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The Legal Reasoning of the Andean Court of Justice in Comparative Context

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Abstract:

The Andean Court of Justice (ACJ), the judicial arm of the Andean Community has emerged as one of the more active of a recent wave of newly created international or regional courts with jurisdiction over a regional trading and integration bloc. The ACJ is one of several such courts in South America, and the European Court of Justice (ECJ) can be understood as a model in terms of its jurisdiction and procedure. The ACJ has dealt with many of the same issues as the ECJ, especially what can be considered 'constitutional' issues. This paper is part of a larger study mapping legal reasoning in international courts, examining both the practice and the articulation of legal reasoning by these courts. First this paper examines the brief period of practice of the Central American Court of Justice (CACJ), the first modern international court, as to how the CACJ approached legal reasoning. From a relatively small number of ACJ judgments are then selected and discussed in some detail on the basis of a qualitative criterion: their 'constitutional' and precedential importance in establishing fundamental principles operative in the legal system of the Andean Community. These principles relate to: supremacy of Andean Community law over the law of its Member States, the direct effect of Andean Community law in the courts of its Member States, and the external relations of the Andean Community. It is concluded that there is a superficial similarity of approach of the ACJ to the ECJ in their approach to legal reasoning, but there are substantial differences. The differences are that the ACJ has tends to be more explicit and does not argue for the specificity of Andean system to the same extent and it appears to accept the universalisability of interpretation. On the other hand, as with the ECJ, neither does it articulate the issue of levels of generality or the substantive reasons for different methods of interpretation. Influences across different regional integration blocs across likely to become a stronger feature of international judicial practice.

KEYWORDS: Legal reasoning, comparative law, international courts, Andean Court of Justice, European Court of Justice

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Introduction

The Andean Court of Justice (ACJ) is one of a proliferation of international courts over the past several decades, and one of several such courts in South America. The ACJ is the dispute settlement mechanism of the Andean Community, founded in 1969 by the Andean Subregional Integration Agreement or Cartagena Agreement.¹ The ACJ itself was founded somewhat later, in 1979 by the Treaty Creating the Court of Justice of the Andean Community,² amended in 1996. Its jurisdiction is quite closely modelled on that of the Court of Justice of the EU (European Court of Justice or ECJ), which, as the longest-established court in an organisation of regional cooperation or integration, tends to be seen as something of a model in this sphere. The ECJ can be understood as a model in several respects: structure and organisation, jurisdiction and procedure, and reasoning and methods of interpretation. However, the ECJ was pre-dated by the Central American Court of Justice (CACJ),³ which was founded in the early years of the 20th century and has been revived since 1991.⁴ The ACJ has a very similar procedural framework to the ECJ, in terms of the types of legal proceedings over which it has jurisdiction. Comparative studies of international and regional courts is an area of scholarship that is just developing, and in the case of the ECJ and ACJ has been pioneered by Alter & Helfer. This paper seeks to complement this emerging body of scholarship in political science by a comparative study of the approaches to legal reasoning of the ECJ and ACJ. The theoretical premise of the paper is a thesis of universalisability of legal reasoning: legal reasoning does not change fundamentally from one jurisdiction to another.⁵ This claim can be understood to have both a descriptive and a normative aspect. Comparative study of statutory interpretation has found that it shares certain features across jurisdictions.⁶ Normatively, a case can be made for certain features of legal reasoning as inherent in the rule of law and the authority of the law-maker. This is not to say that legal reasoning must operate within a single rigid model. Variations occur perhaps as much in national systems as across jurisdictions. Nonetheless, certain fundamental features – most obviously the authority of the written text – are essential to legitimate interpretation as opposed to law-making in the manner and method of a common law judge.

This paper is part of a larger study mapping legal reasoning in international courts, examining both the practice and the articulation of legal reasoning by these courts. A relatively small number of

¹ Entered into force 16 October 1969, 8 ILM (1969), p. 910.

² 28 May 1978, 18 ILM (1979), p. 1203.

³ I am grateful to Dr. Ignacio de la Rasilla y Del Moral for bringing my attention to the role of the CACJ.

⁴ In some respects, the, the ECJ appears to have been modelled on the CACJ or at least is very similar to it.

⁵ G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012), pp. 9-12.

⁶ R. Summers and M. Taruffo, 'Interpretation and Comparative Analysis' in D. N. MacCormick & R. Summers (eds.) *Interpreting Statutes: A Comparative Study* (Aldershot 1991).

ACJ judgments are selected and discussed in some detail on the basis of a qualitative criterion: their ‘constitutional’ and precedential importance in establishing fundamental principles operative in the legal system of the Andean Community.⁷ These principles relate to: supremacy of Andean Community law over the law of its Member States, the direct effect of Andean Community law in the courts of its Member States, and the external relations of the Andean Community. These are of course very familiar in the context of the EU as exactly the same issues arise in the EU legal system, providing a basis for comparison. Comparison is further facilitated by citations of ECJ precedent in ACJ judgments. As well as the ECJ, the ACJ has cited precedents or practices from: the World Intellectual Property Organization; World Trade Organization; United Nations Educational, Scientific and Cultural Organization; European Patent Office; Office for Harmonization in the Internal Market; and Constitutional Courts of Member States.⁸ This wide range of citation of various sources again points to the question of univeralisability of legal reasoning: courts, the ACJ included, tend to assume the legitimacy of precedents from other systems. First, some context is given to the ACJ by looking at the Central American Court of Justice, as the first modern international court and the first such court in South America.⁹

Background to International Courts in South America – The Central American Court of Justice (CACJ)

The adoption of a court to deal with disputes in South America as early as 1907 reflects “the fact that since their independence began the five Central American states [Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua] have had a tradition of solidarity”.¹⁰ As part of various attempts to deal with conflicts and promote cooperation and integration between the States, the Convention establishing the Central American Court of Justice (CACJ) with an additional protocol were adopted in 1907 along with several other conventions at the Central American Peace Conference¹¹ in Washington following conflict between Honduras and Nicaragua. The series of conventions were to be the foundation of a federal Union of Central America. Under Article 1 of the General Treaty of Peace and Amity concluded following the negotiations in Washington, D.C., the five states bound themselves always to “observe the most complete harmony, and decide every difference or difficulty that may arise amongst them, of whatsoever nature it may be, by means of the Central American Court of Justice, created by the Convention which they have concluded for that purpose on this date.”¹² The details of the working of the CACJ are set out in the Convention for the Establishment of a Central American Court of Justice (‘the Convention of 1907’).¹³ The CACJ was stated in Article XIII of the Convention of 1907 as representing the “conscience of Central America”, indicating the importance of an integration principle, given the very explicit goal

⁷ For further discussion of case selection and the legitimacy of generalising from important cases, see Conway (2012), op cit, pp. 7-9.

