

## DISPUTE SETTLEMENT WITHIN THE ANDEAN COMMUNITY

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### Introduction

The aim of this article is to give an outline of the current dispute settlement procedure of the Andean Community. In so doing some attention is also paid to the recent reforms regarding the “Court of Justice of the Andean Community”.

For a better understanding of the topic, the article will be divided into two sections. In the first section, I provide some background information on the Andean Community as it has developed until recently. In the second section, I will explain more in depth the different available procedures for the settlement of disputes used by the Andean Court.

This article does not explain specific legal technical details. The aim is rather to approach the subject in a practical manner, in order to provide some insight to those unfamiliar with the Andean Community.

### I. Background Information<sup>1</sup>

The development of reaching an agreement regarding sub-regional integration between the States sharing the Andean mountain range, began on August 16, 1966 with the “Declaration of Bogotá”. With this declaration the signatory parties agreed to create a joint commission with the objective to propose measures to impel the commitments acquired in the Declaration and to aim for a creation of a regional common market. Subsequently, on May 26, 1969, the Republics of Bolivia, Colombia, Chile, Ecuador and Perú, signed in Bogotá the “Cartagena Agreement”, by which they established the “Andean Pact”. The main objectives of this agreement are outlined in its first chapter, and are all aimed at the general development of the Member States, with specific emphasis on the creation of a common market and a better level of life for its inhabitants. The Republic of Venezuela signed the “Cartagena Agreement” on February 13, 1973. On October 30, 1976 the Republic of Chile denounced the treaty, and thus left the Andean Pact.

The main organs of the Andean Pact were the Commission and the Board. The Andean Court of Justice was created later, on May 28, 1979.

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<sup>1</sup> Based on the article “El sistema de solución de controversias en la Comunidad Andina (CAN)”. Author: José Antonio Pejovés Macedo. Published in the Website of the Andean Community (<http://www.comunidadandina.org/>). Visited on October 15 -2004.

A major reform to the Cartagena Agreement resulted from the “Trujillo Protocol”. The Trujillo Protocol was signed in March 1996, following the “VIII meeting of the Presidential Andean Council”. It modified the structure of the Andean Pact and converted it into the current “Andean Community” (CAN). The Trujillo Protocol aims to give to the Community the necessary instruments to challenge the 21<sup>st</sup> century, creating among others, the Andean System of Integration (ASI), with the objective to provide a more dynamic and effective coordination between the organs of the Community. In addition, it incorporates the Andean Presidential Council, the Council of Foreign Ministers and the General Secretariat into the institutions of the Community, and introduces some changes with respect to the Commission.

The Andean System of Integration (ASI) is conformed by the Andean Presidential Council (highest level body of the Community), the Andean Council of Foreign Ministers, and the Andean Community Commission, which all have competence as organs of direction and decision in the system. The General Secretariat is the executive organ of the Community and is located in Lima, Perú. The General Secretariat is headed by the Secretary General of the Community, and replaces the former Board. The judicial authority in the Community is the Andean Court of Justice, located in Quito, Ecuador. The Andean Parliament is the deliberating body of the Community and is starting to be elected by universal direct suffrage by the inhabitants of the Member States. The Parliament is located in Bogotá, Colombia. Other institutions are the Business Advisory Council and the Labor Advisory Council. The Andean Development Corporation (ADC) and the Latin American Reserve Fund (LARF) are the financial institutions of the system. Finally, the Simón Rodríguez Convention, the Simón Bolívar University and other advisory councils created by the Commission or institutions created within the framework of the sub regional integration should be mentioned.

Of all these institutions, the most important ones are the Andean Presidential Council, the Andean Council of Foreign Ministers, the Andean Community Commission, the Andean Parliament, the General Secretariat, and the Andean Court of Justice.

The Andean Court of Justice has the authority regarding the following procedures: nullity action, action to declare noncompliance, prejudgment interpretation, action due to omission or inactivity. Some major reforms were introduced by the “Cochabamba Protocol”, signed on May 26, 1996. This Protocol modified the procedures mentioned above, and introduced two new functions: arbitration and labor jurisdiction. The Cochabamba Protocol has not yet entered into force, as not all Member States deposited the required ratification instruments with the General Secretariat.

