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# Oxford Public International Law



## **Action Due to Omission or Inactivity: Court of Justice of the Andean Community of Nations**

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**Content type:** Encyclopedia entries

**Product:** Max Planck Encyclopedias of International Law [MPIL]

**Module:** Max Planck Encyclopedia of International Procedural Law [MPEiPro]

**Article last updated:** June 2019

### **Subject(s):**

International courts and tribunals, procedure

Published under the direction of H el ene Ruiz Fabri, with the support of the Department of International Law and Dispute Resolution, under the auspices of the Max Planck Institute Luxembourg for Procedural Law.

## A. Introduction

**1** The Treaty Creating the Court of Justice of the Cartagena Agreement ('Original Treaty'), was signed on 28 May 1979 and came into force on 19 May 1983. It provided that the Court of Justice could deliver judgments in the following cases: actions for annulment, action for non-compliance, and preliminary rulings.

**2** The Andean Integration System ('SAI'), which was created by the Protocol of Trujillo in 1996, consists of several institutions which all seek to facilitate integration. Articles 6-8 of the Andean Subregional Integration Agreement ('Cartagena Agreement') set out the role and composition of the main institutions.

**3** The Original Treaty was reformed by The Protocol of Cochabamba which was signed on 28 May 1996 and came into force on 25 August 1999. It was incorporated into the legal order of the → *Andean Community of Nations (CAN)* through Decision 472 of the Andean Community Commission ('Commission'), which is one of the Andean Community legislators. This Protocol extended the powers of the regional court and renamed it as the '*Tribunal de Justicia de la Comunidad Andina*' ('TJCA'; → *Andean Community of Nations, Court of Justice*). On 22 June 2001, the Andean Council of Foreign Affairs, another Andean Community legislator, repealed Decision 184 and adopted Decision 500 to enact the new Statute of the TJCA. Decision 500 together with the Treaty Creating the Court of Justice of the Andean Community ('TCTJCA'), constitute the main rules that govern the TJCA.

**4** This is an important reform because it extends/enlarges the competences of the TJCA so that it can now deliver judgments in actions due to omission or inactivity, fulfil an arbitral function, and intervene on labour matters.

**5** This relatively new action due to omission or inactivity represents a real step forward in the development of the regional legal order. Any Member State, any regional institution, and, it is worth noting, any private individual that is subject to the Andean regional order can bring a claim under this new procedure (Chahín Lizcano, 2001, 149). If any institution of the Andean Community has failed to act when it had an obligation to do so, the TJCA can call upon this institution to act in accordance with the regional legal order.

## B. Background

**6** The action due to omission or inactivity aims to ensure that bodies and institutions of the SAI fulfil their functions in accordance with the regional legal order.

**7** This constitutes a leap forward in strengthening the regional legal order. The Andean Community has been inspired by the European Union ('EU') legal system which, while drawing on the French *Conseil d'État's* competences/powers (Vigil Toledo, 2011, 86), also recognizes the possibility to bring an action for failure to act before the Court of Justice of the European Union ('CJEU'). Articles 265 and 266 of the Treaty on the Functioning of the European Union ('TFEU') set out that if an EU institution has failed to act when it had an obligation to do so then either Member States or EU institutions, and even private parties with some limitations, can bring an action before the CJEU prior to the end of a pre-litigation procedure.

**8** Latin America has had mixed reactions vis-à-vis the adoption of actions due to omission or inactivity in both national and regional legal orders. Colombia has enacted the *acción de cumplimiento* in Article 87 of the Political Constitution, which has similar features to the above-mentioned action for failure to act. On the contrary, despite being one of the most successful regional trade organizations in the region, → *MERCOSUR* has still not included an action due to omission or inactivity within its legal order. However, the importance of this action in enforcing regional law has led regional actors to include this action in the

Draft Protocol on the Creation of the Court of Justice of MERCOSUR ('CJM'). An action for failure to act will be able to be filed whenever any of the main MERCOSUR institutions fail to adopt a measure, in breach of a MERCOSUR law. Similar to the EU and the Andean Community, *locus standi* will be granted to Member States, PARLASUR (the Parliament of MERCOSUR), the Secretariat, and individuals, in so far as their rights or legitimate interests are affected. If CJM considers that the action is well-founded, its judgment will specify the form, modality, and time-limit for the fulfilment of its obligation (Art 22).