⁸ L. José Díez-Canseco Núñez (then President of the ACJ), *The Andean Court of Justice: Reality and Perspectives* (2015) at < www.eftacourt.int/.../Andean_Court_Presentation_Read-Only_Comp > (last accessed 27th April 2016).

⁹ The Minister of Foreign Affairs of Costa Rica, Luis Anderson, described it as “the first tribunal of its class in the history of civilization”: ‘The Peace Conference of Central America’, *2 American Journal of International Law* 144-151 (1908), p. 145.

¹⁰ M. Hudson, ‘The Central American Court of Justice’, *26 American Journal of International Law* 759-786 (1930), p. 786.

¹¹ J. Brown Scott, ‘The Central American Peace Conference 1907’, *2 American Journal of International Law* 121-143 (1908).

¹² General Treaty of Peace and Amity concluded by Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua, Washington, 20th December 1907.

¹³ 20th December 1907, *2 American Journal of International Law Supplement* 231 (1908).

of creating a federation of Central America. Judges were appointed by the legislature of each Member State.

The CACJ had a very wide jurisdiction, striking for the extent to which it presaged developments in the 20th century. Under Article 1 of the convention of 1907, the five states bound themselves to submit to the court “all controversies or questions which may arise among them, of whatsoever nature and no matter what their origin may be, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding.” The court was also given jurisdiction over cases between a government, and it could hear disputes:

- between individuals of the States of the Union of Central America and their governments¹⁴
- between States of the Union of Central America¹⁵
- between one of the governments of the States of the Union of Central America and a third-party State¹⁶
- by its own initiative, under an optional clause that four of the five Member States accepted¹⁷

Article 22 of the Convention of 1907 gave the CACJ *kompetenz-kompetenz*, i.e. the power to rule on its competence and jurisdiction. The CACJ in this first period of its existence only ended up delivering two judgments out of ten proceedings initiated: *Honduras v. Guatemala and El Salvador* (1908) concerned alleged support by Guatemala and El Salvador for insurrection in Honduras¹⁸ and *Diaz v. Guatemala* (1909) concerned arrest and imprisonment of a Nicaraguan citizen in Guatemala.¹⁹ In *Diaz*, for example, the CACJ resorted to *travaux préparatoires* to reject an argument by the applicant that he could not pursue local remedies, on the ground that this would constitute a defamation on Guatemala. The English translations of the judgments indicate that normal international law principles of interpretation were used, as reflected later in Article 31 of the Vienna Convention on the Law of Treaties,²⁰ which identifies the text first and then the object and purpose of a provision as a basis for interpretation.

In *Honduras v. Guatemala*, the CACJ almost immediately in its judgment commented on how international rules should be interpreted, indicating a consequentialist and systemic approach, but notably treating the wording and spirit as consistent:

That such a view of the matter finds no foundation either in the wording of the law, or much less in a correct interpretation of its spirit, which, in accordance with the principles governing the interpretation of international compacts, should be investigated with a view to deducing from its purport the consequence most in conformity with the order of ideas and interests to which it corresponds and most in conformity with the purpose of maintaining the full efficacy of the provision itself and as related to the remaining articles of the treaty.²¹

¹⁴ Articles I- III.

¹⁵ Article III.

¹⁶ Article IV.

¹⁷ See the review of caselaw in Hudson, *op cit*.

¹⁸ 3 *American Journal of International Law* 434-436, 729-736 (1909) for a summary English translation.

¹⁹ 3 *American Journal of International Law* 737-747 (1909).

²⁰ 1155 UNTS 331, 8*ILM* 679, entered into force Jan. 27, 1980.

²¹ 3 *American Journal of International Law* 729-736 (1909), p. 729, para. 2.

Indeed, the CACJ went on to refer to the intentions of the State parties as indicated by the wording (of Article XVIII of the Convention Establishing the CACJ):

And we must suppose that the high parties signing the convention thought [that efforts in this direction must be begun and concluded in every case before the CACJ could exercise jurisdiction], for the reason that they did not use the formula "in case the respective foreign offices should have begun and concluded negotiations for the purpose of reaching an agreement," or some other explicit mode of expression, instead of the one adopted.²²

It continued by referring to the function and object of the provision being interpreted and its consistency with the text of article I of the General Treaty of Peace and Amity signed at the same time as the convention.²³

In identifying purpose, it refers to the provision itself and the remaining articles of the treaty, thereby suggesting that the purpose of the provision could be interpreted both individually and systemically by reference to the other articles. This stops short of the meta-teleological approach to interpretation of the ECJ, for example, which tends to subsume individual provisions into the overall purpose and scheme of the EU Treaties and which does not focus on wording.

