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by E. Anaya Vera and R. Polanco Lazo

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The Court of Justice of the Andean Community: A New Forum for the Settlement of Foreign Investment Disputes?

Esther Anaya Vera[1]*, Rodrigo Polanco Lazo*[2]

Summary

This paper examines the current role of the Court of Justice of the Andean Community (CJAC), in the settlement of investment disputes between foreign investors and host states. It also embarks on a prospective analysis of the role that CJAC could have on the resolution of such conflicts, in the context that some countries of the Andean region have terminated investment treaties and denounced the main forum for the settlement of investment disputes – ICSID – and that are studying the creation of a regional alternative to the solution of these disputes in the context of UNASUR.

Keywords: *Investor-State Arbitration, foreign investment, Andean Community, UNASUR.*

I. Investor-State arbitration as dispute settlement mechanism

In recent decades, a system of international arbitration between a foreign investor and the host state recipient of that investment, has been consolidated as one of the preferred mechanisms for the settlement of investment disputes, on the basis of the consent given by host state in various international investment agreements (IIAs),[3] treaties aimed at the promotion and protection (and in some cases liberalization) of foreign investment through the establishment of standards of treatment and protection.[4]

IIAs embody a number of obligations on state to ensure a stable and favourable environment for foreign investors. These relate to the treatment that host state's national authorities should give to foreign investors to ensure their ability to perform certain key operations associated with their investment. [5] Among these rights we found the protection against arbitrary expropriation; compensation for losses due to armed conflicts, civil unrest or state of emergency; the free transfer of payments related to a covered investment; standards of

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[3] IIAs come at least in three different shapes: as bilateral investment treaties (BITs) between two states; as investment agreements signed by groups of States in the same region (regional investment agreements – RIAs); and as investment chapters inside preferential trade agreements (PTAs) at bilateral or regional level. Julien Chaisse, 'TPP Agreement: Towards Innovations In Investment Rule-Making' in C. L. Lim and others (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (Cambridge University Press 2012) 147. The United Nations Conference on Trade and Development (UNCTAD) reports that by the end of 2014, the total number of these agreements was 3,268 (2,923 BITs and 345 "other IIAs").United Nations Conference on Trade and Development (UNCTAD), 'Recent Trends In IIAs And ISDS' [2015] IIA Issues Note, 2.

[4] Peter T. Muchlinski, *Multinational Enterprises & The Law* (2 edition, OUP Oxford 2007) 97, 578.

[5] United Nations Conference on Trade and Development, *World Investment Report 2012, Towards A New Generation Of Investment Policies* (United Nations 2012) 136.

protection under international investment law, such as national treatment (NT), the most-favoured nation clause (MFN), fair and equitable treatment (FET) and full protection and security (FPS).[6]

Usually IIAs contain various alternatives for resolving investment disputes,[7] including the courts of host state, dispute settlement mechanisms between the states party to the treaty, and conciliation or arbitration between the foreign investor and the host state, the latter being the most widely used mechanism.[8]

As in recent years the use of investor-state arbitration has increased dramatically – especially in Latin America[9] – the ability of foreign investors to choose such dispute settlement system has been progressively questioned. Critics often point out concerns about its high costs, lack of transparency, excessive duration of arbitration procedures, problems of impartiality and independence of arbitrators, lack of coherence between arbitral awards, and generally increasing perceived lack of legitimacy.[10]

Based on the abovementioned critiques, certain Latin American countries have led the backlash against investment arbitration. Bolivia,[11] Ecuador[12] and Venezuela,[13] denounced the

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[6] Julien Chaisse (n 3) 149.

[7] Sometimes IIAs provide that the choice of forum is final and exclusive ("fork in the road"), although some treaties allow access to investor-State arbitration should domestic courts fail to make a decision within a given period of time. Other stipulates that once the investor has opted for international arbitration, it cannot go back to domestic courts ("no U-turn"). However, none of these restrictions would be effective if the identities of the claimant in the investor-State arbitration and domestic litigation are different. Examples of these provisions are found in many IIAs signed by Andean Community (CAN) Member States, as the Bolivia-Chile BIT (1994), Art. X; Colombia - Switzerland BIT (2006), Art. 11; China - Ecuador BIT (1994), Art. 9; and Canada – Peru (2006) BIT, Art. 26 (2) (e).Christoph Schreuer, 'Traveling The BIT Route: Of Waiting Periods, Umbrella Clauses And Forks In The Road' (2004) 5 J World Invest Trade 231, 247–49.

[8] Rudolf Dolzer and Christoph Schreuer, *Principles Of International Investment Law* (Oxford University Press 2012) 221.

[9] UNCTAD has reported that in known IIAs-based arbitrations by December 2014 (608 cases), Argentina registered the highest number of cases (56), followed by Venezuela (36).Other Latin American countries within the top 20 respondents are Ecuador (# 6 with 22 cases), Mexico (# 7, with 21 cases), Bolivia (# 16, with 11 cases), and Peru (# 20 with 19 cases).United Nations Conference on Trade and Development (UNCTAD), 'Investor-State Dispute Settlement: Review Of Developments In 2014' [2015] IIA Issues Note, 26.

[10] See among others: United Nations Conference on Trade and Development (UNCTAD), 'Reform Of Investor-State Dispute Settlement: In Search Of A Roadmap' (2013) 2 IIA Issues Note; Gus Van Harten, *Investment Treaty Arbitration And Public Law* (Oxford University Press, USA 2008); and Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions And Reality* (Wolters Kluwer Law & Business 2010).

[11] Bolivia signed the ICSID Convention on May 3, 1991, deposited its ratification on June 23, 1995, and denounced it on May 2, 2007, effective on November 3 of that year. In 2009 Bolivia unilaterally denounced its BIT with the Netherlands (1994). Next year, Bolivia terminated the FTA with Mexico (1995) that included an investment chapter, which was replaced by a new FTA without that chapter, in force since June 7, 2010. In 2012, Bolivia unilaterally denounced its BITs with the United States (2001) and Spain (2002); and 2013 did the same with BITs with Germany (1990), Sweden (1992) and Austria (1992). United Nations Conference on Trade and Development (UNCTAD), 'Bolivia, Plurinational State Of - Bilateral Investment Treaties (BITs)' (*Investment Policy Hub*, no date) <http://investmentpolicyhub.unctad.org/IIA/CountryBits/24#iiaInnerMenu> accessed 17 July 2014

[12] Ecuador had signed the ICSID Convention on January 15, 1986, being in force since February 14 of that year, and denounced it on July 6, 2009, effective on January 7, 2010. In 2008, Ecuador terminated nine BITs: with Cuba (1997), Dominican Republic (1999), El Salvador (1996), Guatemala (2005), Honduras (2000), Nicaragua (2000), Paraguay (1994), Romania (1996) and Uruguay (1985). In 2010, Ecuador terminated its BITs with Germany (1965) and Finland (2001). To date, it is in the process of completing the termination of the remaining BITs. United Nations Conference on Trade and Development (UNCTAD), 'Ecuador - Bilateral Investment Treaties (BITs)' (*Investment Policy Hub*, no date) <http://investmentpolicyhub.unctad.org/IIA/CountryBits/61#iiaInnerMenu> accessed 17 July 2014

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which created the International Centre for Settlement of Investment Disputes (ICSID)[14] – the main forum for solving these disputes – and have also terminated or announced the termination of several BITs that include provisions on investor-State arbitration, although the effects of the aforementioned denunciations and terminations do not operate automatically.[15]

