THE LAW OF MERCOSUR

Edited by Marcílio Toscano Franca Filho,
Lucas Lixinski and María Belén Olmos Giupponi

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The Law of MERCOSUR presents both an overview and in-depth analysis of one of the world's most important and increasingly influential economic organisations. The book comprises both a series of first-hand analyses of MERCOSUR by experts from countries in the MERCOSUR bloc, and also discussions from other parts of the world looking at MERCOSUR as global actor of ever-increasing importance. The book is divided into three main parts: the first analyses the key institutional legal aspects of MERCOSUR, looking at its history, the general theory of economic integration, and basic aspects relating to the functioning of MERCOSUR; the second examines specialised topics, including the regulation of the environment, human rights and the energy market in MERCOSUR; and in the third part the editors offer a translation of core MERCOSUR instruments, with the objective of furthering understanding of the economic bloc. Original in its conception, the book aims to fill a major gap in the English-language literature by offering a comprehensive and in-depth analysis of the Law of MERCOSUR, and it is hoped that it will become essential reading for those practitioners and academics who are interested not only in MERCOSUR, but in economic integration generally, in international trade, and in the regional aspects of the phenomenon of globalisation.

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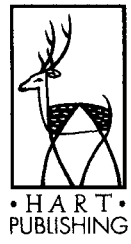

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Marcílio Toscano Franca Filho
Lucas Lixinski
María Belén Olmos Giupponi

Contents

List of Contributors

Fabiano de Andrade Correa PhD Researcher, European University Institute, Florence; MAE-AECI Fellow; Master in Diplomacy and International Relations, Diplomatic Academy of Madrid; LLB, Federal University of Rio Grande do Sul, Porto Alegre, Brazil.

Mario Viola de Azevedo Cunha LLM in Private Law, Rio de Janeiro State University, is Master of Research, European University Institute, Florence; PhD Researcher at the European University Institute, Florence.

Luciana Carvalho LLB, MA, is a Doctoral candidate at the University of São Paulo and a Professor of Legal Translation at the Pontifical Catholic University of São Paulo.

Danilo Doneda PhD in Private Law, Rio de Janeiro State University, is Professor of Private Law at Campos Law School, Río de Janeiro.

Adriana Dreyzin De Klor Fernand Braudel Fellow, European University Institute, Florence, and former legal consultant of the MERCOSUR Secretariat.

Lúcio Tomé Féteira PhD Researcher at the European University Institute, Florence.

Marcílio Toscano Franca Filho Visiting Professor at the Faculty of International Relations of the State University of Paraíba (Brazil) and General Attorney of the Prosecution Office at the Audit Court of Paraiba (Brazil).

Felix Fuders Professor and Researcher at the Universidad Austral de Chile.

Hannes Hofmeister Research Fellow at the Innsbruck University, Austria.

Diego Fraga Lerner LLM in Corporation Law, New York University; LLM in International Law, Federal University of Rio Grande do Sul, Brazil; LLB, Federal University of Rio Grande do Sul, Brazil.

Lucas Lixinski LLM in Human Rights with Specialisation in European and Global Legal Practice, Central European University, Hungary; LLB, Federal University of Rio Grande do Sul, Brazil; MAE-AECI Fellow (Spain), is PhD Researcher, European University Institute, Florence, and a Post-Graduate Fellow at the Bernard and Audre Rapoport Center for Human Rights and Justice at the University of Texas-Austin, United States of America.

Philippe de Lombaerde Associate Director, UNU-CRIS, Bruges.

Alessandra Correia Lima Macedo Franca PhD candidate in International Law, Geneva University; Master in Economic Law, UFPB, Brazil, is Assistant Professor in the Law Faculty at the Federal University of Paraíba, Brazil.

Andrés Malamud Assistant Professor, Institute of Social Sciences, University of Lisbon.

Hugo Roberto Mansueti Professor at the National University of La Matanza in Buenos Aires, Argentina.

Claudia Lima Marques LLM, University of Tübingen, Germany; Diploma in European Integration, Europa-Institut, University of Saarbrücken, Germany, is Professora Titular, Private International Law, Law School of the Federal University of Rio Grande do Sul, Porto Alegre, Brazil; *Doctor iuris utriusque*, University of Heidelberg, Germany.

Jamile Bergamaschine Mata Diz PhD in Communitarian Law at University of Alcalá, Madrid, is Legal Adviser of the Secretariat of MERCOSUR and Professor at the Federal University of Viçosa, Brazil.

Frank Mattheis PhD Researcher, University of Leipzig.

Martha Lucía Olivar Jimenez PhD in European Community Law, Université Robert Schuman, Strasbourg, is Adjunct Professor of Public International Law and Director of the Masters' Programme in International Relations of the Federal University of Rio Grande do Sul, Brazil.

María Belén Olmos Giupponi Junior Professor of International Law and European Union Law at University Rey Juan Carlos in Madrid.

Samantha S Moura Ribeiro Master in Constitutional Law and State Theory and LLB, Pontifícia Universidade Católica do Río de Janeiro, PUC-Río (Brazil), is PhD Researcher, European University Institute, Florence.

Nadine Susani Doctor in Law, Paris X; Research Fellow, UCL, Belgium; author of *Le règlement des différends dans le Mercosur. Un système de droit international pour une organisation d'intégration* (Paris, L'Harmattan, 2008).

Carmen Tiburcio LLM and SJD University of Virginia School of Law, is Professor of Private International Law and International Litigation at the State University of Río de Janeiro; Lawyer at Luís Roberto Barroso & Associados.

Félix Vacas Fernández International Law Professor, University Carlos III of Madrid.

Charlotte Vanfraechem Junior Researcher, UNU-UNESCO Office, Paris.

Abbreviations

MERCOSUR

CCM	Council of the Common Market
CDC	Commission for the Defence of Competition
CMG	Common Market Group
CPC	Joint Parliamentary Commission (Comissâo Parlamentar Conjunta)
CRPM	Commission of Permanent Representatives
FOCEM	MERCOSUR Fund for Structural Convergence
MTC	MERCOSUR Trade Commission
POP	Ouro Preto Protocol
PRC	Permanent Review Court
SIMDEC	Common Information System about Consumer Protection and Defective Products
TA	Treaty of Asunción

European Union

CFSP	Common Foreign and Security Policy
ECF	European Cohesion Fund
ECJ	European Court of Justice
ECL	European Competition Law
ERDF	European Regional Development Fund
EU	European Union

International Organisations and Treaties

ALADI	Latin American Integration Association (Asociación Latinoamericana de Integración)
ALALC	Latin American Free Trade Association (Asociación Latinoamericana de Libre Comercio)
ALBA	Bolivarian Alliance for the Peoples of our America
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
CACM	Central American Common Market
CAN	Andean Community
CARICOM	Caribbean Community
CCG	Cooperation Council for the Arab States of the Gulf
CRTA	GATT Committee on Regional Trade Agreements
DSB	WTO Dispute Settlement Body
DSU	WTO Dispute Settlement Understanding
ECHR	European Convention on Human Rights
ECLAC	Economic Commission for Latin America and the Caribbean
ECOWAS	Economic Community of West African States
EFTA	European Free Trade Association

FTAA	Free Trade Area of the Americas
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILO	International Labour Organization
NAFTA	North American Free Trade Agreement
OAS	Organisation of American States
REMA	Special Conference on the Environment
SADC	Southern African Development Community
SICA	Central American Integration System
STJ	Brazilian Superior Tribunal of Justice
TJCA	Andean Court of Justice
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
UNASUR	Union of South American Nations
UNCTAD	UN Conference on Trade and Development
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Other Terms

AHEG	ad hoc expert group
BIT	bilateral investment treaty
DTA	double taxation agreement
FCA	framework cooperation agreement
FDI	foreign direct investment
GDP	gross domestic product
MFN	most-favoured-nation
NCA	national competition authority
NTU	national technical unit
NUTS	nomenclature of territorial units for statistics
OCA	optimum currency area
PTA	preferential trade agreement
RTA	regional trade agreement
TNC	transnational corporation

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Introduction to the Law of MERCOSUR

MARCÍLIO TOSCANO FRANCA FILHO, LUCAS LIXINSKI AND
MARÍA BELÉN OLMOS GIUPPONI

MERCOSUR (also known as MERCOSUL, Mercado Común del Sur, the Common Market of the South) is one of the most important regional economic integration processes in the world. Its four Member States (Argentina, Brazil, Paraguay and Uruguay) comprise some of the most important economies in the Western hemisphere (Brazil, for instance, is the eighth largest economy in the world,[1] and prospective Member State Venezuela[2] is a leading oil and gas producer). Today, MERCOSUR has a total population of over 250 million people, an area of 12.7 million square kilometers and GDP of more than a trillion dollars (approximately 76 per cent of the entire South American GDP).[3] Moreover, since the successful privatisation processes and economic stabilisation plans in Brazil and Argentina in the 1990s, there has been a growing demand for foreign direct investment in the Southern Cone. Therefore, MERCOSUR is a topic of great concern to all those interested in the regulation of international trade.

In the specific context of the European Union, for instance, a relationship agreement between the two integration blocs is under way, and the completion of this agreement (which will establish the biggest free trade area in the world and the first free trade agreement between two customs unions) makes understanding MERCOSUR vital to all those working with EU external policy. Similarly, MERCOSUR is currently one of the biggest stakeholders in free trade in the Americas, and the fact that the FTAA (Free Trade Area of the Americas) negotiations were stalled precisely because of MERCOSUR[4] is further evidence that, for the advancement of free trade in the continent, MERCOSUR must be properly understood.

Finally, MERCOSUR offers an interesting model for comparative integration studies, as it by no means aims at becoming a complex integration process such as the European Union, while at the same time aiming at being more than the NAFTA. This intermediary position occupied by MERCOSUR makes it an important process to be analysed worldwide.

[1] According to World Bank statistics ranking the GDP of 186 countries. *See* World Bank, Gross Domestic Product 2008, available at http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf.

[2] Venezuela signed a membership agreement on 17 June 2006, but before becoming a full member its entry must be ratified by the Paraguayan Parliament.

[3] *See* Justin Vogler, 'South America: Towards Union or Disintegration?', *Open Democracy*, 20 July 2006, available at www.opendemocracy.net/democracy-protest/union_disintegration_3756.jsp.

[4] *See* International Center for Trade and Sustainable Development, 'FTAA Negotiations Encounter Hurdles', 8 *Bridges Weekly Trade News Digest*, 12 February 2004, available at http://ictsd.net/i/news/bridgesweekly/5876/.

MERCOSUR is therefore an increasingly important player in world affairs, and one that requires attention. This book aims precisely at that, while at the same time filling a gap in English-language literature on the legal regime of this integration process.

The book is divided into three main parts. The first part, comprising nine chapters, deals with the general legal issues of MERCOSUR. The following 13 chapters form the second part, which deals with specialised legal themes within MERCOSUR. And the third part is a document annex with English translations of the four most important instruments of MERCOSUR: the Treaty of Asunción (the foundational instrument of MERCOSUR), the Las Leñas Protocol (on judicial cooperation in civil, commercial, labour and administrative matters) the Ouro Preto Protocol (on the institutional set-up of the bloc), and the Olivos Protocol on dispute settlement (which replaced the earlier Brasília Protocol).