## **II. The Settlement of Disputes in the Andean Community**

In International Organizations, there are two ways to approach disputes: the political approach (conducted via diplomacy), and the judicial approach. The Andean Community is not an exception; each institution of the ASI has its political (diplomatic) negotiations to reach a final decision, taking into account the interests of the Member States, and, finally, of the Community as a whole. The decision making is conducted

in accordance with a standard procedure, where the initiatives are weighted and carefully studied to ensure that all the Member States are satisfied. In the judicial approach, as applied by the Andean Court of Justice (ACJ)<sup>2</sup>, there are no political negotiations. All decisions are based on Community law, and are binding to all Member States and its inhabitants without the need of homologation or exequatur by national authorities. The decisions of the ACJ cannot be appealed to other instances and have authority of *res judicata*. The Member States have to respect the competence of the ACJ and can not impose any national measures that may hinder Community law. In effect this means that the Member States have attributed the role of administration of justice to a supranational court.

It is the judicial settlement procedure that this article will focus on.

### II.1. General rules<sup>3</sup>

The Community law of the Andean Community consists of Treaties, Protocols and Decisions. The most important ones are the Cartagena Agreement, its Protocols and additional instruments, the Treaty establishing the Andean Court of Justice and its modification Protocols, the Trujillo Protocol, the Decisions of the Andean Council of Foreign Ministers and of the Andean Community Commission, the Resolutions of the General Secretariat (which are binding, because they develop primary Community law), the Cochabamba Protocol, the Statute of the Andean Court of Justice<sup>4</sup> the Agreements of industrial complementation and other Agreements that the Member States adopted in the framework of the Andean integration process.

The ACJ is composed of five Magistrates, one for each Member State. The Court has territorial jurisdiction in all Member States.

The figure of Advocate General, with a similar role to the figure in the European Union, is outlined in the statute of the Court, but is not yet implemented in practice.

For the functioning of the Court, there are some general rules regarding the procedure:

- Sessions: There are two kinds of sessions of the Court: administrative sessions, and judicial sessions.
- Deliberations: The deliberations of the Court are reserved until there are no definitive decisions relating to a given subject.
- Quorum: There are two kinds of quorums, the deliberative one, and the de-

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<sup>2</sup> Arts. 40, 41, 47 "Cartagena Agreement".

[http://www.comunidadandina.org/ingles/treaties/trea/ande\\_trieb1.htm](http://www.comunidadandina.org/ingles/treaties/trea/ande_trieb1.htm) (Visited on October 14 – 2004)

<sup>3</sup> Statute of the Andean Community Court of Justice. [http://www.tribunalandino.org.ec/estatuto\\_del\\_tribunal.htm](http://www.tribunalandino.org.ec/estatuto_del_tribunal.htm) (Visited on October 14 – 2004).

<sup>4</sup> Decision 500/01 of the Andean Council of Foreign Ministers.

cisive one. For the administrative affairs the deliberative quorum is of at least three Magistrates; the decisive quorum is of at least three Magistrates present and the conformed vote of at least three of them. For the judicial affairs, the adoption of substantiation acts will be in charge of the presenter Magistrate. The interlocutory acts will need the presence of at least three Magistrates and the conformed vote of at least three of them. The adoption of final decisions, and of interlocutory acts finishing procedures, requires the presence of all the five judges, and the conformed vote of at least three of them. For the labor jurisdiction and the prejudgment interpretations, the Court needs to deliberate and decide the presence of at least three Magistrates and the conformed vote of at least three of them.

- Language: The procedure before the Court are in Spanish. For documents in another language the simple translations could be used unless the Court requires the official one. Dialects can be used but, they must be accompanied by its translation into Spanish.

The decisions of the Court are published in the Official Gazette of the Community and, because those decisions stress or interpret some important points of Community law, they constitute a precedent for the solution of future controversies, not only for the ACJ, but also for the national judges of the Member States.

More specific aspects of the procedure before the Court can be found in the Statute of the Andean Court of Justice.<sup>5</sup>

Under the jurisdictional or judicial way of dispute settlement the following actions can be found: the nullity action, the action to declare noncompliance, the prejudgment interpretation, the action due to omission or inactivity, the arbitration function, and the labor jurisdiction. These actions will be analyzed below.

