 1995 [unpublished] [hereinafter ***Lapointe***] at 68ff).

26 In this case, there is no indication of whether it is considered the marginal cost or the total cost since the cost for an airline to carry a supplementary passenger can be very low (*Ibid.* at 67).

thereby. If one of the Parties considers that a modification shall be made to the rules set, it should start a consultation period with the other Contracting Party (Article 11(a)) and a decision shall be made within 60 days from the date of receiving the request (Article 11(d)). The modifications will be in force when both Parties mutually agree to follow the respective rules and procedures (Article 11(b)). The amendment of the ***BATA*** could be done directly by the Aeronautical Authorities of each Contracting Party and will be in force from the date of the interchange of the diplomatic notes (Article 11(d)). The same principles and period will be applied to the settlement of disputes over any divergence relating to the interpretation or application of the ***BATA***. In case no agreement can be reached, the dispute shall be solved through diplomatic channels (Article 12).

It is surprising that Parties, after having set up automatic (Article 18) and expeditious granting of permit processes (Article 3(3)), have established the limit for dispute settlement between aeronautical authorities at 60 days. It is even more astounding and contrary to any "liberal" orientation, to establish the use of diplomatic channels to settle disputes in case no agreement can be reached. Here, the discussions may last a few months or years before reaching a satisfactory common agreement. This delay may significantly affect the development and economic health of an airline, a consequence contrary to the goals of a "liberal" ***BATA***.

2.2.11.- Multilateral Agreement

Article 13 contemplates the possibility of a multilateral agreement between the Andean Pact Countries liberalizing the air transport service industry among themselves. In fact, most of the preparatory meetings for establishing ***Decision 297*** were done simultaneously during the negotiation and signature of the ***BATA*** and the air transport authorities of the other Andean Pact countries were aware of it. This article mandates the adaption of the ***BATA*** to the terms decided upon in the multilateral agreement

regarding scheduled air transport services (Article 13(1)). In case a conflict between the terms of the multilateral agreement and the ***BATA*** arises, before the entry into force of the modifications adopted in Article 13(1), the terms of the ***BATA*** will prevail (Article 13(2)).

2.2.12.- Applicable Laws

The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the airline or airlines designated by the other Contracting Party (Article 15(a)). The laws and regulations regarding the admission to or departure from its territory of passengers, baggage, crew, cargo or mail of aircraft, including regulations relating to entry, clearance, immigration, passports, customs and quarantine shall be applied to the passengers, baggage, crew, cargo and mail transported by the designated airlines of the other Contracting Party while within the territory of the other Contracting Party (Article 15(b)).

2.2.13.- Aviation Security

Contracting Parties have followed the policy established in Article 7 of the ***Bermuda 2*** Agreement[27] where they conform with the rights and obligations imposed upon them by International Law to avoid acts that may jeopardize the safety of persons or property, adversely affecting the operation of air services and undermining public confidence in the safety of civil aviation. Moreover, Parties ratified that the mutual

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27 *Air Service Agreement between the Government of the United States of America and the Government of the United Kingdom of the Great Britain and Northern Ireland* signed in Bermuda on 23 July 1977, U.S. Department of Transport (Washington) [hereinafter ***Bermuda 2***]

obligation to protect the security of civil aviation is part of the ***BATA***[28] (Article 16(a)) and that they will fully cooperate with each other to avoid such illicit acts (Article 16(a)(b)(d)(e)). The Parties engaged themselves to comply with Annexes of the ***Chicago Convention*** when applicable in this regard and will require its observation to the air carriers licensed by them, the air carriers with head offices or permanent residence in their territory and operators of airports located within the territory (Article 16(c)).

They have also reaffirmed their commitments emanating from the *1963 Tokyo Convention on offences and certain other acts committed on board aircraft*,[29] the *1970 Hague Convention for the suppression of unlawful seizure of aircraft*,[30] and the *1971 Montreal Convention for the suppression of unlawful acts against the safety of civil aviation*[31] (Article 16(a)).

2.2.14.- Earnings Re-Export

Parties have granted to each other the right to convert and re-export the part of the earnings of designated airlines exceeding their expenses obtained in the territory of the other Contracting Party, according to the legislation in force of each country (Article 17).

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28 This part has not been included in Article 7 of the ***Bermuda 2***.

29 *Convention on offences and certain other acts committed on board aircraft*, signed at Tokyo on 14 September 1963, *ICAO Doc. 8364.*

30 *Convention for the suppression of unlawful seizure of aircraft*, signed at The Hague on 16 December 1970, *ICAO No. 8920.*

31 *Convention for the suppression of unlawful acts against the safety of civil aviation*, signed at Montreal on 23 September 1971, *ICAO Doc. 8966.*

2.2.15.- Non-Scheduled Air Services

Regarding the non-scheduled passengers and cargo air services, Parties will automatically grant licenses when the routes to be served are not covered by scheduled air services or, when scheduled air services are offered, the performance of such non-scheduled air services shall not unduly affect those services (Article 18).

2.2.16.- ICAO Registration

The ***BATA*** and any modification therein must be registered with ICAO.

2.2.17.- Conclusion

This ***BATA*** definitely has had a positive influence for the respective air transport industry, contributing to the expansion and improvement of the offer and capacity, reducing the cost and, consequently, the prices. It has also stimulated the creation of new airlines from both Countries (mainly for the cargo sector) and favored the opening of unexploited routes. Within the ***Andean Subregional Air Transport Liberalization*** process, these two countries enjoy a better understanding and benefit from a broader (more liberal) agreement.

A description of the ***Andean Subregional Air Transport Liberalization*** and its impact in the Member Countries will follow.

3. Andean Subregional Air Transport Integration: Decision 297 System

3.1. Scope of Decision 297:

3.1.1. Conditions:

The Member Countries of the ***Cartagena Agreement*** shall apply ***Decision 297*** for the performance of international scheduled and non-scheduled passenger, cargo and mail air transport services among their respective territories within the subregion, and between the latter and extra-subregional countries (Article 2).

The extension of the rights proposed in the ***Decision*** to countries not belonging to the ***Cartagena Agreement*** is subject to the subscription of bilateral or multilateral agreements. Here, each Member Country shall inform the other of the names of the extra-subregional air carriers and the commercial rights to be exercised by them (Article 17).

3.1.2. Additional Rights

The ***Decision*** does not imply, under any circumstances, restrictions to any facilities that Member Countries have granted or may grant among themselves, through bilateral or multilateral agreements or conventions (Article 3). Parties may grant other more flexible or convenient conditions without being compelled to grant them to the others. One example is the ***BATA*** between Colombia and Venezuela as described above.

3.1.3. Granting First and Second Freedoms

Apart from the exchange of freedoms contained in the ***Decision***, Member Countries grant to each other the first and second freedoms to any type of transportation (Article 4).

3.2. Conditions to Perform Scheduled and Non-Scheduled Air Transport Services within the Sub-Region

3.2.1. Scheduled Air Services

3.2.1.1. Definition of Scheduled Air Services

3.2.1.1.1. Scheduled Air Services under the Chicago Convention and as defined by ICAO

Since the ***Chicago Convention*** does not define scheduled international air services, ***ICAO*** has defined Scheduled Air Services as follows: ". . .an air service open to use by the general public and operated according to a published timetable or with such regular frequency that it constitutes an easily recognizable systematic series of flights.[32] Further, for the guidance of Contracting States, the ***ICAO*** Council indicated that scheduled international air service shall include the following characteristics:

> "a) it passes through the air space over the territory of more than one state;
> b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, so that each flight is open to use by members of the public;
> c) it is operated to serve traffic between the same two or more points, either (i) according to published timetable or (ii) with flights so regular or frequent that they form a recognizable systematic series."[33]

The Convention also provides for the right of scheduled international flights, but such rights will be granted on bilateral and multilateral arrangements or authorizations. Thus "[n]o scheduled international air services may be operated over or

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[32] *ICAO Doc 9626* (Provisional Version) at 5.3.1.

[33] *ICAO Doc. 7278-C/841 (1952).*

into the territory of a Contracting State, except with special permission or other authorization of that State and according to the terms of such permission or authorization[34]."

In spite of the right of flight contemplated in the ***Chicago Convention*** applicable to civil aircraft not engaged in scheduled international air services, it is submitted that, in addition to observing the terms and conditions contained in the permission or authorization, a scheduled international air carrier would also have to observe the general conditions and limitations imposed by the Convention on a non-scheduled flight, unless exempted from them by the terms of the authorization[35].

As between the States belonging to the *"Chicago System"*, permission or authorization in favor of scheduled services may be granted "...by multilateral agreement, by bilateral (air transport/services) agreement on or by unilateral permit, thereby laying the basis for current commercial practice, in which the bilateral agreement is the most widespread one"[36] .

3.2.1.1.2. Scheduled Air Services under the "Two Freedoms " Agreement[37]

Under the ***Two Freedoms Agreement*** each Contracting State grants to the other Contracting States the following freedoms of the air with respect to scheduled international air services:

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34 ***Chicago Convention***, Art. 6.

35 *Idem.*

36 ***Haanappel, supra,*** Chapter I, note 47 at 282.

37 See *supra,* Chapter I, note 49. Bolivia, Ecuador and Venezuela are parties to this agreement.

a) the privilege to fly across its territory without landing; and

b) the privilege to land for non-traffic purposes (Art. I).

These privileges are subject to certain limitations: they are not applicable with respect to airports used for military purposes to the exclusion of any scheduled international air services (Art. I(l)); or to aircraft making stops for non-traffic purposes required to offer reasonable commercial service at the stopping places (Art. I(3)).

Each Contracting State may designate routes and airports and other facilities (Art.I(4)). It may also reserve the right to withhold or revoke a certificate or permit to an air transport enterprise of another State if it is not satisfied that substantial ownership and effective control are vested in nationals of a Contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under the Agreement (Art. I(5)). The privileges described in Art. I(l) must be exercised according to the provisions of the ***Chicago Convention*** (Art. I(2)). The Agreement also contains rules for the settlement of disputes arising by ***ICAO*** (Art.II).

3.2.1.1.3. Scheduled Air Services under the "Five Freedoms " Agreement[38]

Under this agreement each Contracting State grants to the other Contracting State the following further freedoms of the air with respect to scheduled international air services, and besides the above-mentioned freedoms, two freedoms:

c) The privilege to put down passengers, mail and cargo taken on in the territory of the state whose nationality the aircraft possesses (Art. I(l)(3));
d) the privilege to take on passengers, mail and cargo destined

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38 See *supra*, Chapter I, note 50. Bolivia signed this agreement on 4 April 1947.

for the territory of the state whose nationality the aircraft possesses (Art. I(l)(4));
e) the privilege to take on passengers, mail and cargo destined for the territory of any other Contracting State and the privilege to put down passengers, mail and cargo coming from any such territory (Art. I(l)(5)).

The Agreement contains similar provisions to those in the ***Two Freedoms Agreement*** with respect to the limitations and conditions. The fifth freedom may be reserved or the State may, at any time, withdraw from granting such privilege (Art IV(l).