## C. Legal Framework

**9** Article 37 of the Treaty, which governs the action due to omission or inactivity provides:

Should the Andean Council of Foreign Ministers, the Andean Community Commission or the General Secretariat abstain from carrying out an activity for which it is expressly responsible under the legal system of the Andean Community, those bodies, Member Countries or natural or artificial persons whose rights and interests are affected as stipulated in Article 19 of this Treaty, may demand the fulfillment of those obligations. If that request fails to be acted upon within the thirty following days, the petitioner may appeal to the Court of Justice of the Andean Community to hand down a ruling on the case. Within thirty days after the appeal has been admitted, the Court shall issue the corresponding ruling based on the existing technical documentation, background of the case, and explanations by the body whose behavior is the subject matter of the action. That ruling, which shall be published in the Official Gazette of the Cartagena Agreement, should stipulate the form, way and period in which the body in question shall fulfill its obligation.

### 1. Procedure

**10** Articles 45-47, 50, and 129-34 of the Statute of the TJCA ('Statute'), which has been approved by Decision 500 of the Andean Council Foreign Affairs, regulates the procedure of the action due to omission or inactivity.

**11** This action aims to ensure that if the Council of Foreign Affairs, the Commission, or the General Secretariat of the Andean Community ('General Secretariat') has failed to fulfil their legal obligations, they can be compelled to act in accordance with the regional legal order (Art 129 of the Statute).

**12** The regional legal order has adopted a broad notion of *locus standi* in this particular action. The Council of Foreign Affairs, the Commission, the General Secretariat, Member States, and natural or legal persons may bring an action before the Court, subject to prior compliance with the requirements and conditions laid down in Article 130 of the Statute.

**13** It is worth pointing out that natural or legal persons also have *locus standi* but only if they can prove that the omission or inactivity of the regional institution affects their subjective rights or their legitimate interests (Art 132 of the Statute and Art 19 TCTJCA).

**14** Article 131 of the Statute provides that the applicant must require, in writing, the regional body to comply with its legal obligations, prior to bringing an action due to omission or inactivity before the TJCA. If the regional institution does not respond positively within a period of 30 days, the applicant may apply before the TJCA for a ruling on possible breaches of regional law.

**15** Article 45 of the Statute details the procedure: the application, signed by the parties and their lawyers, is presented before the Registrar of the TJCA and addressed to the President of the TJCA. It is also possible to submit the application by/via facsimile, postal services, or other electronic means. The applicant shall send the original application and annexes within three days. If the applicant fails to do so, the application shall be considered not to have been lodged. Finally, if the applicant is a natural or legal person and their request is submitted via facsimile, postal services, or other electronic means, their signatures shall be duly recognized by a notary or a judge of the Member State.

**16** Article 50 of the Statute also lays down other requirements:

- a) A copy of the applicant's request to the Andean Community's institution to fulfil their legal obligations, or, alternatively, the proof that the 30-day period within which the regional institution should have fulfilled their obligations has elapsed and no suitable response has been given to the petition.
- b) If the applicant is a natural or legal person, evidence needs to be presented that their subjective rights or legitimate interests have been affected.

**17** Once the application has been accepted, the TJCA has held that

given the urgent nature of the action due to omission or inactivity, and the fact that it pursues the cessation of the regional institution's inactivity, the '*excepciones previas*' procedural stage needs to be skipped, and the TJCA will consider these defences in the final judgment (TJCA, Proceso 01-RO-2007, 2007, 10).

**18** Once the defendant has responded to the application and the evidence has been gathered and presented, the TJCA may hold a public hearing in which the parties will present their closing statements. Alternatively, parties may present their closing statements in writing (Art 83 of the Statute). Article 133 of the Statute lays down that the TJCA, taking into account the explanations and evidence provided, shall deliver a judgment within 30 days of the admission of the application.

**19** If a regional body is found to be in breach, the judgment shall determine the form, manner, and period in which that regional body shall comply with their duties in accordance with Andean Community law (Art 134 of the Statute).

**20** It is worth pointing out that these are 'declaratory' judgments, which exclusively point out how regional bodies must fulfil their obligations. Since the Andean Community legal order does not expressly regulate the effects of judgments delivered in actions due to omission or inactivity, it may be helpful to refer to the European Union doctrine and case law on action for failure to act, which could arguably be applicable to this action (Garrón Bozo, 2005, 753).

## **2. *Locus standi***

**21** The Council of Foreign Affairs, the Commission, the General Secretariat, Member States, and natural or legal persons may be applicants of the action due to omission or inactivity, subject to the conditions set out in Article 19 TCTJCA.