As is often given as a justification of the EU and its institutions, the assurance of peace was a central rationale for the establishment of the CACJ:

The conference recognized that peace is the great need of the Central American republics, and this peace should be based not upon force but upon the administration of justice. Hence, the convention for the establishment of a Central American court of justice in which each state should be represented and whose decisions should be binding alike upon government and citizen.²⁴

In the subsequent *Diaz* case, the judgment was largely concerned with the facts, but the CACJ also cautiously interpreted its own role and was very careful to avoid any encroachment on the sovereignty of the State parties more than was necessary or than they had intended:

In order to decide whether the present case fulfills all the restrictive conditions under which the said law establishes the jurisdiction of this Court in such matters, we must bear in mind: (a) That article XXII *ibidem* confers upon it the power to determine its competency "by interpreting the treaties and conventions relating to the subject in controversy and by applying the principles of the law of nations," which means that it must subject its judgment in each case to the rules established by compacts, and in default thereof, to the precepts of the law of nations, for to do otherwise would be to suppose the Central American Court of Justice invested with an authority superior to its own organic law; (b) that inasmuch as the said rule of the convention affects the sovereignty of the judicial branch of governments, because it confers on said court the power to judge matters under the jurisdiction of the territorial authorities, its bearings should be thoroughly scrutinized in applying it, for, as Fiore says, every

²² *Ibid*, p. 730, para. 3.

²³ *Ibid*, pp. 730-731, paras. 4-7.

²⁴ Brown Scott, *op cit*, p. 34.

limitation of autonomy must be regarded " as an exceptional right and be construed in its narrowest sense, in the manner most suitable to the nation on which it has been imposed and causing the least detriment to its natural liberty." *Codified International Law*, No. 150. (c) That under the hypothesis that the purport of said article II is deficient or doubtful -as to the question whether the court has or has not jurisdiction in the aforementioned claim, we must resort, as an especially authoritative source, to the discussions and votes recorded in respect to the matter in the proceedings of the Washington Peace Conference, in which are shown the weight and purport which the Central American plenipotentiaries intended and wished to give to this part of the treaty.²⁵

It went on to find that it could not accept the claim in the absence of an attempt by the plaintiff to seek redress in the Guatemalan courts, as required under the Convention: the Court "could not take cognizance of the suit without violating the strict and positive provision which the convention makes out of consideration and respect for the sovereignty of nations."²⁶ It further went on later in its judgment to cite the *travaux préparatoires*, which indicated the issue was expressly considered in the negotiations and the interpretation argued for by the plaintiff was deliberately not adopted in the wording.²⁷

The CACJ was dissolved along with the Union of Central America in 1917 and was not re-established until 1992 as part of the institutional framework of regional integration in Central America. This new process of integration had been launched in 1962 in Panama with the Charter of the Organisation of Central American States (ODECA),²⁸ but did not come to be realised until the 1990s after the Protocol to CODECA (known as the Protocol of Tegucigalpa)²⁹. Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Belize and the Dominican Republic are now full members. The Statute of the re-established CACJ was signed in Panama at the XIII Summit of Central American Presidents under Article 12 of the Protocol of Tegucigalpa, which establishes that the Court is one of the institutions of the Central American Integration System with the purpose of guaranteeing "respect for the law in the interpretation and execution of the present Protocol and its supplementary instruments or acts pursuant to it". The jurisdiction of the current CACJ can be summarised as follows:

... first, disputes between member States or between a Member State and a State which is not a member but agrees to the Court's jurisdiction; second, disputes between States and any natural or legal person who is a resident of any Member State; third, disputes about the integration process arising between Central American Integration System's Organs and member States or natural or legal persons. Finally, much like its regional predecessors but unlike most of the bodies included in this matrix, the CACJ/CCJ is characterized by strong supra-national features. It acts as a permanent consultative organ for Supreme Courts of the region and can, upon request of a party, hear disputes between constitutional organs of member States.³⁰

²⁵ 3 *American Journal of International Law* 737-747 (1909), p. 742.

²⁶ *Ibid*, p. 743.

²⁷ *Ibid*, pp. 746-747.

²⁸ 12th December 1962.

²⁹ 13th December 1991.

³⁰ Project on International Courts and Tribunals, 'Central American Court of Justice', < <http://www.pict-pcti.org/courts/CACJ.html> > (accessed 25th April 2016). See Chapter III, Article 22 et seq, of the Statute of the Central

This jurisdictional pattern is very similar to both the ACJ and the ECJ,³¹ but is broader in two respects: it can hear disputes with third-party States and can even address constitutional conflicts at national level, which reflects the jurisdiction of the original CACJ. Linking national courts with a supranational court is a key feature enabling the effectiveness of the latter: national courts, if they are cooperative, have the capacity to invest their own legal authority in the enforcement of supranational law by acting as a proxy for supranational judgments. This happens through the preliminary reference system in the EU. This procedural point can be connected to the notion of universalisability of legal reasoning: it only makes sense for national courts to be willing to apply supranational judgments if those latter judgments are legitimate in their reasoning and interpretation according to national standards. Notwithstanding that ECJ interpretation has tended to be avowedly distinctive, national courts have largely accepted it albeit with only one national constitutional court outright refusing to apply an EU law,³² although there have been important points of resistance at national level.

International Courts in South America Today in light of the ‘ECJ Model’

The reformed CACJ is one of a class of international courts that have emerged in South America, as a process of regional trading and integration blocs has emerged. The ACJ was the first of these, having been created in 1979 and coming into operation in 1984, ten years after Andean Community or CAN was created. The Mercosur Permanent Tribunal of Review was created in 2002, and has been in operation since 2004.³³ The Caribbean Court of Justice was created in 2001, in operation since 2005 (it differs to from other such international courts in that some signatory States accept it as a final appellate court).³⁴ Although the historical example of the CACJ exists in South America, given that the CACJ in its first form lasted for such a limited period and did not have the opportunity to develop a significant body of jurisprudence, it is unsurprising that the ECJ has become much more of a model and point of reference for these newer courts. The context of integration blocs in South America is less dramatic than is the case in the EU, given the historical backdrop of two World Wars originating in Europe. Nonetheless, the idea of maintaining peace through integration is also apparent from the first CACJ, one of its two delivered judgments dealing exactly with this issue. In South America, experience has been very different to Europe: there have been few conflicts in recent decades. The rationale of integration beginning with trade matters tends to follow a narrower ‘functional’ logic of enabling conditions to allow for import substitution over time, greater trade opportunities generally, and economies of scale through more joint-merged commercial action.