The first part opens with a chapter by Andrés Malamud looking at the theories on why states get together and form regional economic integration blocs, and using these theories to explore the origins and the early development of MERCOSUR. Adriana Dreyzin de Klor, a former high member of the MERCOSUR Secretariat, then explains the institutional structure of MERCOSUR, which has seen many changes over the years. It is noteworthy in this sense that the Treaty of Asunción did not provide for the institutional make-up of the bloc, and that this was first regulated by the Ouro Preto Protocol. As MERCOSUR evolved, however, the structure of the Ouro Preto Protocol has been changed by the reformulation, for instance, of the dispute settlement mechanism, and the creation of the MERCOSUR Parliament, which formed a great moment of the process of the 'relaunching' of MERCOSUR that started in 2000.

María Belén Olmos Giupponi, one of this book's editors, then looks at the sources of law in MERCOSUR, which do not derive from a single body, and, depending on their source, can be applied with or without the need for subsequent ratification. MERCOSUR norms, in some cases, must not only be implemented in national legislation, but they must also go through the formal ratification process of regular international treaties. Nadine Susani then looks at the issue of dispute settlement, which has evolved from ad hoc arbitration panels under the Brasília Protocol towards a system where, even though decisions are still taken by ad hoc panels, there is a permanent body to which states can appeal the decision of the arbitrary panel. This also has a mandate to give advisory opinions, which has already been put to the test, with satisfactory results.

The following chapter, on economic freedoms, is authored by Felix Fuders. This is perhaps the core chapter from the perspective of trade law, as it analyses the rules that enable the functioning of the bloc. He draws heavily on the European Union as a model for MERCOSUR, which has been a political and legal fact since the creation of the bloc in 1991. He argues that MERCOSUR is much closer to the achievement of the common market than many believe (common belief is that MERCOSUR has so far only reached the stage of an imperfect customs union). Even though he admits MERCOSUR looks up to the EU model for inspiration (and even outright imitation at times), he also highlights that MERCOSUR has been much more advanced than the European Union in regulating exceptions to market freedoms based on reasons of public health and environmental protection, which is overall a laudable development.

A series of chapters in part I of the book then puts MERCOSUR into perspective. Samantha Ribeiro looks at how the MERCOSUR and WTO legal regimes interact. She analyses an instance in which a case presented before MERCOSUR was subsequently

'appealed' before the WTO (a problem of forum shopping corrected by the Olivos Protocol), as well as a case in which the same issues, but involving different parties, have been brought before the MERCOSUR arbitral system and a WTO panel. She concludes that MERCOSUR tends to operate in a relationship of subordination towards the WTO, which is not a positive feature, even if an inevitable one as things stand.

Marcílio Toscano Franca Filho, also an editor of this book, then looks at the issue of interregional relations, or, to put it differently, MERCOSUR's external relations towards other international actors. The chapter is focused primarily on EU-MERCOSUR relations, which are by far the best developed ones, but it also looks at how MERCOSUR interacts with other systems within Latin America. The importance of MERCOSUR's external relations must not be underestimated, not only for its trade effects, but also for its spillover effects in opening up the way for the expansion of MERCOSUR regulation in other areas, as we will see below.

Phillipe de Lombaerde, Frank Mattheis and Charlotte Vanfraechem engage in the effort of studying comparative integration, wondering what lessons, if any, MERCOSUR legislators and policy-makers can learn from looking at other regional integration blocs. Through an extensive review of the literature on the topic of comparative integration, the authors conclude that comparative integration studies is a valuable tool, as it helps determine in which direction MERCOSUR may be headed based on the development of scenarios similar to those of MERCOSUR in other parts of the world.

Martha Lucía Olivar Jimenez, concluding the first part of the book, then analyses the relationship between MERCOSUR law and general international law. One of the questions one should ask while reading her contribution is to what extent, if any, MERCOSUR law (or economic integration law, for that matter) constitutes a self-contained regime. Her conclusion is that MERCOSUR is greatly dependent upon general rules of general international law, and that, while some legal autonomy has been sought for MERCOSUR in order to strengthen the integration process, ultimately MERCOSUR is subject to general principles and rules of international law, independently of whether they have been expressly incorporated in MERCOSUR legal instruments.

The second part of the book discusses more specialised topics of law in MERCOSUR, and areas of law in which MERCOSUR was not originally meant to venture, but which became necessary for the success of the integration process. Carmem Tibúrcio looks at the topic of cooperation in civil judicial matters in MERCOSUR, perhaps one of the most successful experiments in regional law-making. The instruments on the matter have been for the most part incorporated by all Member States, and are a vital part of the functioning of International Private Law in the region.

Alessandra Macedo Franca analyses the issue of environmental protection in MERCOSUR. This is one of the areas in which the external relations dimension of MERCOSUR has positively influenced law-making, because, as she points out in her text, it was partly the signing of agreements between MERCOSUR and other countries and regional integration processes that spurred the need for the development of environmental law and policies within Member States, as well as the harmonisation of national legislation in favour of a common regional standard.

Hugo Roberto Mansueti's contribution focuses on labour and social security regulation in MERCOSUR. This is an important topic because it is partly the expression of the

fundamental economic freedom of circulation of workers. This topic gains even more significance as MERCOSUR considers bringing the MERCOSUR Socio-Labor Declaration to the status of binding MERCOSUR law.

Another member of the MERCOSUR Secretariat, Jamile B. Mata Diz, contributes to this book by discussing the issue of taxation in MERCOSUR. In her chapter, she argues that the harmonisation of tax law in the Member States is essential for the progressive development of the bloc, especially as tax regimes are a determinant factor in attracting foreign investment and increasing political confidence in the integration process.

The following chapter, by Diego Fraga Lerner, focuses on the promotion of foreign direct investment in MERCOSUR, both from the perspective of promotion of investment within the bloc, and also from the perspective of promoting external investment in MERCOSUR, as well as the role of MERCOSUR as an investor. Given the growing economic importance of MERCOSUR, the bloc has slowly moved from being solely a receiver of foreign investment to increasingly become an investor. The expansion of the bloc, as well as the increasing cooperation with other regional blocs, enhances the need for clear regulation of this matter, as this regulation may act as an important catalysing agent in the economic strengthening of the bloc.

With this idea in mind, Lúcio Féteira looks at the regulation of competition within MERCOSUR, arguing that the prospects for specific regulation in the bloc are less than ideal, and that this lack of decisiveness in competition law has been harming the pace of integration in the region. In a different vein Félix Vacas Fernández looks at the regulation of intellectual property in the bloc, which is quite an advanced area of harmonised regulation among MERCOSUR Member States, and an important staple for the advancement of integration.

Claudia Lima Marques then considers the protection of consumers as an important asset for the development of the bloc. She analyses the evolution of consumer protection law and policy in the bloc, arguing that, despite the frustrated efforts surrounding the Santa Maria Protocol on law applicable to consumer transactions, consumer protection in the bloc is gaining momentum, and other initiatives are being undertaken to protect what she refers to as the 'forgotten protagonist' of the integration process.

Following the line of protection of weaker parties, Lucas Lixinski, another editor of this book, then examines the issue of human rights protection in MERCOSUR. As is the case with the environment, human rights protection is greatly influenced by MERCOSUR's external relations. The possibility of promoting human rights norms through trade agreements has been studied elsewhere, to the conclusion that these clauses, even if not inserted into trade agreements necessarily out of humanitarian considerations, still have positive spillover effects and do in fact promote human rights.[5] Lixinski looks at how human rights concerns and economic freedoms should be balanced in MERCOSUR, and how the human rights discourse is becoming an increasingly larger part of MERCOSUR's activities, especially with the creation of the Parliament. Human rights promotion becomes an important asset for the advancement of the integration process.

Mario Viola de Azevedo Cunha and Danilo Doneda look at another asset, and examine the character of data protection as an important trade resource in MERCOSUR. They

[5] *See* Emilie M. Hafner-Burton, *Forced to be Good: Why Trade Agreements Boost Human Rights* (Springer 2009) (discussing how the European Union's agreements on cooperation and trade with third parties, by including a human rights clause, have actually helped improve human rights in these third parties).

discuss the lack of specific regulation of this matter within MERCOSUR, and argue that this protection is necessary to enhance market trust and thus give impulse to the integration process overall. Data protection is then a tool for the promotion of development.

And so is the regulation of the energy market. As Venezuela joins MERCOSUR, and new oil reserves are discovered in Brazil, the bloc becomes an energy juggernaut, and the question of regulation of energy markets becomes vital. Hannes Hofmeister takes up the challenging task of looking at this booming area of MERCOSUR, which is still fairly unregulated.

Also focusing on development, Fabiano de Andrade Corrêa looks at the Fund for Structural Convergence (FOCEM, in the Portuguese and Spanish acronyms). In this chapter, he argues that regional integration is a tool for the promotion of development. The MERCOSUR Fund, inspired by similar initiatives at the EU level, aims at reducing asymmetries both among Member States and within each individual Member State, by looking at each region separately. This can develop into a large step towards a less Member State-centric MERCOSUR.

Fabiano de Andrade Corrêa comes back with Lucas Lixinski in the concluding chapter of the book, speculating on 'the legal future of MERCOSUR'. They look at this issue from the vantage points of three emerging challenges to the bloc. The first is the creation of the Parliament, which reorients the institutional structure of MERCOSUR, and can greatly expand its legitimacy and reach, helping guarantee a prosperous political future for the bloc. The second challenge is the expansion of the bloc with Venezuela's accession, which expands MERCOSUR's territory and market, but also raises questions related to Venezuela's political stability, which could threaten the image of the bloc. Finally, one has to take into account the creation of UNASUR, which can be looked at as both a complementary and a competing integration process. As UNASUR attempts to bind together all 12 South American States, it is important to embrace this initiative, while at the same time preserving MERCOSUR's autonomy.

One final note is in order regarding our choice of cover. The painting on the cover is located in a palace in Florence, where the editors of this book met and to which several of the contributors are connected institutionally. This fresco is an illustration of Themis, the Greek Goddess of Justice, and Hermes, the Messenger of the Gods and the God of Trade. MERCOSUR's intellectual territory is a fertile one located between Law and Economy, a space in which a dialogue between Themis and Hermes develops to ensure the fairness of trade. Law and Economy are side by side in MERCOSUR. However, even acknowledging the great strategic value of MERCOSUR for the regional and global economies, this book takes as its basis the essential assumption that MERCOSUR must be, first and foremost, a legal entity, built upon the pillars of loyalty, cooperation and security among Member States. Only the development of an efficient legal structure can guarantee the security and stability necessary to the sustainable development of the bloc's economic activities.

