"Mercosur: Money Laundering and International Cooperation"

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THE PROSPECTS OF A LEGISLATIVE HARMONISATION

Section 1 of the Asuncion Treaty sets up the Common Market of the Southern Cone (Mercosur).

It establishes, *inter alia*, 'the commitment of the Member Parties to harmonize their laws in the relevant areas, with a view to strengthening the integration process'. Such a harmonisation implies an intention to establish increasingly common criteria and similar patterns at a sub-regional level to deal with a specific set of rules that are currently dissimilar.

In doing so, a first step towards harmonisation could make use of assimilation practices between national legislation and common-market interests, by virtue of which judges may initially apply national legislation in their decisions while harmonisation is in progress. However, the possibility that such harmonisation may be achieved by the adoption of supranational laws cannot be excluded. Nor can the possibility of a common body for judicial decisions be excluded, a Court of Mercosur, apart from the already existing jurisdiction of the Inter-American Court on Human Rights, the Pact of San José, Costa Rica, which was approved in Argentina pursuant to Act 23054.

The Inter-American Court is a limited but encouraging sign of the prospective creation of a Mercosur Court of Justice. Furthermore, Argentina's Supreme Court of Justice has ratified the supremacy of treaties on national legislation, which leads to a less strict interpretation of s.100 of the Constitution of the Republic of Argentina.

In substantive and procedural criminal law matters, the Meeting of Justice Ministers, 6th-8th November, 1991, convened by Argentina's then Justice Minister, Leon Arslanián, was attended by Chile, Uruguay, Brazil and Paraguay representatives. It aimed at establishing the fundamental basis for understanding and cooperation to comply with the requirements of the harmonisation of laws as set forth in s.1 of the Asuncion Treaty. They agreed on instituting within the Common Market Group a meeting of Mercosur's Justice Ministers, to be supported by a technical committee comprised of representatives of the Justice Ministry. They also agreed on developing a common framework for legal cooperation in civil, commercial, labour and administrative criminal matters, special consideration being given to extradition and other modern developments in connection with the criminal law of nations. To facilitate cooperation among the Justice Ministers, the organization of central authorities was required. Likewise, a system for permanent exchange and updating of information in connection with the laws of the states parties, based on foreign law information agreements and information technology, was recommended.

The meeting advocated the harmonisation of the domestic laws of member states. To that end, it recommended the adoption of model legislation, with a particular emphasis on the existence of model codes for Latin America, in connection with civil law of procedure, criminal law of procedure and a model Criminal Code for Latin America. Finally, it recommended the enactment of common rules on international jurisdiction.

All this focused on the process of harmonisation of criminal policy in these countries. This will afford a great opportunity for adjusting criminal substantive law, the criminal law of procedure and the law pertaining to prisons or jails to new modes of transnational and national delinquency: the so-called white-collar crimes. As the pioneering work of Edwin Sutherland has indicated, white-collar crime encompasses a wide range of crimes with an organizational basis.

ANTI MONEY-LAUNDERING PROVISIONS IN MERCOSUR MEMBER COUNTRIES

As far as money laundering is concerned, Mercosur member countries[1] are cooperating actively in this fight. Specific legislation against money laundering has been enacted in various countries. On 7th September, 1994, the Republic of Uruguay incorporated into its domestic law, by means of Act 16,759 the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. In October 1997 some provisions of an executive order passed into Act 14,294 so that the types of crime related to the laundering of assets derived from drug trafficking and the financial sector were modified and extended to supplement the prevention of and fight against such actions.

[1] Countries integrated to form Mercosur are Argentina, Brazil, Paraguay and Uruguay.

Chile's Act 19366 of 1995 penalised illicit trafficking in narcotic drugs and psychotropic substances. It provides a legal definition of criminal offences for the laundering of money derived from drug trafficking and related crimes, and established rules of administration and jurisdiction aimed at both prevention and control.

Bolivia's Act of 19th July, 1988 considers narcotics trafficking an international crime that threatens international security and is contrary to international law. Act 1015 of 3rd November, 1996 governs the duties, proceedings and procedures to be used in the prevention of the use of the financial sector, or any other economic sector, for the carrying out of any acts aimed at the legitimisation of money or property flowing, directly or indirectly, from criminal activities prohibited by law. It also sets forth the types of crime related to property or money laundering and their respective punishments.