Additional freedoms include: a) carriage of traffic between two foreign States, via the home State of the airline (a combination of the third and fourth freedoms, which is another pattern of the fifth freedom)[39]; b) carriage of international traffic by an airline operating entirely outside its home State, also a form of the fifth freedom[40]; or c) cabotage[41][42]

3.2.1.2. Scheduled Air Services under the Andean Air Transport Liberalization System and its Application to Intra- Subregional Scheduled Air Services

Article 1 of ***Decision 297*** contains the definitions to be applied to the principles set therein. There we find the common understanding for "schedule air services" as "those flights done subject to fixed itinerary and schedules".

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39 Also known as "*sixth freedom.*"

40 Also known as "*seventh freedom.*"

41 Also known as "*eigth freedom.*"

42 ***Cheng,*** *supra,* Chapter I, note 67 at 9ff.

This definition was the basis for applying Article 5 of the said ***Decision***. According to this Article, Parties confer to one another free exercise of the third, fourth and fifth freedoms of the air for *scheduled* air services of passengers, cargo and mail to be carried out within the subregion. The article was interpreted differently from one Member to another, creating serious differences of opinion when conferring the air traffic rights granted therein. Parties have applied it in a restrictive way, especially regarding exclusive air cargo services, limiting its operation to the main goal: intra subregional liberalization.

After experiencing these differences, Member Countries considered it important to make the concept of scheduled air transport services compatible with the principle adopted in this regard by ***ICAO*** and, consequently, the ***Commission*** passed ***Decision 360***[43] where, among other changes, the concept of "scheduled" and "non-scheduled" air services were redefined following the principles adopted by ***ICAO*** as described above.[44] Accordingly, Article 1 of the said Decision defines "*scheduled air services*" as those done subject to fixed itinerary and schedules, offered to the public through a series of systematic flights.

Consequently, other rules were adapted to these new definitions. In this case, Article 5 of ***Decision 297***, which embodies the principle appplicable to intra subregional scheduled air transport services, was substituted as follows:

"Parties confer to one another free exercise of the third,

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43 ***Decision 360***, *Modification of Decision 297 "Integration of the Subregional Air Transport"* in Gaceta Oficial del Acuerdo de Cartagena, Year X, No 156 (Lima, 10 June 1994) [hereinafter ***Decision 360***] Preamble. This Decision has it origins in *Resolution CAAA No. I.EX-5*, passed by the ***AAAC*** in their *First Extraordinary Meeting*, held in Cartagena de Indias (Colombia) on 4 April 1994; in *JUN/R.CAAA/I-E/Acta Final* at 13ff.

44 See *supra*, page 25.

fourth and fifth freedoms of the air for combined schedule air transport services of passengers, cargo and mail, or exclusive passenger or cargo air transport services carried out within the subregion"[45]

Article 7 of ***Decision 297*** enacts the obligation of Member Countries to comply with the principles set thereby, through the revision of the permission or agreements reached among themselves and orienting them to the free interchange of intra subregional commercial air services that will benefit the communitary interest, assuring healthy competition and a competent and efficient international air transport service.

3.2.1.2.1. Principle of Multiple Designation (PMD)

3.2.1.2.1.1 Decision 297 on the Principle of Multiple Designation (PMD)

Member Countries accept the principle of multiple designation in the performance of scheduled passenger, cargo and mail air services (Article 9). By this provision, each State can designate one or more national airlines to perform international scheduled air services on one route. Further, this article provides for the *Andean Aeronautical Authorities Commission (AAAC)* to set up uniform regulations to apply this principle, insuring free access to the market for any type of service.

In this regard, the ***AAAC*** on 11 February 1992 passed ***Resolution CAAA.III-4***[46] which deals with the principle of *Multiple Designation.*[47] In the Preamble, the

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[45] *Decision 360*, Article 2.

[46] *Final Act of the III Meeting of the AAAC,* held in Lima (Peru) on 10 and 11 February 1992, document *JUN/R.AA/III/Acta Final* at 27.

[47] Resolutions coming from these kind of bodies are not legally binding but rather have the status of "recommendations".

AAAC asked the ***Board*** to acquire from the highest level (the ***Commission***) a regulation on the subject, to make it binding to all parties. Thereafter, the ***Commission*** passed ***Decision 320,***[48] which contains the rules set in ***Resolution CAAA.III-4.***

3.2.1.2.1.2. Decision 320 on the Principle of Multiple Designation and Procedure

a) Member Countries can designate one or more national transportation enterprises with an operational license to perform internationally scheduled air transport services of passengers, cargo and mail on any routes within the Subregion. Free access to the market and non-discrimination shall be insured by Parties (Article 1). The *National Transportation Enterprise* will be the one legally established in the designated Member Country to apply this Decision (Article 1).

In this article, the ***Commission*** did not rule out what should be considered as *National Transportation Enterprise*; it forwards the interpretation of the concept to the applicable law of each country, without offering any uniform communitary solution[49] as is done for other concepts in Article 1 of ***Decision 297.***

Moreover, Article 1 of ***Decision 320*** differs from the one contained in the *Resolution* recommended by the ***AAAC*** regarding its implementation. Article 1 of

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48 "*Multiple Designation for the Andean Subregional Air Transport Services*" in Gaceta Oficial del Acuerdo de Cartagena, Year IX, No. 111 (Lima, 19 June 1992) [hereinafter ***Decision 320***].

49 M. Donato & A. Ravina, "*Propiedad Sustancial y Control Efectivo de las Empresas de Transporte Aéreo y Marítimo Internacionales,*" in La Aviación Civil Internacional y El Derecho Aeronáutico Hacia el Siglo XXI (Asociación Latinoamericana de Derecho Aeronáutico y Espacial: Buenos Aires) at 103 [hereinafter ***Propiedad Substancial***].

Resolution CAAA.III-4 establishes that *National Air Transportation Enterprise* is the one legally established in a Member Country, which is *substantially owned* and *effectively controlled* by any country of the Subregion or by their nationals. Further, it defines '*substantial property*' as owning the majority of the company's shares, and '*effective control*' as the one reflected in the direction and management of the said company.

This situation has created concern and disagreement among the parties. The ***AAAC,*** in their IV Meeting,[50] highlighted the importance of defining such terms since the privatization process of some subregional air carriers may substantially change the proportion of national ownership and/or effective control. Here, the exercise of rights granted by the Member States through communitary legislation may benefit foreign enterprises, a situation which may create unfair competition.

Furthermore, the ***AAAC*** proposed consideration of the communitary concept of '*mixed enterprise,*' coined in ***Decision 291***[51], as a standard for defining the concept of '*substantial ownership*' and '*effective control*'. This decision regulates the foreign investment regime in the Andean Pact. There, the ***Commission*** set the minimum amount of national ownership to be between 51% and 80% in order to consider the enterprise as '*mixed*' and thus qualified to benefit from the special regime set thereby. The qualification of '*mixed enterprise*' will come from the competent national authority, which will evaluate whether the amount set as the minimum is *reflected* in the technical, financial, administrative and commercial direction of the enterprise (Article 1).

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50 Final Act of the IV Meeting of the ***AAAC*** held in Quito (Ecuator) on the 22 and 23 November 1993, document *JUN/R.AA/IV/Acta Final* at 3.

51 *Decision 291* of the ***Commission*** of the Cartagena Agreement. This Decision substitutes *Decision 220* in ***Propiedad Sustancial,*** *supra,* note 49 at 103.

The *Andean Association of Airlines* (***AAA***)[52] expressed the convenience of applying ***Decision 291*** to air transport carriers as it applies to maritime transport carriers, because it will better protect national interests.[53]

Another communitary rule that might help define the concepts of '*substantial ownership*' and '*effective control*' is Article 1 of ***Decision 292***[54] regarding the constitution of an '*Andean Multinational Enterprise*' (***AME***)[55]. Article 1 of ***Resolution CAAA.III-4*** contemplates this principle. This rule, if applied, may change the concept of '*national flag*' to '*communitary flag*,' aiming at a real "Air Transport Integration" policy.

On the other hand, we should not forget that at their Fifth Meeting, the Andean Presidential Council (***Meeting of Presidents***), in confirming ***Decision 297***, also urged the national airlines of the Member Countries to form a *consortium* before their integration took place. So far this issue has not been addressed, but in Europe the '*comité des sages*' highlighted, in January 1994, the benefits for ***EU*** air carriers conducting the alliances and fusions among them. They also concluded that the concept of '*national flag*' does not correspond to the integration process.[56]

If one of the problems arising from the privatization process is the search for capital investment (most likely to come from other countries), it would be a more logical alternative to try to apply partnership, in any of its different approaches, with

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52 See *infra* Page 91.

53 ***Propiedad Sustancial***, *supra*, note 49 at 104.

54 *Decision 292*, " *Agreement on the Regime for the Andean Multinational Enterprises*" in ***Propiedad Sustancial***, *supra*, note 49 at 104.

55 *Ibid.* at 104.

56 *Ibid.* at 105.

like-minded partners. The Andean Countries also count on a subregional financing organization[57] that might assist them in reaching this goal.

It is important to define these concepts and their extensions, to allow for a coherent communitary understanding. An air transport enterprise may be legally established in a Member Country (thus considered as *national*), but its *substantial ownership* and *effective control* may not be in the hands of the Member States or its nationals. If this is the case, a foreign-owned and/or effectively controlled air carrier can exercise the rights granted through communitary rules (intended to protect a subregional market to benefit Member States and their nationals) and, consequently, create situations of unfair competition for local air carriers.

b) The Corresponding National Authority (*CNA*) will admit and solve the petitions coming from the air carrier within its country who requests to be *designated* in order to exploit scheduled air services in the countries of the Subregion (Article 2). Once having received the petition, the *CNA* will make a decision on the request and its implementation within 30 days (Article 3).

c) The *CNA* shall inform in writing to each Member where the air carrier will exercise the aero-commercial rights granted, the name of the company, routes, frequencies and equipment to be used (Article 4).

d) Article 5 of ***Decision 320*** has been substituted by Article 1 of ***Decision 361.***[58] The passing of this Decision was inspired by the seeking of rules of

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57 The ***Andean Development Corporation*** (see, *supra,* page 44).

58 *"Modification of Decision 320: Multiple Designation on the Andean Subregional Air Tranport"*, Gaceta Oficial del Acuerdo de Cartagena, Year X, No 156 (Lima, 10 June 1994) [hereinafter ***Decision 361***]. This Decision has its origins in *Resolution CAAA- No. I.EX-5.*

harmonization regarding the requirements to be fulfilled by designated air carriers. The new article reads as follows:

> " The *CNA* notified by another Member Country on the designation of an air carrier, will allow the performance of the services for the routes and frequencies granted by the designating country within thirty calendar days,[59] calculated from the date of the notification reception and previous fulfilment of the following requirements:
>
> 1) Copy of the Operation Permit granted by the designating authority, duly legalized according to the laws of the receiving country.
>
> 2) To set the legal representation and comply with the requirements on commercial registration or domicile according to the laws of the receipting Member Country.
>
> 3) Certification of the insurance policies according to international standards accepted for air transport, and
>
> 4) Accountancy of having paid the fees for the concept of issuing an operational permit, established by the receiving country.
>
> The documents described above will be presented by the designated enterprise to the receiving Member Country, whom will coordinate any modification of the schedule demanded which will be of impossible performance due to technical reasons."

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[59] Calendar days are counted on a continual basis, which includes week-ends and festivity days.