The bottom line of this book is that MERCOSUR is an integration process under construction, but which has great potential and has achieved far more than it is usually given credit for. Throughout these pages, all the authors have tried to demonstrate that MERCOSUR is an important, well-established partner in the international arena. Even though there is still much to be done, the necessary effort is being put into creating the

means for MERCOSUR to fulfil its destiny and consolidate itself as the economic giant it already is. The following chapters will offer the reader the evidence for this belief, and we wish you all an enjoyable read.

Part I

General Legal Aspects of MERCOSUR

2

Theories of Regional Integration and the Origins of MERCOSUR

ANDRÉS MALAMUC

The very concepts of region, regionalism, and regional integration are controversial.[1] However, Joseph Nye's definitions are a useful base of departure. He identified an international region as 'a limited number of States linked together by a geographical relationship and by a degree of mutual interdependence', and regionalism as 'the formation of interest groupings on the basis of regions'.[2] Classical or old regionalism conceived closed regions as depicted by the term 'fortress', as they tended to foster regional integration at the cost of global fragmentation. In contrast, contemporary or open regionalism aims at achieving 'compatibility between the explosion of regional trading arrangements around the world and the global trading system as embodied in the World Trade Organization'.[3]

Contemporary regionalism can be seen as an umbrella concept, covering a multiplicity of distinct phenomena. Andrew Hurrell enumerates five of these, arguing that none should be given the exclusive use of the term: (a) regionalisation; (b) regional awareness and identity' (c) regional interstate cooperation; (d) state-promoted regional integration; and (e) regional cohesion.[4] The first meaning—regionalization—could be understood as interdependence, whereas the second—regional identity—conveys more a cultural than a political or economic notion; their common feature is that none is produced intentionally but are brought about by unintended factors, such as increasing interchange flows or common historical roots. The next three subtypes respond to a different logic: they are either the outcome of state decisions—cooperation and integration—or its consequence—regional cohesion. In them, 'the region plays a defining role in the relations between the states (and other major actors) of that region and the rest of the world', while constituting 'the organizing basis for policy within the region across a range of issues'.[5]

[1] BM Russett, 'International Regimes and the Study of Regions' (1969) 13 *International Studies Quarterly* 123; L Fawcett and A Hurrell (eds), *Regionalism in World Politics: Regional Organization and International Order* (Oxford, Oxford University Press, 1995); A Gamble and A Payne (eds), *Regionalism and World Order* (Malaysia, MacMillan Press, 1996); A Warleigh and B Rosamond, 'Theorising Regional Integration Comparatively: An Introduction', ECPR Joint Sessions of Workshops, Workshop 10 on Comparative Regional Integration, Towards a Research Agenda, Nicosia, Cyprus, 25–30 April 2006.

[2] JN Nye, *International Regionalism* (Boston, Little, Brown & Co, 1968) vii.

[3] F Bergstein, 'Open Regionalism' (1997) 20 *The World Economy* 5.

[4] A Hurrell, 'Regionalism in Theoretical Perspective' in L Fawcett and A Hurrell (eds), *Regionalism in World Politics: Regional Organization and International Order* (Oxford, Oxford University Press, 1995).

[5] Hurrell, 'Regionalism in Theoretical Perspective' (n 4) 44.

With regard to the economic dimension of regional integration, there are four progressive levels of achievement.[6] The simplest, the *free-trade zone*, is an area in which domestic obstacles to trade are dismantled; this means that customs tariffs are not imposed on the products of any member country. Distinctively, a *customs union* moves one step further: at this stage a common external tariff is established, fixing the amount that products coming from the rest of the world have to pay to enter the region. This implies that the member countries form only one entity in the arena of international trade. The third step, a *common* or *single market*, is a customs union to which the free mobility of productive factors between the member countries and a common trade policy are added. It also contemplates the coordination of sectoral macro-economic policies among its members, and requires the harmonisation of national legislation. Fourthly, an *economic union* appends centralised monetary institutions and common financial policies to the single market. It goes beyond simple coordination and harmonisation among the member countries, to establish unified supranational agencies, such as a central bank, and a single currency.

Despite the economic goals of regional integration, the necessity of establishing some kind of common institutional arrangements fosters linkages other than purely economic. In the wake of higher levels of state-promoted economic integration, increasing flows of trade and investment are likely to manifest, ie growing regionalisation in the sense of the first subtype defined by Hurrell. Likewise, increasing flows of people and communications are able to nurture a regional awareness, as in the second subtype. None of them, however, mean regional integration, which can be defined as the process of 'how and why [national states] voluntarily mingle, merge and mix with their neighbors so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts among themselves',[7] provided that 'they do so by creating common and permanent institutions capable of making decisions binding on all members'.[8]

The main theories of international relations, the most significant of which are neo-realism (developed by Kenneth Waltz), neo-liberalism (Robert Keohane and Joseph Nye), constructivism (Alexander Wendt), and neo-idealism (Bruce Russett), do not fully grasp the phenomenon of regional integration—and often they do not even address it. Therefore, several specific theories have been devised to cope with it. Among the most noteworthy are federalism (advanced mainly by Michael Burgess), functionalism (David Mitrany), neo-functionalism (Ernst Haas), communicative interactionism (Karl Deutsch), liberal intergovernmentalism (Andrew Moravcsik), and supranational institutionalism (Wayne Sandholtz and Alec Stone Sweet). They are all discussed next in order subsequently to test their fit to the case of MERCOSUR.

[6] B Balassa, *The Theory of Economic Integration* (Westport, CT, Greenwood Press, 1961).

[7] EB Haas, 'The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing' in LN Lindberg and SA Scheingold (eds), *Regional Integration: Theory and Research* (Cambridge, MA, Harvard University Press, 1971) 6.

[8] A Malamud and PC Schmitter, 'The Experience of European Integration and the Potential for Integration in South America' in N Robinson, B Rosamond and A Warleigh-Lack (eds) *The New Regionalism and the European Union, Dialogues, Comparisons and New Research Directions* (London/New York, Routledge, forthcoming 2010).

I Theories of International Relations

Regional integration can be considered as a small sub-area in the broader field of world politics, though it has grown strongly (yet not steadily) over the last half century. This development was unexpected for most analysts and theoreticians; furthermore, it was often at odds with mainstream theories of international relations.

Since being updated by Kenneth Waltz,[9] as a result of which the prefix 'neo-' was added, the realist theory originally sketched by Hans Morgenthau[10] has dominated the field of international relations. World politics are conceived of as taking place in an anarchic environment, where sovereign nation-states are the only key actors. As no legitimate monopolist power is at work, self-help is the only behaviour that states may count on; hence, the different interests and capabilities of the actors will mould their interactions, giving rise to a dynamics of international alliances and oppositions resulting in a balance of power. National interests are defined in two layers, high politics—politico-territorial and military issues—and low politics—economic and other issues. The former are crucial, thus rendering the world an arena determined by security concerns and power politics.

Neo-realism 'has little interest in regionalization or regional economic integration'.[11] Instead, it focuses on the concept of regime, defined as 'explicit or implicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations'.[12] In this view, 'any action which either diminishes that capability deliberately or assigns it irrevocably to another polity is (theoretically) incomprehensible'.[13] Consequently, neo-realism does not aim at explaining international arrangements that 'may involve institutional structures very different from the traditional idea of a coalition, alliance, or traditional international organization'.[14]

Unlike neo-realism, institutional neo-liberalism claims that cooperation among states is not only possible but also to be expected, given certain conditions.[15] As national *interests* are translated into national *preferences*, by way of opening the black box of the state, institutions manage to play a crucial role in facilitating agreements, guaranteeing compromises through monitoring and supervision, reducing transaction and information costs, and generally orienting behaviour. The zero-sum game of realists thus becomes a positive-sum game, and the issue-linkage allowed by the dilution of the high/low politics distinction gives place to a scenario of complex interdependence. In this context, subnational agencies and transnational actors are recognised to play a relevant role that is neglected in neo-realist theory.

Interdependence 'consists of (a) economic interpenetration in terms of international trade and financial flows; (b) nation-states' collective interest in avoiding a major nuclear

[9] K Waltz, *Theory of International Politics* (Reading, MA, Addison-Wesley, 1979).

[10] HJ Morgenthau, *Politics Among Nations: the Struggle for Power and Peace* (New York, Knopf, [1948] 1985).

[11] Hurrell, 'Regionalism in Theoretical Perspective' (n 4) 53.

[12] SD Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' in SD Krasner (ed), *International Regimes* (Ithaca, NY, Cornell University Press, 1983) 1.

[13] PC Schmitter, 'Examining the Present Euro-Polity with the Help of Past Theories' in G Marks, FW Scharpf, PC Schmitter and W Streeck, *Governance in the European Union* (London, Sage Publications, 1996).

[14] Hurrell, 'Regionalism in Theoretical Perspective' (n 4) 53.

[15] R Axelrod, *The Evolution of Cooperation* (New York, Basic Book Inc., 1984); R Keohane and JN Nye, *Power and Interdependence*, 2nd edn (Glenview, IL, Scott, Foresman & Co., 1989).

war; and (c) nation-states' collective interest in avoiding ecological catastrophe'.[16] Despite this threefold definition of interdependence, the main emphasis falls on the first factor, intensive economic exchange, 'which may influence political relationships but does not necessarily elicit an integrative response from those most affected'.[17] Interdependence is not a sufficient condition for, nor is it the same as, cooperation or integration, but it is a facilitating (and may even be a necessary) condition.

A third approach, constructivism (or reflectivism)[18] lies on less material foundations than the above theories. Instead of drawing on either political or economic factors, constructivists 'are interested in the construction of identities and interests, and, as such, take a more sociological than economic approach to systemic theory. On this basis, they have argued that states are not structurally or exogenously given but constructed by historically contingent interactions'.[19] Consequently, they 'emphasize the importance of shared knowledge, learning, ideational forces, and normative and institutional structures'.[20] Although there are many orientations within the constructivist label, all of the various approaches reject both neo-realism and neo-liberalism for their positivist and rationalist assumptions.

Integration is, in the constructivist framework, a possible response to the transformation of national identities and expectations. As interchange between different peoples grows, new collective identities are believed to emerge from previous allegiances; supranational institutions are thus created in order to encompass and contain the most recent loyalties.

Finally, one of the first but long-time dormant theories of international relations is neo-idealism. Its origins go back at least two centuries to Immanuel Kant's speculations on world peace,[21] but its latest rediscovery dates from the 1970s and 1980s, when the third wave of democratisation acquired momentum. Neo-idealists claim that domestic factors are neither secondary nor complementary for international politics but instead they are fundamental, and regime type is among the most determinant of them.[22] As first evidence, these approaches underline that democracies do not wage war with each other. From this peaceful assumption, it has frequently been concluded that some kind of cooperative behaviour will arise, and indeed, this has happened in many regions worldwide. However, democracy has not yet proven to be either a necessary (see the initial case of Mexico in NAFTA, or the more complex instance of ASEAN) or a sufficient condition for regional integration.

[16] D Sanders, 'International Relations: Neo-Realism and Neo-Liberalism' in RE Goodin and H-D Klingemann (eds), *A New Handbook of Political Science* (Oxford, Oxford University Press, 1996) 444.