Act 9613 of 1st March, 1988 in Brazil provides a legal description of the crime involved in money laundering and concealment of property, rights and securities. Section 1 provides three to ten years' imprisonment for concealing or hiding the nature, source, location or transactions of properties or goods, rights or securities flowing from the illicit traffic in psychotropic substances or related drugs. Further, terrorism, smuggling, the traffic in weapons, ammunition or any material for the manufacture of weapons, kidnapping for ransom, offences against the public administration or the national financial system or offences committed by a criminal organization are also precursors for money-laundering offences. Act 9034/95, passed some time ago in Brazil, concerns instruments of evidence and investigation procedures for crimes resulting from the action of gangs or bands.

In Argentina, Act 23737/89 as amended provides that:

'Any person who, without having taken part or cooperated in the execution of the acts provided in this law, intervenes in the investment, sale, pledging, transfer or cession of profits, property or rights derived from them, or benefit obtained from the crime, shall be sentenced to two to ten years' imprisonment. He or she shall also pay a fine of Australes five hundred thousand, if he or she had known or suspected the source of such property. Any person who purchased, kept, concealed or hid those profits, property or rights or benefits having known or suspected its sources shall receive the same punishment. This section shall apply no matter whether the transaction which originated such profit, property, rights or benefits has taken place in foreign territory or not.

A court shall institute the procedures necessary to ensure that the profits or property supposed to be derived from the facts described in this law are forfeited. During the course of proceedings the interested party may prove its legitimate source, in which case the court shall order the restitution of the property or shall order the corresponding indemnification. Otherwise, the court shall dispose of profits or property as provided by that section.

RECOVERY OF CRIMINAL ASSETS

The Argentine legislation in relation to the recovery of criminal assets has been recently modified by Law 21.815 of 2003.[2] According to the new law; confiscation both of the instruments and gains of crime, is mandatory in all criminal sentences (Art. 23) in relation to all crimes of the Penal Code and special laws. All assets are included, personal and real corporal and incorporeal, cars, boats, and also real estate property in cases of kidnapping in respect of the house in which the victims were deprived of their liberty, that is when assets are elements of the perpetration of crimes. All restraint measures are authorized in order to secure the assets, whatever their economic nature might be. The law also modifies Art. 277 of the Penal Code, authorizing forfeiture of illegitimate assets when a person receiving them had reason to suspect, according to the circumstances of the situation, the legitimate origin of the transacted assets.[3]

All assets confiscated shall be allocated for programmes of victim assistance and support.

The criminal sentence in all cases, will decide forfeiture of the assets to benefit the federal state, the provinces or the municipalities. Bona fide parties and victims maintain, however, their rights to prove legitimate ownership. However, if third parties have received benefits from the crime they are subject to forfeiture procedures. If the forfeited assets possess a cultural value, the judge can decide to transfer ownership to public or private enterprises. If there is no value, assets could be destroyed. If they are of any commercial value the judge will

[2] Law 25.815 reforming Art. 23 and Arts. 277-279 of the Argentine Penal Code, ADLA Bol 32/2003.

[3] Palacio Laje. Decomiso y encubrimiento atenuado, La Ley 02/03/2004. Also Bulit Goñi, Roberto. Reformas al Decomiso y Encubrimiento. Adla. 2004-A-34.

order them to be sold.

In relation to restrain measures, Art. 231 of the Federal Procedural Code gives great latitude to the judge to secure all objects related to the crime and amenable of forfeiture.

The same code by Art. 518, authorizes the judge to adopt all restraint measures against the patrimony of participants even before ordering the initiation of criminal proceedings.

When there is danger in not acting swiftly (periculum mora and bonus fumus juris).

Let's remember here, that law No. 25.246, the money laundering prevention and repression law, in Art. 27, gives all forfeited proceeds of crime to the Unit of Financial Information, and to programmes of rehabilitation of addicts, and programmes of labour rehabilitation and health.

Law 25.246 has established that all assets will be allocated by the judge, to the National Executive Power during the duration of penal proceedings, to be administered by the state.

To these effects, since these assets should be under the administration of the state until devolution or forfeiture, the administrative authority should have a provisional reserve not less than 50% of all assets received in provisional manner.

