

# A NOTE ON THE CREATION OF THE ANDEAN TRIBUNAL

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In a public declaration at Bogota, Colombia in late 1977, the Presidents of Venezuela, Colombia, Ecuador, Peru, and Bolivia—countries constituting the Andean Group created by the 1969 Cartagena Agreement<sup>1</sup>—expressed their intention to establish a judicial organ of the Agreement, to be designated the Andean Tribunal. This international court, the first of its kind in Latin America, will begin its juridical functions by December 31, 1979.

In the two meetings held since the announcement at Bogota, experts representing the member nations analyzed and discussed the draft treaty submitted by the Legal Department of the Junta.<sup>2</sup> The last of these meetings, which took place in October 1978, ended with a general consensus on the main points of the draft. However, provisions for time, place and other final details were left for later negotiation. In the closing months of 1979, the member countries will meet again to complete the draft and vote on ratification.

The current draft treaty is basically divided into five parts. The first part outlines the rules constituting the legal system of the Andean Group. These rules will be applied by the Tribunal to accomplish the process of Andean integration, something not done by previous treaties. According to the draft, the Andean legal system is comprised of complementary treaties, modificatory protocols, decisions of the Commission,<sup>3</sup> resolutions of the Junta, and “other rules.”

The authors of the draft hoped that the references to “other rules” would provide a certain flexibility in the document. In this way, there could be recognition for various accepted points of law which, for political or technical reasons, the countries chose not to formally incorpo-

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1. Cartagena Agreement on Andean Subregional Integration, May 26, 1969, *reprinted in* 8 INT'L LEGAL MATERIALS 910.

2. The Legal Department of the Junta is the technical body which formulates the policies of the Commission of the Cartagena Agreement. The Junta (or Board) and the Commission are the two principal organs of the Agreement. *Id.* art. 5.

3. The Commission of the Cartagena Agreement is the supreme authority of the Andean Group. *Id.* art. 6.

rate in treaties, protocols, decisions, or resolutions. However, the delegates felt that the phrase was too vague to be useful. After some discussion, the delegates decided to satisfy the need for flexibility by including Tribunal judgments as a source of Andean community law. This more clearly defined the interpretive organs of the system and, at the same time, allowed some freedom in the Andean integration process.

The second part of the draft treaty deals with the judicial composition of the Tribunal. The original provision submitted by the Junta proposed a court of three judges, who could be nationals of any Latin American country. However, almost all the delegates at the last meeting felt that three justices would be insufficient to deal with the volume of important cases to be brought before the Tribunal. After extensive discussion, the number of justices was increased to five.

The delegates also agreed that judges should come only from the member countries of the Cartagena Agreement, and that the requirements for eligibility in the Andean judiciary should be identical to those of the candidate's national Supreme Court. The appointment of the justices, and also their removal for misconduct, is to be by unanimous vote of the representatives of the member countries. The terms of the judges will be initially of differing lengths, so that the composition of the Tribunal changes periodically, while maintaining a certain degree of continuity. Afterwards, judges will be appointed for six-year periods, and can be reappointed continuously until retirement.

The three remaining parts of the draft delineate the express judicial functions of the Tribunal. The Tribunal recognizes three types of actions: illegality, non-compliance, and interpretation. In an action to determine illegality, the Tribunal will entertain suits against the Commission or the Junta for infringements of the Cartagena Agreement, complementary treaties, or modificatory protocols. Significantly, this is an action which may be brought by member countries as well as by private individuals and corporations from any country. Thus, this action will cover all cases involving failure by the Commission or the Junta to comply with the mandatory rules of the Andean legal system, and all cases involving "*ultra vires*" actions. Upon finding a violation, the Tribunal shall order the modification or elimination of the infringement, and the Commission or Junta must comply within a specified period of time.

In an action of non-compliance, the Commission, the Junta or any combination of member states, can bring an action against any member-state not in compliance with the rules of the Andean legal system, *i.e.*, the provisions of the Cartagena Agreement, complementary trea-

ties, modificatory protocols, decisions of the Commission, or resolutions of the Junta. This action will cover countries which do not implement the different programmed stages of the integration process or which receive undue benefits through non-compliance with a mandatory provision. In such cases, the Tribunal can order the specific performance of the violated provision, suspend the member's common market benefits or even order the country's withdrawal from the Andean Group. Although private individuals and corporations can only sue a member-state before that state's courts, the national court will be expected to request the opinion of the Andean Tribunal.

As was to be expected, the issue that raised the greatest controversy was the question of actions for interpretation. These actions require the court of last resort of a member country (*i.e.*, either a Supreme Court or a lower court from which an appeal is not allowed) to consult the Andean Tribunal in all matters involving the interpretation of Andean Group rules. The Tribunal will consider the merits of the case, issue an opinion on the correct interpretation of the rules, and remand the case back to the national court. The national court will then be bound to render judgment according to the Tribunal's interpretation.

It could be argued that although important, the other two actions are merely ordinary legal devices for the resolution of the various conflicts arising in the usual relations between parties to a treaty. In contrast, the action of interpretation implies relinquishing an important part of national judicial sovereignty in favor of a communitarian jurisdiction. Thus, the action of interpretation is probably the key to determining whether there has been real progress towards the effective integration of the Andean Group — whether, after ten years, some of the original goals of the Andean Commission have been achieved.

The adoption of this treaty will be a meaningful step towards the integration of Latin America and will help alter patterns of nationalistic thinking that very often are even stronger and more difficult to overcome than tariff and customs barriers. Although in theory it is still possible that the Andean leaders might change their minds before signing the treaty, recent declarations of heads of state and high-ranking officials make it possible to look forward to the creation of the Andean Tribunal with confidence and growing hope.