But the rejection of the main features of the current investor-State dispute settlement (ISDS) does not necessarily mean a return to exclusive domestic jurisdiction for foreign investment disputes ("Calvo Doctrine").[16] In fact, Ecuador, has been one of the main promoters of the creation of a regional centre for the settlement of foreign investment disputes within the Union of South American Nations (UNASUR),[17] which it has been supported by all other members of the Union, as well as by the Bolivarian Alliance for the Peoples of Our America (ALBA) [18] and the Southern Common Market (MERCOSUR). [19]

The idea of a regional mechanism to settle foreign investment disputes concerning foreign investment is not a new idea. The jurisdiction of the first Central American Court of Justice

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[13] Venezuela had signed the ICSID Convention on January 18, 1993, in force since June 1, 1995, and denounced it on January 24, 2012, effective July 25 of that year. In 2008, Venezuela terminated its BIT with the Netherlands (1993). United Nations Conference on Trade and Development (UNCTAD), 'Venezuela, Bolivarian Republic Of - Bilateral Investment Treaties (BITs)' (*Investment Policy Hub*, no date) <http://investmentpolicyhub.unctad.org/IIA/CountryBits/228#iiaInnerMenu> accessed 17 July 2014

[14] The ICSID Convention, opened for signature in Washington, 1965 and entered into force in 1966. Today 159 states have signed the Convention, of which 151 are contracting states that have deposited their instruments of ratification. International Centre for Settlement of Investment Disputes (ICSID), 'International Centre For Settlement Of Investment Disputes. Member States' (no date) <https://icsid.worldbank.org/ICSID/Index.jsp> accessed 17 July 2014

[15] For an analysis of the consequences of the termination and denunciations of IIAs see among others: Federico M. Lavopa and others, 'How To Kill A BIT And Not Die Trying: Legal And Political Challenges Of Denouncing Or Renegotiating Bilateral Investment Treaties' (2013) 16 J Int Econ Law 869;Laurence Burger and James Nicholson, 'Opting Out Of ICSID And BITs: Legal And Economic Effects' (2014) 11 Transnatl Dispute Manag TDM; Rodrigo Polanco Lazo, 'Denuncia de Tratados de Inversiones en Latinoamérica. Causas y Consecuencias.' in José Manuel Álvarez and others (eds), *Estado y futuro del derecho económico internacional en América Latina I Conferencia bianual de la Red Latinoamericana de Derecho Económico Internacional* (U Externado de Colombia 2013).

[16] See: Rodrigo Polanco Lazo, 'Is There A Life For Latin American Countries After Denouncing The ICSID Convention?' (2014) 11 Transnatl Dispute Manag TDM.

[17] UNASUR was created under the treaty signed in Brasilia on 23 May 2008. Its member states are Argentina, Brazil, Paraguay, Uruguay, Venezuela, Bolivia, Colombia, Ecuador, Peru, Guyana, Suriname and Chile. In 2009, Ecuador proposed the establishment of a regional centre for arbitration of investment disputes and a Working Group of High Level Experts on the Settlement of Investment Disputes was established in 2010.

[18] ALBA was created by the Treaty of La Havana on December 14, 2004 and its member states currently are Venezuela, Cuba, Bolivia, Nicaragua, Dominica, Ecuador, Saint Vincent and the Grenadines, Antigua and Barbuda, and St. Lucia. The UNASUR's proposal has been expressly supported by ALBA member in the Declaration on the First Ministerial Conference of Latin American States Affected by transnational interests, of April 22, 2013.

[19] MERCOSUR was created by the Treaty of Asuncion on March 26, 1991, and its member states currently are Argentina, Brazil, Paraguay, Uruguay and Venezuela, while Bolivia is waiting for parliamentary ratification of its accession. UNASUR's proposal was implicitly supported by MERCOSUR members through the decision of June 29, 2012 (MERCOSUR / CMC / DEC No. 24/12), which declared the need to promote joint and complementarity of policies, agreements and commitments of investment with similar initiatives developed by UNASUR in order to optimize resources, avoid duplication and enhance the efforts in the integration schemes in South America. Additionally, both the Colonia Protocol (1993) for the Promotion and Reciprocal Protection of Investments in MERCOSUR, and the Protocol of Buenos Aires (1994) on the Promotion and Reciprocal Protection of Investments Coming from States not Parties to the MERCOSUR, have now been repealed. Natasha Suñe and Raphael Carvalho de Vasconcelos, 'Inversiones y Solución de Controversias en el MERCOSUR' (2013) 1 Rev Secr Trib Perm Revisión 195.

("Court of Cartago") which operated between 1907 and 1918, already allowed claims by private individuals, but during its existence no case concerning foreign investment was initiated. The Inter-American Court of Human Rights, created in 1979, can also deal with disputes involving foreign investment, when dealing with cases about the right to private property. More than a decade ago, authors like Witker and Banderas proposed the creation of a system similar to ICSID in Latin America, embedding their own regional characteristics, which would reduce translation and transportation costs, considering the physical proximity of the countries in the area, as well as their legal systems. In 2009, UNCTAD together with the Central America Academy, the Organization of American States (OAS) and the Inter-American Development Bank (IDB), proposed the establishment of a Consulting Mechanism on International Investment Law and Investor-State Dispute Resolution in Latin America. However, the draft treaty resulting from those negotiations was not signed by any State.

But before creating a new regional dispute settlement mechanism in Latin America, this article aims to assess the operation of another regional forum with jurisdiction on foreign investment, This is the system of the Andean Community (CAN), [20] where a permanent and supranational court of justice was created by treaty of May 28, 1979, ten years after the Andean integration process started in 1969. However, CAN's judicial institution only started functioning on January 2, 1984 and subsequently by the Protocol of Cochabamba (in force since August 25, 1999), it was designated with the official name of the Court of Justice of the Andean Community (CJAC or "Andean Court of Justice"). [21]

II. Regulation of Foreign Investment in the Andean Community

The CAN regulates foreign investment in the Andean Sub-region through Decision 291 of March 12, 1991: "Common Provisions on the Treatment of Foreign Capital and Trademarks, Patents, Licenses and Royalties". Under Article 1 of this Decision, is considered Foreign Direct Investment (FDI) any contributions from abroad owned by foreign individuals or companies to the capital of an enterprise, in freely convertible currency or in physical or tangible assets, such as industrial plants, new and reconditioned machinery, new and reconditioned equipment, spare parts and pieces, raw materials and intermediate products. Investments made in local currency from resources that are entitled to be remitted abroad and their reinvestments are also considered as FDI.

The Decision 291 also provides that CAN member state, according to their national legislation, *may* consider as capital contributions, *inter alia*, intangible technology, such as trademarks and patents, which are regulated at a supranational level by the CAN Decision 486 of September 14, 2000: "Common Regime of Industrial Property" and the CAN Decision 351 of December 17, 1993: "Common Provisions on Copyright and Related Rights", among others.

Article 2 of the Decision 291 establishes the principle of national treatment for foreign investors, declaring that they will have the same rights and obligations than domestic investors, with the exceptions provided in the domestic legislation of each member state.

[20] The Andean Community was created by the Cartagena Agreement ("Andean Pact") on May 26, 1969, signed between Bolivia, Chile, Colombia, Ecuador and Peru. Chile withdrew from the Andean Pact in 1976. Venezuela became a member in 1973, but withdrew in 2006.