Another requirement to be fulfilled has been included in Article 2 of ***Decision 361***, which adds a paragraph to Article 7 of ***Decision 320***. It allows the Member Country to require the exhibition of a document that will certify that the designated air carrier is 'clean' of any report on narcotic trafficking or subversion-related activities.[60]

f) Without affecting the rules contained in the ***Andean Court of Justice Treaty***[61], the respective ***CNA*** may consult with each other to solve differences when discrepancies or observations related to the fulfillment of the precepts set in this ***Decision*** arise (Article 7).

3.2.2. Non-Scheduled Air Services

3.2.2.1. Definition of Non-Scheduled Air Services

3.2.2.1.1 Non-Scheduled Air Services in the Chicago Convention

The ***Chicago Convention*** does not define non-scheduled air transport services. It only provides, among other things, for the exchange of certain rights and duties concerning flights over the territory of Contracting States.[62] One such right granted by the Convention is the right of non-scheduled flights as contained in Article 5. This article grants to an aircraft of a Contracting State not engaged in scheduled international air services the right to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes (the first two freedoms of the air), without the necessity of obtaining prior permission.

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60 ***Decision 361***, *supra*, note 59, Article 2.

61 See *supra*, note 73.

62 ***Chicago Convention***, Chapter II, Articles 5 to 16.

Nevertheless, various conditions are imposed upon this right, including: (a) the observance of other terms of the Convention, (b) for safety reasons, the reservation of the right to require permission or to follow prescribed routes over regions which are inaccessible or without adequate navigation facilities. The other three freedoms were also multilaterally exchanged subject to certain regulations, conditions or limitations that might be imposed by the States, on the privilege to take on or discharge passengers, cargo or mail when carried for remuneration or hire[63].

The practice has shown that the multilateral exchange of rights set by this article is limited to the first two freedoms of the air[64], leaving the rest to be exchanged by authorizations. These authorizations are predominantly done on a unilateral basis, opposed to the practice of exchange of rights in scheduled air transport where the ruling is through bilateral agreements.[65]

Since no definition has been given within the text of the ***Chicago Convention***, the ***Council*** of ***ICAO*** has developed a definition for the term "*non-scheduled air services*" as opposed to "*scheduled air services*" (as described above[66]): "A *non-scheduled air service* is a commercial air transport service performed as other than a *scheduled air service.*"[67] The characteristics and kinds of service are also described in the same document.

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63 ***Chicago Convention*** Art. 5.

64 ***Haanappel,*** *supra,* Chapter I, note 47 at at 283.

65 *Ibid.*

66 See *supra*, note 32.

67 *ICAO Doc 9626* (Provisional Version) at 4.6.1.

3.2.2.1.2. Non-Scheduled Air Services under the Andean Air Transport Liberalization System

Article 1 of ***Decision 297*** defines *non-scheduled* air transport services as those flights done which are not subject to a fixed itinerary and schedules. As expressed above regarding scheduled air transport services, this definition was substituted by ***Decision 320*** to be read as follow:

> Non-scheduled air services are "...those air transport services not done with the elements used to define scheduled air transport services"[68]

3.2.2.2. Non-scheduled Air Services under the Andean Air Transport Liberalization System and its Application to Intra Subregional Scheduled Air Services

3.2.2.2.1. Non-Scheduled Passengers Air Services

Regarding non-scheduled air transport service of *passenger* permits, the conditions to comply with are the following (Article 10):

a) To submit the request to the respective Authority, enclosing the exploitation certification issue by the National Competent Authority from the country of the air carrier nationality and the respective insurance contracts. These documents may be contained in a certification issued by the National Competent Authority.

b) The permit will be granted between points not served by scheduled air services. In case this services exist, the Authorities will grant the permit if the offer of non-scheduled air services will not harm the economic stability of the existing scheduled air services.

c) When the request lies on a sequence of non-scheduled flights, these

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[68] This definition follows the structure expressed in *ICAO Doc 9626* at 5.3.

should correspond to packages "all included", consisting on preestablished departure and arrival round trip.

3.2.2.2.2. Non-Scheduled Cargo Air Transport Services

Member Countries adopt a liberal regime[69] regarding non-scheduled air *cargo* services to be performed within the Subregion (Article 6). With respect to non-scheduled *cargo* air service permits, air carriers must comply with paragraph a) and b) of Article 10.[70]

3.2.2.2.3. Authorizations to Perform Non-Scheduled Air Services

The authorization to perform non-scheduled air transport services of passengers, cargo and mail will be automatically granted by the corresponding National Authorities (Article 10).

3.2.2.2.4. Non-Performance of Rules set in Article 10 of Decision 297

The non-performance of the rules set in Article 10 carrying any non-scheduled air service will imply the application of the sanctions in force, set by the legislation of each Member Country.[71]

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69 "Liberal Regime" in this Article is understood as the application of the five freedoms of the air.

70 The ***AAAC*** agreed on this matter (in *Régimen de Integración Económica* (Legislacion Económica: Bogota, 1994) [hereinafter ***Integración Económica***] at 89.

71 Here Parties did not take uniform sanctions regarding the non-fulfillment of rules set. It should be on the ***Andean Court of Justice*** the control of the performance of the rules set in ***Decision 297*** (see *supra* page 35 regarding Article 7 of ***Decision 320***. See also, supra, page 48 regarding the ***Andean***

3.2.2.2.5. Adjustment of Previous Rules and Agreements

Article 7 orders the revision of the operating rights, bilateral agreements and other administrative acts in force among parties, to respond to community requirements set by this Decision in the Andean Air Transport Policy.[72] The said modifications should be done to achieve the free intra-Subregional interchange of traffic rights, benefiting the communitary interest and ensuring healthy competition and the quality and efficiency of international air transport services.

3.2.2.2.6. Multiple Designation for Non-Scheduled Air Services

Article 6 of ***Decision 320*** contemplates that the designed enterprise granted to perform scheduled air services will also be allowed to execute non-scheduled passenger, cargo and mail air services. In this regard, the requirements prescribed in Article 10 of ***Decision 297*** must be fulfilled.

3.3. Conditions to Perform Scheduled and Non-Scheduled Air Services between any Member Country and Third Countries (Extra Subregional)

3.3.1. Extra Subregional Scheduled Passengers Air Services

Member Countries will grant each other fifth freedom rights to scheduled air services performed between countries of the Subregion and third countries, subject to bilateral or multilateral negotiations, where parties will apply the principle of equity,

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Court of Justice).

[72] This document is known as "*Acta de la Paz*", see *supra*, note 4.

under adequate compensation formulas.[73]

3.3.2. Extra Subregional Non-Scheduled Passengers Air Services

Member Countries will grant each other fifth freedom rights to scheduled air services between countries of the Subregion and third countries, subject to bilateral or multilateral negotiations, where parties will apply the principle of equity, under adequate compensation formulas. Parties will also establish conditions under which non-scheduled passenger air services between Member Countries will be performed[74].

This issue was discussed at the Third Meeting of the ***AAAC***[75] and was solved by the creation of a ***Task Group***, integrated by representatives of each country to study and propose solutions regarding the application of Article 11[76]. They concluded the following:

> 1) Confirmed that for granting fifth freedom rights from and to third countries it must be the result of bilateral and multilateral negotiations, and applying the principles contained in Article 11: equity and adequate compensation formulas.
>
> 2) That it will be convenient to analyze the economic impact that the granting of fifth freedom to third countries will have on the Andean market, by giving reciprocal treatment to their airlines that will serve Subregional traffic.
>
> 3) That it will be appropriated that Subregional air carriers identify commercial cooperation agreements that will enhance their capacities and

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73 ***Decision 297***, Article 11. There is a time limit for granting this right; "..before 31 December 1992..." Parties are still negotiating these rights.

74 *Ibid.*

75 Final Act of the Third Meeting of the AAAC, 10-11 February 1992 (Lima, Peru), *JUN/R.AA/III/Acta Final.*

76 ***Resolution CAAA No. III-3, Ibid.*** In fact, this Task Group made comments on the overall Andean Subregional Air Transport Liberalization system.

generate economic benefits to all the national airlines operating in the Subregional market.

4) The ***Board*** of the ***Cartagena Agreement*** will be in charge of setting up a database containing statistical information regarding capacity, frequencies, origin and destination and financial economic capacity of the air carriers, and of any other database that will allow the evaluation of the market.[77]

Despite the concerns displayed by the members of the *Task Group*, no major changes were made regarding this article.

3.3.3. Extra Subregional Non-Scheduled Cargo Air Services

Article 12 of ***Decision 297*** indicates that Member Countries adopt a "free" regime regarding non-scheduled cargo air services performed by their territories to third countries. This article has been considered to be excessively open concerning the controls and requirements demanded to scheduled air cargo services.

Since Article 1 of ***Decision 360*** changed the definitions of *scheduled air services* and *non-scheduled air services* contained in Article 1 of ***Decision 297***, Article 12 of the latter *Decision* was also updated by Article 3 of ***Decision 360***. The new Article 12 reads as follows:

> "Member Countries adopt a regime of freedom regarding non-scheduled cargo air services of their enterprises, which will not constitute a systematic group of flights between one same origin and destination, performed between countries of the Subregion and third countries."

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[77] *Final Report of the Air Transport Task Group*, in *JUN/GT.CAAA/I/Informe*, 20 October 1993 at 6ff.

3.4. General Rules

3.4.1. Coordination

Each Member Country will communicate to the other Members and the ***Board***, in a timely manner, the names of national air carriers and their corresponding granted rights, to be performed within or outside the Subregion. A Member will also communicate to the others the names of extra Subregional air carriers and their corresponding granted rights.

3.4.2. Duty to Inform to other Member Countries of Regulations Regarding Flights Schedules Procedures

Each Member Country shall, in a timely manner, inform the others and the ***Board*** of the national provisions in force for the authorization of routes, frequencies, itineraries and schedules for scheduled and non-scheduled air services (Article 18).

The ***Task Group*** urged the Board to develop a database containing statistical information regarding capacity, frequencies, origin and destination and financial economic capacity of the air carriers, and of any other database that will allow the evaluation of the market. We find in this Article the basis for the Board to require from Member Countries the necessary information.

3.4.3. Complementary Dispositions

The ***Commission*** shall, within one hundred and eighty calendar days from the date of entry into force of the ***Decision***, adopt and put into force a series of rules aimed at preventing or correcting distortions produced by unfair competition in air transport services (Article 19). These modications shall be made, according to the provision contained in the Andean Air Transport Policy, "...maintaining the principle of equity and subject to adequate compensation arrangements" as indicated in Article

11.

3.4.4. Tariffs

The principle of *country of origin* will be applied to set the tariffs applicable to the performance of air transport services within the Andean Subregion.[78]

3.5. The Andean Aeronautical Authorities Committee (AAAC)

Chapter V of ***Decision 297*** contemplates the creation of the ***Andean Aeronautical Authorities Committee*** [hereinafter ***AAAC***]. The regulation included therein is enhanced by *Resolution CAAA No. III-2.*[79] A description of the Committee as well as its composition and functions of the Committee will follow.