[17] C Webb, 'Theoretical Perspectives and Problems' in H Wallace, W Wallace and C Webb (eds), *Policy-Making in the European Community*, 2nd edn (Chichester, John Wiley & Sons, 1977) 32.

[18] R Keohane, *International Institutions and State Power* (Boulder, CO, Westview, 1989).

[19] A Wendt, 'Collective Identity Formation and the International State' (1994) 88 *American Political Science Review* 385.

[20] Hurrell, 'Regionalism in Theoretical Perspective' (n 4) 65.

[21] I Kant, *La Paz Perpetua* (Madrid, Editorial Tecnos, [1795] 1985).

[22] JN Nye, 'Neorealism and Neoliberalism' (1988) 40 *World Politics* 235; PC Schmitter, 'Change in Regime Type and Progress in International Relations' in E Adler and B Crawford (eds), *Progress in Postwar International Relations* (New York, Columbia University Press, 1991); Z Maoz and BM Russett, 'Normative and Structural Causes of Democratic Peace, 1946–1986' (1993) 87 *American Political Science Review* 624.

II Theories of Regional Integration

A Federalism

As regards political integration, the idea of federalism goes a long way back. However, although some medieval thinkers (and even the ancient Greeks) developed this idea, modern federalism is a newer strategy. Kant in principle, and the American founding fathers in practice, devised a model that evolved successfully and was thus admired and emulated elsewhere. Almost two centuries later, the idea migrated back to its original continent to sustain Europe's nascent self-consciousness. Altiero Spinelli, the Italian leader of the European Federalist Movement, was the staunchest advocate of a federal pan-Europeanism; he 'believed that only a dramatic leap to federalism would succeed in unifying Europe'.[23] Many European constructors originally adopted this idea, including Jean Monnet and Robert Schuman. However, when federalism proved unable to support the Council of Europe as the embryo of an integrated continent, in 1949, most of them turned to an incremental approach.[24]

One of the key federalist assumptions is the interchangeability between the national and supranational levels. It presupposes that 'the political postulates concerning identity, action and loyalty are the same regardless of the level of institutional formation. Hence, the principles underpinning federalism at the national level apply equally to federalism at the world (level)' or, more restrictively, at the regional level.[25] As an example, the archetype of the Swiss Confederation has been offered as a prospective model to explore for the institutionalisation and democratisation of the European Union.[26] Other authors would argue that 'federal politics' is an already appropriate label for the European Union,[27] or even that federalist features resembling German federalism are currently at work at the expense, not to the benefit, of optimal policy outcomes.[28]

International federalists see their object as a process—federalisation—rather than as a static end-point—federation.[29] The federal strategy admits two ways to advance integration: either through intergovernmental constitutional bargaining or through the call of a constituent assembly. In the end, however, both paths lead to the establishment of a federal state, and both are driven from above, although the latter demands the people to support the call from the elites.

[23] BF Nelsen and AC-G Stubb (eds), *The European Union: Readings on the Theory and Practice of European Integration* (Boulder, CO, Lynne Rienner Publishers, 1994) 69.

[24] D Mutimer, 'Theories of Political Integration' in HJ Michelmann and P Soldatos (eds), *European Integration: Theories and Approaches* (Lanham, MD, University Press of America, 1994).

[25] S Hix, 'The Study of the European Community: the Challenge to Comparative Politics' (1994) 17 *West European Politics* 11.

[26] J Blondel, 'Il Modello Svizzero: un Futuro per l'Europa?' (1998) 28 *Rivista Italiana di Scienza Politica* 203; A. Trechsel, 'How to Federalize the European Union … and Why Bother' (2005) 12 *Journal of European Public Policy* 401.

[27] AM Sbragia, 'Thinking about the European Future: the Uses of Comparison' in AM Sbragia (ed), *Euro-Politics: Institutions and Policymaking in the 'New' European Community* (Washington, DC, Brookings Institution, 1992); S Dosenrode (ed), *Approaching the European Federation* (Aldershot, Ashgate, 2007).

[28] FW Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) 66 *Public Administration* 239.

[29] M Burgess, *Federalism and European Union: the Building of Europe, 1950–2000* (New York, Routledge, 2000).

B Functionalism

Functionalism came into being by the end of the Second World War, and was advanced as an alternative mechanism to international politics for safeguarding world peace. It shared with federalism its prescriptive elements and aims, but rejected rather than embraced politics either as a means or end. David Mitrany, who first proposed it, viewed it as a pragmatic, technocratic and flexible system to overcome the problems raised by nationalism and 'competing political units'. The functional approach would 'overlay political divisions with a spreading web of international activities and agencies, in which and through which the interests and life of all the nations would be gradually integrated'.[30]

Despite its recognition of a dynamics of integration, thereby accepting integration as a process, functionalism was an ideological tool aimed at a static objective.[31] That end was the construction of a final *super-partes* world entity. To achieve a supranational state that would prevent war, the element of conflict, which is tantamount to saying any theory of politics, was put to one side. This neglect was stressed by later critics of functionalism, and would subsequently be addressed by the following approach, neo-functionalism.

Mitrany deeply distrusted in a potential central authority, so his proposal was based on the experience of the American New Deal. He supposed that a decentralised area-by-area and issue-by-issue treatment of questions would increasingly drain states' capacity, while building non-political organs and bodies capable of dealing with administrative tasks.[32]

C Neo-functionalism

As pointed out by Nelsen and Stubb, 'functionalism failed as a theory for several reasons, but one stands out: it contained no theory of politics'.[33] When economic problems proved to be unmanageable by technical experts, and theory could not explain why certain choices had been made, a new approach emerged to understand the development of the European Community by addressing the deficiencies of functionalism. It was then that a group of scholars from the University of Berkeley, led by Ernst Haas, developed the neo-functionalist theory.

Haas carried out much of his work in the 1950s and 1960s, when he supported the idea that technological and scientific changes would produce incentives and pressures for international institutional innovation. In turn, innovation would lead to political 'learning' by political leaders, national bureaucracies and international organisations. Neo-functionalism, just like the functionalist and other pluralist approaches, argues that 'what matters most is a utilitarian calculus on the part of actors, and not a dramatic or passionate commitment to a new order'.[34] The theory conceives of integration as an open *process*, characterised by the *spillover* from one area to another. Although the ending point is supposed to be open, 'it is clearly intended to be institutional'.[35]

[30] D Mitrany, *A Working Peace System: an Argument for the Functional Development of International Organization* (London, Royal Institute of International Affairs, 1943).
[31] Hix, 'The Study of the European Community' (n 25) 11.
[32] Mutimer, 'Theories of Political Integration' (n 24).
[33] Nelsen and Stubb, *The European Union* (n 23) 99.
[34] EB Haas, *The Obsolescence of Regional Integration Theory* (Berkeley, CA, University of California, 1975) 12.
[35] Mutimer, 'Theories of Political Integration' (n 24) 31.

Spillover, the central metaphor of neo-functionalist theory, is the process whereby 'a given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more, and so forth'.[36] Jean Monnet captured this logic of gradually creating factual solidarities (as opposed to following a pre-established plan) in his motto, *petits pas, grands effets* (take small steps to achieve large effects). Interests, rather than politics or discourse, were considered to constitute the fuel for integration.

However, one shortcoming of neo-functionalism was that it 'always had more to say about the ongoing role of institutions than about the factors that explain the birth of regionalist schemes'.[37] Although it recognised the difference between background conditions, conditions at the time of union, and process conditions, thus allowing for different variables to have a different weight according to the stage, the main accent and stronger predictions were oriented towards the process. Once integration had started, neo-functionalism saw it as being fostered by two sorts of spillover: functional and political, unlike Mitrany's purely technical conception. Such a twofold mechanism predicted that integration would become self-sustaining. This expected capacity of prediction was what the neo-functionalists believed to be one of the most salient features of their theory.

However, the spillover effect did not take place as planned. What first appeared as a complex but self-sustainable process turned afterwards into an extremely contingent phenomenon, of little use for eliciting general conclusions or predicting particular outcomes. As a consequence, Haas began to stress the role of ideas and 'consensual knowledge', thus paying more attention to the relevance of political leaders and their goals.[38]

The change of focus, from an 'inevitable' and incremental evolution of international complexity toward a less-determined process, led to the modification of some previous assumptions. Consequently, the role that individuals can play in the international arena, and the institutional contexts that may provide incentives for or constrain their actions, were highlighted as key elements of a more general development. De Gaulle's disruptive intervention was decisive for Haas's theoretical reformulation.[39]

It is within this framework that the executive format, ie presidentialist or parliamentary, acquires greater relevance. If the leadership and the leaders' goals are to influence the integration process, then the mechanisms by which national leaders are appointed, and the institutional resources they may resort to or by which they are limited, cannot be neglected. Hence the executive format, as a given structure of incentives and restrictions, affects the opportunities and features of the integration process.

D Communicative Interactionism

Communicative interactionism, also called transactionalism, was a theoretical tool developed by Karl Deutsch in the 1950s, aiming at the explanation—and the creation—of a

[36] LN Lindberg, *The Political Dynamics of European Economic Integration* (Stanford, CA, Stanford University Press, 1963) 9.

[37] Hurrell, 'Regionalism in Theoretical Perspective' (n 4) 60.

[38] K Waltz, 'Foreword' in E Adler and B Crawford (eds), *Progress in Postwar International Relations* (New York, Columbia University Press, 1991).

[39] Haas, *The Obsolescence of Regional Integration Theory* (n 34).

'security community'. This concept means that, among a number of countries that feature similar substantive attributes in a given region, the possibility of waging war against each other becomes entirely unthinkable (*Gemeinschaft*). The theory suggests that an increasing pattern of communication and interchange between neighbouring societies will give rise to a growing sense of community, regional awareness and supranational identification. The departing point is the homogeneity among mass societies that share common values, such as capitalism and liberal democracy.[40] Hence, elites and organised groups are considered of minor importance for this process.

The assumptions of transactionalism stress the importance of intraregional communications such as trade flows, telephone calls, post-mail and even tourism, all measurable variables that render the theory easily falsifiable. However, there have been difficulties in establishing a correlation between 'behaviour' and 'identity', the defining characteristic of a 'community'.[41]

In what concerns the organisational aspects of integration, the theory expects the development of common identities among the people of the integrating areas prior to any formal institutionalisation. Therefore, institutions are considered to be an outcome rather than an engine of integration.

E Intergovernmentalism

Intergovernmentalism is the tangible form that the realist approach takes to integration.[42] However, its most sophisticated versions add more than nuances to a plain neo-realist conception. Moravcsik, for instance, deliberately denominates his framework as 'liberal intergovernmentalism', because it does not assume the state as a unitary actor but considers instead that domestic politics have a decisive impact on subsequent interstate relations.[43] In this sense, he makes a concession to the many criticisms received by realist authors regarding their neglect of subnational processes, and accepts the idea of opening up the black box of the state as neo-liberal institutionalism had already proposed.[44] However, this acquiescence does not imply a compromise; it leads instead to the reaffirmation of all the intergovernmentalist tenets as far as the international level is concerned.