American Court of Justice, XIII Cumbre de Presidentes del Istmo CentroAmericano, Panama, 9-11th de Diciembre de 1992.

³¹ Alter & Helfer comment that the ACJ is the ECJ’s jurisdictional clone and includes a preliminary reference mechanism nearly identical to the one that exists in Europe”: K. Alter & L. Helfer, ‘The Andean Tribunal of Justice and Its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community’, 41 *New York University Journal of International Law and Politics* 871-930 (2009), p. 874.

³² J. Komárek, ‘Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*; Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*’, 8(2) *European Constitutional Law Review* 323-327 (2012).

³³ Mercosur has the following as full members: Argentina, Brazil, Paraguay, Uruguay and Venezuela.

³⁴ Agreement Establishing the Caribbean Court of Justice, available at < http://www.sice.oas.org/trade/caricom/caricind_text.asp > (last accessed 28th January 2016). The following States have so far ratified the Treaty: Antigua & Barbuda; Barbados; Belize; Grenada; Guyana; Jamaica; Saint Kitts & Nevis; Saint Lucia; Suriname; and Trinidad & Tobago, Dominica and Saint Vincent & the Grenadines.

What might be described a socio-political concern with avoiding a sense of being left behind and dwarfed by global trends and anticipation of competition between world regions. As a cultural backdrop, one might note the continuing cultural dominance by intellectual élites in the ‘Old World’. Africa, like South America, is also following the European model of the past 50-60 years. A similar tendency can be seen in the commonality of human rights frameworks, based again already on the European model in the form of the European Convention on Human Rights and the European Court of Human Rights, despite the contested character of content of rights.³⁵ Again in this broader context, it is not surprising that the ECJ has tended to be seen as a model, as the first such contemporary international court. The ECJ can be seen as the most influential due to: (i) the traditional political pre-eminence of Europe; (ii) the relative economic advancement of the EU and its internal market, of which the ECJ is seen as a guarantor; (iii) the extent of support amongst élites, including academic, for European integration. Weiler has commented on the ECJ ‘sweeping the boards’ of its audiences.³⁶ However, the ECJ has also been very controversial, beginning with Rasmussen’s ground-breaking critique in 1986 *On Law and Policy of the European Court of Justice*.³⁷ The ECJ structure and jurisdiction have been broadly copied, but not in every respect. The purpose of this Working Paper is to assess how the methods of legal reasoning of the ECJ and ACJ can be compared and contrasted.

The Jurisdiction and Procedure of the Andean Court of Justice

The jurisdictional procedure of the ACJ is very similar to the ECJ, although the pattern of practice has not always been the same (especially as regards the preliminary reference procedure):³⁸

- Nullity actions³⁹ regarding decisions of the Andean Community institutions brought by Member States (but only when they have not approved the decision), one of the institutions, or individuals where decisions affect their subjective rights or their legitimate interests.
- Non-compliance actions⁴⁰ against Member States, which can be brought by another Member State or the General Secretariat, as in the EU under Articles 258 and 259 of the Treaty on the Functioning of the European Union (the General Secretariat being the Andean equivalent of the European Commission), but unlike the EU, non-compliance actions can be brought by individuals directly before the Andean Court rather than just in national courts
- Preliminary reference from national courts (or prejudgment interpretation, to use the Andean terminology)⁴¹

In the ACJ, there is a single judgment as with the ECJ, but there fewer judges: 4 in the ACJ, as compared to 28 in the ECJ. Further, at the ACJ there is no Advocate General. In the ECJ context, the more detailed reasoning of Advocates General can deflect from brevity of ECJ judgment. Thus,

³⁵ G. Beck, ‘The Mythology of Human Rights’, 21(3) *Ratio Juris* 312–347 (2008).

³⁶ J. H. H. Weiler, ‘Rewriting *Van Gend en Loos*: Towards a Normative Theory of ECJ Hermeneutics’ in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (The Hague: Kluwer, 2003), 150.

³⁷ H. Rasmussen, 1986 *On Law and Policy of the European Court of Justice* (Kluwer 1986).

³⁸ Alter & Helfer (2009), op cit; K. Alter & L. Helfer, ‘Nature or Nurture: Lawmaking in the European Court of Justice and the Andean Tribunal of Justice’, 64 *International Organization* 563-592 (2010), op cit; K. Alter, L. Helfer & O. Saldías, ‘Transplanting the European Court of Justice: The Experience of the Andean Court of Justice’, 60 *American Journal of Comparative Law* 629-664 (2012).

³⁹ Articles 17-22 of the Treaty Creating the Andean Court of Justice (as amended by the Cochabamba Protocol).

⁴⁰ Articles 23-31 of the Treaty Creating the Andean Court of Justice (as amended by the Cochabamba Protocol).

⁴¹ Articles 32-36 of the Treaty Creating the Andean Court of Justice (as amended by the Cochabamba Protocol).

the absence of an Advocate General places more emphasis on the requirement for justification in the judgment of the ACJ itself. The ACJ has had to deal with many similar issues as the ECJ. In its very first judgment, even though it did not have to, the ACJ addressed the issues of direct effect and supremacy. In this judgment, *Proceso No. 1-IP-87*, the ACJ also made explicit its approach to interpretation (which the ECJ generally does not do), with a heading specifically on methods of interpretation. Although following the ECJ as to results, the ACJ suggested ‘universal principles’ apply in the sphere of interpretation or legal reasoning, which is consistent with the thesis of universalisability suggested above. In contrast, both the ECJ and much academic commentary on it links its teleological method to the specific or *sui generis* character of the EU as an entity or polity.