3.5.1. Composition

The ***AAAC*** was created during the V Meeting of Transport, Communication and Public Work Ministers of Member Countries by *Resolution V.104.*[80] It is composed by the national civil air transport representatives, or their subrogates, of each Member Country.[81] In the case of a Representative's absence, the subrogate will exercise all the functions, rights and obligations vested within the representation.[82] Before each ***AAAC*** meeting, each Member Country's representative, and the

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78 Article 20, ***Decision 297.***

79 Resolution CAAA III-2 [hereinafter ***Resolution CAAA III-2***], published in *JUN/R.AA/III/Acta Final,* in Lima, 12 February 1992.

80 ***Decision 297***, Article 13.

81 *Resolution CAAA III-2*, Article 1.

82 *Ibid.*

corresponding subrogates, will be accredited before the ***Board*** and the Committee's Presidency by the corresponding competent national authority.[83] The ***Board*** shall also be informed, before each meeting, about the members of each participating delegation.[84]

The ***Board*** will designate[85] and accredit its ad hoc delegate[86] to the Committee's Presidency, who will exercise the function of Permanent Technical Secretary.[87] Other international organizations and public or private association representatives, who represent the Subregion and are effectively related to air transport activities, may attend ***AAAC*** meetings as observers, when requested by the National Competent Authority or the ***Board***.[88] These representatives will be accredited in front of the ***Board*** before each meeting, and they will have right of voice but not vote.[89] The Board and each delegation may include all the advisors they consider appropiate and may be heard at the request of any Representative.[90]

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83 *Ibid.*, Article 2.

84 *Ibid.*, Article 3.

85 *Ibid.*, Article 1.

86 *Ibid.*, Article 2.

87 *Ibid.*

88 *Ibid.*, Article 4.

89 *Ibid.*

90 *Ibid.*, Article 3.

3.5.2 Functions

Chapter II of *Resolution CAAA III-2*[91] contemplates the Committee's functions. The Committee is in charge of surveillance for the fulfillment and application of rules of the ***Decision 297*** system (Article 5(a)). It will recommend solutions to problems arising regarding this subject within or outside the Subregion (Article 5(b)), and will recommend objectives, policies, programs and actions to facilitate and develop air services (Article 5(c)). The Committee will also promote harmonization and actualization of standards and legal rules in force related to air transport in Member Countries (Article 5(d)), and will guide the ***Board*** or the competent national bodies regarding the working papers and aims, previously analyzed in the Committee's meetings, that will support resolutions and agreements on the air transport sector (Article5(e)). This Committee may require from the ***Board***, or through the ***Board***, to the competent national bodies or international organization, all the support needed for conducting studies, seminars, working programs and any other action to be taken to make effective and modernize services regarding air transport (Article 5(f)). The Committee has the duty of registering and disseminating permanently, through the ***Board***, the information on air carriers operating within the Andean Subregion, the statistics on passengers and cargo operations, and the applicable regulations on air transport in each Member Country (Article 5(g)). The Committe will also have the ability to set up ***task groups***[92] in charge of elaborating studies or performing actions aimed to complement the Committee's resolutions (Article 5(h)).

An important function to be performed by the Committee is to concert joint positions for negotiating with third parties (either a country or a group -block- of

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91 See *supra*, note 79.

92 ***Task Groups*** have played an important role in developing concepts and suggesting procedures to the ***AAAC***.

countries), to obtain maximum benefits for the Subregion, for which, in each case a negociating team will be created (Article5(i)).

The Committee will propose the regulation needed for the application of the Commission's Decisions regarding air transport, when expressly required (Article 5(j)) and will put for the ***Board***'s consideration Decisions, Drafts and/or modifications adopted regarding air transport (Article 5(k)). It will also propose to the Competent National Authorities the working paper alignments to be analyzed during the Committee's meetings, aimed to the adoption of resolutions, agreements and execution of actions relating to air transport (Article 5(l)). It will, finally, pass and modify its own regulation (Article 5(m)) and will perform all the other functions prescribed in the Commission's Decisions (Article 5(n)).

3.5.3. Meetings

The ***AAAC*** will meet at least twice a year for *Ordinary Sessions*. These meetings will be convened by the *Permanent Technical Secretariat* of the ***AAAC***, to be held during the first and third quarter of each year.[93] These meetings will be held, alternatively, in each Member Country and in the ***Board***'s head office.[94] The ***AAAC*** will also convene for *Extrordinary Sessions* when one or more National Authorities of Member Countries, the ***Board*** or the ***Commission*** requests it.[95]

3.5.4. The President

The functions of the ***AAAC*** 's President will be assumed by the Representative

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93 ***Decision 297***, Article 16 and ***Resolution CAAA III-2***, Article 6.

94 ***Resolution CAAA III-2***, Article 7.

95 *Ibid.*

of the Member Country where the first quarter's *Ordinary* meeting is to be held. The President will hold the position for one year.[96] The President's functions[97] are to: a) Represent the ***AAAC*** and preside over its meetings; b) decide about the *Ordinary* or *Extraordinary* meetings' convocations in coordination with the *Permanent Technical Secretariat*; c) conduct the debates and solve points of order, by limiting the interventions' number and duration of each representation on the same subject; d) verify that parties comply with the ***AAAC Regulation***; e) render a report to the Commitee, at the end of its exercise, on the activities performed and the state of the comply of the adopted resolutions; f) any other activity the Committee will entrusted to him.

3.5.5. Quorum and Voting Process

The minimum number of participating Member Country representatives needed to hold a session are four.[98] The ***AAAC***'s will is expressed through resolutions, which will be identified with the acronym ***CAAA***, followed by a Roman numeral that indicates the meeting, and are numbered consecutively.[99] Each Member Country has the right to vote. The ***Board***'s representative has the right to speech but not to vote[100] and, when consensus cannot be reached, the resolution will be approved when four affirmative votes from the assisting Representatives are convened.[101]

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96 *Ibid.*, Article 14.

97 *Ibid.*, Article 15.

98 *Ibid.*, Article 17.

99 *Ibid.*, Article 18.

100 *Ibid.*, Article 19.

101 *Ibid.*, Article 20.

3.5.6. Permanent Technical Secretariat

The *Permanent Technical Secretariat* will be exercised by a ***Board***'s representative.[102] Its functions are to: a) convene to ordinary or extraordinary sessions in coordination with the Committee's President; b) accept representatives' credentials; c) receive communication from Member Countries authorizing the assistance of councellors to the ordinary and extraordinary meetings; d) send invitations to councellors and observers that the Committee aproves; e) excercise the functions of secretary to the Committee's meetings; f) elaborate and distribute the Final Act and other Committee official documents; g) be the depository of the Committee's Acts and official documents; and h) present in each Committee's ordinary sessions a report on the state of compliance of the Andean legal framework on air transport.[103]

3.6. The Andean Airlines Association (AAA)

3.6.1. General

The *AAA* was created under the framework of the Andean Pact. In fact, the meeting for the creation and incorporation of the Charter was convened, conducted and, finally, published by the ***Board***. This nonprofit organization has subregional and private characteristics and its own legal personality. Its head office will be located in Caracas, Venezuela and will be constituted and managed according to Venezuelan laws.[104]

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102 *Ibid.*, Article 21.

103 *Ibid.*, Article 21

104 *JUN/R.AALA/Acta Final*, 10 November 1993.

3.6.2. Goals

The ***AAA*** will act as a consulting entity to the Andean Pact organizations, mainly the ***AAAC***. It will protect and surveil regional and subregional interests of the members regarding passengers, cargo and air mail transport, and will promote and establish consulting mechanisms, with national authorities and other regional and international organizations, regarding air and multimodal transport; organize and promote market research and financial and technical assistance toward the integral development of the aerocommercial sector in the Andean Pact; establish a compilation and distribution system for information regarding air transport and related matters; actively cooperate with national authorities and the subregional bodies to achieve the strategic goals set for Andean integration, and to promote the aerocommercial activity in the Andean Subregion; define, promote and implement subregional programs to rationalize and facilitate air transport within the Andean Subregion, applying rules of healthy competition; and establish links with other economic blocks or communities of countries with whom Member Countries maintain commercial relations.[105]

3.6.3. Members

To become a member of the ***AAA***, the airlines shall be a national of one of the Member Countries of the Andean Pact. Extra-subregional airlines cannot become members of the ***AAA***. In the case that a National Airline ceases to have this quality according to national laws, the Member loses its membership.[106] The membership is divided in two classes: *Founding Members* and *Adherent Members*. The former are those that subscribe to the Constituting Act, the latter are those that present their application and are admitted by the Board. The ***Board*** and other regional and

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105 *Ibid.*, Section II.

106 *Ibid.*, Section III (C).

international organizations that deal with air transport may be invited to the meeting with the right of speech.[107] The *AAA* establishes Chapters in each Member Country.[108]

3.6.4. Organization

The supreme authority resides on the *General Assembly*, which is conformed by all the national subregional air transport enterprise members of the *AAA*. The General Assembly meets once a year (on the 31st of March each year) in ordinary sessions as required by the President of the *AAA* or the National Chapters. A valid quorum requires the presence of, at least, half plus one of the *AAA*'s Members.[109] Parties did not agree on the General Assembly decisions concerning votation. Some (Venezuelan and Colombian airlines) proposed that decisions should be taken by reaching a simple majority (half plus one) of the represented votes in the meeting, and others (Peru, Ecuador and Bolivia) suggested the amount of two-thirds of the represented votes the meeting.[110] There is no agreement on this subject yet.

The *AAA* has a *Board* which is formed by the *President* and the *Directors* of each *National Chapter*. The *Board* meets twice a year for *ordinary* sessions and for *extraordinary* sessions whenever invoked by the President or when a National Chapter requests it. The *Board* may invite national, regional, subregional or international air transport representatives when necessary. A quorum is reached with the presence of the President and three Chapters. The President and each Chapter have the right to

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107 *Ibid.*, Section III.

108 *Ibid.*, Section IV.

109 *Ibid.*, Section IV(A).

110 *Ibid.*

vote. The President will only use its vote when the votation is tied.[111]

The *Board* elects the *General Executive Secretary*,[112] who is the Legal Representative of the ***AAA***,[113] and, among other functions, is in charge of verifying the compliance of Board decisions and agreements adopted by the members, and recommending actions which comply to ***AAA*** and Andean Pact goals. It also organizes and manages the Information Center which compiles legal, statistical and institutional information, and conducts, prepares and releases ***AAA*** publications.[114]

4.- Results of the Andean Subregional Air Transport Integration Policy

We recognize that Latin America is one of the fastest growing markets in air transport. In fact, in the last four years, air transport has increased in Latin America, in general, and the ***ANCOM*** in particular, to the order of 400%.[115] In Latin America air transport activity have moved from a deficitary state to become a profitable activity, increasing the occupational rate, diversifying routes, improving services to users and promoting competitive tariffs.[116] This is shown by the sustained growth and potential of this industry.

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111 *Ibid.*, Section IV(C).

112 *Ibid.*, Section IV(D).

113 *Ibid.*, Section IV(F).

114 *Ibid.*

115 R.L. Oliveros in ***Visión Retrospectiva***, *supra*, note 22 at 2. He compares this result with the 7% increase verified in the U.S. air transport market during 1992 and 1993 with respect to 1991.