One of the first authors to call attention to the domestic level was Bulmer.[45] He underlined the primacy of the nation-state: his point was that 'member governments, pursuing their own interests, were the "central actors" in the EC policymaking process'.[46] Domestic politics was thus the source for explaining regional policy-making, and also integration itself; yet Bulmer thought his theory had 'a mixed intellectual parentage' with

[40] K Deutsch, *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience* (Princeton, NJ, Princeton University Press, 1957); Hurrell, 'Regionalism in Theoretical Perspective' (n 4).

[41] Hix, 'The Study of the European Community' (n 25) 4.

[42] Ibid; Schmitter, 'Examining the Present Euro-Polity' (n 13).

[43] A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, NY, Cornell University Press, 1998).

[44] Keohane, *International Institutions* (n 18); Keohane and Nye, *Power and Interdependence* (n 15).

[45] S Bulmer, 'Domestic Politics and European Community Policy Making' (1983) 21 *Journal of Common Market Studies* 349.

[46] Nelsen and Stubb, *The European Union* (n 23) 141.

'the transnationalist study of the international political economy'.[47] This rather eclectic and empirical analysis was deepened in the next decade, especially by Alan Milward's 'European rescue of the nation-state'.[48]

What constitutes the leading intergovernmentalist study so far was, however, published in 1998.[49] It is an impressive piece of work in which a framework for understanding European integration is offered, along with an in-depth examination of the so-called five major bargains[50] that arguably defined the features of the European Union. Moravcsik presents a three-stage approach to regional building. In the first stage, national preferences are defined by each state based on its economic interests; consequently, the theory dismisses the view that geopolitical interests may hold the same importance as economic ones to explain the formation of national preferences, thereby detaching itself even further from neo-realism. The second step consists of the negotiations between national governments to fulfil their nationally defined preferences; these negotiations depend on the asymmetrical interdependence existing between the bargaining states, and not on any kind of supranational entrepreneurship—a point that makes a crucial difference with the neo-functionalist assumptions. The last phase involves the establishment of common institutions, according to intergovernmentalism, to ensure the credibility of the commitments achieved; Moravcsik concludes that the choice for the transfer of sovereignty to international institutions is due neither to federalist ideology nor to centralised technocratic management. In turn, the option between pooling and delegation of decision-making competence varies across countries and issues and responds to the equilibrium reached by national preferences in each bargain.

Many intergovernmentalists see integration as a limited (regional) international regime. Thereby, its institutionalisation is not reckoned as endangering the primacy of the signatory nation-states. In other words, 'intergovernmentalism argues that supranational integration will be limited to areas which do not affect the fundamental issues of national sovereignty'.[51] However, it is not easy to understand how a state could undo its compromises once its ties with the neighbouring countries have reached a certain level of interdependence. Institutions have effects and these effects are cost reversible: that is precisely the function of institutions, to make compromises credible through raising the costs of non-compliance. The relativisation of institutions on the part of intergovernmentalism sheds some shadow on the potential to generalise conclusions anywhere else than Europe.

F Supranational Institutionalism

The last major theory developed to deal with integration could be labelled 'neo-transactionalism', although its main supporters have timidly called it a 'transaction-based

[47] Bulmer, 'Domestic Politics' (n 45) 363.

[48] A Milward, *The European Rescue of the Nation-State* (Berkeley, CA, University of California Press, 1992).

[49] Moravcsik, *The Choice for Europe* (n 43).

[50] Each one of these turning points roughly characterises a decade in the existence of the European Union. They are the Treaty of Rome, the consolidation of the common market (comprising the Common Agricultural Policy, the implementation of the common market, the veto of British membership, and the Luxembourg Compromise), the European Monetary System, the Single European Act and the Treaty on European Union.

[51] Hix, 'The Study of the European Community' (n 25) 6.

theory of integration'.[52] Others prefer instead the term 'supranational institutionalism' or 'supranational bargaining theory', as opposed to Moravcsik's 'intergovernmental bargaining theory'.

This approach is explicitly crafted to explain the rise and shape of the European Union, although its using of general theories to account for integration allows for its generalisation and application elsewhere. The fundamentals of neo-transactionalism draw on two of the previously reviewed theories, ie transactionalism and, especially, neo-functionalism. It assumes that the increase in transnational transactions between neighbouring countries leads to the development of a more complex pattern of relations, both social and economic, within and among countries. The resulting increase in complexity cannot be managed satisfactorily by existing norms and regulations, thus the costs of information and transaction will rise. In turn, the need to reduce these costs will drive transnational transactors to claim for the establishment and standardisation of rules.

According to this view, the main actors of integration are nation-states (as for intergovernmentalism) and also transnational transactors, the European Commission and the European Court of Justice.[53] In short, all the four national, transnational and supranational actors must be reckoned as playing a part in determining the outcome of European integration. The starting point for the process is regarded as institutional, since the Treaty of Rome established the two supranational bodies in 1957.

The theoretical roots of neo-transactionalism are made explicit by Stone Sweet and Sandholtz, who observe that 'the three constituent elements of our theory are prefigured in neofunctionalism: the development of transnational society, the role of supranational organizations with meaningful autonomous capacity to pursue integrative agendas, and the focus on European rule-making to resolve international policy externalities'.[54] They also claim to agree with Haas 'that there is a logic of institutionalization'.[55] However, it is at the institutional level that they advance significant modifications to previous theorisation.

While the influence of institutions is simultaneously determining of and determined by other feedback factors, there are two logics that underlie the process and keep it far from the mechanical or political automatism of simple spillover: 'the first has to do with path-dependence, the second with principal-agent relations'.[56] Based on these logics, neo-transactionalists distance themselves to some extent from neo-functionalism and, especially, from intergovernmentalism, since both logics reinforce their argument that 'institutionalization in the EC is not reducible to the preferences of, or bargaining among, member governments. The expansion of transnational society pushes for supranational governance, which is exercised to facilitate and regulate that society'.[57]

The concept of governance as a continuum between an intergovernmental and a supranational pole is not new. However, the novelty offered by neo-transactionalism is the possibility that changes can occur at different speeds, or even in opposite directions, regarding different issue areas. Therefore, many European Unions are possible depending

[52] W Sandholtz and A Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford, Oxford University Press, 1998).

[53] Ibid.

[54] Ibid 6.

[55] Ibid 16.

[56] Ibid 19.

[57] Ibid 19. Stone Sweet and Sandholtz define supranational governance as the competence of the European Community to make binding rules, for its member states and citizens, in any given political sector.

on the matter at stake (telecommunications, monetary union, security, defence, and the like). The disaggregation of a given region's governing processes by policy sector may well tell us more than its characterisation as a whole, or the search for an average measure.

Another crucial feature of integration is its possibility of developing in either a negative or positive way. Negative integration refers to the dismantling of national restraints on trade and distortion of competition, while positive integration implies common policies that shape the conditions under which markets operate.[58] This distinction is highly significant because the former can be attained through intergovernmental proceedings, while the latter may require the enforcement of supranational organisations. Since negative and positive integration are generally sequential, the use of this criterion supports the view of those who see the passage of intergovernmentalism to supranationalism as progressive over time; however, progressive does not mean irreversible.

III Comparing the Theories

Not all the authors agree on calling his or her conception of integration a 'theory'. Among them, Schmitter and Moravcsik[59] stand out for designating theirs as an 'approach' and a 'framework' respectively. Their attitude is a tacit acknowledgment of the complexity of the subject matter; however, the utility of their work for both explanation and prediction is no more limited than those schools that call themselves 'theories'. Therefore, the three terms will be used interchangeably here.

A crucial element for assessing the reach of these theories is the role allocated to economics. Many of the approaches recognise a central position to economic aspects such as commercial flows and trade interdependence, while others hold a more culturalist or even institutionalist accent. An emphasis on political economy is particularly given by intergovernmentalism, as it stresses the convergence towards more liberal, deregulated, open and market-oriented policies on the part of previously divergent national economies to explain the domestic push for integration. In contrast, neo-realism is unable to account for processes where the economy or ideational values rather than security and power concerns appear as first movers.

Regardless of the approach, MERCOSUR provides challenges to most of the above economic assumptions. As Hurrell points out, 'liberal theories (both neo-functionalist and institutionalist) which see cooperation as a response to the problems generated by increased interdependence have little to say about the moves towards subregional cooperation that gathered pace in the second half of the 1980s. Indeed state-led cooperation was a response to *declining* levels of trade interdependence'.[60] Although neo-functionalism never intended to explain initiation, its logic does not adequately fit MERCOSUR's further steps either. Paradoxically, a pure intergovernmentalist approach to such an intergovernmental region as MERCOSUR is not appropriate either, since no major interstate

[58] FW Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in G Marks, FW Scharpf, PC Schmitter and W Streeck (eds), *Governance in the European Union* (London, Sage Publications, 1996).

[59] Schmitter, 'Imagining the Future of the Euro-Polity' (n 13); Moravcsik, *The Choice for Europe* (n 43).

[60] Hurrell, 'Regionalism in Theoretical Perspective' (n 4) 258.

bargaining has led to either pooling or delegation of sovereignty. Furthermore, MERCOSUR has not even completed the negative stage of integration, while negotiations to advance through the positive phase more often than not end in failure or lack of implementation.

An additional distinction between contending theories is regarding politicised processes versus technical-economic processes. While it is true that the neo-functionalists have been the main supporters of this distinction, intergovernmentalism has also seemed to accept the dyad simply to turn it upside-down, emphasising the major importance of asymmetrical power over technical management. In contrast, MERCOSUR suggests a different continuum, running from the politicisation pole to the institutionalisation pole (see Figure 2.1), as it exhibits a process of non-conflictive complementarities between politicians and technocrats (although with a visible supremacy of the former) but without supplying their operation with an institutional framework.

Figure 2.1 Different uses of the concept 'politicisation'

Theory	*Context*	*Continuum and emphasis*	
Neo-functionalism	European Union	Politicisation	Technical management
Intergovernmentalism	European Union	Politicisation	Technical management
Interpresidentialism	MERCOSUR	Politicisation	Institutionalisation

Assuming the use of 'politicisation' as opposed to technical management, Caporaso argues that 'power has been strangely downplayed in the EC. I can see two reasons for backgrounding power. The first reason is that integration studies, as a field, has a "technicist" orientation in a certain sense … The second … has to do with the nature of the EC itself'.[61] However, the mechanism through which political leaders agree on general principles and leave the drafting of the detailed rules to leading national and supranational technicians arose prior to the development of any EU *nature*: it was the process (lately known as the 'Messina method') eventually used in the drafting of the Treaties of Rome.[62] In contrast, the second meaning of the concept 'politicisation', as opposed to institutionalised proceedings, better suits the operation of MERCOSUR. Whether this is due to MERCOSUR's nature or to its immaturity, and hence temporary, is still to be seen.

The issue of 'institutionalisation', as discussed above, is certainly not missing in the debates on European integration. The role played by the European Court of Justice has been recognised as crucial to fostering integration, especially during the seeming stagnation ages of the 1970s and early 1980s.[63] Some authors have arrived at the point of

[61] JA Caporaso, 'Regional Integration Theory: Understanding Our Past and Anticipating Our Future' in A Stone Sweet and W Sandholtz (eds), *European Integration and Supranational Governance* (Oxford, Oxford University Press, 1998) 347.