[21] Since this reform, the CJAC was endowed with functions on arbitration, opening the possibility of submitting international disputes to the community jurisdiction and allowing access of individuals to the new arbitral jurisdiction.Aníbal Sierralta, 'Los Mecanismos De Solución De Controversias En La Comunidad Andina De Naciones: Desarrollo, Tendencias Y Los Desafíos Del Comercio Internacional' [2005] CEPAL, 26.

Also, Articles 4 and 5 of Decision 291, expressly recognize the right of free transfer of funds abroad, in freely convertible currencies, for both net profits, and the liquidation of the investment.

In this regard, it should be noted that CAN's Decision 291, while regulating foreign investment in the sub-region, gives wide latitude to state members to legislate internally and conclude bilateral or multilateral agreements for the promotion and protection of investments with non-member states. Thus, in the Andean sub-region there are three sources of investment law: national law, Andean Community Law and bilateral and multilateral agreements.[22]

However, provided that the controverted issues relate to Andean Community legislation, the dispute between a CAN member state and an individual – a concept which includes foreign investors, whether natural persons or companies – must be submitted to the CJAC as court of supranational justice in the sub-region, either as a non-compliance action or a preliminary interpretation.

This obligation derives from Article 42 of the Treaty Creating the CJAC which states that "The Member States shall not submit any dispute arising in connection with the application of the rules comprising the legal system the Andean Community to any court, arbitration system or proceeding other than those referred to in this Treaty".

In this regard, the CJAC as confirmed that the arbitration system is considered equivalent to a national court for the purposes of the obligation to directly request prejudicial interpretation to the Court of Justice of the Andean Community in cases relating to Andean Community legislation.[23] Indeed, the CJAC in its judgment of August 26, 2011, in the non-compliance case 03-AI-2010, included the arbitration system in the concept of national court.[24] In the

[22] UNCTAD reports, that Bolivia has currently 14 BITs still in force with UK, Switzerland, Italy, Peru, Argentina, China, France, Romania, Denmark, Korea, Ecuador, Cuba, Chile, and Belgium / Luxembourg; Colombia has five BITs in force with Spain, Switzerland, Peru, China and India, and six FTAs with investment chapters, with United States, Chile, Canada, the European Free Trade Association (EFTA which includes Switzerland, Liechtenstein, Norway and Iceland), with Peru and the European Union (EU), and with the Pacific Alliance (which includes Mexico, Peru and Chile). Ecuador still keeps 16 BITs in force, with Switzerland, Venezuela, United Kingdom, Argentina, Chile, France, USA, Canada, Spain, China, Bolivia, Germany, Peru, Netherlands, Sweden and Italy. Finally, Peru has 29 BITs in force with Thailand, Switzerland, UK, Sweden, Paraguay, Romania, China, Denmark, Czech Republic, Bolivia, Norway, Italy, Portugal, Malaysia, the Netherlands, Spain, France, Finland, Argentina, El Salvador, Australia, Germany, Venezuela, Ecuador, Cuba, Canada, Belgium/Luxembourg, Japan and Colombia, and twelve FTAs with investment chapters, with United States, Chile, Canada, Singapore, China, Korea, Mexico, Costa Rica, Panama, EU-Colombia, Guatemala and the Pacific Alliance (including Colombia, Chile and Mexico). United Nations Conference on Trade and Development (UNCTAD), 'International Investment Agreements By Economy' (December 2014) <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu> accessed 11 December 2014.

[23] According to Articles 122 and 123 of the Statute of the Court of Justice of the Andean Community, the national courts of each CAN member countries are obliged to consult the Andean Court on the legality of a rule contained in a Decision Resolution or Convention, when a party in a proceeding or a national judge has questioned its validity and have considered it as irrelevant to the case. Aníbal Sierralta (n 19) 14.

[24] CJAC, Judgment in the case 03-AI-2010: "(...) It must also be considered that the arbitrators have the ability to decide the case submitted to them, and therefore they can administer justice, having the ability to issue provisional measures that are the same that judges can decide; the arbitrators might be excused and disqualified for the same grounds established for a judge. Arbitral awards issued by the arbitrators have the effect of final judgment and *res judicata* and will be executed in the same way as judgments of last instance. The national courts cannot review awards but they can execute them. Therefore, if the arbitrators have jurisdictional functions and act as a last instance and do not depend on national courts, for the purposes of Community Law act as national judges, meaning that, according to an extensive interpretation adjudicative arbitrators are included within the concept of national court, and then they must directly request judicial interpretation to the Court of Justice of the Andean Community, without the involvement or mediation of the judiciary. As noted above, the

same line, this supranational court in the prejudicial interpretation 57-IP-2012 July 11, 2012, concluded that:

> *The arbitrators or arbitral tribunals that are the only or last instance, are included within the concept of national court contained in Articles 33 of the Treaty Creating the Court of Justice of the Andean Community, and 122 and 123 of its Statute and therefore have an obligation to seek preliminary rulings to the Court of Justice of the Andean Community when they learn of a process in which norms belonging to the Andean legal system must be applied or are controverted, in accordance with the provisions enshrined in the Community legislation.*

Accordingly, and as shown by the abovementioned case law, from the point of view of the CAN the CJAC is not one of the available fora for foreign investment dispute resolution, but is a mandatory forum when the dispute relates to the interpretation or application of Andean Community rules.

III. The Andean Dispute Settlement System

In this section we will examine with more detail the Andean System of dispute resolution and its contribution to legal certainty and institutionalization of the sub-region, which includes ensuring respect for the rights of individuals who invest in the community space, originated in the Andean law, who for these purposes, are entitled to use two instruments before the Andean Court: the request for a preliminary interpretation and the non-compliance action.

It is also noteworthy that the institutional and legal security that the CJAC provides, contribute to improve the quality of life of the inhabitants of its member states, which is the ultimate aim of the Andean Community, giving precedence to the protection of life, health and environment before any interest, as it has been interpreted by the case law the Court of Justice of the Andean Community.[25]

A. The application for prejudicial interpretation to the Court of Justice of the Andean Community

For the enforcement of the rights of individuals who invest in the sub-region, the Andean Dispute Settlement System includes both arbitration systems and national courts of member

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concept of national courts, in accordance with community rules, is extensive to adjudicative arbitrators, who will decide the case, in accordance with the law, to the universal principles of law, the jurisprudence and the doctrine. Therefore, having an arbitrator the same powers as the judge, that are granted first by the parties in the exercise of their free autonomy and second by the state, it can be concluded that the adjudicative arbitrators are also directly empowered to make requests of preliminary interpretation, as already has been stated (...). In this vein, is mandatory for the arbitrators to seek a preliminary interpretation directly to the Court of Justice of the Andean Community, if the arbitration is adjudicative and on issues covered by community legal order, and if they act as only or last instance".

