EDITORIAL COMMENTS

The Cartagena Agreement 1979

For its future development and in particular for the influence it may have elsewhere in the world, it is important that a legal order is well received. A system generally seen as good law will more easily survive than a system whose appropriateness is questioned. For the European Communities it is interesting, therefore, to note that much of its legal system has been accepted by the Andean Common Market. By an agreement of 28 May 1979 the Governments of Bolivia, Colombia, Ecuador, Peru and Venezuela created a Court of Justice which will operate within this market. The agreement clearly uses the Court of Justice of the European Communities as a model. For a European lawyer it is interesting to see from the agreement that important provisions of European Community law have proved to be acceptable in another part of the world. It is also interesting to note that the American States have amended the European system in several ways. Some of the amendments were needed because of different situations in the Latin American market but at least eight of them are intended to remedy provisions which the American States considered less acceptable.

1. Apart from some minor differences the system for electing judges is the same as in the European Communities, but the judges may be re-elected only once.[1] It is not certain whether this change will be an improvement. On the one hand it will promote rotation of the judges; it may lower their average age, but on the other hand it may prevent the re-election of judges who because of their knowledge and wisdom are valuable to the court.
2. Each judge has a first and a second substitute who take his place in case of absence.[2] This is to ensure that there will always be a judge from each of the Member States without the need to appoint a judge *ad hoc* at a time when an issue is already before the court. The provision is apparently meant to strengthen the nationality element in the court. It may work if the court has such a heavy work-load that the substitutes can be involved in it (as legal secretaries to the judges?) even when they do not sit. If, however, the substitutes have to come in only occasionally for one case, they may be insufficiently incorporated in the court for it to operate as a team.
3. Individuals may bring an action for annulment against acts of the

1. Cartagena Agreement 1979, Art. 9.
2. *Ibid.*, Art. 10.

Council and the Commission[3] whenever an act applies to them and causes them harm.[4] The American States apparently considered the provisions of EEC Article 173 as being too restrictive. The vast majority of the legal profession in Europe will agree with them.

4. Actions for annulment may be brought until the end of the year after that in which the disputed act entered into force.[5] This too seems to be an improvement. For complicated legal questions the time-limit of two months, used in Europe, is very short. On the other hand a time-limit which may be almost two years could harm legal certainty. Annulment after such a long period of time may cause harm to all further rules and decisions which have been based upon the invalid act. A long period of time may also slow down the plaintiff's preparation of his case.

5. When the Court partially or entirely annuls an act, it will at the same time indicate the effect of the annulment[6]. This provision offers an opportunity to the American court to find a way between the two extremes of void and valid. In some respects it may be useful to allow the court to replace invalid acts by others or to make temporary provisions. Under certain circumstances it may be useful, for example, to expressly permit the court to rule that an annulment has no retroactive effect. The general rule allowing the court to indicate special effects of the annulment of acts may be dangerous, however. In a community having only a rudimentary legal system a court comes closer to performing a legislative role than in any of the existing Western European States, where one can find hardly any important gaps in the legal order. Allowing the court to replace acts by others instead of annulling them would give the court an even more legislative role, a role for which the European Court of Justice has not been created and which it does not want to perform.

6. In the American court preliminary rulings must be asked for in all cases which are not susceptible of appeal, even if they are not decided by a supreme court[7]. In the European Communities this same rule has been developed but the text of the Treaties is less clear. New is the provision that only in the last instance does the request for a preliminary ruling suspend the case. In the earlier instances the court may decide the case before it receives a reply to its request for a preliminary ruling[8]. This may be helpful in urgent cases, such as interim injunctions.

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3. In the Andean Common Market these organs are called "Commission" and "Junta", respectively.

4. Cartagena Agreement 1979, Art. 19.

5. *Ibid.*, Art. 20.

6. Art. 22.

7. Art. 29 (2).

8. Art. 29 (1).

7. Preliminary rulings may not be requested on questions of validity. The European experience, demonstrating that preliminary rulings on validity may be an important substitute for actions for annulment, has obviously influenced the American treaty makers: they agreed to widen the possibility for actions for annulment but did not accept preliminary rulings on the validity of acts. This may create problems for the court when interpretation is asked of an act which it considers void. In such a case it may well be that the court will offer an interpretation so narrow that its effect will come close to a declaration of invalidity.
8. The procedure against breaches of Treaty obligations by Member States, which is almost identical to that of EEC Articles 169-171, is further refined[9]. Time-limits have been added for the consultation prior to the reasoned opinion in proceedings brought by the Commission (Junta). In proceedings brought by another Member State a theoretical gap has been filled by authorizing the claimant to bring its case before the Court of Justice, when the Commission (Junta) has delivered a reasoned opinion but does not subsequently bring the case before the Court.

The agreement requires ratification by the participating States before the Court can enter into operation. Even then it is not certain that the Court will get many cases, but it may be hoped that its future case-law will further develop the rules now created and will offer us interesting material for comparison.

9. Art. 23-27.