## II.2. Nullity Action

The main objectives of the nullity action<sup>6</sup> is the control of legality of Community law. From this point of view, the Court can nullify Decisions of the Andean Council, Foreign Ministers, or the Andean Community Commission, Resolutions of the General Secretariat, Agreements of industrial complementation, and other Agreements that Member States adopt in the framework of the Andean integration process.

The applicants of this action can be the Andean Council of Foreign Ministers, the Andean Community Commission and the General Secretariat. The Member States can only initiate this procedure if the Decisions or Agreements are not approved with its affirmative vote. The natural and legal persons can only request the nullity if the Community law affects their subjective rights or legitimate interests.

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<sup>5</sup> Statute of the Andean Community Court of Justice. [http://www.tribunalandino.org.ec/estatuto\\_del\\_tribunal.htm](http://www.tribunalandino.org.ec/estatuto_del_tribunal.htm) (Visited on October 14 – 2004).

<sup>6</sup> Arts. 101-106 “Statute of the Andean Community Court of Justice”. Arts. 17-22 “Cochabamba Protocol”.

The nullity action can be initiated until two years following the date of entry into force of the Community law in question. However, after that time, if a case is presented before a national court and deals with Community law in some of its parts, an inapplicability request can still be presented. In that case, the national judge has to consult the ACJ, which will give an opinion about that point of the case, and that opinion will be mandatory to adopt by the national judge.

The interposition of this action will have a deferred effect to the contested law, but if the ACJ considers that it will provoke an irreparable damage it can order the temporary suspension of the law. In its final decision, if the ACJ nullifies a legislative measure, it will have to point out the effects of its decision in time, and the organ of the Community in charge will have to adopt corrective measures to make up the situation.

### **II.3. Action to Declare Noncompliance**

The noncompliance action<sup>7</sup> is an action to complain before the Court with respect to the failure of a Member State to comply with its obligations under Community law. The failure to comply with an obligation can be positive, that is, issuing norms or acts that hinder Community law, or negative, that is, by failing to act (omission) or by issuing norms or acts opposed to the obligation.

For this action to be operative there is first an administrative procedure before the General Secretariat.<sup>8</sup> In this procedure, the General Secretariat, by its own initiative, or upon the initiative of a Member State, or a natural or legal person with affected interests, will formulate the observations in writing to the Member State and give it a term to answer, which can not be more than sixty days. When the General Secretariat receives the answer or the sixty days term expires, the General Secretariat will issue a final motivated decision, which must be issued within the next fifteen days. The final decision concludes the compliance or noncompliance of the obligations of the Member State.

The privileged applicant to this action is the General Secretariat. Exceptionally, in case the General Secretariat fails to initiate the action (it has a term of sixty days maximum after having issued its final decision), or does not issue a final decision (in a term of sixty-five days after the compliant has come to their knowledge) or decides in the final decision that there has not been a noncompliance, the other Member States or the natural or legal persons affected can invoke the action directly before the Court (or before a national court, but this procedure would exclude the procedure before the ACJ).

If the final decision of the General Secretariat concludes a noncompliance and the Member State persists in its behavior, the General Secretariat must bring the action before the ACJ. In that case, the Member State affected by the noncompliance, can

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<sup>7</sup> Arts. 107-120 "Statute of the Andean Community Court of Justice". Arts. 23-31 "Cochabamba Protocol".

<sup>8</sup> Decision 425 of the Andean Council of Foreign Ministers.

join the procedure. The Court, then, can decide according to its procedure.

If the ACJ decides that the Member State is failing to comply with its obligations, the Member State has to take all necessary measures (and especially those mentioned in the decision) within ninety days after notification of the decision. It is a responsibility of the Court to follow the compliance with its decision. If the Member State does not comply, the ACJ, after having heard the opinion of the General Secretariat, can take other measures, which it considers convenient and which can comprehend the suspension or restriction of the benefits granted under the Cartagena Agreement.<sup>9</sup>

The decisions of the ACJ can be reviewed by itself, but only if there is a fact that was unaware or unknown at the moment of the decision which could change its result. The time limit to start this review procedure is ninety days after the fact was discovered or in all cases, within a year of the issuing of the decision.