[25] CJAC, Judgment of January 27, 2010 in the non-compliance case 05-AI-2008: "(...) With everything mentioned so far, it is clear that the ultimate aim of Decision 436, beyond the commercial regulation and harmonization on the formal registration and control of pesticides, is the protection of life, health and the environment. It is also deeply unquestionable that the interpretation of any provision of that decision must be made in accordance with this very purpose (...)"J. This jurisprudential statement has been reiterated by the CJAC in its judgment of 16 July 2013 on the case for non-compliance 01-AI-2012.

states. Under the principles of supremacy, direct application and immediate effect of the Andean law, the CJAC has declared: [26]

> *The Andean Community Law generally and under the principles of immediate application and direct effect, becomes part and have automatic effect in the domestic legal system of the Member States. In this sense, internal legal operators must apply the existing Andean Community Law.*

Therefore, when arbitrators or a national court hear a case where they should interpret and/or implement Andean Community rules, under the principle of judicial cooperation with the CJAC and the particular characteristics of Andean Community regulations, they will act as community judges, as guardians of the Andean legal system. [27] In this respect, to consider a prejudicial interpretation by the CJAC is an essential, basic and angular for the functioning of the sub-regional integration system.[28] The CJAC has emphasized that role of national courts:[29]

> *(...)is not limited to applying a rule to a particular case, but their activity is to structure its judicial task in the sub-regional legal scenario, applying, balancing and harmonizing national legislation with the community legislation, giving primacy to the second on specific issues regulated by it (...).*

As mentioned, the Treaty Creating the CJAC has provided in its Article 31 that "individuals" – a concept that includes foreign investors – are entitled to appear before the competent courts in accordance with the provisions of its domestic law, which in the case of foreign investors it corresponds to the host State of the investment, when their rights are affected by the failure of the Member States to comply with their obligations to adopt the measures necessary to ensure compliance with the rules that make the system of Andean Community Law. This includes the adoption or use of any measure that is contrary to Community Law or that somehow hinder its implementation.

Thus, foreign investors that have decided to settle an investment dispute opting either for the domestic jurisdiction of the host state or for arbitration (providing that is the only or last instance) may request the suspension of these processes,[30] if they believe the rights under CAN Decision 291 of March 12, 1991 or another Andean norm have been violated. Such tribunals or arbitral bodies are obliged to suspend the processes and must demand directly by a simple request (no *exequatur* is needed) the preliminary interpretation of Andean legislation in dispute to the CJAC,[31] as this is the Community judicial institution that safeguards the uniform application of Community Law in the Andean sub-region. [32]

Furthermore, it can be argued that in these cases the national courts or arbitrators of only or last instance, are required to require *ex officio* the preliminary interpretation of the CJCAN

[26] CJAC, Prejudicial Interpretation in case 57-IP-2012 July 11, 2012.
[27] Id.
[28] CJAC, Prejudicial Interpretation 106-IP-2009, April 21, 2010. This position has been reiterated, among others in the Prejudicial Interpretation in case 01-IP-2010, May 19, 2010.
[29] CJAC, Non-Compliance Judgment in case 3-AI-2010, August 26, 2011.
[30] Treaty Creating the CJAC, Art. 33, and Statute of the CJAC, Art. 124.
[31] Treaty Creating the CJAC, Art. 32 and Statute of the CJAC, Art. 121.
[32] Treaty Creating the CJAC, Art. 32.

without this meaning that undermines their independence, as for the purposes of the CAN, both the national courts or arbitrators act as community judges.[33]

In this regard, it should be noted that the requirement to request preliminary rulings in cases submitted to arbitration of only or last instance, it is mandatory for the Member states of the Andean Community as it is automatically incorporated into their domestic procedural law under the principles of direct application and immediate effect of the Andean Community rules.

The failure to request preliminary rulings in these cases is a violation of the right to due process and thus the judgment or arbitral award would be susceptible to annulment procedures in the respective CAN's domestic jurisdiction. On the same basis, additional constitutional remedies might be available for the foreign investor, like actions of *tutela*, *amparo* and *protection*,[34] if they are considered under national laws. In this regard, María Antonieta Gálvez Krüger has noted that:

> Against a judgment that has become *res judicata* and suffers from this previously indicated vice, would in principle claim its annulment alleging that has affected due process (annulment of fraudulent res judicata). An *amparo* action could also be attempted alleging that it is a judicial decision issued by an irregular process that violates the right to due process. In both processes the judge deciding as last instance should also require a preliminary interpretation, as to resolve necessarily would have to refer to the Treaty Creating the CJAC. [35]

For example, in this regard, the judgment of Cassation of the Supreme Court of Ecuador, Chamber of Administrative Litigation, of August 31, 2001, file 256-2001, 195-00 in the case "Alicorp SA c / Ministry of Industry, Trade, Integration and Fisheries - National Director of Industrial Property", declared the nullity of the judgment in question, and the file was remanded to comply with the requirement of requesting an interpretation to the CJAC as the case related to the Andean Community Law. [36]

The need for judicial interpretation in community matters is not exclusive to the Andean Community. In a similar situation, within the framework of European Union law, the Constitutional Court of Spain, in judgment STC 58/2004 declared founded a constitutional action of *amparo* for breach of the obligation to seek preliminary rulings to the Court of Justice of the European Communities (CJEC, now of the European Union).[37] In this respect, while annulling the judgment of the Supreme Court of Catalonia, the Constitutional Court of

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[33] CJAC, Prejudicial Interpretation in case 57-IP-2012, July 11, 2012 (Claimant: COMUNICACIÓN CELULAR COMCEL S.A.).

[34] Id.

[35] María Antonieta Gálvez Krüger, 'Comentarios sobre la interpretación prejudicial del tribunal de justicia de la Comunidad Andina' (2015) 0 THĒMIS-Rev Derecho 131, 142–43.

[36] Ecuador's Supreme Court had already held that criterion in the judgment of the 3rd Civil Chamber and Trade, of October 5, 1999, in the case No. 13-99 "New Yorker SA / Procter & Gamble Interamericas, Inc.". Patricio Bueno Martínez y Alejandro Daniel Perotti, "La teoría del acto aclarado?` Resulta necesaria su aplicación en el marco de la interpretación prejudicial andina?" (2005) 14:1 Díkaion Revista de Fundamentación Jurídica, online: <http://dikaionunisabanaedu.suvh6.com/index.php/dikaion/article/view/1324> at 137.

[37] In this case, a judgment was challenged through an appeal to the Spanish Constitutional Court, because the Division of Administrative Litigation of the Superior Court of Catalonia (an ordinary court of an autonomous region) ruled that between the contradiction between a Community rule and an internal standard, the latter is applied. Alfonso Herrera García, 'Tribunal Constitucional Y Unión Europea. El Caso Español A Propósito De La Sentencia 58/2004 Y De La Fase Actual De La Integración Constitucional De Europa' (2007) 16 Cuest Const 405, 418.

Spain Spanish acted in the same way as the Supreme Court of Ecuador, that is, as true community judges, resetting both the rules of due process and applying Community Law were consultation with the supranational Courts of Justice is mandatory.[38]

It should also be noted that when the preliminary interpretation of the CJAC is not requested in cases where it is mandatory, the member country would be committing flagrant violation of the Andean Community Law and therefore a complaint could be filed by the individuals affected – even if they have the character of foreign investors – to the General Secretariat of the CAN which can take the case to the CJAC. In this regard, Art. 128 of the Statute of the CJAC stipulates that "Individuals have the right to come up to the Court in the exercise of non-compliance action, when the national judge that was required to request a consultation refrains from doing so, or when the judge has requested it, if applies a different interpretation than that given by the Court".

In the same way that under domestic law, the judgment of non-compliance adopted by the CJAC, is a legal and sufficient title for the foreign investor to request compensation for damages and losses to the national court, without any *exequatur* or other homologation process. It is in this regard that Article 36 of the Treaty Creating the CJAC in relation to the request for a preliminary interpretation, expressly provides "The Member States of the Andean Community shall ensure compliance with the provisions of this Treaty, and particularly observance by the national judges to the provisions of this Section".