116 *Ibid.*

The implementation of the *Andean Subregional Air Transport Integration Policy* has developed the Subregional air transport market at large. Indeed, new airlines were constituted, new routes were served[117] and more frequencies[118] have resulted from its implementation. The significant increase of air cargo transport within the Andean Subregion is the most important result of the implementation of ***Decision 297***.[119]

We also recognize that the legal framework established by ***ANCOM*** regarding air transport is unique and revolutionary. They did not chose to take gradual steps to achieve the Subregional air transport liberalization like the European Union did through the "three packages" approach. In fact, they decided to pass ***Decision 297*** with a general policy and principles, and later adjusted or modified the rules according to the results. This may be seen as precipitous and wrong, but it definetely responded to the ***ANCOM*** methods and standards for ruling. Moreover, the differences arising from the signature of the U.S.-The Netherlands ***BATA*** and the upcoming negotiation of a ***PATA*** between the U.S. and the Nine European Countries regarding communitary rules, procedures and jurisdiction, question which procedure is the best.[120]

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117 In Colombia 31 new international routes and 46 new national routes were approved during 1993-1994 (O.L. Gonzalez Parra, in ***Visión Retrospectiva***, *supra*, note 22 at 23.

118 In the case of Colombia, during 1990 there were 13 frequencies per week between this country and the other ANCOM Members serving 188,000 passengers. In 1993, these frequencies rose to 56 per week serving 369,000 passengers (***ibid.***). In Ecuador passenger traffic increased to 42% from 1990 to 1993 (M.D. Rivera Cadena in ***Visión Retrospectiva***, *supra*, note 22 at 29).

119 *Ibid.*

120 Moreover, the major differences regarding monetary policies and political integration arising within the European Union (seen as the best example of total integration) reflects that the integration process is a long and cumbersome process.

4.1.- Obstacles to Achieve the Andean Subregional Air Transport Integration

Despite the positive results of the Integration Policy, we believe that there are certain elements and facts that refrain this Policy from generating more positive and coherent results. A description of these issues will follow.

4.1.1.- Regarding Supranationality

The institutional framework applied by the ***Cartagena Agreement*** in 1969 is supranational in essence. Despite this fact, Parties did not consider that the obligations set by the ***ANCOM*** institutions were fully respected by all Member Countries. Member Countries then believed that the institutional framework was lacking a jurisdictional body that would require all Parties involved to follow these obligations. In fact, the Governments of Bolivia, Colombia, Ecuador, Peru and Venezuela subscribed to the *Treaty of the Andean Court of Justice* in view of the need to guarantee the strict performance of the obligations derived from the direct or undirect application of the ***Cartagena Agreement***[121].

Today, we encounter the same predicament that protests respect for communitary regulation by some Member Countries regarding many ***Decisions***.[122] In the case of ***Decisions 297*** and ***320***, Member Countries continue to apply national regulations and the principles included in the ***BATA*** in force regarding designation and the issuing of operation permits, to perform international air transport operations between Member Countries. Furthermore, certain National Competent Authorities

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121 ***Integración Económica***, *supra*, note 70 at 727.

122 Recently, the Government of Venezuela is considering a claim against Colombia to the ***Andean Court of Justice***, regarding the restriction that the Government of Colombia is imposing on the sale of Venezuelan steel to that country (*El Nacional*, 25 July 1995, Caracas, Venezuela, Internet service version).

give preferential treatment to certain subregional and extra-subregional air carriers regarding their incorporation to the Andean Subregional market. These practices are against the communitary principles set by those Decisions.[123]

Moreover, the delays caused by certain national authorities, which continue to impose the fulfillment of requirements different from those contemplated in the country of origin regarding the granting of operation and routes permits, also show the degree of non-fulfillment of ***Decision 320***. This demonstrates that Member Countries continue to protect their national "flag" carriers and limit the principle of "*free market access*", which constitutes the essence of the air transport integration process set by the ***ANCOM***.[124]

Following the supranational ***ANCOM*** regulation, Member Countries may claim non-fulfillment of the obligations set by communitary regulation to the ***Andean Court of Justice***. Once obtaining a favorable sentence, and according to the procedure set by Article 23 and the followings of the ***Andean Court of Justice Treaty***, Member Countries may compel the others to adopt all the necessary measures to execute the sentence.[125] If the Member Country persists in the non-fulfillment, the Court will, previous to the ***Board***'s opinion, determine the limits within which the claiming Country, or any other Country, may restrict or suspend the Cartagena Agreement advantages that benefit the remiss Country Member.[126]

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123 See "*Acta Final del II Encuentro de Líneas Aéreas del Grupo Andino,*" in *JUN/ENC.LA/II/Acta Final* [hereinafter ***Acta Final***] at 3.

124 *Ibid* at 4.

125 *Ibid.*, Article 25.

126 *Ibid.*

Despite this regulation, the *ANCOM* experience has shown that the ***Andean Court of Justice*** has never been used in this regard. There is a tacit agreement between Members not to employ these means. The only alternative left are the consultations and recommendations coming from national authorities and communitary bodies, which are not binding. Consequently, the principles set by the ***Decision 297*** system are not fully followed nor will these practices be challenged through the jurisdictional bodies. Member Countries may raise their claim to the "new" maximum *ANCOM* body (the ***Meeting of Presidents***) to find "political" solutions to the troublesome situation caused by the non-fulfillment of communitary obligations, by encouraging each other to follow the principle set by ***Decision 297***.

On the other hand, while the supreme body (although not recognized as such by the *ANCOM* legal framework) will continue to be the ***Meeting of the Presidents***,[127] we cannot talk about having a truly supranational framework. There is no need to give this status to the ***Meeting of the Presidents*** since the Andean framework already has a formal body formed by each Government plenipotentiary representatives (the ***Commission***) to exercise this function. The new ancillary institution (the ***Meeting of the Presidents***) and any other similar initiative, may confuse the already intrincated Andean legal famework and show a certain distrust of the *ANCOM* as the body that shall govern the interests of all its Members.

4.1.2.- Regarding Market Access and Competition

The increase of air carriers services from third countries (mainly from the U.S. and the European Union) within the Subregion has generated an unbalance in the market. Their operating resources and competition mechanisms are saturating the

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127 The importance given to the ***Meeting of the Presidents*** shows Member Countries reluctance in giving supreme power to the *ANCOM* institutions.

subregional market, affecting local air carriers that lack economic and technical means to face, in equal and competitive conditions, the international mega-carriers.[128] In this respect the ***Andean Airlines Association*** has passed the ***Galapagos Declaration***[129] whereby they recommend to the national competent authorities the adoption of all the measures and mechanisms (legal, economic and administratives) to control such adverse practices.[130]

On the other hand, the Members of the ***Andean Airlines Association*** have claimed that the arrival of new air carriers having precarious (and some times doubtful) origin, constitution, organization and operation, that have obtained permits to perform international air services, are contributing to the distortion of competition, generating a depredatory effect on tariffs, saturating routes and frequencies and increasing the problems of over-capacity described above. These problems also affect the ability to replace the aircraft fleet of the other air carriers.

In this case, the ***Commission*** shall establish, through a *Decision*, the technical, economic and administrative requirements needed to qualify as a "designated air carrier," (as established in ***Decision 320***, Article 1) and enjoy the rights emanating from the *Andean Subregional Integration Policy*.[131]

Another significant problem is related to the fuel prices, taxes and other tariffs related to the air services, including airport obligations and travel agency

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128 See ***Acta Final***, *supra*, note 123 at 3.

129 *Galapagos Declaration*, approved by the Andean Airlines Association General Assembly during the Second General Assembly, on 5 May 1994 (somewhere in the Pacific Ocean) on route to the Galapagos Islands [hereinafter ***Galapagos Declaration***].

130 *Ibid.*, Section I.

131 *Ibid.* at 4.

commissions, that affect the operating costs of most of the subregional air carriers vis-à-vis their competitivity with extra-subregional air carriers. Member Countries shall establish a common and preferencial treatment regarding these issues as set by the Venezuela-Colombia ***BATA***.[132] In the ***Galapagos Declaration***, the ***AAA*** exhorted national competent authorities to define a coherent outline to diversify services related to air transport in the view of the imminent entry into force of the "***ANCOM Service Liberalization Regime***".[133] The measures shall translate into the harmonization of operation costs as well as any other cost related to taxes or tariffs (including the abolition of tarrif barriers applied to aircrafts, parts).[134]

There is also the problem arising from the lack of common position regarding bilateral negotiation of fifth freedom rights to third countries. Member Countries are more absorbed in their intra-Subregional bilateral negotiations than in defining a common air transport policy towards the protection and exploitation of the Subregional Market for their common benefit. Member Countries shall understand the implications of ***Decision 297*** and, consequently, apply the concepts contained therein when negotiating with third countries. In fact, Member Countries should realize that their major negotiating asset is their "common" subregional market. A good example is the case of the Government of Colombia, who has refused to give the fifth freedom for the ***ANCOM*** territory to Panama, Cuba and Aruba because it is a protected market and the offer is sufficient.[135]

In this respect, the ***AAA*** in their ***Galapagos Declaration*** has recommended the national competent authorities to adopt the following principles when negotiating with

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132 Articles 5, 6 and 15 (see *supra*, page 62).

133 ***Galapagos Declaration***, *supra*, note 129, Section II.

134 *Ibid.*, Sections II and V.

135 O.L. Gonzalez Parra in ***Visión Retrospectiva***, *supra*, note 22 at 26.

extra-subregional countries:

> a) to refrain from negotiating agreements under the modality known as the Post 1977 Agreement (or Bermuda 2);
> b) to predetermine the capacity;
> c) to consider fifth and sixth freedoms as complementary, and grant them if there is a demand and according to the rules set by the ***ANCOM***.
> d) to apply the Country of Origin rule regarding tarrifs and marketing strategies;
> e) to apply national legislation unilateraly regarding charter (or non-scheduled) air services.[136]

Regarding the common position of Subregional air services, Member Countries shall understand the importance of consolidating a coherent common policy, not only for bilateral negotiations between themselves, but for the bilateral negotiation between the ***ANCOM*** and a group of countries (or block negotiations) regarding air transport. Here, we mean the possible negotiation with the European Union or with part or the rest of Latin America. In this regard, the ***AAA*** supports the ***ANCOM*** bodies, and particularly the ***Board***, in all the actions taken towards the creation of a South American air transport market.[137]

4.1.3.- Regarding Ownership and Effective Control

As the basis for enjoying the rights coming from the *Andean Subregional Integration Policy*, the designated air carriers shall be nationals of the Member Countries or owned by their nationals, to be considered as National Transportation Enterprise. The *National Transportation Enterprise* will be the one legally established in the designated Member Country to apply ***Decision 320*** (Article 1). However the ***Commission*** did not rule on what should be considered as *National Transportation*

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136 ***Galapagos Declaration***, *supra*, note 129, Section IV.

137 *Ibid.*, Section VII.

Enterprise; it forwards the interpretation of the concept to the applicable laws of each country, without offering any uniform communitary solution[138] as is done for other concepts in Article 1 of ***Decision 297***.