A Preliminary Assessment of the Legal Reasoning of the Andean Court of Justice – Supremacy, Direct Effect, and External Relations

In *Proceso No. 1-IP-87*, the ACJ immediately addressed the substance of the issue of supremacy of Andean Community law over national law. Its reasoning is quite different from that of the ECJ in *Costa v. ENEL*,⁴² the first case in which the ECJ explicitly set out its supremacy claim (it had hinted at it in *Van Gend en Loos*⁴³). Whereas in *Costa v ENEL*, the ECJ referred to the effectiveness of EU law and the nature of the system of integration without reference to the specific intention of the representativeness of the Member States, the ACJ refers to the latter as its primary justification:

First, it is necessary to point out that the legal system of the Andean integration prevails in its application on internal or national standards, being an essential feature of Community law, as a basic requirement for building integration. This was recognized by the Cartagena Agreement Commission composed of plenipotentiaries of the Member Countries, in the statement adopted at its Twenty-Ninth Regular Session (Lima, May 29 June 5, 1980), when it declared the "full force" of the following concepts: a) the legal system of the Cartagena Agreement is identity and autonomy, is a common law and is part of national law, b) the law of the Agreement prevails within the framework of its powers, on national standards without being able to oppose it measures or unilateral acts of the Member Countries, c) Decisions involving obligations for Member Countries become effective on the date indicated or, otherwise, on the date of the Final Act of the respective meeting in accordance with Article 21 of the Regulations of the Commission. Consequently, those decisions acquire binding force and are enforceable from the date thereof.⁴⁴

While the ACJ here relates supremacy to the need for effectiveness of Andean Community law in this passage, it expressly refers to statements made by the representatives of the signatory States. This passage adopts a historical interpretation, for which the rationale can be related to the rule of

⁴² Case 6/64, *Costa v. ENEL* [1963] ECR 585, at 593.

⁴³ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, at 12.

⁴⁴ PROCESO No. 1-IP-87, *Interpretación prejudicial de los artículos 58, 62 y 64 de la Decisión 85 de la Comisión del Acuerdo de Cartagena, solicitada por el Consejo de Estado de la República de Colombia*, sec. 2.

law, democracy, and a separation of powers (i.e. underlying substantive values), though the latter are not referred to. In an international context, treaty-making by signatory States, and their intentions reflected in *travaux préparatoires*, constitute the legislative power. An analogy does lie, nonetheless, with EU law as it developed. The Member States of the EU chose not to put an express supremacy statement in the revised EU Treaties at the last amendment in the Treaty of Lisbon, instead referring to it indirectly through Declaration No. 17 attached to the Lisbon Treaty. Immediately following its holding on supremacy in *Proceso* No. 1-IP-87, the ACJ went on, under a specific heading of Methods of Interpretation (*Métodos de interpretación*), to observe:

As for the methods of interpretation that the Court should use, the reality and essential features of the new Integration Law and the important contribution in this regard that European experience has accumulated must be remembered, especially the contribution of the jurisprudence of the Court of Justice, the Court of the European Communities on the application of this law, which acts constantly for the benefit of community building, without losing sight of the permanent purpose of the rule. For these reasons, the preferred method of interpretation corresponds to what is referred to as "functional", as a systematic and teleological method, while still using, if applicable, the other universally accepted methods of interpretation, with the caveat that the teleological method acquires special meaning in Community law and legislation as a norm for achieving a common goal, as best suited to the nature of the preliminary decision in taking into account the "object and purpose" of the norm which, ultimately, is the process of integration of the Andean subregion, the purpose behind the signing of the Cartagena Agreement. (*emphasis added*)⁴⁵

There is some tension within this statement: on the one hand, the ACJ refers to ‘universal principles where they apply’, yet also refers to the specific teleology of the Cartagena Agreement. Whereas the former points to a structured approach relying primarily on the text, the latter places less attention on specific texts and more on overall purposes. The reference to “... ultimately, is the process of integration of the Andean subregion ...” indicates a meta-teleological approach, i.e. the purpose of the Andean Community overall, and not just the purpose of a particular provision or law. This is characteristic of the ECJ. Further, the ACJ refers to the specific context of preliminary judgments. In this type of procedure, as in the EU, a court is not required to give a judgment on the facts, and this points to a more general evaluation. Nonetheless, it does not require a court to resort to meta-teleological interpretation. A more restrained interpretation is always possible. Therefore, meta-teleological interpretation reflects a choice. In its judgment, the ACJ refer to community building, rather than invoking also the other substantive values indicated above of the rule of law, democracy, and a separation of powers. However, it implicitly accepted these latter values in its earlier passage by a justification based on historical interpretation. Meta-teleological interpretation is not inevitable, as is apparent from the judgments of the CACJ in its first existence. Even though the CACJ was working within a system avowedly federal, more so than the current Andean Community, it did not refer to purposes in this way, although it did refer to the order of ideas related to a law. Overall, though, it placed emphasis on specific texts in the first place. Thus, the influence of the ECJ can be

⁴⁵ Ibid, sec. 3.5.

seen in the articulation of the ACJ, even if the ACJ is less radical in practice and is more traditional in its reference to text and/or intention.

Shortly after, in *Proceso No. 2-IP-88*, the ACJ re-stated the supremacy principle, this time linking supremacy itself to a universal method of legal reasoning:

In other words, the internal standard is inapplicable, to the benefit of the Community legislation. This has been repeatedly stated by the Court of Justice of the European Communities (see judgments mainly *Costa / ENEL* of June 15, 1964 , and the *Simmenthal* judgment of 9 March 1978) accordingly, at this point, with the spirit of the Andean integration standards. This crowding of the national standard as a result of the principle of preferential application, it is especially clear when the subsequent law must prevail over the former in accordance with universal principles of law – [this] is precisely the Community legislation.⁴⁶

This can be understood at a formal level as an application of the norm conflict rule of *lex superior*. Norm conflict is an inevitable feature of any legal system, in that two contradictory norms cannot be maintained. At a formal level, there is nothing unusual about the ACJ approach, it is inevitable: either national law or Community law had to prevail, and in line with its previous jurisprudence, the ACJ applied Community law. It expresses itself similarly to how the ECJ did, for example, in international *Handelsgesellschaft Internationale*.⁴⁷ Regarding supremacy of (now) EU law over national law:

The Court of Justice of the European Communities, cited above, has affirmed the absolute primacy of Community law over domestic, this turns out to be also applicable in the legal system of the Andean integration as previously indicated.