However, it should be noted that in the case of national courts or arbitration systems that are not of only or last instance, the request for a preliminary interpretation of the CJAC is optional and can be presented directly by the judge on its own initiative or at the request of a party. In these cases a waiting period until the CJAC adopts a preliminary interpretation, or the suspension of the process, is not required. [39]

Once admitted the request for a mandatory or optional preliminary interpretation, the CJAC should issue a judgment within thirty (30) calendar days,[40] a decision that must be limited to specify the content and scope of the respective Andean law applied to the specific case without qualifying the material facts of the internal judicial process.[41]

Once the preliminary interpretation of the CJAC has been received, the national court or arbitral tribunal that have requested it are obliged to adopt this interpretation in their judgment.[42] Therefore, the national court or arbitral tribunal should not only refer to the preliminary interpretation in their judgment or award, but must abide by it in comprehensive manner and in accordance with the sense of it.[43]

[38] Ricardo Vigil Toledo, *Reflexiones En Torno A La Construcción De La Comunidad Sudamericana De Naciones* (Artes Gráficas Señal 2006) 26–29.
[39] Treaty Creating the CJAC, Art. 33.
[40] Statute of the CJAC, Art. 126.
[41] Treaty Creating the CJAC, Art. 34.
[42] Treaty Creating the CJAC, Art. 35.
[43] CJAC, Prejudicial Interpretation case 57-IP-2012 July 11, 2012.

B. Non-Compliance Action before the Court of Justice of the Andean Community

The CJAC[44] is the maximum community instance to demand compliance with the Andean legal system, being a jurisdictional, supranational and community institution established to declare the Andean law, settle disputes arising therefrom and ensure their implementation and uniform interpretation within the territory of all Member States, with absolute impartiality and independence.

Therefore, the CJAC as a supranational and community institution is also the highest authority to ensure respect for the rights of individuals who invest in the sub-region, as provided in Art. 35 of the Statute of the CJAC, which declares: "The procedures under this Statute are aimed at ensuring: the effectiveness of the substantive rights of persons subject to its jurisdiction (...)". This include the rights that are recognized to foreign investors in that CAN Decision 291 of March 12, 1991, or any other Andean norm.

The behaviour of the CAN member country that could be subject of a complaint or claim may include: issuing domestic regulation contrary to Andean legal framework; the failure to issue rules that give effect to that framework; or by performing any act or omission opposed to it or that somehow hinder or obstruct its implementation.

It is noteworthy to highlight in this respect that the Andean Community is the only regional integration process in Latin America that has been successful in having its member's states to accept the supranational level provided by the Community rules, and a permanent and regional Court of Justice.

In the next section, we will explain the Community administrative procedure that should be followed by foreign investors before the General Secretariat of the CAN to denounce the violation of their rights by a possible breach of the law of the Andean Community by one of its Member States. At the same time, we will detail, the Community judicial procedure to be followed by foreign investors before the CJAC, once the Community administrative procedure has been exhausted.

1. Administrative Procedure to the General Secretariat of the Andean Community

The Community's General Secretariat, as the executive body of the CAN, acts exclusively in the interests of the sub-region, having among its main functions to ensure compliance with the Andean Community Law.[45] To that end, it is the competent community administrative body to initiate *ex officio* or upon party request an investigation against a Member State for possible breach of the Andean legal system.

If foreign investors affected in their rights by the failure of a CAN's Member to comply with its obligations stemming from the Andean Community Law, decide to file a complaint to Community institutions and not before host States courts under the same grounds,[46] they should first report the complaint to the CAN's General Secretariat (SGCAN) through a

[44] According to Article 6 of the Treaty Creating the CJAC, the Court is composed of four judges, who must be nationals of member countries that should have high moral character and possess the qualifications required in their countries for the exercise of the highest judicial office or be jurits of recognized competence. Judges are appointed for a period of six years, partially renewed every three years and may be re-elected only once.

[45] Cartagena Agreement, Art. 30a.

[46] Art. 25 of the Treaty Creating the CJAC expressly excludes the possibility of having an individual simultaneously filing a claim before domestic and community courts on the same grounds.

written submission sent to the headquarters of that Community institution or electronically by e-mail address, meeting the following requirements: [47]

a) Full identification of the claimant, indicating the address where notifications will be served, as well as phone number, fax or e-mail if are available;
b) Expression of acting under Article 25 of the Treaty Creating the CJAC, being a claim brought by a natural or legal person affected in their rights;
c) A statement that the claimant has not instituted simultaneously and on the same grounds a case before a domestic court (of the host State);
d) Identification and description of the measure or situation in question, accompanied by all available information relevant for the best decision of the General Secretariat;
e) Identification of the rules of the Andean Community legal system that would be the subject of non-compliance; Y
f) Reasons why the claimant believes the measures or conduct of a Member State are in a breach of the CAN's legal rules, as previously identified.

The community administrative procedure before the SGCAN is free, requires no lawyer and is characterized by being expeditious, efficient and its judicial economy. In this respect, the SGCAN within five (5) business days after receiving the complaint must analyse the documentation to determine whether it meets the established requirements that allow initiation of an investigation. Otherwise, the SGCAN will notify the complainant foreign investor in writing, of any omission or failure in the submission, granting a period of fifteen (15) working days for correction, after which the complaint will be dismissed if corrections are insufficient.[48]

Once the investigation has been initiated, the SGCAN must send to the Member State against whom the complaint is brought, a note with observations attaching a copy of the complaint filed by the foreign investor that identifies and describes the alleged infringement. This notice shall stipulate the time granted to the Member State to respond the claim which, depending on the seriousness of the case shall not exceed sixty (60) calendar days,[49] and in cases of flagrant violations of the Andean Community Law shall not exceed twenty (20) business days.[50] Such note with observations should be served simultaneously to the country under investigation, to other CAN's Member states and to foreign investor complainant; who they are granted the same period for submitting information that deem relevant to decide the complaint.

The SGCAN, within fifteen (15) days after the deadline given in the note of observations to the respondent Member State, should issue a reasoned decision on its state of compliance with the obligations under the Andean regulations.[51] If non-compliance has been determined, the SGAN decision must indicate a time frame for the respondent State to inform on the correcting measures aimed at bringing its actions in compliance with Andean Community

[47] CAN, Decision 623. Rules on the Prejudicial Phase of the Non-Compliance Action, Art. 14.
[48] Id., Art. 15.
[49] CAN Decision 623 defines the character of flagrant in its Article 24 as follows: "A breach is deemed flagrant when it is evident, in cases such as the repetition of a breach by a Member State, previously declared by the Court, even if formally it continues through different instruments, or where the breach falls on substantive issues on which the Court has previously decided".
[50] CAN, Decision 623. Rules on the Prejudicial Phase of the Non-Compliance Action, Art. 16.
[51] Id., Art. 20.