The idea of establishing in the Argentine legal system a procedure similar to the American civil forfeiture has been advocated.[4]

The introduction of a lesser standard of proof in civil forfeiture will certainly help in the effectiveness of the efforts to prevent and repress serious forms of criminality.

Though the Argentine constitution in Art. 17 prohibits the confiscation of assets stating that confiscation should be for always barred from the Argentine Penal Code, the prohibition does not refer to assets related to criminality, but only to a total and general confiscation of all assets of a person.[5]

HUMAN RIGHTS ISSUES

Special consideration in relation to the protection of fundamental rights of due process, merits Art. 268, 2 of the Argentine Penal Code dealing with the offence of "illicit enrichment" of public employees.[6]

The Article punishes with imprisonment from 3 to 6 years and absolute inhabilitation from 3 to 10 years, those who duly required, do not justify a substantial enrichment of their patrimony, personally or of a person placed to abscond it. The Article is structured in the fashion suggested later by Art. 20, of the UN Convention against Corruption. Article 20 recommends countries to criminalize illicit enrichment subject to its constitution and fundamental principles of its legal system.

One of the principal objections to Art 268, 2 of the Penal Code is that it ignores the principle in dubio pro-reo introduced in 1889 in the Procedural Penal Code of the Federal Capital.[7] In this manner the crime of illicit enrichment is in fact a punishment for the crime of suspiciousness, a punishment extra-ordinem, (Verdachtsstraffe) applicable to crimes when it was not possible to get complete proof of its commission; and it was sanctioned with a lesser penalty.

Additionally, it was said, in the legislative debates of the times, that illicit enrichment would permit persecutions and vengeance against all functionaries whose patrimony could be in a light fashion, labelled "excessive".

The inversion of the onus probandi, is not the most serious objection, but the fact of the lack of determination

[4] Bulit Goñi, op.cit.

[5] Bidart Campos, Germán J., Manual de la Constitución Reformada, p. 129 (cited by Bulit Goñi).

[6] Law 16.648. BO 18/11/1964. Leer Sancinetti, Marcelo. El Delito de enriquecimiento ilícito de funcionario público, Art. 268,2 CP. Un tipo penal violatorio del Estado de Derecho.

[7] Sancinetti, op. At p. 43.

about what is the forbidden conduct.[8]

Finally, the fact that the accused has to produce proof to legitimize the prohibited conduct, implies violation of Art. 18 of the Argentine national institution, that nobody is obliged to declare against himself".

In concluding: let's add that the Argentine money laundering regime was based on Drug Law No. 23.737 enacted on 10 October 1989.

The law contained provision in order to authorize the seizing and forfeiture of assets related to illicit drug traffic and money laundering crimes.

JURIDICAL AND TECHNICAL COOPERATION IN THE MERCOSUR

There is an increasing interest on the part of Mercosur countries to strengthen cooperation mechanisms to provide effectiveness to the fight against money laundering and various forms of international transnational criminality, including the financing of terrorism.

The Mercosur countries have also signed accords of cooperation with the European Union in 1995.[9]

An important dimension to provide for more effective and practical ways to enhance international cooperation is provided by GAFISUD – the South America Group of Financial Action against Money Laundering and the Financing of Terrorism.

GAFISUD has organized a conference of countries in Cartagena de Indias (Colombia, 7 to 9 December 2000) signing a Political Declaration and many accords and projects to share experiences and technology.

One of the conclusions of the Conference of Cartagena de Indias was the importance, for countries of the area to enact legislative comprehensive frameworks to incriminate a vast array of crimes, and provide for innovative investigative procedures, including seizing and confiscation of criminal assets.

An important aspect was the need to establish UFI's, at the national level with mixed functions, police, penal and administrative. Gafisud, with the cooperation of the IMF and the World Bank, the Egmont Group and the Organization of American States have organized seminars for the coordination of regional strategies and the training of practitioners for mutual evaluation of the Units of Financial Investigations, inter alia, one in Santa Cruz de la Sierra, Bolivia (16-19 September 2001) and Montevideo, Uruguay, (18-20 September of 2002).

In summary, Mercosur countries are now pressing for a more effective and prompt response to the challenges posed by the increasing threat of economic criminality.

[8] Sancinetti, pp. 43-46.

[9] See Mendes de Souza Solanges. "Cooperación Jurídica en el Mercosur", Edit. Renovar, Río de Janeiro, Brasil, 2001, p. 277