This problem is particularly important with regard to the past, present and future air carrier privatization and globalization process. In fact, R. Oliveros stressed the fact that there is a need to find an equilibrium between the relative protection aimed by air carriers from subregional origin, and the process of internationalization of the investment to some of the most important Latin American airlines.[139]

Member Countries shall face the inconveniences created by this ruling and apply the communitary ***Decisions*** (***291***[140] and ***292***[141]) as well as follow the advice of the ***AAAC*** reflected in ***Resolution CAAA.III-4***[142] to fill this gap. ***Decision 291*** is considered a standard for defining the concept of '*substantial ownership*' and '*effective control*'. It coined the concept of '*mixed enterprise*' and regulates the foreign investment regime in the Andean Pact. Thereby, the ***Commission*** set the minimum amount of national ownership to be between 51% and 80% in order to consider the enterprise as '*mixed*' and thus qualified to benefit from the special regime set thereby. The qualification of '*mixed enterprise*' will come from the competent national authority, which will evaluate whether the amount set as the minimum is *reflected* in

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138 ***Propiedad Substancial***, *supra*, note 49 at 103.

139 *Final Act of the III Meeting of the AAAC,* held in Lima (Peru) on 10 and 11 of February 1992, document *JUN/R.AA/III/Acta Final* at 6. See *supra,* page 72ff.

140 *Decision 291* of 21 March 1991, Commission of the Cartagena Agreement. This decision substitutes *Decision 220* (*Ibid.*).

141 *Decision 292*, Commission of the Cartagena Agreement on the "*Regime for the Andean Multinational Enterprises*" (*Ibid.* at 104).

142 *Final Act of the III Meeting of the AAAC,* held in Lima (Peru) on 10 and 11 of February 1992, document *JUN/R.AA/III/Acta Final* at 6. See *supra,* page 72ff.

the technical, financial, administrative and commercial direction of the enterprise (Article 1).

Decision 292 is another communitary rule that may help define the concepts of '*substantial ownership*' and '*effective control*' regarding the constitution of an '*Andean Multinational Enterprise.*' Article 1 of ***Resolution CAAA.III-4*** contemplates this principle. This rule, if applied, may change the concept of '*national flag*' to '*communitary flag,*' aiming at a real "Andean Subregional Air Transport Integration" process.

On the other hand, Article 1 of ***Resolution CAAA.III-4*** establishes that *National Air Transportation Enterprise* is the one legally established in a Member Country, which is *substantially owned* and *effectively controlled* by any country of the Subregion or by their nationals. Further, it defines '*substantial property*' as owning the majority of the company's shares, and '*effective control*' as the one reflected in the direction and management of the said company.

4.1.4.- Air Carriers Cooperation Agreements

Due to the political and legal complexity of the ***ANCOM*** regime, the non-fulfillment of the regulations coming therefrom, the application of all standards for granting fifth freedoms within the Subregion and the consequences of such actions, we believe that the foremost alternative to enhance the Andean Subregional Air Transport Integration Policy may be reached by their key players: the air carriers.

ANCOM Airlines shall be encouraged to enter into commercial agreements and partnerships among themselves, to increase the understanding and benefits coming

from system set by ***Decision 297***.[143]

The major failure of the ***Decision 297*** system is the lack of promotion of inter-air carriers agreements. Andean air carriers shall enter into economic and technical arrangements and explore the possibility of interchange of equity participation, perform joint operations,[144] sharing technical support, setting up a pool of engines and spare parts, training of personnel, insurance and aircraft financing block negotiation, promotion of common frequent traveller packages,[145] etc.[146] We believe this kind of negotiation will be less complicated and faster to establish and adapt, and the active players ultimately benefit from the arrangements.

To implement the economic and technical agreements and benefit from the enlargement of the Andean market and beyond, Andean air carriers shall invest in an ***Andean Computer Reservation System***, where all the subregional air carriers will

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143 At their Fifth Meeting, the Andean Presidential Council, confirmed ***Decision 297*** and "...Urge the national airlines of the Member Countries to form a *consortium* before their integration." (***Act of Caracas***, ***supra***, note 11).

144 This joint operation may start by rationalizing the use of the ***ANCOM*** fleet and coordinating the schedules serving the different areas of the world (i.e., creating different hubs for serving different areas of the world; one for Europe, another for the U.S., another to serve the far East and Latin America). This will also rationalize and focus the investment to be done in infrastructure and airports in the ***ANCOM***. They may also enter into a "code-sharing agreement," not as a simply computer reservation arrangement, but as part of a more important economic and operation agreement.

145 Some Latin American air carrier have created a Frequent Traveller package called *LatinPass*. Not all the Andean carriers are part of this system. (See E. Gallardo, "*El LatinPass*" (1994) AITAL Boletin Informativo, Year 4, No 20 at 31

146 E. Vasquez Rocha highlights the failure of the ***Andean Development Corporation*** to finance the acquisition of modern aircrafts because it required a form of joint exploitation (in ***Visión Retrospectiva***, ***supra***, note 22 at 44).

have a share and equal participation. The promotion of the intra and extra-subregional air traffic starts by offering better service, logical connections, low prices, etc.

The ***ANCOM*** involvement shall only be in passing and administering a communitary "*code of conduct*" to avoid unfair competition and predatory and dumping practices (predatory prices, excesive capacity and frequencies) from Andean and extra-subregional air carriers. The code shall be focused on the "effects" rather than trying to prove the intention.[147] It will be convenient to create an "*ad hoc*" tribunal to solve the differences and apply the rules contained in the "*code of conduct,*" with a structure similar to the ***Board*** of the ***ANCOM***, to guarantee independence, objectivity and, ultimately, protect communitary rights.

Furthermore, this "*code of conduct*" shall also contain an effective "*Dispute Resolution Mechanism.*"[148] It shall contain an expeditous procedure for solving differences. For example, the mechanism may consist of a consultation started by a Member Country (officialy or extra-officially) to the other regarding any differences concerning prices or capacities. If the problem is not solved within the consultation, one of the Parties may submit a claim to the impartial "*ad hoc*" tribunal, which will make a decision within 60 days maximum, and have the final judgement which is binding to Parties involved (similar to a ***Judgement*** of the ***Andean Court of Justice***).[149]

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147 See C. Dudley in ***Visión Retrospectiva***, *supra*, note 1 at 64. E. Vásquez Rocha has highlighted the fact that, following the U.S. legal doctrine, predatory prices are difficult to prove. This is not the case of the European Union, where a Communitary body look after those activities for the benefit of the Union (*Ibid.* at 47).

148 The mechanism set by the Colombia-Venezuela ***BATA*** (with some modifications) may used as basis.

149 See also C.H. Dudley in ***Visión Retrospectiva***, *supra*, note 22 at 64.

Another important involvement of the ***ANCOM*** is the one regarding the establishment of a *"database"* involving bilateral agreements, tariffs and pricing data, statistics, etc. We consider that the ***ANCOM*** bodies, particularly the *Physical Integration Department* (which is part of the ***Board***), are better placed to play this role. The national competent authorities shall (under communitary ruling) inmediately provide all the information needed to support the database. This database will help Member Countries and the "*ad hoc*" tribunal evaluate and react to the irregular air transport activities in the ***ANCOM***, enacting the correctives needed, and will support the negotiating teams for bilateral negotiations, be it with third countries or with another block of countries.

CONCLUSIONS

Latin America is one of the fastest growing markets in air transport. In fact, in the last four years, air transport has increased in Latin America, in general, and the ***ANCOM*** in particular, to the order of 400%. In the ***ANCOM***, air transport activity have moved from a deficitary state to become a profitable activity, increasing the occupational rate, diversifying routes, improving services to users and promoting competitive tariffs.

The implementation of the *Andean Subregional Air Transport Integration Policy* has developed the Subregional air transport market at large. Indeed, new airlines were constituted, new routes were served and more frequencies have resulted from its implementation. The significant increase of air cargo transport within the Andean subregion is the most important result of the implementation of ***Decision 297***.

The legal framework established by ***ANCOM*** regarding air transport is unique and revolutionary. However, this system suffers from profound difficulties coming from the ***ANCOM*** structure itself. In fact, the principle of supranationality within the ***ANCOM*** is not fully understood and is constantly overcome. Member Countries tend to defend their national interests to the detriment of communitary interests.

On the other hand, Air Transport services have long been regulated internally and based on the principles of "reciprocity" and "national flag". Some Member Countries continue to apply these concepts which are contrary to the new communitary principles contained in ***Decisions 297*** and ***320***.

The experience of the ***ANCOM*** in implementing ***Decision 297*** and ***320***, and the difficulties derived from the non-fulfillment of these regulations, are creating negative effects in the Andean Subregional Market. Member Countries are not adapting their

national legislation nor their ***BATA***s to keep pace with the *Andean Subregional Integration Air Transport Policy.*

Member Countries need to agree in defining the principles contained in ***Decision 297*** and ***320*** and their extension and finally comply with them to allow a coherent communitary understanding of the Subregional Air Transport Policy.

The Andean air carriers have to play a more active role in developing and exploiting the Andean Subregional market. These activities are related to economic and technical cooperation. The ***ANCOM*** bodies and national competent authorities shall support and encourage such activities through all means.

The ***ANCOM*** shall develop and enforce a "*code of conduct*" to avoid unfair competition and predatory and dumping practices (predatory prices, excessive capacity and frequencies) from Andean and extra-subregional air carriers. This code shall include a "*Resolution of Conflict Procedure*" and shall be administered by the ***Board*** and enforced through an "*ad hoc*" communitary tribunal whose decisions will have the same status as the ***Judgement*** of the ***Andean Court of Justice***.

Member Countries shall create a database containing all the information relating to air transport to help national authorities, ***ANCOM*** bodies and the "*ad hoc*" tribunal understand the air transport problems and react, in a timely manner, to any abnormality related to the *Andean Subregional Air Transport Integration Policy.*

Finally, we recognize that the legal framework set by the ***ANCOM*** regarding subregional air trasport integration is adequate, although it needs certain adjustments and a common understanding of the concepts and principles involved. It responds the communitary needs for carrying the integration process a step forward, and was correctly implemented through the proper communitary means. Unfortunately, the implementation

has not been successfully achieved, requesting the concertation of Member Countries' political will in this regard.

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GACETA OFICIAL del Acuerdo de Cartagena

Año IX - Número 111

Lima, 19 de junio de 1992

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Decisiones de la Comisión

Decisiones de la Comisión

DECISION 318

Designación de Miembro de la Junta

LA COMISION DEL ACUERDO DE CARTAGENA,

VISTO: El literal c) del Artículo 7 del Acuerdo;

DECIDE:

Artículo Unico.- Designar Miembro de la Junta del Acuerdo de Cartagena al señor doctor Manuel José Cárdenas por un período de tres años que se contará a partir de la fecha en que asuma sus funciones.

Dada en la ciudad de Quito, Ecuador, a los diecisiete días del mes de junio de mil novecientos noventa y dos.

DECISION 319

Suscripción de un Acuerdo Marco entre el Grupo Andino y México

LA COMISION DEL ACUERDO DE CARTAGENA,

VISTOS: Los Artículos 1, 68, 108, 108A y 108B del Acuerdo de Cartagena y el Acta de Barahona, suscrita por los Presidentes de los Países Miembros el 5 de diciembre de 1991;

DECIDE:

Artículo 1.- Suscribir un Acuerdo Marco con México con los siguientes objetivos:

a) Establecer las bases para la negociación de programas de liberación comercial entre México y cada uno de los países o grupos de países del Grupo Andino;
b) Definir los principios fundamentales que incorporarán las negociaciones relativas a origen, cláusulas de salvaguardia, normas sobre competencia, tratamiento en materia de tributos internos, normas técnicas, transporte y solución de controversias; y,
c) Establecer las directrices básicas en materia de cooperación económica, promoción comercial y de las inversiones, compras gubernamentales, propiedad intelectual y propiedad industrial.