Law or to express its position in relation to the SGCAN decision, in no less than fifteen (15) nor more than thirty (30) calendar days. [52]

If the respondent Member State persists in the conduct subject of the complaint after the time allowed for the cessation of the non-compliance, the SGACN shall request a ruling from the CJAC as soon as possible, terminating with this the Community administrative infringement procedure. [53]

Also, natural or legal persons, of public or private nature from the Member States, can collaborate with investigations conducted by the SGCAN in the performance of its duties and as such, provide information on the issues under investigation, within the time allowed to respond the note of observations or to take steps aimed at remedying the non-compliance. [54]

2. Judicial Proceedings before the Court of Justice of the Andean Community

The complainant foreign investors are entitled to directly file a claim for non-compliance before the CJAC, against the Member State that would be violating their rights, only if one of the following three conditions is fulfilled: [55]

a) If within seventy-five (75) days after the date the complaint was filed with the SGCAN, the Secretariat fails to give an opinion.
b) If within sixty (60) days after the issuance of the opinion of non-compliance against the respondent Member State, the SGCAN submit a claim before the CJAC against that State.
c) If once the Community administrative infringement procedure has concluded, the SGCAN finds the Member State in compliance, disagreeing with what has been denounced by the foreign investor.

The judicial process before the CJAC has no cost, except for the expenses incurred by the Court for issuing copies, the practice of judicial inspections or the work of experts, paid according to fees or costs approved by the Tribunal.[56] Costs will be awarded and included in the judgment only if the parties have requested it in the complaint or the answer to complaint of defence.

The complaint presented by an individual before the CJAC must meet the minimum requirements specified in Articles 45 to 55 of its Statute, among which being signed by the individual or his legal representative and an attorney with registration at the Bar of a CAN Member State.

Admitted the complaint, the respondent State has forty (40) calendar days from the date of service of the complaint for answering and making the preliminary objections it deems appropriate. [57]

Once the answer to the complaint has been accepted, the Court will order its service together with the preliminary objections that have been formulated, giving to the other party ten (10)

[52] Id., Art. 21
[53] Treaty Creating the CJAC, Art. 23.
[54] CAN, Decision 623. Rules on the Prejudicial Phase of the Non-Compliance Action, Art. 25.
[55] Treaty Creating the CJAC, Art. 24.
[56] Statute of the CJAC. Art. 38.
[57] Id., Arts. 56 to 62.

calendar days to submit its observations, after which the CJAC shall first decide, the preliminary objections that have been contested.[58] The Court will declare *ex officio* or upon request, the irremediable nullity of the proceedings in the following cases: [59]

a) When there is another appropriate jurisdiction;
b) When the Court lacks jurisdiction; and
c) When the procedural formalities that are required to appear before the Tribunal have not been met.

Within ten (10) calendar days after the expiration of the term provided for the answer to the complaint, an evidentiary period is opened, where only the types of the evidence that are deemed by appropriate and conducive by the Court are allowed. If it a term to produce the evidence is needed it will be established, for a period not exceeding thirty (30) calendar days from the execution of the judicial decision authorizing the production of evidence, notwithstanding that, the court may extend up that term to an equal period, on justified grounds. [60]

The CJAC, when deems it necessary to fulfil its duties, may request cooperation in the production of evidence or the execution of other judicial decisions directly to the national courts of the host State of the investment or other authorities of the Member States.[61]

If it was authorized by the Court, once the evidentiary period has expired, or if not, after the answer to the complaint was received it, the Court will define, if is necessary to hold a public hearing,[62] or in the alternative, to issue the order for the Parties to submit their final written submissions.[63] To do so, the CJAC will make available the file of the case at the Court's Clerk office, for a common term of fifteen (15) calendar days.

In this regard, it should be noted that the Andean Dispute Settlement System, recognizes a significant benefit to individuals – including foreign investors – to ensure the enforceability of their rights: precautionary measures. Through these measures, the CJAC, before issuing the final judgment, at the request of the claimant and previous request of a judicial bond if the Court deems it necessary, could order the provisional suspension of the allegedly non-compliant measure, if this measure could harm or cause irreparable or difficult to repair damages to the claimant or to the Andean sub-region.[64]

After the hearing has taken place, or once the deadline to submit final written submissions has passed, the Court will proceed to issue a judgment within sixty (60) days. [65] The judgment shall include the decision of the Court on costs, provided that it has been specifically requested in the complaint or the answer to the complaint. The judgments of the CJAC are

[58] The preliminary objections that may be filed by the respondent before the CJAC are: *forum non conveniens*; lack of jurisdiction of the Court; disability or misrepresentation of the parties; absence of the plaintiff or defendant; lack of formal requirements of the complaint; undue accumulation of claims; pending claims between the same parties on the same subject matter; *res judicata*; defense of prescription of action; failure to exhaust prior administrative remedies before the SGCAN; undue nature of the action; and lack of purpose of the complaint..
[59] Statute of the CJAC, Arts. 64 and 65.
[60] Statute of the CJAC, Art. 75.
[61] Treaty Creating the CJAC, Art. 44; Statute of the CJAC, Art. 80.
[62] For further details on hearings, see Statute of the CJAC, Arts. 82 to 85.
[63] For final written submissions, see Id., Art. 86.
[64] Treaty Creating the CJAC, Art. 28; Statute of the CJAC, Art. 109.
[65] The content that a CJAC judgment shall include are detailed in Statute of the CJAC, Art. 90 to 98.

binding and have the effect of *res judicata* from the day following its service and are directly applicable in the territory of the Member States without needing approval or *exequatur*. [66] Also, the non-compliance judgment issued by the CJAC in a case brought by a foreign investor is legal and sufficient title for this individual to ask the competent national court for compensation for damages and losses.[67]

Within a period of fifteen (15) days following the service of the judgment, the parties may request clarification of the points which they consider as equivocal or questionable. At the same time, after the judgment has been served, the Court's Clerk shall transmit it to the SGCAN for its publication in the Official Gazette of the Cartagena Agreement.

Against a final judgment, only application for a review appeal ("recurso de revision") by those who have been party to the process provided that it is based on a fact that may have decisively influenced the outcome and it was not aware at the date of the issuance of the judgment by the party who requested the review. The application for a review appeal must be filed within ninety (90) days from the date the claimant knew of the fact that is the basis of the recourse and, in any case, within the year following the date of the non-compliance judgment. The filing of this review does not interrupt the execution of the judgment.[68]

If the Court finds non-compliance by a Member State, the country whose conduct is the subject of the judgment, shall be required to take the necessary measures to enforce the decision in no later than ninety (90) days after the judgment has been served.[69]

If that Member State does not comply with has been decided on the judgment, the CJAC, can initiate summary proceedings for contempt of the judgment, previous opinion of the SGCAN. The Court may determine the limits within which the other member states may restrict or suspend in whole or in part, the advantages of the Cartagena Agreement that benefit the Member State in contempt, or any other action that it deemed most appropriate,[70] to address the non-compliance of Community Law and not just the particular interest of a foreign investor.