The temporary suspension of Community law operates in this action as well.

#### **II.4. Prejudgment Interpretation**

The main objective of the prejudgment interpretation procedure<sup>10</sup> is to give the ACJ the responsibility to ensure the uniform application of Community law in all Member States. The Court gives an interpretation of Community law, which is binding for national judges. The procedure will be initiated by national judges if Community law is applicable or argued in cases brought before the national court. Accordingly, there are two possibilities: the mandatory request for interpretation, and the optional request for interpretation. The mandatory request for interpretation is applied *ex officio* by the judge, or if one of the parties requests it, the case must be one of unique or last instance and without any other resources in internal law. The procedure of internal law must be suspended until the interpretation of the Court is received.

In the optional request for interpretation, the national judge may request an interpretation of the Court. This possibility applies to cases which can be appealed in domestic law. In this case the national procedure is not suspended. This means that if the time comes to issue a final decision by the national judge, and the interpretation of the Court has not been received, the judge can issue a final decision. However, if the interpretation is received on time, the judge is bound to decide accordingly.

The ACJ will have thirty days after the admission to issue a final decision / interpretation. In this decision the Court will only be able to refer to the content and scope of the Community law in the context of the case, and will not be able to refer to the scope or content of national law, neither to judge the facts of the case.

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<sup>9</sup> Arts. 112 – 120. Statute of the Andean Community Court of Justice. [http://www.tribunalandino.org.ec/estatuto\\_del\\_tribunal.htm](http://www.tribunalandino.org.ec/estatuto_del_tribunal.htm) (The official version is only available in Spanish).

<sup>10</sup> Arts. 121-128 “Statute of the Andean Community Court of Justice”. Arts. 32-26 “Cochabamba Protocol”.

The national judges that requested interpretations must send a copy of the final decisions issued in the national court to the ACJ, in order to ensure the fulfillment of its obligations.

In addition, if the judge does not comply with its obligations (to adopt the interpretation in its final decision or to request the interpretation), the Member State or a legal or natural person affected, can exercise the action of noncompliance before the ACJ to solve the issue.

### **II.5. Action due to Omission or Inactivity**

The objective of this action<sup>11</sup> is to compel the Andean Council of Foreign Ministers, the General Secretariat, or the Andean Community Commission to execute an obligation or activity they should do according to the Community law, but, that for any reason, they have not executed yet.

The applicants for this action are: the Andean Council of Foreign Ministers, the General Secretariat, the Andean Community Commission, the Member States and any natural or legal person whose rights or interests are affected.

Before this action can be brought to the ACJ, a written requirement (administrative procedure) has to be sent to the institution responsible of fulfillment of the obligation, requesting such activity. If within the thirty following days there is no answer, or the answer given is not satisfactory, the petitioner can appeal to the ACJ to rule on the issue. After admission, the ACJ will ask for an explanation from the president of the body accused to fail with the obligation, and after that, will have thirty days to issue a decision, based on the explanations given, the technical documentation and the backgrounds of the case. The decision should specify the way, form and period by which the obligation should be fulfilled.

### **II.6. Future Functions of the ACJ**

As mentioned in section I, with the entry into force of the Cochabamba Protocol, two new functions will be added to the jurisdiction of the ACJ: labor jurisdiction and an arbitration function. Although the Protocol has not yet entered into force, this section will briefly describe these future functions of the ACJ.

#### **II.6.1. Labor Jurisdiction**

The objective of this action<sup>12</sup> is to give the Court jurisdiction to solve the controversies arising between institutions of the Andean Community and its employees related to labor matters or labor relationships. In doing so, the Court will have to take into account applicable law in order to solve this kind of controversies the general principles recognized by the ILO, and the common principles to the Member States.

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<sup>11</sup> Arts. 129-134 "Statute of the Andean Community Court of Justice". Art. 37 "Cochabamba Protocol".

<sup>12</sup> Arts. 135-139 "Statute of the Andean Community Court of Justice". Art. 40 "Cochabamba Protocol".