Artículo 2.- Se autoriza a los Países Miembros que en desarrollo a lo que se convenga en el Acuerdo Marco, celebren los acuerdos de liberación comercial a que se refiere el literal a) del Artículo 1 de la presente Decisión.

Artículo 3.- Convocar a un Período Extraordinario de Sesiones de la Comisión del Acuerdo de Cartagena, a efectos de examinar el Proyecto de Acuerdo Marco y acordar los términos de la negociación.

Dada en la ciudad de Quito, Ecuador, a los diecisiete días del mes de junio de mil novecientos noventa y dos.

DECISION 320

Múltiple Designación en el Transporte Aéreo de la Subregión Andina

LA COMISION DEL ACUERDO DE CARTAGENA,

VISTOS: El Capítulo XI del Acuerdo de Cartagena, la Decisión 297 "Integración del Transporte Aéreo en la Subregión Andina", y la Propuesta 253 de la Junta;

CONSIDERANDO: Que el artículo 9 de la Decisión 297 "Integración del Transporte Aéreo en la Subregión Andina", establece que los Países Miembros aceptan el Principio de Múltiple Designación en la realización de los servicios regulares de pasajeros, carga y correo, y que el Comité Andino de Autoridades Aeronáuticas adoptará la reglamentación uniforme necesaria para la aplicación de este principio, garantizando en todo caso el libre acceso al mercado;

Que la III Reunión del Comité Andino de Autoridades Aeronáuticas, realizada el 10 y 11 de febrero de 1992, aprobó mediante Resolución CAAA No. III-4, el documento "Múltiple Designación en el Transporte Aéreo de la Subregión Andina", que recoge los principios de la Directriz Presidencial sobre cielos abiertos;

DECIDE:

Artículo 1.- Los Países Miembros podrán designar a una o más empresas nacionales de transporte aéreo con permiso de operación para la realización de servicios de transporte aéreo internacional regular de pasajeros, carga y correo, en cualquiera de las rutas dentro de la Subregión, garantizando el libre acceso al mercado y sin ningún género de discriminación.

Para los efectos de la presente Decisión, se entiende por empresa nacional de transporte aéreo susceptible de ser designada, aquella legalmente constituida en el País Miembro designante.

Artículo 2.- Corresponde al Organismo Nacional Competente, conocer y resolver las peticiones de las empresas de transporte aéreo de su país que pretendan ser designadas para explotar servicios aéreos, de modo regular, dentro de los Países de la Subregión.

Artículo 3.- Recibida la solicitud para ser empresa de transporte aéreo designada, el Organismo Nacional Competente decidirá sobre la misma, así como sobre los pormenores de operación, dentro del plazo máximo de treinta días.

Artículo 4.- El Organismo Nacional Competente, una vez definida la designación, la notificará directamente, por escrito, a cada uno de los Organismos Nacionales Competentes de los Países Miembros en los que el solicitante vaya a ejercer derechos aéreo-comerciales, indicándole la denominación social, las rutas, frecuencias y equipos con los cuales operará.

Artículo 5.- El Organismo Nacional Competente que sea notificado por otro País Miembro, con la designación realizada a una empresa de transporte aéreo, permitirá en forma inmediata la realización de los servicios en las rutas y frecuencias ya autorizadas por el país designante, dentro de un plazo máximo de treinta días de recibida la notificación. Asimismo, éste coordinará con la empresa designada cualquier modificación del horario solicitado que por razones técnicas sea necesario efectuar.

Artículo 6.- El hecho de que una empresa de transporte aéreo haya sido designada para realizar vuelos regulares, en nada afecta su capacidad para realizar vuelos no regulares de pasajeros, carga y correo, cumpliendo los requisitos del artículo 10 de la Decisión 297.

Artículo 7.- Sin perjuicio de lo dispuesto en el Tratado de Creación del Tribunal de Justicia del Acuerdo de Cartagena, cuando se presenten discrepancias u observaciones en relación con el cumplimiento de esta Decisión, los Organismos Nacionales Competentes podrán celebrar entre ellos consultas directas, encaminadas a resolver las diferencias planteadas.

Artículo 8.- La presente Decisión entrará en vigencia el día de su publicación en la Gaceta Oficial del Acuerdo de Cartagena.

Dada en la ciudad de Quito, Ecuador, a los diecisiete días del mes de junio de mil novecientos noventa y dos.

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GACETA OFICIAL del Acuerdo de Cartagena

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Decisiones de la Comisión

Decisiones de la Comisión

DECISION 297

Integración del Transporte Aéreo en la Subregión Andina

LA COMISION DEL ACUERDO DE CARTAGENA,

VISTOS: El Capítulo XI del Acuerdo de Cartagena, el Acta de La Paz, suscrita con motivo del IV Consejo Presidencial Andino, las Recomendaciones emanadas de la II Reunión del Comité Andino de Autoridades Aeronáuticas, la Resolución I-RE.123, de la I Reunión Extraordinaria de Ministros de Transportes, Comunicaciones y Obras Públicas de los Países Miembros del Acuerdo de Cartagena, celebrada en Caracas, Venezuela, los días 13 y 14 de mayo de 1991, y la Propuesta 234/Rev.1 de la Junta;

CONSIDERANDO:

Que el Diseño Estratégico para la Orientación del Grupo Andino señala que "se observa una tendencia general a la apertura de las economías, que busca entre otras cosas, exponer el aparato productivo a los rigores de la competencia e inducir mejores niveles de competitividad", así como "subraya la ejecución de políticas y acciones tendentes a mejorar, ampliar y modernizar la capacidad de la infraestructura y la prestación de servicios de transporte y comunicaciones, cuya insuficiencia y altos costos actuales impiden la rápida y segura vinculación con los centros de producción y de los de consumo";

Que el Diseño Estratégico resolvió en el plano de la integración física regional "realizar una reunión de autoridades nacionales del transporte aéreo a fin de promover acuerdos bilaterales y multilaterales para el mejoramiento de los servicios aéreos subregionales, y de cooperación para el uso conjunto de las capacidades de infraestructura y equipo, y la adopción de posiciones conjuntas ante terceros";

Que en el Acta de La Paz, suscrita con motivo del IV Consejo Presidencial Andino, los Presidentes de los países de la Subregión dispusieron adoptar la política de "cielos abiertos andinos" y encomendaron a la Junta del Acuerdo de Cartagena que efectúe una propuesta para ser analizada en la próxima Reunión del Consejo Presidencial en base a las iniciativas de Venezuela y Colombia al respecto;

Que el Comité Andino de Autoridades Aeronáuticas, en su II Reunión celebrada el 18 y 19 de marzo de 1991, aprobó mediante Resolución CAAA No. II-1, el Documento "Política Andina de Transporte Aéreo", el cual incluye un conjunto de principios que responde, sustancialmente, a la antedicha Directriz Presidencial;

DECIDE:

CAPITULO I

DEFINICIONES

Artículo 1.- Para los efectos de la presente Decisión se entiende por:

Primera Libertad: El derecho de volar a través del territorio de otro país sin aterrizar.

Segunda Libertad: El derecho de aterrizar en otro país para fines no comerciales.

Tercera Libertad: El derecho de desembarcar en un país pasajeros, carga y correo, embarcados en el territorio cuya nacionalidad posee el transportista.

Cuarta Libertad: El derecho de embarcar en un país pasajeros, carga y correo, destinados al territorio del país cuya nacionalidad posee el transportista.

Quinta Libertad: El derecho de embarcar pasajeros, carga y correo en un país distinto del de la nacionalidad del transportista, con destino a otro país de la Subregión o de fuera de ella, también distinto del de la nacionalidad del transportista.

País de Origen: El territorio del Estado cuya nacionalidad posee el transportista que embarca pasajeros y carga y en el que se fijan las tarifas del transporte aéreo respectivo.

Vuelos regulares: Los vuelos que se realizan con sujeción a itinerarios y horarios prefijados.

Vuelos no regulares: Los vuelos que se realizan sin sujeción a itinerarios y horarios prefijados.

Series de vuelos: Dos o más vuelos no regulares que se programan y realizan en conjunto.

Paquete todo incluido: el conjunto del transporte aéreo y servicios turísticos que un viajero contrata como una sola operación.

Certificado de explotación: El documento emitido por la Autoridad Aeronáutica de un País Miembro, por el que se acredita la autorización otorgada a un transportador aéreo para realizar un servicio aéreo determinado.

Múltiple designación: La designación por un país de dos o más líneas aéreas para realizar servicios de transporte aéreo internacional.

País Miembro: Uno de los Países Miembros del Acuerdo de Cartagena.

Junta: La Junta del Acuerdo de Cartagena.

Comisión: La Comisión del Acuerdo de Cartagena.

Organismos Nacionales Competentes: Las Autoridades Aeronáuticas Civiles de los Países Miembros.

CAPITULO II

AMBITO DE APLICACION

Artículo 2.- Los Países Miembros aplicarán la presente Decisión en la realización de los servicios de transporte aéreo internacional regulares y no regulares de pasajeros, carga y correo, entre sus respectivos territorios y entre éstos y países extrasubregionales.

Artículo 3.- La presente Decisión no significará, bajo ninguna circunstancia, restricciones a las facilidades que los Países Miembros se hayan otorgado o pudieran otorgarse entre sí, mediante acuerdos o convenios bilaterales o multilaterales.

Artículo 4.- Sin perjuicio de las libertades que se otorgan en la presente Decisión, los Países Miembros se conceden también los derechos de la primera y segunda libertades del aire.

CAPITULO III

DE LAS CONDICIONES PARA LA REALIZACION DE LOS VUELOS REGULARES Y NO REGULARES DENTRO DE LA SUBREGION

Artículo 5.- Los Países Miembros se conceden el libre ejercicio de los derechos de terceras, cuartas y quintas libertades del aire, en vuelos regulares de pasajeros, carga y de correo, que se realicen dentro de la Subregión.

Artículo 6.- Los Países Miembros adoptan un régimen de libertad para los vuelos no regulares de carga de sus empresas, que se realicen dentro de la Subregión.

Artículo 7.- Los Países Miembros, en cumplimiento de la presente Decisión, y de conformidad con lo dispuesto en la Política Andina de Transporte Aéreo, revisarán los permisos de operación, los acuerdos bilaterales u otros actos administrativos vigentes entre ellos, y efectuarán las modificaciones en función de las mismas, orientándolos al libre intercambio de derechos aerocomerciales intrasubregionales que responda al interés comunitario y asegure una sana competencia y la calidad y eficiencia del servicio de transporte aéreo internacional.

Artículo 8.- En materia de tributación, se aplicarán a las empresas de transporte aéreo de la Subregión las disposiciones pertinentes del Convenio para evitar doble tributación entre los Países Miembros, aprobadas mediante la Decisión 40 de la Comisión.

Artículo 9.- Los Países Miembros aceptan el principio de múltiple designación en la realización de los servicios regulares de pasajeros, carga y correo. El Comité Andino de Autoridades Aeronáuticas adoptará, en el plazo de noventa (90) días de aprobada la presente Decisión, la reglamentación uniforme necesaria para la aplicación de este principio, garantizando en todo caso el libre acceso al mercado.