IV. Foreign Investors and the Andean Dispute Settlement System

In the context referred to above, several foreign investors or foreign-capital enterprises have submitted judicial claims against CAN Member States before the CJAC, in defence of their rights as recognized by the Andean regulations,[71] either directly, through actions of non-

[66] Treaty Creating the CJAC, Art. 41; Statute of the CJAC, Art. 91 and 110.
[67] Treaty Creating the CJAC, Art. 30; Statute of the CJAC, Art. 110.
[68] Statute of the CJAC, Art. Art. 95.
[69] Treaty Creating the CJAC, Art. 27; Statute of the CJAC, Art. 111.
[70] Treaty Creating the CJAC, Art. 27; Statute of the CJAC, Arts. 116 and 117.
[71] VIVAX PHARMACEUTICALS (Case TJCAN 127-AI-2004); FARMAGRO BAYER S.A (Case TJCAN 5-AI-08); VOLVO (Case TJCAN 1-IP-87); NIKE (Case TJCAN 7-IP-2006); KIMBERLY-CLARK (Case TJCAN 5-IP-93); COLGATE PALMOLIVE COMPANY (Case TJCAN 12-IP-95); ELIZABETH ARDEN INC (Case TJCAN 4-IP-94); PFIZER INC (Case TJCAN 192-IP-2005); MONSANTO COMPANY (Case TJCAN 07-IP-94); CIGARRERA BIGOTT (Case TJCAN 11-IP-96); PROCTER & GAMBLE COMPANY (Case TJCAN 106-IP-2002); PHILIP MORRIS (Case TJCAN 104-IP-2000); ARCOR (Case TJCAN 13-IP-2001); MC DONALD'S CORPORATION (Case TJCAN 101-IP-2000); BAVARIA S.A (Case TJCAN 7-IP-2002); STARBUCKS CORPORATION (Case TJCAN 104-IP-2002); SANTANDER INVESTMENT BANK (Case TJCAN 42-IP-2003); J.P MORGAN CHASE & CO (Case TJCAN 40-IP-2004); PEPSICO INC (Case TJCAN 58-IP-2006); TEXACO INC (Case TJCAN 65-IP-2006); JOHNSON & JOHNSON INC (Case TJCAN 61-IP-2006); FARMEX S.A. and others (Case TJCAN 01-AI-2011; among several other foreign investors acting as claimants.

compliance, or indirectly through request of preliminary interpretations by the national courts. Between 2000 and 2013 the CJAC has decided a total of 2,305 cases including both actions of non-compliance and with an average of 165 cases per year, being the largest number of cases processes of preliminary interpretations.[72] The same pattern is followed in the cases brought by foreign investors.

A. Non-Compliance Actions

Actions of non-compliance have been brought by foreign investors against all countries of the Andean Community. For example, *Inter American Game Technology Ltd* (CJAC Case 03-IA-2006) sued Ecuador for its alleged breach of Community rules by issuing a series of standards that were against the Program of Liberalization of Services, as they regulated substantive aspects in relation to the provision of services of games of chance and gambling. The claim was finally dismissed.

In the case of Colombia, (CJAC Case 22-AI-2002), an action of non-compliance was filed by the companies *Merck Colombia*, *Frosst Laboratories Inc.*, *Schering Colombiana*, *Boehringer Ingelheim*, *GlaxoSmithKline* and *Parke Davis*, against the Republic of Colombia, on alleged violation of Community rules on industrial property by granting registration of certain trademarks. That claim was later withdrawn by the plaintiffs.

With regard to Bolivia, in the CJAC Case 44-AI-2000, the SGCAN requested a judgment from the CJAC, due to the alleged non-compliance by the Government of Bolivia consistent in refusing to renew the operating permit for non-scheduled air transport of international cargo to the company *Skies of Peru SA*. The claim was later dismissed, as the court determined that Bolivia had renewed the permit of air transport prior to the filing of the claim.

Even Venezuela was also subject of a non-compliance action before withdrawing from the CAN. In *Vivax Pharmaceuticals* (CJAC Case 127-AI-2004), Venezuela was sued for alleged patent infringement in violation of Community rules and in prejudice of foreign investors, although this claim was eventually declared overruled.

However, we also find examples of claims that have been accepted by the CJAC. Some examples of this are the complaints brought by *Farmagro Bayer SA* against Peru (CJAC Case 5-AI-08), based on the different treatment granted by Peru to Farmers-Importers-Users (FIU) for the registration and control of chemicals pesticides for agricultural use.; and the complaint of *Farmex SA and Others* against Peru (CJAC Case 01-AI-2011), also referred to the breach of Community rules by that country, establishing less stringent requirements for amending the registration of a chemical pesticide for agricultural use at a national level, and not extending these requirements to other countries of origin. In both cases, Peru was sentenced to repeal all national standards subject to non-compliance and all registrations granted based on these, besides having to pay the costs in the CJAC case 01-AI-2011 process.

B. Preliminary Interpretations

Preliminary interpretations of the CJAC have been required repeatedly by various foreign companies and foreign investors, much more often that the actions of non-compliance. Except for Bolivia, cases of preliminary interpretations have been brought against all other countries of the Andean Community on disputes related to foreign investment.

[72] Webpage of the CJAC <http://www.tribunalandino.org.ec/sitetjca/index.php>.

The CAN Member State that has been respondent in more preliminary interpretations cases is Colombia. The Council of State of Colombia (highest Colombian tribunal for administrative disputes) has requested this interpretation from the CJAC with respect to petitions filed by several foreign companies in proceedings initiated for violation of their intellectual property, like *Volvo* (CJAC Case 1-IP-87). *Kimberly-Clark Corporation* (CJAC Case 5-IP-93), *Colgate Palmolive Company* (CJAC Case 12-IP-95 and 118-IP-2013) , *Elizabeth Arden Inc* (CJAC Case 04-IP-94), *Pfizer Inc* (CJAC Case 192-IP-2005), *Procter & Gamble Company* (CJAC Case 106-IP-2002), *Philip Morris* (CJAC Case 104-IP-2000), *Arcor* (CJAC Case 13-IP-2001), *Bavaria SA* (CJAC Case 7-IP-2002), *Starbucks Corporation* (CJAC Case 104-IP-2002), *Santander Investment Bank* (CJAC Case 42-IP-2003) and *JP Morgan Chase & Co* (CJAC Case 40-IP-2004). Likewise, the company *West Pharmaceutical Services, Inc* requested this interpretation in a process of annulment of a trademark against the Superintendence of Industry and Commerce of Colombia (CJAC Case 160-IP-2013).

In the case of Peru, Volvo has applied this interpretation in proceedings initiated for violation of their intellectual property (CJAC Cases IP-089 -2011 and 101-IP-2013). In turn, the Permanent Chamber of Constitutional and Social Law of the Supreme Court of the Republic of Peru has applied this interpretation with respect to requests made by Nike (CJAC Case 7-IP-2006), Texaco Inc (CJAC Case 65- IP-2006), *Johnson & Johnson Inc* (CJAC Case 61-IP-2006), among several others.

With regard to Ecuador, the District Court No. 1 for Administrative Disputes of Quito required this interpretation after a request made by *Cigarrera Bigott* (CJAC Case 11 IP-96). The same happened with the Third Chamber of the Superior Court of Justice Quito, on an application filed by *Mc Donald's Corporation* (CJAC Case 101-IP-2000), and with the First Chamber of the Court of Administrative Disputes of Quito, with respect to a request by *Pepsico Inc* (CJAC Case 58-IP-2006), among other foreign investment companies.

Of the current members of the Andean Community, Bolivia is globally the country that has fewer procedures of preliminary interpretation. Of the two cases currently registered against Bolivia at least one (CJAC Case 79-IP-2009), refers indirectly to a foreign investor, since in this case, the *Fábrica de Mermeladas y Caramekis Watt's Casal Ltda*, requested the annulment of the administrative decision issued by the National Intellectual Property Service of Bolivia, which granted the registration application for a trademark in favour of *Société des Produits Nestlé SA*.

Something similar happened with Venezuela, which although is not currently a member of the CAN, register two cases of judicial interpretation. Only one (CJAC Case 24-IP-98), was initiated by the Venezuelan company *Promoter Cedel CA*, in a lawsuit for damages sought against *Microsoft Corporation*, who in a previous process, had requested and obtained the seizure of goods of the claimant, to determine whether there was violation of its copyright in the seized goods.