[62] EB Haas, '*The Uniting of Europe* and the Uniting of Latin America' (1967) 5 *Journal of Common Market Studies* 340.

[63] JHH Weiler, 'A Quiet Revolution: the European Court and its Interlocutors' (1994) 26 *Comparative Political Studies* 510; A Stone Sweet and TL Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 *American Political Science Review* 63; W Mattli and A-M Slaughter, 'Revisiting the European Court of Justice' (1998) 52 *International Organization* 177.

explicitly proposing 'an institutionalist theory of European integration'.[64] The difference between the two blocs, however, is that what must be explained in the European Union is the presence (and shape) of institutions, whereas in MERCOSUR the question to be accounted for is their absence.

Until a few years ago, a major difficulty in studying integration was 'the single-case issue' provided by the European experience.[65] Now that integration seems to have settled its roots elsewhere, comparative studies have become possible. However, while most theorists concerned with integration are now switching from international relations to a comparative politics approach, they are doing so conceiving the European Union as a novel 'national case' instead of approaching it by contrast to other regions.[66] This may be fruitful for a better understanding of European domestic politics or the Europeanisation of the European national polities, but does not add much to the understanding of integration processes as such. Likewise, the contributions made in the field of public policy[67] and regulation theory[68] are not yet generalisable to other regions in the world.

What are the perspectives, therefore, for the theoretical debate on integration? It is highly likely that it will open up over the next few years, along with the expansion of the object itself. The consolidation of regions other than Europe, whether following the European model or not, will demand further research to cope with this. However blurred this development may appear at present, some of the major debates it will raise are foreseeable: (a) the prior relevance of micro or macro-foundations; (b) the relationship between transnational society and supranational institutions; (c) the relevance of history and path-dependence;[69] (d) the scope, limits and shape of regional institutionalisation; and (e) the role and extension of democracy (at both levels).[70]

Figure 2.2 shows a comparison of the theories presented above across six key dimensions. All these theories have been devised to understand the EU development, so it comes as no surprise that none fits the case of MERCOSUR. Federalism never was in the minds of the founders; spillover has not taken place; interdependence has followed rather than preceded the signature of the treaties; and a common identity can seldom be seen as either a driver or a consequence of Southern Cone integration. Rather, it seems that the initial decisions were fed by domestic interests as identified by the national presidents, and their implementation profited not so much from the successful example of the European Union, as from the failure of past Latin American experiences, which were considered excessively ambitious in terms of institutions and too naïve regarding their faith in supranationality. The choice for policy-makers opposed supranationalism to intergovernmentalism, and the former was defeated by the latter. The experience of MERCOSUR

[64] G Tsebelis and A Kreppel, 'The History of Conditional Agenda-Setting in European Institutions' (1998) 33 *European Journal of Political Research* 41.

[65] Caporaso, 'Regional Integration Theory' (n 61) 343.

[66] Hix, 'The Study of the European Community' (n 25); Caporaso, 'Regional Integration Theory' (n 61); PC Schmitter, *How to Democratize the European Union . . . and Why Bother* (Lanham, MD, Rowman & Littlefield, 2000); Warleigh and Rosamond, 'Theorising Regional Integration Comparatively' (n 1).

[67] A Heritier, *Policy-Making by Subterfuge: Interest Accommodation, Innovation, and Substitute Democratic Legitimization in Europe* (San Domenico di Fiesole, European University Institute, 1996).

[68] G Majone, 'The European Community Between Social Policy and Social Regulation' (1993) 31 *Journal of Common Market Studies* 153.

[69] Caporaso, 'Regional Integration Theory' (n 61).

[70] S Bartolini, *Restructuring Europe: Centre Formation, System Building and Political Structuring Between the Nation State and the EU* (Oxford, Oxford University Press, 2005); Schmitter, *How to Democratize the European Union* (n 66).

Figure 2.2 Theories of regional integration: comparative features

	Federalism	*Functionalism*	*Neo-functionalism*	*Communicative interactionism*	*Liberal intergovern-mentalism*	*Supranational institutionalism*
Main actors	States	Technical bodies	States, supranational bargainers, national and regional economic elites	Mass societies	Mightiest states	States, supra-national bargainers, transnational transactors
Central mechanism	Constitutional convention or international treaties	Technical needs	Spillover	Transnational transactions	Interstate bargaining	Transnational transactions, supranational bargaining
Domain	Region/ World	World	Region	Region	State/Region	Region
Role of inter-dependence	Background factor	Causal factor	Causal factor	Tantamount to integration	Causal factor	Causal factor (and outcome)
Role of identity and values	Background factor	None	Outcome	Causal factor	None	Secondary factor
Role of institutions	Causal factor	None	Causal factor and outcome (feedback)	Outcome	Outcome	Causal factor and outcome (feedback)

expresses a drift of the driving push for integration away from society (demand side) and towards the state (supply side).[71]

IV The Origins of Mercosur[72]

Latin American integration has a long history according to conventional political rhetoric, but a poor record when it comes to concrete accomplishments. The region was previously ruled by two colonial powers, both located on the Iberian Peninsula. Gradually, the territory dominated by the Spanish crown was divided in two, later into four and then successively into a dozen autonomous regions, a process that culminated in the establishment of the nineteen independent, Spanish-speaking states in existence today. Even as the process of fragmentation evolved, the leaders of the wars of independence nurtured the myth of Latin America's natural unity and the ultimate aim of restoring it. Simón Bolívar, the best known of these leaders, called two Pan-American congresses in 1819 and 1826, but failed to bring about regional unity. Almost two centuries later, with the failure of reiterated unification attempts, the Pan-American movement waned and was gradually superseded by a less ambitious but more realistic project: that of regional integration. Idealism and identity receded while economic interests took their place as the justification for collective action.

The first serious effort to promote regional integration occurred in 1960 with the creation of the Latin American Free Trade Association (ALALC, Asociación Latinoamericana de Libre Comercio). Twenty years later, because of its poor performance it was replaced by the Latin American Integration Association (ALADI, Asociación Latinoamericana de Integración),[73] with slightly better but still unremarkable results. Various subregional integration efforts were also made: the Central American Common Market (MCCA, Mercado Común Centroamericano) was established in 1960; the Andean Pact and the embryo of the Caribbean Community were set up in 1969; and in 1991, MERCOSUR was created. These groups scored some early points, but then stagnated or decayed.

The process began in the 1980s, when the third wave of democratisation took root in the region. Democracy would consequently become one of the main goals of the agreements. However, the first steps were taken in 1979, under the military presidencies of Jorge Videla in Argentina and João Figueiredo in Brazil. That year both countries, together with General Ströessner's Paraguay, signed a trilateral agreement regarding the Paraná basin. This agreement settled many disputes on the use of hydric resources in the region,

[71] A Malamud, 'Presidentialism and MERCOSUR: a Hidden Cause for a Successful Experience' in F Laursen (ed), *Comparative Regional Integration: Theoretical Perspectives* (London, Ashgate, 2003); JR Perales, 'A Supply-Side Theory of International Economic Institutions for the MERCOSUR' in F Laursen (ed), *Comparative Regional Integration: Theoretical Perspectives* (London, Ashgate, 2003).

[72] This section draws on A Malamud, 'MERCOSUR Turns 15: Between Rising Talk and Declining Achievement' (2005) 18 *Cambridge Review of International Affairs* 421.

[73] ALALC and ALADI comprised the 10 Latin American countries of South America plus Mexico and Cuba.

including the inconveniences and perceived threats to Argentina that would have been created by the construction of the giant Itaipú dam.[74]

The Malvinas/Falklands war allowed for a second crucial stage: the building of confidence and the emergence of a shared self-perception vis-à-vis world politics.[75] On that occasion Brazil assumed a position that, despite its reluctance to support the use of force, explicitly endorsed Argentina's right to the islands. Such a stand was in harmony with most of Latin America, except Chile; but it was all the more significant because Brazil was not only the largest Latin American power, but also Argentina's traditional rival.

The third step, giving rise to lasting cooperation ranging from economic matters through such sensitive issues as atomic power, was launched by the new democratic leaders of the 1980s.[76] Elected in 1983 and 1985 respectively, both Argentina's Raúl Alfonsín and Brazil's José Sarney decided to engage themselves in a process that would have been unlikely to succeed without their strong commitment. Within the frame of the more general treaties, Argentina and Brazil signed 24 bilateral protocols with the purpose of improving trade between 1984 and 1989. In 1985, they signed the Declaration of Foz de Iguazú, which laid the basis for future integration and created a High Level Bilateral Commission to foster the process. The crucial Argentine-Brazilian Integration Act was endorsed in July 1986 in Buenos Aires, setting up the Integration and Cooperation Program (PICAB). As widely acknowledged later, this agreement constituted a turning point in the history of relations between these two countries, and in fact can be seen as the embryo of MERCOSUR. The change was substantially due to the role the newly appointed democratic presidents had decided to play in the regional scenario. Arguably, neither the globalisation pressures nor the democratisation process would have been sufficient to overcome the secular distrust between Argentina and Brazil, including as it did military cooperation and the mutual inspection of their nuclear installations.[77]

In 1988, during the same presidential tenures, the Treaty on Integration, Cooperation and Development was signed. Conceived of as the culmination of a process of mutual recognition and confidence building, it turned out to be a crucial step into the next phase of the new relationship. Towards the end of 1990, Argentina and Brazil signed, and registered with ALADI, an Agreement on Economic Cooperation that systematised and deepened pre-existing bilateral commercial agreements. That same year, representatives of both countries met with Uruguayan and Paraguayan authorities, who expressed their willingness to participate in the ongoing integration process. The result was an agreement to create a common market among the four nations.

[74] C Lafer, 'Relações Brasil-Argentina: Alcance e Significado de uma Parceria Estratégica' (1997) 19 *Contexto Internacional* 249.

[75] F Peña, 'Argentina y la Cooperación Latinoamericana' in RM Perina and R Russell (eds), *Argentina en el Mundo: 1973–1987* (Buenos Aires, Grupo Editor Latinoamericano, 1988); Lafer, 'Relações Brasil-Argentina' (n 74).

[76] However, Gian Luca Gardini in 'The Hidden Diplomatic History of Argentine-Brazilian Bilateral Integration: Implications for Historiography and Theory' (2005) 30 *Canadian Journal of Latin American and Caribbean Studies* 63, shows that previous negotiations had taken place prior to the democratisation in Brazil.

[77] Along with the main Treaty the presidents signed a Joint Declaration on Nuclear Policy (Declaración Conjunta sobre Política Nuclear). For further developments on nuclear cooperation, *cf* M Hirst and HE Bocco, 'Cooperação Nuclear e Integração Brasil-Argentina' (1989) 9 *Contexto Internacional* 63, and JP Milanese, 'Supranacionalidad en el Cono Sur? Análisis de un caso inédito, ignorado y potencialmente paradigmático', I Encuentro internacional de Investigadores de la Red Latinoamericana de Cooperación Universitaria, Universidad de Belgrano, Buenos Aires, 11–12 March 2004.