Artículo 10.- Las autorizaciones para efectuar servicios de transporte aéreo no regulares de pasajeros, carga y correo dentro de la Subregión, por parte de empresas nacionales de los Países Miembros, se otorgarán automáticamente por los correspondientes Organismos Nacionales Competentes.

En el otorgamiento de las autorizaciones para la realización de vuelos no regulares de pasajeros, se observarán las siguientes condiciones:

a) Se presentarán las solicitudes ante la respectiva Autoridad, acompañadas de los documentos que contienen los certificados de explotación del país de la nacionalidad de la empresa y del contrato contentivo de los seguros correspondientes. Estos documentos pueden estar contenidos en una certificación expedida por el Organismo Nacional Competente.

b) Se autorizarán para ser realizados entre puntos en los que no existan servicios aéreos regulares establecidos. En los casos en que dichos servicios regulares existan, las autorizaciones se otorgarán siempre que la oferta de los vuelos no regulares no ponga en peligro la estabilidad económica de los servicios regulares existentes.

c) Cuando se soliciten series de vuelos no regulares, los mismos deberán responder a la realización de "paquetes todo incluido" y se cumplirán necesariamente en una ruta de ida y vuelta, con salidas y retornos prefijados.

El incumplimiento de estas condiciones ocasionará la aplicación de las respectivas sanciones, de acuerdo con la legislación vigente en cada País Miembro.

CAPITULO IV

DE LAS CONDICIONES PARA LA REALIZACION DE VUELOS EXTRASUBREGIONALES

Artículo 11.- Los Países Miembros se concederán, antes del 31 de diciembre de 1992, sujeto a negociaciones bilaterales o multilaterales, manteniendo el principio de equidad, y bajo fórmulas adecuadas de compensación, derechos de tráfico aéreo de quinta libertad en vuelos regulares y establecerán las condiciones para la realización de vuelos no regulares de pasajeros, que se realicen entre países de la Subregión y terceros países.

Artículo 12.- Los Países Miembros adoptan un régimen de libertad para los vuelos no regulares de carga de sus empresas, que se realicen entre países de la Subregión y terceros países.

CAPITULO V

DEL COMITE ANDINO DE AUTORIDADES AERONAUTICAS

Artículo 13.- El Comité Andino de Autoridades Aeronáuticas, creado por Resolución V.104 de la V Reunión de Ministros de Transportes, Comunicaciones y Obras Públicas de los Países Miembros, será el encargado de velar por el cumplimiento y aplicación integral de la presente Decisión.

Artículo 14.- El Comité Andino de Autoridades Aeronáuticas estará integrado por la autoridad responsable de la aeronáutica civil de cada País Miembro y por su subrogante, quienes actuarán como Representantes Titular y Alterno de dicho país, respectivamente, y se acreditarán ante la Junta.

Artículo 15.- El Comité Andino de Autoridades Aeronáuticas tiene las siguientes funciones:

a) Velar por y evaluar la aplicación de las Decisiones de la Comisión en materia de transporte aéreo;

b) Recomendar soluciones a los problemas que se presenten en esa materia en la Subregión y fuera de ella;

c) Las que señalen las Decisiones de la Comisión;

d) Recomendar objetivos, políticas, programas y acciones que desarrollen y faciliten los servicios aéreos;

e) Promover la armonización y actualización de las normas, técnicas y disposiciones legales vigentes en los Países Miembros en materia aeronáutica;

f) Poner en conocimiento de la Junta o de los organismos nacionales competentes, los documentos de trabajo y orientaciones previamente analizados en las reuniones del Comité para concretar resoluciones y acuerdos relacionados con el sector aeronáutico;

g) Solicitar a la Junta o por intermedio de ella a los organismos nacionales competentes y a los organismos internacionales, el apoyo necesario para realizar estudios, seminarios, programas de trabajo y demás acciones encaminadas a efectivizar y modernizar los servicios para el transporte aéreo;

h) Registrar y difundir en forma permanente la información sobre las empresas aéreas que operan en la Subregión Andina, las estadísticas sobre movimientos de pasajeros y mercancías, y las normas y disposiciones aplicables en cada País Miembro en materia de transporte aéreo;

i) Constituir grupos de trabajo destinados a elaborar estudios o realizar acciones que complementen las resoluciones emanadas del Comité;

j) Concertar posiciones conjuntas para las negociaciones frente a terceros que permita obtener los máximos beneficios para la Subregión, para lo cual, en cada caso, creará un equipo de negociación; y,

k) Dictar su propio reglamento.

Artículo 16.- El Comité Andino de Autoridades Aeronáuticas se reunirá por lo menos dos veces por año en sesiones ordinarias, las que se llevarán a cabo el primer y tercer trimestre de cada año.

También se reunirá en sesiones extraordinarias cuando lo solicite uno o más de los organismos nacionales competentes de los Países Miembros, la Junta o la Comisión.

CAPITULO VI

DISPOSICIONES GENERALES

Artículo 17.- Cada País Miembro comunicará a los restantes Países Miembros el nombre de las empresas nacionales designadas y los derechos aerocomerciales que las mismas ejercerán, tanto en la Subregión como fuera de ella. También se comunicarán entre ellos el nombre de las empresas extrasubregionales y los derechos aerocomerciales que las mismas ejercerán.

Artículo 18.- Cada País Miembro comunicará en forma oportuna a los restantes Países Miembros y a la Junta, las disposiciones nacionales vigentes en sus respectivos países para otorgar las autorizaciones de rutas, frecuencias, itinerarios y horarios para los vuelos regulares, así como para las autorizaciones de los vuelos no regulares.

Artículo 19.- La Comisión, dentro del plazo de ciento ochenta (180) días calendario, contados a partir de la entrada en vigencia de la presente Decisión, adoptará y pondrá en vigor una normativa orientada a prevenir o corregir las distorsiones generadas por competencias desleales en los servicios de transporte aéreo.

Artículo 20.- En materia de tarifas intrasubregionales se aplicará el principio de país de origen.

Artículo 21.- La presente decisión entrará en vigencia el día de su publicación en la Gaceta Oficial del Acuerdo de Cartagena.

Dada en la ciudad de Caracas, Venezuela, a los dieciséis días del mes de mayo de mil novecientos noventa y uno.

GACETA OFICIAL del Acuerdo de Cartagena

Año X - Número 156

Lima, 10 de junio de 1994

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LA COMISION DEL ACUERDO DE CARTAGENA,

VISTOS: La Decisión 297 de la Comisión y la Propuesta 265 de la Junta;

CONSIDERANDO: Que las distintas interpretaciones que las autoridades nacionales competentes vienen dando al texto vigente del artículo 5 de la Decisión 297, ha traído como consecuencia limitaciones y restricciones en su aplicación, afectando el funcionamiento del sistema de transporte aéreo al interior de la Subregión, particularmente en lo que corresponde al transporte exclusivo de carga;

Que el Comité Andino de Autoridades Aeronáuticas (CAAA) ha considerado importante que se precisen las definiciones de "vuelos regulares" y "vuelos no regulares", con el propósito de hacerlas compatibles con los criterios que sobre estos conceptos tiene la Organización de Aviación Civil Internacional (OACI);

Que es necesario que los preceptos contenidos en la norma comunitaria señalada, reflejen la orientación dada por los Presidentes de los Países Miembros, de concederse libertad total en la realización de las operaciones de transporte aéreo entre los Países Miembros;

DECIDE:

Artículo 1.- Sustituir las definiciones de "vuelos regulares" y "vuelos no regulares" contenidos en el artículo 1 de la Decisión 297, por los siguientes textos:

"Vuelos regulares, los que se realizan con sujeción a itinerarios, horarios prefijados y que se ofrecen al público mediante una serie sistemática de vuelos. Tales condiciones deben cumplirse en su conjunto.

Vuelos no regulares, los que se realizan sin sujeción a la conjunción de los elementos que definen los vuelos regulares."

Artículo 2.- Sustituir el artículo 5 de la Decisión 297, por el siguiente texto:

"Artículo 5.- Los Países Miembros se conceden el libre ejercicio de los derechos de tercera, cuarta y quinta libertades del aire en vuelos regulares combinados de pasajeros, carga y correo, o exclusivos de pasajeros o de carga, que se realicen dentro de la Subregión."

Artículo 3.- Sustituir el artículo 12 de la Decisión 297, por el siguiente texto:

"Artículo 12.- Los Países Miembros adoptan un régimen de libertad para los vuelos no regulares de carga de sus empresas, que no constituyan un conjunto sistemático de vuelos entre un mismo origen y destino, que se realicen entre países de la Subregión y terceros países."

Dada en la ciudad de Lima, Perú, a los veintiséis días del mes de mayo de mil novecientos noventa y cuatro.

DECISION 361

Modificación de la Decisión 320 "Múltiple Designación en el Transporte Aéreo en la Subregión Andina"

LA COMISION DEL ACUERDO DE CARTAGENA,

VISTOS: Las Decisiones 297 y 320 de la Comisión y la Propuesta 266 de la Junta;

CONSIDERANDO: Que en la aplicación de la Decisión 320, las empresas designadas por los Países Miembros del Acuerdo de Cartagena han identificado los requerimientos exigidos por las autoridades nacionales competentes, para permitirles las operaciones de transporte aéreo en sus respectivos territorios;

Que el Comité Andino de Autoridades Aeronáuticas (CAAA) ha señalado la importancia de armonizar los requisitos que deben cumplir las empresas aéreas designadas para operar en la Subregión Andina;

DECIDE:

Artículo 1.- Sustituir el artículo 5 de la Decisión 320, por el siguiente texto:

"Artículo 5.- El organismo nacional competente que sea notificado por otro País Miembro, con la designación hecha a una empresa de transporte aéreo, permitirá la realización de los servicios en las rutas y frecuencias autorizadas por el país designante, dentro de un plazo no mayor de treinta (30) días calendario, contados a partir de la fecha de recepción de la notificación, y previo el cumplimiento de los siguientes requisitos:

1. Copia del Permiso de Operación otorgado por la autoridad designante, debidamente legalizada o autenticada, conforme a la legislación del país receptor;

2. Acreditar la representación legal y cumplir los requisitos sobre inscripción comercial o domicilio, todo ello de conformidad con el orden jurídico del País Miembro receptor;

3. Certificación de las pólizas de seguro, de acuerdo con las exigencias internacionales aceptadas para el transporte aéreo; y,

4. Acreditación del pago de los derechos por concepto de otorgamiento del permiso de operación que establezca el país receptor.

Los documentos descritos en los numerales anteriores, serán presentados por la empresa designada ante el organismo nacional competente del País Miembro receptor, quien coordinará con la empresa cualquier modificación del horario solicitado que por razones técnicas sea necesario efectuar."

Artículo 2.- Incluir a continuación del artículo 7 de la Decisión 320 el siguiente artículo:

"Artículo...- Los Países Miembros que en sus legislaciones exijan la presentación de certificados sobre carencia de informes o procesos sobre narcotráfico y subversión, podrán requerir el cumplimiento de este requisito a las empresas aéreas designadas, mientras así lo establezca su legislación nacional."

Dada en la ciudad de Lima, Perú, a los veintiséis días del mes de mayo de mil novecientos noventa y cuatro.

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