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LATIN AMERICAN ECONOMIC INTEGRATION

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PROPOSED ANDEAN TRIBUNAL

During its Sixth Special Session (1971) the Commission of the Agreement of Cartagena noted in its proceedings its consensus regarding the need to create a jurisdictional organ which would be charged with "reconciling the controversies that may arise in connection with the application of the Agreement, the decisions of the Commission and the resolutions of the Board." On that occasion the Commission agreed to recommend to the Board that it undertake the studies that would be required to make available before the Regular Session of 1972 the necessary guidelines for formulating recommendations to the governments on the creation of the above-mentioned organ.¹

For this purpose the Board requested reports from national specialists and consultants and, having obtained them, called a Meeting of Experts, held in June 1972, which, in addition to those specialists and consultants, was attended by Prof. Gerard Olivier, the Assistant Director General of the Legal Service of the European Communities, and Dr. Pierre Pescatore, present Judge of the Court of Justice of those Communities. Immediately thereafter, the Board drafted the basis of a treaty for establishing the jurisdictional organ, which was analysed in a meeting of government experts in November 1972. Its report of December 12 of that year contains a revised version of that draft treaty.² Later the Board presented, in the nature of a proposal, the definitive text of the instrument.³

The draft treaty contains a first chapter intended to "complete the normative system of the Agreement, by defining its juridical structure, the form of incorporation of the decisions of the Commission in national legal orders, and, finally, the obligations of the member states with respect to the norms that comprise the juridical structure of the Agreement

of Cartagena.”⁴ The second chapter of the draft is confined to the “Organization of the Tribunal”. The tribunal, which would perform its functions on a permanent basis, would be comprised of three magistrates appointed by common agreement by the governments of the member countries, who should be nationals of any Latin American country, enjoy a good moral reputation and meet the conditions required in their country for exercising the highest juridical functions; they would enjoy full independence in the exercise of their functions, they could not perform any other professional activities, whether remunerated or not, except those of a teaching or academic nature, and they would abstain from any action incompatible with the nature of their position. On the other hand, the member countries would be obliged to grant the tribunal all the facilities necessary to carry out its functions adequately; the tribunal and its magistrates would enjoy in the territory of those countries the immunities recognized by international custom and especially by the Vienna Convention on diplomatic relations.

In the course of the Thirteenth Special Session of the Commission (1974) the Board presented a statement on the background and fundamentals of the proposal for the creation of the tribunal or jurisdictional organ. Following a discussion of a general nature in which the representatives explained their initial viewpoints, it was agreed to entrust the Board with making an additional effort so that its draft of the proposed treaty would be circulated and discussed in all the member countries at the level of competent, specialized authorities on the subject.⁵

At its Sixteenth Regular Meeting the Commission considered the subject anew and agreed on a detailed program of action, which included, among other things, consultations which the Board would carry on with the governments between the months of January and March 1975; the organization, in accordance therewith, of discussions on the topic of solution of controversies and others contained in Proposal 43, in which Board members and functionaries would participate, together with ad hoc consultants, if necessary. In the month of April of that year a meeting of high-level government experts would be carried out at the headquarters of the Board as a consultative group, if the Commission so desired, for the purpose of transmitting to the Commission the results of the consultations and having the group issue an opinion on Proposal 43. Upon completion of the above program, the proposal would be included on the Commission’s agenda either in the regular meeting to begin July 7 or in an earlier special meeting, as the case might require.⁶

As was indicated at the outset, as conceived by the Commission in taking the initiative to create a jurisdictional organ, such an organ would be charged with "reconciling the controversies that may arise in connection with the application of the Agreement, the decisions of the Commission and the resolutions of the Board." The proposed treaty drafted by the Board provides for another type of competency for the new subregional organ. In effect, what the Board has recommended is "a system of control of legality and uniform interpretation, rather than a procedure for a pure and simple solution of controversies between member states." In the document which it presented to the Commission the Board indicates the reasons why it was considered necessary to recommend such a system.⁷