To invoke this action, it is a *sine qua non* requisite that the employee sends a requirement (administrative procedure) to the institution, claiming for the possible rights violated. The institution will have thirty days to answer. If the institution does not answer within that period, or if the answer is totally not or partially in favor of the petitioner, he/she can bring the action before the ACJ. In this action, a conciliation procedure can be exercised at any moment. The possibility to undertake the action will expire three years after the occurrence of the fact or act which originated the petition.

### **II.6.2. Arbitration Function**

The main objective of the arbitration function<sup>13</sup> is to give the ACJ competence to act as an arbitration court, to settle disputes between institutions of the Community or those institutions and third parties. The ACJ is given the competence to settle disputes relating to the application and interpretation of contracts, conventions or agreements related to Community law.

For this function to be exercised by the Court, the parties have to agree with the competence, and the form to settle (law or equity).

In addition, arbitration functions can be given to the General Secretariat of the Community by private parties, to settle aspects of private contracts governed by the Community law. The award has to be issued according to equity, and the parties can choose whether it would be final.

### **Conclusions**

The institutions for the settlement of disputes in regional organizations are very important in the sense that they facilitate the formation and achievement of the main objectives of a Community, not only by giving confidence to the Member States about the seriousness of the organs in which they have trusted aspects of its sovereignty, but furthermore, giving decisions based on clear rules, giving impulse to the integration process with new interpretations, bringing legal security to the system and what in most of the cases is more important, giving a proper enforcement to its decisions.

The system used in the Andean Community is a modern system, independent of other bodies, and which can be adapted to the changing situation of today's economic world. The system has a clear point of commitment, conformed by highly qualified Judges. The decisions of the Andean Court of Justice are binding to the parties and can be enforced in the Member States; the applicants for the different procedures are the Member States, the Community institutions and the natural and legal persons. This provides a great variety in participation. The right of defense of the parties is guaranteed because of the opportunities they have to argue and present proofs. Deci-

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<sup>13</sup> Arts. 38-39 "Cochabamba Protocol".

sions are published and there is a strong precedent system, which guarantees legal security.

In other integration processes, such as MERCOSUR, CARICOM, ASEAN, African Union and SADC, the system of settlement of disputes is not as developed as it could be. Often, this is due to lack of commitment of Member States, or systems that are non-enforceable and in many ways, slow and disorganized. Furthermore there are no clear actions and no clear procedures.

The ACJ has developed a clear system through the years. It is still developing, and has established a clear rule of hierarchy and independence of laws. It separates national and Community law, but keeps them connected, through the Cartagena Agreement, its Protocols and the precedent system.

The ACJ has served as a motor of integration for the Community, due to the impulse it has given to the Community rules, and its authority, respected within the other organs and Member States. Moreover, helping to abolish protectionist or improper measures, and pointing the weaknesses of national authorities to achieve integration.

The Andean system has managed well, relating to the aspects mentioned above, despite the lack of resources due to the budgetary problems of the Community as a whole. It is an example to the world in all those aspects.

In addition, the Andean Community does not have courts of less hierarchy like in other organizations, leaving all the legal disputes in the hands of one body. This point is arguable logical because of the size and amount of legal disputes of the Andean Community. It also marks an important point because of the lack of an appealing procedure to a higher instance, leaving only as a resource a review to the same Court under certain preexistent conditions. Furthermore, it has been a clever strategy to decentralize the settlement of disputes, giving authorities and national courts power to settle disputes relating to Community law, with the help of communitarian instruments. The national courts are not part of the hierarchy, but play a fundamental role in the application of the Community law in the Member States and, consequently, with the application of the rulings of the ACJ as a supranational institution. A very good example of this aspect is the common use of the prejudicial interpretation procedure, which has been a powerful instrument to make national judges aware of the importance of Community law and its paper in the daily life of the Member States. However, there is still a long way to go before these problems will be solved.

As a weak point it can be stressed that the lack of will of Member States to promote the Community as an organization (including its system of settlement of disputes) closer to the citizen, showing it as something useful to get a better quality of life, and to not promote its legal framework specially in the faculties of law of the universities of the Member States, which is something serious if we interpret that as that the same lawyers within the Community are ignorant of this aspects.