During the period running between the signature of the PICAB and the creation of MERCOSUR in 1991, a versatile institutional arrangement was settled in order to keep the process working. Its main features were the direct participation of high officials in the negotiations, under the coordination of the foreign ministries; the meeting of a six-monthly presidential summit; the high profile of bilateral diplomatic channels, especially the ambassadors in every capital; and the non-existence of common bodies integrated by independent experts.[78] Most of these characteristics, imprinted with maximum pragmatism and flexibility, were to be maintained in the further stages of the process despite the endowment of some formal structures.

MERCOSUR was finally established in 1991 by the Treaty of Asunción, which brought together Argentina, Brazil, Paraguay and Uruguay. Although the original goal of Presidents Alfonsín (Argentina) and Sarney (Brazil) had been to provide support for their fledgling democratic regimes by lessening domestic pressures for greater military spending and increasing social welfare through international cooperation, the Treaty abstained from referring to political institutions or social actors. Instead, it focused exclusively on economic and commercial issues.

The Protocol of Ouro Preto, signed in 1994, gave MERCOSUR a formal institutional structure that was to remain untouched during the subsequent decade. The Protocol also gave MERCOSUR an international legal personality and defined its juridical bases. However, the bloc has not become a common market. At best, it established the blueprints for a customs union that is still far from complete.[79]

The Treaty of Asunción and the Protocol of Ouro Preto, together with another three Protocols,[80] constitute the institutional skeleton and juridical backbone of MERCOSUR. They deal with economic integration (content) and organisational structure (form). They do not deal with aspects that have acquired greater relevance in the European Union such as regional citizenship, social cohesion and democratic decision-making. Somewhat surprisingly, however, these issues have been and still are present in nearly all debates about MERCOSUR.

The presidents and foreign ministers of MERCOSUR Member States have referred to it as a 'strategic alliance', 'destiny rather than choice', 'the dynamic axis of South American integration', and even as 'the most transcendental political decision in our history'.[81] Lower ranking officials tend to use less lofty language but it is the highest authorities, particularly the presidents of the two largest members, who define the contours of the public image of MERCOSUR. After the global financial crises of 1995–1999, MERCOSUR came to be seen as a symbol of resistance to neo-liberalism. It has even been considered as a prototypical association of developing countries that could stand in the way of a US-promoted hemispheric free trade area. For progressive ideologues, it has acquired an

[78] F Peña, 'El Desarrollo Institucional del Mercosur' in AAVV, *Comunidad Andina y Mercosur. Desafíos Pendientes de la Integración en América Latina* (Bogotá, Ministerio de RREE/Corporación Andina de Fomento, 1998).

[79] R Bouzas, P Motta Veiga and R Torrent, *In-Depth Analysis of MERCOSUR Integration, its Prospectives and the Effects Thereof on the Market Access of EU Goods, Services and Investment*, Report presented to the Commission of the European Communities, Observatory of Globalization, Barcelona (November 2002) available at http://mkaccdb.eu.int/study/studies/32.doc.

[80] They are the Protocol of Brasília (establishing a system for dispute settlement and signed in 1991), the Protocol of Ushuaia (establishing a democratic clause and signed in 1998), and the Protocol of Olivos (establishing a permanent court for appeals and signed in 2002).

[81] A Malamud, 'MERCOSUR Turns 15' (n 72).

'epic' status as a preferred tool for promoting social rather than merely economic goals. The battle cry has been for the creation of 'a political MERCOSUR' that would be able to combat the neo-liberal approach to regional integration. The argument is that the original agreements signed by Argentina and Brazil in 1985–1988 were perverted in the 1990s, transforming what had been a progressive state-led initiative into a conservative market-based project. A return to the original intent would involve bringing political objectives to the fore, ie by prioritising the social and representative dimensions of regional integration as opposed to its trade and investment aims. In this context, recurrent references have been made to the participation of civil society and the establishment of a regional parliament.

In opposition to this romantic view, MERCOSUR was deliberately created and maintained as an intergovernmental organisation. Its founders did not want to replicate the failures of previous attempts at integration in Latin America, especially the experience of the Andean Pact. Hence, they insisted that all decisions would have to be made through a process that exclusively involved national officials, with unanimous consent as the only decision rule. As there is neither community law nor direct effect, all significant decisions have to be transposed into the domestic legislation of every member country to take effect. Furthermore, policies can only be implemented at the national level by national officials, as there is no regional bureaucracy. Dispute settlement is the only area that has been formally excluded from the requirement for intergovernmental consensus, although the mechanisms established by the Protocol of Brasília have been called upon only 10 times in 15 years—in contrast to the more than one hundred rulings made every year by the European Court of Justice. As has been pointed out elsewhere, MERCOSUR appears to incarnate an extreme type of intergovernmentalism: 'interpresidentialism'.[82] Interpresidentialism is the outcome of combining a foreign policy strategy—presidential diplomacy, with a domestic institutional structure—presidential democracy. It consists of resorting to direct negotiations between national presidents who, making use of their institutional and political capabilities, intervene in regional affairs every time a crucial decision has to be made or a critical conflict needs to be solved. Thus far, low levels of previous interdependence associated with interpresidential dynamics have kept MERCOSUR working but prevented spillover from taking place.

Lately, some projects have been advanced with the aim of placing MERCOSUR on track towards deeper integration. The introduction of IIRSA (Initiative for the Integration of South American Regional Infrastructure) in 2000, the creation of a Committee of Permanent Representatives in 2003, the foundation of a permanent Court of Appeals in 2004, the establishment of FOCEM (Fund for MERCOSUR Structural Convergence) in 2005, and the creation of a regional parliament in 2006 seem to be steps in that direction. Venezuela signed a treaty of accession in 2006, although it has not yet been ratified by Paraguay. At the same time, a more strident initiative aimed at integrating the whole subcontinent has been launched: the Union of South American Nations (UNASUR). However, all these projects have been widely publicised but only partially or defectively implemented. After reaping notable successes in the first half of its lifetime and undergoing recurrent crises in the second half, MERCOSUR seems to face a turning point:

[82] Malamud, 'Presidentialism and MERCOSUR' (n 71); A Malamud, 'Presidential Diplomacy and the Institutional Underpinnings of Mercosur: An Empirical Examination' (2005) 40 *Latin American Research Review* 138.

either it recovers its *raison d'être* and consolidates its institutional and normative structure, or it becomes a high-profile but mostly irrelevant political banner. So far, paraphrasing Monnet, its operation could be expressed as *grands mots, petits effets* (speak grandiloquent words to achieve small effects).

3

The Legal-Institutional Structure of MERCOSUR

ADRIANA DREYZIN DE KLOR

I Introduction

In order to understand the political-institutional system adopted by MERCOSUR at the present time, the first step is to understand the political circumstances that characterise the creation of regional economic integration processes. These circumstances derive from the factors that were agreed upon in the original document as a means to lay down the foundations for an institution initially based solely on political considerations, without taking into account the legal requirements for its creation. These factors have a direct impact on the modifications that have been produced in the mechanics of MERCOSUR, and they are important in the shaping of ideology in different countries. Changes in the mechanics of MERCOSUR can create, sustain or delay the necessary transformation of ideology and political objectives into effective and cohesive legal tools.

In December 2004, the Meeting of Ouro Preto took place and expectations were high on the anniversary of the signing of the Protocol on Institutional Structure, signed ten years before in the city of Ouro Preto in Brazil, that institutional reform would become more than a mere possibility for the future. However, the expectations were disappointed; once again MERCOSUR was a platform for mere empty rhetoric. I will analyse the ways in which this rhetoric affected the institutional structure of MERCOSUR, and its current progress towards the achievement of a common market.

I will conclude this chapter with some reflections on how I predict the process will continue under the current political-institutional vision towards achieving the objectives established in the Treaty of Asunción.

II Origins of MERCOSUR

The subregional process that eventually led to the creation of MERCOSUR did not begin by chance; several factors related to the political, social and economic situation had their share of influence, and resulted in the realisation of the shared importance of the universal alliance characterised by the conformation of new geographic areas with a clear unified definition of their interests and their actions.

In this context, democratisation among the South American nations played an important part, reflecting the wishes of the ordinary citizen to live freely and the institutional

support for the internal and external democratic mechanisms. This possibility to create an association among the states founded upon their political systems is one of the principal reasons why economic integration could not be achieved in the region before that time. The existence of democratic regimes is a basic presumption of a new and dynamic phase of the regional process, but also with this standard of legitimacy there is the additional facility created by the modernisation of technology, product transformation and the competitive interaction with the world.[1] Consequently, starting in the mid-1980s, and more decisively through the Treaty of Asunción (TA), a large step was taken towards bringing the good intentions and the isolated efforts into successful reality, something that the previous projects of integration had not been able to accomplish.

Societies in these countries, in the meanwhile, were going through a difficult phase of coming together after being damaged (*sumamente mellada*) by 10 years of economic deterioration produced by the exhaustion of development from the previous period, illustrated by the external debt built up by the actions of dictatorial governments[2]—a situation that unfortunately, although not common to all parts of the region, in many cases had not (and still has not) been overcome.

The most profound transformations took place in the configuration of the world through the appearance of complex global problems, such as the shortage or poor distribution of food, demographic pressures, competition over the control of resources and a range of economic difficulties, including inflation and unemployment, to a level in which the problems of instability amongst the markets and basic products[3] pushed countries to decide to interrelate by means of alliances and integrations as a means to face these very difficult scenarios.[4]

In light of these developments at a global level, new industrial and commercial powers emerged, and as that happened the strict national structures of the first half of the century became more flexible, and new regional models have appeared. These transformations offer major possibilities of change, but they bring threats as well, confrontational situations, and for that reason greater insecurity.

[1] Currently, democracy appears to be an accepted part of the region's status, though that was not the case just two decades ago. See R Bouzas, 'Mercosur: Crisis económica o crisis de integración?' in C Hugheney Filho and CH Cardim (eds), *Grupo de reflexión prospectiva sobre el Mercosur* (Brasília, FUNAG/IPRI/BID, 2003) 47–49.

[2] For further discussion on the causes of the external debt of Latin America, see M Ossandon, 'Deuda Externa, ajustes y comercio en América Latina: El triple enfoque', A Calcagno, 'Planteo jurídico de la deuda externa argentina', B Kunicka-Michalska, 'La deuda externa latinoamericana y los derechos del hombre de la tercera generación', all in *Revista Debito Internazionale, Principio Generali del Diritto, Corte Internazionale di Giustizia*, papers presented at the Seminario Giuridico internazionale, 'Profili giuridici del debito internazionale con particolare riferimento all' America Latina' (Roma, Libreria Editrice Lateranense, No 23).