**22** This provision provides that natural or legal persons that bring an action for annulment and/or an action due to omission or inactivity must prove how their subjective rights or legitimate interests have been affected.

**23** It is worth noting that the *locus standi* of private individuals to bring an action for annulment or an action due to omission or inactivity is more flexible than in an action for non-compliance against a Member State. The former only requires proving that a legitimate interest has been affected whilst the latter requires that an applicant's subjective rights have been affected.

**24** *Locus standi* is a procedural requirement for the action due to omission or inactivity; consequently, it is an essential condition for the admissibility of the action. It is worth mentioning that it is through case law that natural or legal persons' *locus standi* has become more flexible: 'this broad natural or legal persons' *locus standi* approach has replaced the action for annulment Original Treaty requirement, whereby private citizens had to prove that the provision challenged was addressed to them and caused them prejudice, for a broader and more generic requirement according to which provisions challenged only need to affect their subjective rights or their legitimate interests (Vigil Toledo, 2004, 164).

**25** The landmark case regarding the *locus standi* of private citizens is *Proceso 14-AN-2001* (Applicant: César Moyano Bonilla). The TJCA pointed out that the Protocol of Cochabamba sought to broaden the notion of *locus standi* of private citizens according to the new definition laid down in Article 19 TCTJCA. Hence, the TJCA ruled that an Andean citizen and lawyer's application was receivable based upon the fact of their interests being affected.

**26** According to the TJCA, the fact that the applicant was a citizen subject to the Andean Community norms and a lawyer subject to professional standards was sufficient to consider that their legitimate interests had been affected. Although the TJCA did not address whether the applicant's subjective right was also affected, the possibility that it may have been did not constitute an obstacle when bringing the action for annulment. The applicant needed to have only proved either that they had a legitimate interest or that their subjective right was affected (Vigil Toledo, 2004, 165).

**27** In *Proceso 14-AN-2001*, the TJCA has demonstrated that the Andean legal order is, in this respect, more liberal than the EU legal order which has set out more stringent conditions for private individuals to be able to bring an action before the EU courts. Specifically, they are not granted *locus standi* to challenge some EU provisions such as Regulations, which are general legal acts (Ortega, 1999, 225).

**28** Guillermo Chahín Lizcano, former Colombian judge of the TJCA, states that the action due to omission or inactivity 'has the features of a public action inasmuch as every subject of this legal order, including the private individuals, be legal or natural persons ... and it only requires, in order to be brought before the TJCA, the proof that the applicant has demanded in writing to the institution to fulfil its obligations according to the Andean legal order, and this institution has failed to act (Chahín Lizcano, 2001, 149).

## **D. Action Due to Omission or Inactivity: The TJCA Case Law**

**29** From 1984 when the TJCA became operational—despite being created in 1979—until 2018, only eight actions due to omission or inactivity were lodged.

**30** In *Proceso 70-RO-03*, the Republic of Peru brought an action due to omission or inactivity against the General Secretariat because the latter had not delivered a decision in an appeal presented by the former against a decision of the General Secretariat. In this

case, the TJCA pointed out that (which was also reiterated in subsequent cases such as 01-RO-2007 and 02-RO-2007):

In order to guarantee the effectiveness of the review of the legality of acts by the TJCA, it must be taken into account ... the omissions or abstentions that entail the breach of the regional norm ... Therefore, it has been deemed necessary to endow the actors of the integration process—Member States, Regional Institutions and natural or legal persons—with an instrument that allows them to demand regional institutions in the Cartagena Agreement, when they have failed to act according to the regional legal order, to do so or to go before the Court, which may require the regional institution to act.

**31** In *Proceso 70-RO-03*, the Court held that:

The General Secretariat of the Andean Community has omitted to act and failed to meet the time limit established in Article 44 of Decision 425 in order to decide the appeal brought by the Republic of Peru against Resolution 576. Nonetheless, considering that the objective of the action due to omission or inactivity is to compel the General Secretariat to act when the legal order requires to do so; and, that in this case it has attempted to end its infringement by issuing Resolution 757 on 29 August 2003; the TJCA, in this case, has exempted itself from compelling the General Secretariat to issue the omitted resolution because its illegal omission has, albeit extemporaneously, ceased (TJCA, *Proceso 70-RO-2003*, 2003, 7).

**32** Moreover, by a judgment delivered on 6 October 2003 adopted in *Proceso 76-RO-2003*, the TJCA pointed out that this action ‘is intended for those cases in which the bodies that must comply with and are in charge of enforcing a provision of the Andean Community legal order do not do so, and thus their omission constitutes an infringement of regional law’.