In the last statement above it is concluded that "every national court which has to decide within its jurisdiction, has an obligation to fully apply Community law and protect the rights it confers on individuals, by not applying any provision may conflict with national law, whether before or after the Community rule".⁴⁸

As Alter & Helfer put it, "But whereas the ECJ had framed its analysis in constitutional terms, boldly asserting ... the ATJ stressed the functional necessity and implicit state support for supremacy."⁴⁹

Direct effect:

Alter & Helfer have summarized the development of direct effect by the ACJ as follows:

Although neither the Cartagena Agreement nor the Treaty Establishing the Andean Tribunal explicitly stated that Andean law has direct effect in national legal systems

⁴⁶ *Proceso N° 2-IP-88 Interpretación prejudicial de los artículos 56, 58, 76, 77 y 84 de la Decisión 85 de la Comisión del Acuerdo de Cartagena, solicitada por la Corte Suprema de Justicia de la República de Colombia*, sec. II.

⁴⁷ Case 11/70, *Internationale Handelsgesellschaft GmbH* [1970] ECR 1125.

⁴⁸ *Ibid*, sec. 2.

⁴⁹ K. Alter & L. Helfer, 'Nature or Nurture: Lawmaking in the European Court of Justice and the Andean Tribunal of Justice', 64 *International Organization* 563-592 (2010), pp. 570-571. See also Alter et al (2012), op cit.

or that it is supreme to national law, negotiators assumed that the Andean system would replicate these judge-made EC doctrines. But the drafters also sought to hem in expansionist lawmaking by allowing only member states to bring noncompliance complaints, and by explicitly stating that the ATJ should not delve into the facts of preliminary rulings. The ATJ's faithful respect of these limitations contributed to the dearth of Andean cases in its early years. In 1996, member states relaxed both of these restrictions, so that after 1996, the ATJ resembles the ECJ's structure even more closely.⁵⁰

The ACJ previously asserted direct effect, for example, in *Proceso No. 2-IP-88*, but linked it to supremacy and was careful to deny that direct effect linked to supremacy invalidated national law, just that it meant Andean law applied instead (reflecting the cautious approach Alter & Helfer identify):

It itself is not a question that subsequent Community legislation repealing the existing national standard, as is the case in terms of domestic law, since they are two separate, independent and separate legal systems, to adopt within their own powers peculiar ways create and extinguish the right, which of course interchangeable. It is, more precisely, the direct effect of the principle of immediate application and primacy in any case be granted to the Community rules on the internal level. It has been said there is an occupation of land with displacement of the rules occupied before, which become inapplicable as incompatible with the provisions of Community law ("preemption"). The internal standard, however, could continue in effect even if inapplicable, and remain dormant until Community law shifted and modified.⁵¹

External relations:

The Trujillo Protocol⁵² gave the Council of Foreign Ministers direct responsibility for conducting the Andean Community's external relations. This is an area where the ACJ has been considerably more cautious than the ECJ. It has not developed any equivalent of the doctrine of parallelism, although the Trujillo Protocol clearly made this a more difficult option. However, within the context of external relations, the ACJ has adopted the following position in *Proceso 1-IP-96*:

... according to ACJ case law, primary law overrides any other Community provision, namely secondary law or treaties which regulate the external relations of the Andean Community. Additionally, the ACJ asserted its jurisdiction to oversee the fulfilment of this hierarchical normative relationship.⁵³

⁵⁰ Alter & Helfer (2010), op cit, pp. 567-568.

⁵¹ *Proceso No. 2-IP-88*, sec. II.

⁵² *Trujillo Act and the Protocol Amending the Cartagena Agreement*, 10 March 1996.

⁵³ Y. Reyes Tagle, 'The Law of Regional and Multilateral Agreements: How does Andean Community law relate to WTO rules?', *SECO / WTI Academic Cooperation Project Working Paper Series 2014/15* (November 2014), p. 14.

Thus, in *Proceso 1-IP-96*,⁵⁴ the ACJ has asserted the normative hierarchy of Andean Community agreements entered into by the Council of Foreign Ministers over contrary international agreements. It was the first judgment in which the ACJ had to directly address the relationship between the Andean Community and the international legal system. Unlike the famously brief and declaratory style found in some ECJ judgments, the ACJ elaborated at some length on the relationship between Andean Community external agreements and other international agreements. The facts concerned the compatibility of the Cartagena Agreement with international intellectual property rules found in the Paris Convention for the Protection of Industrial Property.⁵⁵

The ACJ in *Proceso 1-IP-96* describes the process of Andean integration in terms of an exercise of delegation of sovereignty rather than a limitation on it, and is somewhat in contrast to the ECJ rhetoric in *Costa v. ENEL* on a permanent transfer of sovereignty:

In this process the nations, rather than limit its sovereignty, what they do in the exercise of that sovereign power, it is to delegate some of its powers, transferred from the orbit internal state action to the orbit of Community action. This occurs in areas such as the Common Industrial Property Regime. The sovereign manifestation expressed in integration treaties, the result of the exercise of state power in representative democracies - particularly and especially in the Andean Group - creates a basic legal system, which by its direct effect, becomes shared by countries members and of their nationals.⁵⁶

Later in the same judgment, the Court observed that the Member States of the Andean Community have sovereignly decided to transfer a “limited jurisdiction to such bodies”.⁵⁷ The ACJ quite adroitly avoided offering a definitive statement of the relationship between Andean Community law and public international law by explaining that international law was to be understood as going into the legal system of each Member State and as at that point becoming subject to the preeminence of Community law just as over other national law:

In the case of international treaties signed by members to the regulation of certain legal-economic activities such as protection of industrial property countries, it can be argued that to the extent that the supranational community takes jurisdiction to regulate this aspect of economic life, Community law is linked to the international treaty so that it can serve as a source to develop its regulatory activity, no one can say, however, that Community law is subordinated to that. Conversely, since the international treaty becomes part of the legal system applicable in each and every one of the member countries, maintaining Community law - by applying its

⁵⁴ *Proceso No. 1-IP-96 Solicitud de Interpretación Prejudicial, de los artículos 1, 2, 4, 6 y 7 de la Decisión 344 y 2 y 3 de la Decisión 345 de la Comisión del Acuerdo de Cartagena, en relación con el artículo 1º, numeral 3º del Convenio de París para la protección de la Propiedad Industrial.*

⁵⁵ First adopted in 1883, UST 1583, 828 UNTS 305.