To exercise the control of legality, a nullity action on the decisions of the Commission and the resolutions of the Board is contemplated, in the first place. As has been observed, this competency has been conceived in broad terms, since it foresees the possibility of impugning any act emanating from the Commission or the Board through a nullity action based on any of the following grounds: (a) violation of the norms that form the juridical structure of the Agreement; and (b) diversion of power. The broad nature of these grounds permits the inclusion of the defects of incompetence and violation of the substantial norms on the part of the organs.⁸ This action could be promoted by the member countries, unless they express their consent at the time of approval of the act, if decisions are involved; by the Commission, regarding resolutions of the Board; by the Board, regarding decisions of the Commission; by any natural or juridical person of a member country, regarding decisions of the Commission or resolutions of the Board that may be applicable.

For the same purposes of control of legality an "action of non-fulfillment of the juridical order of the Agreement of Cartagena" is also contemplated. What is involved here is the competence of the proposed tribunal to hear cases of nonfulfillment of the obligations emanating from the Andean juridical legislation of the member countries. Consequently with the basic conception of the report of the Board, it is made clear in that report that "within the juridical structure of the Agreement, conflicts deriving from common norms are not controversies between member states which can be resolved by way of direct negotiations. They are substantially conflicts between a party that does not fulfill its obligations and the juridical structure of the Agreement of Cartagena. For that reason, the procedure recommended by the Board excludes the traditional phases of direct negotiations, mediation or good offices between

member states . . ." Now then, since the action relates to acts of member countries, in the opinion of the Board the tribunal should not have the competence to nullify them since this would represent an encroachment upon competences reserved for national jurisdictions; the finding or decision of the tribunal would be limited to verifying the situation of nonfulfillment. Furthermore, only the member countries and the Board could interpose the action of nonfulfillment, it being understood that the right of natural and juridical persons is protected by the possibility of resorting to the national courts of the country in which the situation of nonfulfillment has arisen, in which case the procedure of pre-judicial interpretation, to which reference is made immediately below, would apply.⁹

The third and last of the competences that the proposed Andean tribunal would exercise is that of interpretation, in a pre-judicial manner, which would be similar in form and purpose to that assumed by the European Court of Justice by Art. 77 of the Treaty of Rome. Departing, perhaps, from the premise that neither of the previous two competences makes it possible to overcome the differences of interpretation that could arise as a result of the application of subregional norms by national courts, the report recommends that whenever litigation is brought before those jurisdictions the national judges petition the subregional tribunal to issue an opinion as to interpretation of the common subregional norm. It would then be incumbent on the national judge to resolve the litigation based on the interpretation of the norms derived from the juridical structure of the Agreement made by the subregional tribunal. This tribunal would not act as a type of court of cassation since it would not have competence to resolve any litigation brought before national courts. It would, however, have competence in interpreting the subregional norms or acts involved because the matter dealt with excludes internal jurisdiction.¹⁰

NOTES

¹See the *Acta Final* of the meeting referred to, December 9-18, 1971, p. 6.

²*Cf. Informe de la Junta sobre el Establecimiento de un Organismo Jurisdiccional del Acuerdo de Cartagena*, COM/X-E/di/5. The mentioned draft basis was circulated as document J/AS 12, 2 August 1972.

³*Cf. Proyecto de Tratado para la Creación del Tribunal del Acuerdo de Cartagena*, JUN/PROPUESTA 43, 18 January 1974.

⁴*Cf. Report cited*, p. 2.

⁵*Cf. Acta Final* of that meeting, held 12 to 14 November, 1974, p. 4.

⁶*Cf. Acta Final* of that meeting, held 27 May to 5 June, 1975, p. 5.

⁷The *Board* specially noted that "a system like the one established in the Agreement of Cartagena requires a procedure for control of legality much stricter than that necessary for an organization whose decisions are taken only by the unanimity of its components or which has only the authority to recommend." *Cf. Report* cited, pp. 2 and 13 *et seq.*

⁸*Cf. F. Orrego Vicuña*, "La creación de un Tribunal de Justicia en el Grupo Andino," in INTAL, *Derecho de la Integración*, No. 15, March 1974, p. 40.

⁹Report cited, pp. 21-23.

¹⁰Report cited, pp. 23-24.