**33** In *Proceso 76-RO-2003*, the TJCA held:

FIRST: To declare the action due to omission or inactivity lodged by the Republic of Peru against the General Secretariat of the Andean Community well-founded on the grounds that the latter has not issued a Resolution, which should have delivered as provided by Article 54 of the Decision 425 of the Andean Council of Ministers of Foreign Affairs. SECOND: To compel the General Secretariat of the Andean Community to issue, within ten days from notification of this judgment, a Resolution on the appeal described in the claim, in full compliance with Article 54 of Decision 425 (TJCA, *Proceso 76-RO-2003*, 2003, 10–11).

**34** Furthermore, another relevant action due to omission or inactivity was brought in *Proceso 02-RO-2007* in which the General Secretariat had allegedly not complied with Articles 14 and 15 of Decision 623, which governs the pre-litigation stage of the action for non-compliance procedure. In this case, it is worth noting that the TJCA referred to the European legal doctrine:

The scholar Guy Isaac holds that: ‘The Court of Justice is not only competent to sanction the unlawful acts adopted by regional institutions, but also the omissions in breach of the regional law (Isaac Guy, *Manual de Derecho Comunitario General*, Editorial Ariel S.A. Barcelona, 1985, 285).

*Eduardo García de Enterría* states that ‘... it is widely accepted that this type of action [action for failure to act or action due to omission or inactivity] enables to control the lack of compliance with the obligations imposed on the regional bodies provided by the Treaties’ (*Tratado de Derecho Comunitario Europeo, Editorial Civitas S.A., Madrid 1986, 687-688*).

TJCA, *Proceso 02-RO-2007*, 2007, 6.

**35** In *Proceso 02-RO-2007*, the Court ruled that:

THIRD: To declare the action due to omission or inactivity brought by Mr. Julio César Peñaherrera Astudillo against the General Secretariat of the Andean Community well-founded on the ground that the latter has not granted a 15-working days to rectify the claim for failure to act lodged by the applicant in accordance with Article 15 of Decision 623 of the Andean Council of Ministers of Foreign Affairs.

FOURTH: To compel the General Secretariat of the Andean Community to issue a resolution within 10 working days from notification of this judgment, in which it grants 15 working days to the applicant to rectify its claim for failure to act in accordance with Article 15 of the Decision 623 of the Andean Council of the Ministers of Foreign Affairs (TJCA, *Proceso 02-RO-2007*, 2007, 12)‘.

**36** It is worth mentioning that all the actions due to omission or inactivity that have been lodged thus far have been brought against the General Secretariat, which has, generally, failed to comply with legal deadlines (*Procesos 70-RO-03, 76-RO-2003 y 02-RO-2007*).

**37** Other actions have also been brought against the General Secretariat based upon diverse grounds, such as:

- Not declaring the termination in an immediate and anticipated manner of an investigation launched against Terranova Venezuela SA for alleged dumping (*Proceso 2-RO-2006*);
- Not issuing a resolution regarding some agricultural development programmes in accordance with Article 91 of the Agreement of Cartagena (*Proceso 1-RO-2007*); and,
- In an action related to the request of elimination of specific origin requirements applied to export oilseed products to Member States markets.

**38** In *Proceso 01-RO-2017*, the TJCA rejected the action due to omission or inactivity brought by Flores Maravilla SA against the General Secretariat and decided to close the file. Finally, in *Proceso 01-RO-2018*, the TJCA considered that the action brought by Directv Colombia Ltda, Telmex Colombia SA, and UNE EPM Telecomunicaciones SA against the General Secretariat had not been lodged.

## **E. Assessment**

**39** The goal of this action is to prevent the lack of or defective intervention by the Andean Community authorities. This instrument constitutes a critical action in order to ensure that the bodies and institutions of the SAI fulfil their obligations in a timely and proper manner (Tangarife Torres, 2005, 410 and 412).

**40** It has been highlighted that

this action and its implementation by the TJCA will introduce key elements, currently missing to the integration process, which will enable that every legal instrument and mechanism that are part of it, many of whom/which have not been developed or have been implemented with deficiencies, delays and shortcomings, is enforced and implemented in a timely and proper manner (Chahín Lizcano, 2001, 149).

**41** The action due to omission or inactivity has indeed filled a vacuum in the 1979 Original Treaty. Nevertheless, it is worth mentioning that despite not being a brand new competence, this action has not been widely used. This is not a specificity of the Andean Community. The use of this action has been rather limited in other organizations such as the EU.

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