⁵⁶ *Proceso No. 1-IP-96*, sec. III.

⁵⁷ *Ibid*, sec. III(b).

"existential" characteristics of obligation, direct effect and preeminence - the preferred specific applicability of the domestic law of the respective country.⁵⁸

Its reasoning could then be linked to its reasoning above on supremacy. It thus avoided having to deal with the issue in terms of a direct conflict between Community law and public international law, which the ECJ came to decide upon in the case after several decades of its existence in *Kadi*, and in favour of the primacy of EU law.⁵⁹ Further on in this judgment, the ACJ interpreted a particular provision of Andean Community legislation (Article 6 of Decision 344) in a “systematic, functional and teleological interpretation” way by reference to the surrounding articles, rather than on the basis of a meta-teleological interpretation.⁶⁰ In the event, the ACJ was able to find there was no contradiction between the Paris Convention and Andean Community law.

Points of Contrast and Comparison with the European Court of Justice

Some points of comparison and difference in approach between the ECJ and ACJ were identified in the above discussion, and this section elaborates on this. Stein famously commented in 1981 that the ECJ “had been tucked away in the fairytale land of Luxembourg and subject to benign neglect by the powers that be...”⁶¹ The ECJ had a key role in the unfolding of European integration, through creating the doctrines of direct effect (and indirect effect), supremacy, parallelism and pre-emption in external relations, an expansive approach to competences of the Community (now Union), and the development of human rights as general principles of Community (now Union) law. To put Stein’s words in another way, national governments often did not fully realise the long-term implications of the Court’s caselaw, partly because the Community was seen as essentially technocratic project that did not fundamentally impact on sovereignty and partly because of the support of legal élites in the Member States for what the ECJ was doing (other factors were also operative). Rasmussen has referred to the “privileged relationship” with academia,⁶² while Shaw highlighted Weiler’s use of the expression “language of love” to their attitude to the ECJ.⁶³ The ECJ now operates by its own estimation as a ‘constitutional court’ for the EU, and indeed ‘constitutionalisation’ has acted as a legitimating paradigm for the Court’s role in more recent decades. From the beginning, the ECJ has emphasised ‘systemic interpretation’ although it really only commenced its more radical jurisprudence in the 1960s. Systematic interpretation is writ large in the methodology of the ECJ in the form of ‘meta-teleology’ (as aptly put by Lasser⁶⁴), i.e. purposive interpretation at the highest level of abstraction of purpose, namely the idea of ever-closer Union (not the more modest purposive interpretation of statute law at national level). Characteristics of the overall interpretative approach of the ECJ include:

⁵⁸ Ibid, sec. III(c).

⁵⁹ Joined Cases C-402 & 415/05P, *Kadi and Al Barakaat International Foundation v. Council & Commission* [2008] ECR I-6351.

⁶⁰ Ibid, sec. III(a).

⁶¹ E. Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’, 75(1) *American Journal of International Law* 1-27 (1981), p. 1.

⁶² H. Rasmussen, *On Law and Policy of the European Court of Justice* (Martinus Nijhoff 1986), p. 303.

⁶³ J. Shaw, ‘European Union Legal Studies in Crisis? Towards a New Dynamic’, 16(2) *Oxford Journal of Legal Studies* 231-253 (1996), 243 referring to J. H. H. Weiler, ‘A Quiet Revolution? The European Court of Justice and its Interlocutors’, 26(5) *Comparative Political Studies* 510-534 (1994), 531.

⁶⁴ M. de S.-O.-L’E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press, 2004)

- Usually, non-articulation of interpretative dynamics, facilitating discretion
- When interpretative practice is articulated, no hierarchy identified
- No automatic privileging of textual interpretation of *lex specialis*
- Generally, *lex specialis* not adhered to with any consistency⁶⁵

Representative of the Court's general tendency is its uncharacteristic explicit articulation of its interpretative method in *CILFIT*:

Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.⁶⁶

This passage evokes evolutive and not historical interpretation, as well as meta-teleology. Bobbio recognised the problem of hyper-integration for which the ECJ is most open to criticism: everyone understood that amongst the various interpretative methods, recourse to the spirit of the system of general principles of law is the one to be deployed most rarely and most cautiously, since it is the interpretative method most vulnerable to personal preferences and the ideology of the judge.⁶⁷

Two recent cases well illustrate its method. *Pringle v. Ireland*⁶⁸ concerned the legal basis of the ESM Treaty: whether it could be adopted under Article 136 TFEU being amended on the basis of Article 48(6) TEU, regarding simplified revision of Part II TFEU on the internal market, or whether the correct legal basis was Part III TFEU on monetary union (meaning Article 48(6) TEU could not be used). The ECJ held the Treaty was not concerned with price stability, but with addressing the financing requirements of the Euro Member States. Price stability is, however, just one aspect of monetary policy, and the financing requirements related to the maintenance of the currency, so the Court's reasoning so is not absolutely persuasive on this point. This is a good example of not applying *lex specialis* (monetary policy) over *lex generalis* (internal market).