As we can see, the vast majority of cases filed to date by foreign investors before the CJAC are related to the violation or impairment of industrial property rights, especially trademarks and patents, one of the rights where protection has been granted to foreign investors by Community rules (Decisions 291 of 1991, 351 of 1993 and 486 of 2000), and which are also explicitly protected in international investment agreements signed by Member States of the Andean Community.

V. Conclusion

The Andean Dispute Settlement System is one of the existing Latin American regional mechanisms that can be used to solve conflicts between host States that are recipients of foreign investment which are members of the CAN and foreign investors.

However, it should be noted that the jurisdiction of the CJAC is more limited than the one of arbitral tribunals established under IIAs, as Andean Community rules on foreign investment contain only some of the rights that traditionally IIAs have considered as part of the protection of foreign investors. So, as we have seen, CAN Decision 291 of 1991 declares national treatment, of free transfer and convertibility as foreign investor's rights, but leaving outside extended standards of protection and treatment that the vast majority of IIAs consider today, such as full compensation in case of regulatory or indirect expropriation, fair and equitable treatment, and full protection and security.

Also, the Andean System of Justice does not consider direct compensation of investors - the remedy traditionally claimed in international investment arbitrations - although CJAC judgements could eventually serve as a basis for filing a lawsuit for damages by the affected foreign investor.

Nevertheless, the procedure before the Andean Dispute Settlement System has certain positive aspects worth noting that may be of interest to foreign investors, such as the possibility of obtaining injunctive relief (a debated issue in international investment arbitrations)[73], it has standards of transparency and publicity, [74] that even allow the intervention of collaborative third parties,[75] consider (and in some cases mandates) the request of preliminary interpretations (which minimizes the possibility of conflicting jurisprudence on the same subject); and generally offers quick and expeditious procedures, compared to other international and supranational courts, including the European Court of Justice. For example, the process of judicial interpretation before the CJAC takes an average two months, while the preliminary rulings European Court of Justice take on average two years. [76]

Also, the CJAC allows greater access of individuals to this supranational jurisdiction compared to its European counterpart. In this line, only the Andean Community Law

[73] Although there are various arbitration rules that expressly recognize the power of arbitral tribunals to grant binding interim measures (including Article 47 of the ICSID Convention, Article 26 of the Arbitration Rules of UNCITRAL (2010) and Article 28 of the Rules of Arbitration of the International Chamber of Commerce (ICC) in 2012), there is conflicting case law on the standard of "necessity" required to grant these measures, a problem that grows when multiple tribunals are interpreting those rules. See: Dan Sarooshi, 'Provisional Measures And Investment Treaty Arbitration' (2013) 29 Arbitr Int 361

[74] Transparency obligations of the Andean Community are in various regulations, such as Resolution 852 of 17 September 2004, which sets the rules on public access to documents of the Andean Community. We must recall that, under Article 94 of the CJAC Statute, once the judgment has been served, the Registrar shall transmit it to the SGCAN for its publication in the Official Gazette of the Cartagena Agreement. This contrasts with the transparency rules of international arbitrations, where generally the publication of awards is prohibited without the consent of the parties. This is laid down in Article 48 (5) ICSID Convention and the Arts. 28.2 and 34.2. the Rules of Arbitration of the ICC (2012). The same happens in the Arbitration Rules of UNCITRAL (Rules 32.5 and 34.5), unless the State party has expressly referred to the UNCITRAL Rules on Transparency in investor-state arbitrations in the framework of a treaty (2014).

[75] See for example, *Vivax Pharmaceuticals* (Case CJAC 127-AI-2004), and *Farmagro Bayer S.A* (CJAC Case 5-AI-08), among many others.

[76] María Ángela Sasaki Otani, 'El Sistema De Sanciones Por Incumplimiento En El ámbito De La Comunidad Andina' (2012) XII Anu Mex Derecho Int 301, 308..

empowers individuals to submit claims before the CJAC, once exhausted the preliminary phase before the SGCAN.

In addition to the mentioned above, the Andean Community system consider sanctions by the other CAN Member states against the non-compliant State, complemented with the ability of the individual to demand compensation for damages and losses before a competent national court – or even before a parallel arbitral tribunal constituted under an IIA concluded by the non-compliant host State.

All these features make the CJAC a forum for the settlement of disputes concerning foreign investment that offers different but important benefits to foreign investors who wish to use this system, while contributing significantly to legal certainty and institutionalization of the Andean sub-region.

In this context, a proposal to optimize the performance of the function of CJAC, as maximum guarantor of the compliance with the Andean Legal System and the rights that recognize to individuals, including foreign investors; should be oriented to improve its coercive function, which today is limited to the imposition of commercial sanctions by other Member States.

Even if Art. 27 of the Treaty Establishing the CJAC consider the possibility of imposing another type of effective sanctions commensurate with the particularities of each case, CAN Decision 500 of 2001 does not clarify the conditions and limitations of this power, that should be further developed in the Court's Statute.

In this sense, what is needed is an amendment to Art. 119 of the CJAC Statute setting the scope of its power to impose other types of sanctions that are more suited to the specific circumstances of each case, as it could be the periodic penalty payments, a type of sanction that is imposed by the European Court of Justice to enforce its rulings. [77] As the CJAC Statute has been approved by a Community Decision, a derivative rule of Andean law, such amendment would not require ratification by the legislatures of CAN Member States; but merely the adoption of this amendment by Decision of the Andean Council of Foreign Ministers, to be incorporated at the CAN's legal framework.[78] The power of the CJAC to punish the non-compliance with its judgments could even be strengthened by allowing the Court to impose mandatory penalties together with commercial sanctions, depending on the circumstances of the case. [79]

In this regard, one might wonder whether a more interesting amendment would be to consider direct compensation for damages and losses in favour of investors that use the Andean Dispute Settlement System.

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[77] ibid 337.

[78] As a result of modifications to the Cartagena Agreement (Treaty Establishing the CAN) introduced by the Trujillo Protocol, as well as those arising from the Protocol Amending the Treaty Creating the CJAC (Cochabamba Protocol), corresponds to Andean Council of Foreign Ministers to approve the amendments to the Statute of the Court.
Como resultado de las modificaciones al Acuerdo de Cartagena (Tratado Constitutivo de la CAN) introducidas por el Protocolo de Trujillo, así como las derivadas del Protocolo Modificatorio del Tratado de Creación del Tribunal de Justicia de la Comunidad Andina (Protocolo de Cochabamba), corresponde al Consejo Andino de Ministros de Relaciones Exteriores aprobar las modificaciones al Estatuto de Tribunal de Justicia. En: COMUNIDAD ANDINA. Decisión 500: Estatuto del Tribunal de Justicia de la Comunidad Andina. Preámbulo.

[79] For further reference on proposals for reform of the enforcement system of the CJAC, see: María Ángela Sasaki Otani (n 76).

The practice of the CJAC, and the lessons learned after more than a decade of operation, in the terms expressed in this paper, can serve not only to improve the Andean Dispute Settlement System, but also as an example to consider while creating regional dispute settlement mechanisms, especially the proposed regional centre for the settlement of foreign investment disputes being discussed within UNASUR and supported by ALBA and MERCOSUR. It can also serve as a case study in finding the right balance and complementarity between domestic, regional and international mechanisms that inevitably come into play in investment disputes.