

The prejudicial interpretation of the Andean Community

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According to the passage of time and based on the constant struggles of man for the recognition of his rights which have been obtained as a result of the French Revolution, he has been creating rules and laws that allow the regulation of his obligations, in order to achieve harmony that allows the improvement of society in all its aspects.

Thus international treaties arise that will allow not only the improvement of man as an individual being, but also the improvement of society as a whole. It is in this way that in Latin America and based on the precedents left by the European Community the creation of the Andean Community arises as a result of the signing of the Cartagena Agreement.

In this sense, the Andean Community has been integrating over the years countries that have joined voluntarily with the objective of achieving an integral, more balanced and autonomous development through Andean, South American and Latin American integration¹; which currently has a supranational body whose function is to verify the legality of Community law and which in turn has been carrying out prejudicial interpretations that allow a better application of Community legislation to ensure the effectiveness of the legal system. Said body is called the Court of Justice of the Andean Community.

In this way and as indicated by the same Court on the first prejudicial interpretation judgment in Process 01-IP-87:

It is the basic function of this court, essential to protect the validity of the principle of legality in the Andean integration process and to functionally adapt its complex legal system, to interpret its rules in order to ensure uniform application in the territory of member countries (...) fundamental objective that is logically outside the competences of local judges (...)²

¹ Portal of the Andean Community (2018). Recovered from:
<http://www.comunidadandina.org/Seccion.aspx?id=189&tipo=QU&title=somos-comunidad-andina>

² Process 01-IP-87: Prejudicial interpretation of articles 58, 62 and 64 of decision 85 of the Commission of the Cartagena Agreement, requested by the Council of State of the Republic of Colombia.

From what is indicated by the Court it is possible to see that it is only for the body to carry out the prejudicial interpretations of the community norm and that they will be of uniform application in the territory of the member countries.

Therefore the purposes of the prejudicial interpretation, following the European model are diverse:

- I. Collaboration between the judge who knows a process involving a rule of community law and the community court, in order that the latter clarifies their doubts about the interpretation to be given.
- II. Guarantee the uniformity and stability of community law, favor its development, speed up its decentralized application, serve as a means of protecting people. In turn, the prejudicial interpretation is intended to standardize the interpretation of Andean Community Law and provide a fair solution to the controversial case, where any of the actionable people (or in certain cases the government) of one of the member countries invoke in their favor in a judicial process a regulation of Andean Community Law³

Now, with regard to this last figure, it is necessary to point out that this will be carried out only when the local judges (understood as both the local judges or courts, the arbitrators in law and the administrative authorities that exercise a quasi-jurisdictional function), request the prejudicial interpretation of a community regulation, but not when an individual requests it. Since the Creation Treaty of TJCA (Court of Justice of the Andean Community) does not contain the possibility for a private individual to go directly and freely to the Court to obtain interpretations or concepts; but rather legitimizes only the local judges to request it.

However, such action should not confuse with the fact that the parties request the local judge to consider the prejudicial interpretation, which may be granted provided that the local judge determines whether the request is appropriate in accordance with the need or not to apply Community regulations to resolve the specific case⁴

With regard to the figure of the local judge, it is appropriate to point out that, since it is an authority that exercises a quasi-jurisdictional function that requests a prejudicial interpretation from the Court of Justice of the Andean Community, it must evidence as indicated in the Process 121-IP-2014 the following requirements:

³ Pachón Muñoz. Manuel. Prejudicial interpretation action in Andean community law. Themis, 23 (1992), p. 76

⁴ Well, Martínez Patricio. The prejudicial interpretation. Op. Cit. p. 98-99.

1. It has been constituted by legal mandate.
2. It is a permanent body
3. The mandatory character of their competences
4. The obligation to apply Andean community regulations in the exercise of their faculties
5. The contradictory nature of the procedures under its responsibility and respect for due process and
6. The impartiality of their acts

If the aforementioned faculties are not evidenced, said authority may not request the prejudicial interpretation, and in doing so, it shall be declared inadmissible.