Opinion 2/13 on EU Accession to ECHR⁶⁹ ranks along with *Opinion 1/91* as a radical assertion of the jurisdiction of the ECJ to protect its own prerogatives.⁷⁰ The Court struck down a draft agreement proposed by the European Commission implementing the requirement in Article 6 TEU that the ECJ accede to the ECHR.

- That it failed to coordinate higher protection than the ECHR Member States could apply under Article 53 ECHR with Article 53 of the EU Charter,
- That it allowed Member States to be a party against each other before the European Court of Human Rights, (notwithstanding that this possible already under Article 259 TFEU)

⁶⁵ See generally Conway, op cit.

⁶⁶ Case 283/81, *CILFIT v. Ministry of Health* [1982] ECR 3415, para. 2.

⁶⁷ N. Bobbio, 'Des Critères Pour Résoudre les Antinomies', in C. Perelman (ed.), *Les Antinomies en Droit* (Bruxelles: Bruylant, 1965), 240–241.

⁶⁸ Case C-370/12, *Pringle v. Ireland*, judgment of 27th November 2012.

⁶⁹ *Opinion 2/13 on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 18th December 2014.

⁷⁰ In *Opinion 1/91 Re European Economic Area Agreement* [1991] ECR I- 6079, the ECJ refused to accept that the Member States could create a separate court for the European Economic Area. Shaw commented that Shaw observed that here '[the ECJ] intervened directly in the exercise of sovereign will by the Member States': Shaw, op cit, p. 239.

- That a problem could arise in the future under Protocol 16 to the ECHR whereby Member States could request an advisory opinion to the Strasbourg Court in a way incompatible with the preliminary references procedure under Article 267 TFEU
- That it did not preserve the exclusive jurisdiction of the ECJ under Article 344 TFEU (on exclusivity of ECJ jurisdiction),
- That it provided the possibility for the Strasbourg court to rule on the division of powers between the EU and the Member States and on EU secondary law independently of an ECJ interpretation of them,
- That it did not provide for the Strasbourg court to be bound by a judgment of the ECJ on the same issue of law, and
- That it could provide for Strasbourg to have jurisdiction over an aspect of the Common Foreign Security Policy over which the ECJ did not have jurisdiction
- The Court is about as stringent as possible in interpreting the internal requirements of EU law for accession to the ECHR, e.g. it is far more stringent than national constitutional courts require
- Its interpretation of Article 344 TFEU as precluding Strasbourg jurisdiction where the ECJ does not have jurisdiction is not required by the text (MSs “may not resort to methods of dispute settlement other than those provided therein”)
- As in in *Opinion 1/91*, the ECJ is determined to ensure its own prerogative as a matter of the internal logic of its caselaw, not on the Treaty text or intentions of the Member States

By comparison, although the ACJ has cited ECJ jurisprudence and approved a teleological or systemic approach to interpretation, it has undoubtedly been more modest. It has not developed doctrines that are neither in the text of the Treaty or that could not reasonably be attributed to the member States. It has expressly referred to the *travaux préparatoires* of the Cartagena Agreement and has not sought to characterise its method as *sui generis* or at odds with universal principles of interpretation. On the contrary, it has explicitly invoked the idea of universal principles. Although the ACJ has asserted the normative superiority of external agreements of the Council of Foreign Ministers over other international law treaties, it has not sought to shape the external powers of the Andean Community compared to the fundamental role the ECJ has played in the transferring external powers to the EU in *ERTA*⁷¹ and subsequent cases through its doctrines of parallelism and pre-emption of Member State competence. As Alter & Helfer have demonstrated, support from legal élites in the Member States of the Andean Community for the ACJ is much more variable than is the case in the Member States of the EU regarding the ECJ.⁷² Their important research has noted, notwithstanding it has been an ‘activist’ court in some of its judgments (mainly on intellectual property), the ACJ’s strikingly more modest judicial lawmaking as compared to the ECJ”.⁷³ The analysis in this Working Paper seeks to elaborate in terms of the theory of legal reasoning how this has been so.

Conclusion

In conclusion, there is a superficial similarity of approach of ACJ to the ECJ, but there are substantial differences. The differences are that the ACJ has tended to be more explicit and does not

⁷¹ Case 22/70, *Commission v. Council (Re European Road Transport Agreement)* (*ERTA*) [1971] ECR 263, paras. 17–19, 28–31 (only slightly refined in later cases).

⁷² Alter & Helfer (2009), op cit, pp. 921-926; Alter & Helfer (2010), op cit, esp. pp. 585-586.

⁷³ Alter & Helfer (2010), op cit, p. 565.

argue for specificity of Andean system to the same extent and it appears to accept the universalisability of interpretation. On the other hand, as with the ECJ, neither does it articulate the issue of levels of generality or the substantive reasons for different methods of interpretation. Influences across different regional integration blocs across likely to become a stronger feature of international judicial practice. This is an emerging area of research, and only a small sample, albeit qualitatively important, of ACJ caselaw has been surveyed above. The idea of universal principles of interpretation, articulated within ACJ caselaw, is an important one as it points to the deeper normative foundations of legal reasoning, which cannot solely be considered by reference to the actual practice of a particular court. Important areas for future research include the consistency of approach of ACJ in articulating its method, its approach to *lex specialis* versus *lex generalis*, and its understanding of gaps (prominent in commentary on ECJ). The ACJ has undoubtedly been influenced by the ECJ, but it is not as radical in its practice and is generally rooted in more widely accepted methods of interpretation than a reliance on meta-teleology. This was implicitly acknowledged in the 2015 comment from the then President of the ACJ that the ACJ in future could consider being more innovative.⁷⁴ A key feature of the future of regional blocs of integration is quite how influential the ECJ will be and quite how innovative their respective courts turn out to be. Also of much importance will be the extent to which any innovation does not result in a countervailing backlash from the respective courts' audience, in particular, the governments of the Member States of the integration organisation and national legal communities.

⁷⁴ Diez-Canseco Núñez, op cit.

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