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PRESS

THE PROTOCOL OF OLIVOS AND THE MERCOSUL: PROGRESS?

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One of the most important aspects in connection with any integration agreement – such as Mercosul – is the need of setting up an efficient system for the settlement of disputes among its members. Therefore, the members of Mercosul executed in 1991 the Protocol of Brasilia, which used to regulate the solution of controversies within the block.

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Said protocol established that, in case of disputes between the members of Mercosul, they should, first, enter upon direct negotiations and, in the event of failure, the procedure would be tried before an ad hoc arbitral tribunal. Despite the fact that the decision of the arbitrators imprinted by such tribunal doesn't have a direct effect –i.e. to be effective in Brazil it would have to be internalized, which means that to be enforced in Brazil they have to be submitted to the Supreme Court (STF) – the decisions issued have always been forthwith complied with.

The countries members of Mercosul, however, believed that the system should be improved and thus, in 2002, executed the Protocol of Olivos. Said protocol maintains unchanged some instruments anticipated by the Protocol of Brasilia, as the direct negotiation and the arbitral proceeding, but the so-called the Permanent Review Court was established.

This new system, which is in force internationally, and in Brazil, since January, 1st 2004, seeks the certification of a standardized interpretation of the Mercosul rules. It has been understood that it would be essential, since in the previous system the arbitral tribunal could issue decisions about identical affairs in conflicting ways.

As a matter of fact, the permanent court established by the Protocol of Olivos will have three essential assignments: (1) it will perform as reviewer of the ad hoc arbitral tribunal, when one of the parties argues an appeal of revision; (2) it will perform as exclusive jurisdiction for the dispute resolution, since the parties may agree to refer the dispute directly to the Permanent Review Court without undergoing the arbitral tribunal; or yet (3) it will respond to enquiries formulated by the Common Market Council, the highest body of Mercosul.

In connection with some issues, though, the improvement was beneath the expectations. The system still has an intergovernamental nature, i.e., direct access by private parties is still prohibited.

Another aspect that deserved better attention was the possibility of disputes emerged among the member countries of Mercosul to be solved by some other dispute resolution bodies. One example of this possibility was the recent case of imposition of an antidumping measure by Argentina regarding the chicken exported by Brazil, which was judged by the World Trade Organization (WTO). Actually, even with the Protocol of Olivos, the members of Mercosul are still free to choose the jurisdiction to which they will submit disputes, what may weaken and depreciate the block as a whole.

The Protocol of Olivos has also been harshly criticized by various specialists in international law, since it creates as unusual situation in which the decisions originated in the arbitral reports may be object of revision of the permanent court. Presently, some of the greatest virtues of the arbitral proceeding, the speed and the impossibility of appealing from its decisions, would be hindered.

At last, it is important to emphasize that, in addition to the establishment of the Permanent Review Court, the controversies system could have been a little bit more improved. As a matter of fact, the example of the European Union is categoric and makes it clear that the tribunal has vital importance in the process of regional integration, whereas its decisions are clearly motivated to the achieving of a higher goal, that is, the effective approximation of the country members by means of a common market, eliminating little by little fortuitous domestic resistance to the integration.

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