On the other hand, it is important to point out that prejudicial interpretations must be requested provided that:

- Within one of the member countries, a legal action has been initiated.
- That in the internal process a regulation of Community Law is going to be applied, that is, the point or issue of Community Law is necessary to resolve the case, since it will influence the decision adopted by the local judge.
- That the local judge should go to the TJCA.

With regard to the second point, we must indicate that, as indicated in Article 32 of the Treaty of Creation of the Community Court of Justice:

“Local judges who are aware of a process in which any of the regulations that make up the legal system of the Andean Community must be applied or disputed, may request, directly, the Tribunal's interpretation of said regulations, provided that the judgment is susceptible of appeals in domestic law. If the opportunity arrives to issue a judgment without having received the interpretation of the Court, the judge must decide the process. In all the processes in which the judgment is not subject to domestic remedies, the judge will suspend the procedure and will directly request, ex officio or at the request of a party, the Court's interpretation”.

From the aforementioned article, it follows what is known today as the types of a request of prejudicial interpretation, which are in accordance with Articles 121 and 122 of the Statute of the Court, we have:

- a) A request for a prejudicial interpretation is optional when the local judge issues a judgment that is susceptible to domestic law, that is, when there are challenging channels for which questioning is possible, so Article 122 of the Statute of the Court respectively indicates:

“Local judges who are aware of a process in which any of the regulations that make up the legal system of the Andean Community must be applied or disputed, may request, directly and

through a simple letter, the Tribunal's interpretation of said regulations, provided that the judgment is subject to remedies under domestic law (...)"

Thus, in the case of administrative entities, the request for a prejudicial interpretation is optional, as there are contested appeals that may be applied to the relevant procedures.

As an example, we can cite the prejudicial interpretation issued by the Court of Justice of the Andean Community in the Proceedings No. 37-IP-2013: "Ex-officio prejudicial interpretation of articles 134 paragraph a), 136 paragraph a) and f), 150 and 159 of Decision 486 of the Commission of the Andean Community, based on the request made by the First Section of the Council of State of the Republic of Colombia".

- b) A prejudicial interpretation is mandatory when the local judge acts as a final instance, that is to say it includes all those cases in which the decision of the local court that applies Andean Community law is not susceptible to be challenged by judicial appeal, according to the provisions of the internal law. Thus Article 123 of the Statute indicates that:

"Ex officio or at the request of a party, the local judge that is aware of a process in which the judgment was sole or final instance, that was not susceptible of domestic legal remedies, in which any of the regulations that make up the legal system of the Andean Community must be applied or disputed, must suspend the procedure and request directly and by simple office, the interpretation of the Court".

In the case of the mandatory prejudicial interpretation, this corresponds only to the Supreme Court, since, since it is the last instance, it is no longer feasible to submit any impugnative appeal.

For the present case we can cite as an example what is stipulated in Process 068-OP-2014 on "Prejudicial Interpretation of Articles 32 and 33 of the Treaty of Creation of the Court of Justice of the Andean Community, 123 of its statute, 45 and 46 of the Decision 486 of the Andean Community, requested by the Permanent Chamber of Constitutional and Social Law of the Supreme Court of Justice of the Republic of Peru"

Conclusions

- The request for the optional and compulsory prejudicial interpretation is of strict compliance by the jurisdictional or quasi-jurisdictional bodies, and they are not constituted as evidence within a procedure or process, since its nature is of procedural incidence.
- The prejudicial interpretation of the Court of the community serves to form homogenizing and integration criteria, since the matter in intellectual property in our country has not been developed in an extensive manner, which serves as a basis and as a guide for the solution of controversies.

- Although prejudicial interpretations make it possible to homogenize the understanding of the regulation, it is necessary to apply the principle of primacy of reality, meanwhile each case must be analyzed in a particular way and according to the territorial reality.

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