[3] See JA Carrillo Salcedo, *El Derecho internacional en un mundo en cambio* (Madrid, Tecnos, 1985) 13. The author enumerates a long list of global issues that affect the current system. See also F Orrego Vicuña, 'El derecho internacional en la perspectiva de un cambio de siglo' in Z Drnas de Clement (ed), *Estudios de derecho internacional en homenaje al Profesor Ernesto Rey Caro* (Córdoba, Drnas-Lerner, 2002) 1055–67.

[4] Following the Second World War, the idea gained support of creating economic partnerships aiming to overcome the serious crisis affecting states. As a result of the growth of alliances, the contemporary world has seen the establishment of multiparty associations which have brought about the inevitable reshaping of the international order. As to this, see JI García-Peluffo, 'Mercosur: más allá de la coyuntura' in Hugueney Filho and Cardim, *Grupo de reflexión prospectiva sobre el Mercosur* (n 1) 127–45.

A What Have Been the Most Important Influences in the Subregion?

In the first place, the most significant influence was the collective attitude of these countries in opposition to the trends suggested by the paradigmatic integration of the twentieth century, the current European Union.[5] Although the emergence of the European Union was followed in particular by those states with origins in the older continent, there were, however, considerable obstacles that hindered these regions from setting out in the same direction.[6]

One difference from the EU model is the Latin American integration option, which is associated with the economic development model that is promoted as a strategy of industrialisation and extension of the regional market. There were some early attempts to follow the model that led to the creation of the European common market,[7] which intended to create different types of economic associations between the Latin American states, but the circumstances of the day were not favourable to such ambitious initiatives. Amongst the reasons that prevented the creation of the necessary conditions were the realisation that less ambitious undertakings were necessary, the difficulties in accommodating the various economic policies that were adopted by each country, the nationalist feelings that accompanied these policies, and the recurrent picture of institutional instability in the region.[8]

However, these did not act as roadblocks preventing South American states entering into bilateral agreements as a means to accomplish the partial solution of the identified problems, such agreements arising from the necessity of finding ways to allow the clearing of the balance of international trade between two or more countries and the multilateral use of balances bilaterally in currency that is not freely convertible, especially European

[5] Among the many works that are available on the European model, its gestation, institutions and Community law, we suggest R Alonso García, *Derecho comunitario, sistema constitucional y administrativo de la Comunidad Europea* (Madrid, Centro de Estudios Ramón Areces, 1994).

[6] Beginning in 1945, a wide-ranging government-level theoretical discussion took place, primarily between economists and intellectuals, on the merits of integration between states as a tool to advance modernisation, economic growth and prosperity. The theoretical design that was developed in particular in Europe resulted in a focus solely on the economic aspects of integration, relegating the social and political aspects to a level of minor importance. See A Frambes-Buxeda, 'Teorías sobre la integración aplicables a la unificación de los países latinoamericanos' 1(2) *Configuraciones del mundo actual* (UNAM, 1990) 267.

[7] According to W Rostow, we should not lose sight of the theoretical discussions raised in the social sciences around the 'theory of development' and the 'theory of dependency'. These theories question whether a modern industrialised country can reach high levels of employment, education, wages and other aspects tending towards a prosperous and efficient human existence, as argued by some authors, using economic mechanisms only, or whether, as maintained by others, it is vital to consider the impact and relevance of social, legal and political issues. See W Rostow, *La economía del despegue* (Madrid, Alianza, 1967). See also H Mansilla, 'Latin America and the Third World: Similarities and Differences in Development Concepts' (1977) 68 *Vierteljahresberichte* (Bonn) 119; S. Kalmanovitz, 'Cuestiones de método en la teoría del desarrollo' (1982) 32(5) *Comercio Exterior* (México) 531. As regards the 'theory of dependency', see FH Cardoso and E Faletto, *Dependencia y desarrollo en América Latina* (México, Siglo XXI, 1979); O. Sünkel, *Dependencia, cambio social y urbanización en Latinoamérica* (Chile, ILPES, 1967); C Furtado, 'Dependencia externa y teoría económica' 38(150) *El Trimestre Económico* 335–349 (México, 1971); RH Chilcote, *Dependency and Marxism, Toward a Resolution of the Debate* (Boulder, Colorado, Westview Press, 1982).

[8] Attempts were made, eg, to reach an agreement between Argentina and Brazil in 1939, on the coordination of industrial activities within a new framework of free trade. In 1941, a customs union was proposed (Union Aduanera del Plata).

currencies.[9] Despite the use of such mechanisms, first in the Latin American Free Trade Association (ALALC, Asociación Latinoamericana de Libre Comercio), and then the Latin American Integration Association (ALADI, Asociación Latinoamericana de Integración), both associations failed in their objectives; however, recently with the creation of MERCOSUR, the Latin American association has recovered a certain momentum and today is revitalised.

B The Subregional Model

When the founding states determined to establish MERCOSUR, a debate about the model of integration to be adopted was generated, which led to the initial talks about what became the Treaty of Asunción. Among the possible plans, the choice was made to construct 'a common economic space that promotes the competitive benefits to the states parties, in order to achieve an economic arena more adaptable to the international markets'. This type of association was regarded as best suited to respond to the ambition of those who participated actively in the negotiations.[10]

Following the various fields addressed in the agreements that preceded the TA, there was a consensus on the need to focus the process in its first stage on the economic aspect. In the economic field, the states' interests and viewpoints were framed in a series of structural factors, such as their economic asymmetry; the low level of commercial exchange; a conflicting schedule of commercial priorities; converging programmes of external politics; political willingness towards integration and the consequent revision and modification of bilateral commercial guidelines; technical personnel prepared for the necessary cooperation required for integration; sectoral interests favourable to the project; beneficial economic conditions within the subregional projection; and the elaboration of confidence-boosting measures in strategic themes.

As regards the vital political backing for the process, this was expressed in the preliminary statements in the TA by Member States reaffirming their 'political willingness to move on from the established status quo towards a stronger and stronger union between the common people', a call that was also confirmed by the ratification of the TA by the parliaments of the four countries involved without any reservations. In the

[9] These agreements covered both the problem of payments and the regulation of trade. In cases where the level of protection was not very high, solving the problem of payments involved, to a large extent, solving the obstacles to increasing mutual trade.

[10] This was stated by former Secretary of International Economic Relations of the Ministry of Foreign Affairs of Argentina, Ambassador Alieto Guadagni; from a different viewpoint, there are those who believe that 'the Treaty of Asunción essentially established a compromise between the four countries for the formation of a free trade zone'. In this vein, see Simonsen Associados, *MERCOSUR: El Desafío del Marketing de Integración* (São Paulo, Makron Books do Brasil, 1992) 17. On the other hand, Gomes Chiarelli, former Minister of Integration of Brazil, and Di Tella, Argentine Foreign Minister, both expressed the view that the TA, since its inception, had established an institutional structure which was fully defined in its legal nature, purpose and timing. The free trade area of MERCOSUR, according to Gomes, was only one part of the whole, not in terms of phases over time, or a stage in the process, but as a segment of a package designed as a whole *ab initio*. See Simonsen, *ibid* 139–40. It should be noted that the previous integrationist experiences of Latin America, including ALALC and ALADI, served (or should have done so) to assist the states parties to draw conclusions and to avoid further mistakes. The influence of the European experience was also evident in the choice of the objective of forming a common market, rather than a free trade zone. See A Dreyzin de Klor, *El MERCOSUR: Generador de una nueva fuente de Derecho internacional privado* (Buenos Aires, Zavalía, 1997) 49 *et seq.*

subsequent meetings of the Council of the Common Market (CCM),[11] the Presidents of the Member States reiterated their willingness to ratify the agreement they had previously reached as a means to put the economic union into effect and to guarantee its objectives.[12]

In managing the plan, it is vital that there is clarity as to the importance of the integration process as a means of achieving development, and furthering a long-term political strategy of approximating the notoriously distinct socio-political realities, in the American continent. Such a process will allow governments to declare their countries' adaptation to the new world order, by participating in an alliance that guarantees their survival in the globalised world.[13] If revitalised in this way, a process of sustained integration can be built on the political willingness of the Member States, based on their convinced acceptance of the role that such a process can play as a means to make growth viable.[14]

The other fundamental factor to bear in mind is the appearance of a new world economic order which has forced states to redefine their positions. The implementation of this economic association serves as a constructive response to the rapid changes that are happening in world economics. These changes also affected the states who constructed the guidelines for the achievement of the proposed objectives and for the success of this regional undertaking, and the project was thus subordinated to a series of economic and political conditions. Amongst these, special importance was given to the permanent roles of the government and the technical groups, not only in areas of implementation of agreements established under the TA to increase productivity, efficiency and the competitive advantages of the region, but also in raising the awareness of national governments within their own countries of the imperative to achieve 'a common culture based on willing support oriented to obtain the agreed just outcomes'. This was vitally incorporated into the legal nature of a treaty framework that does not offer the possibility to establish *ab initio* the essential regulatory structure corresponding to the agreed processes.

Not only with regard to its structure, but also in all its aspects, the subregional outline prompted great interest. The legal community of the states parties focused on analysis of the marketplace with the purpose of bringing themselves up to date with integrationist experiences and adapting prevailing doctrinal and academic opinion so as to elaborate the bases upon which to build regional integration. The fact that the Member States had established a timeframe for the structuring of the common market (by 31 December 1994)[15] exercised considerable influence by operating as a major motivating factor for the completion of the proposals, and the agreed instruments were therefore elaborated within the due time.

[11] The CCM is the superior organ of MERCOSUR. Its nature, functions and characteristics are discussed below when we analyse the institutional structure provided for the subregional scheme.

[12] The joint communiqués issued by the senior leaders at the summit meetings held since 1991 to date can be found at www. mercosur.net.uy.

[13] At the time of the signing of the founding treaty, integration processes existed in several key economic regions: Western Europe, North America (United States, Canada and Mexico) and the Pacific region (Japan also had close relations with the United States, Canada and Australia).

[14] The TA came into force on 29 November 1991. The instruments of ratification were deposited with Paraguay, who is still the depositary of all MERCOSUR instruments. Argentina and Brazil deposited their instruments on 30 October 1991; Paraguay and Uruguay did the same on 1 August 1991.

[15] TA, chapter I, 'The Aims, Principles and Instruments', art 1 provides: 'States parties decide to form a common market, which should be formed by 31 December 1994, to be called 'the Southern Common Market (MERCOSUR)'.

It is important to understand that the TA retains the quality of a framework agreement,[16] designed as a platform to launch the bloc. Through its constitutive instruments establishing the procedures for the constitution of a common market, the structure of the common market remains subject to the decisions of the constituent members. These instruments include general directives which must be made concrete through agreements, specific protocols or other legally binding acts. Through this foundational basis, a period of transition is prescribed,[17] with the intention that it will at some point in the future be replaced by new instruments, organisations and institutions—an ideal which would require accommodation of the peculiarities and needs of the states parties.[18]

The chosen mechanism has given rise to diverse opinions. On one side, critics who disagree with the intergovernmental model adopted argue that it puts into question the sincere political will to integrate. This argument holds that the process depends on the existence of an inherent and absolute trust between the parties who have agreed to integrate, the absence of which would lead to the very serious consequence of states being unwilling to yield even the smallest degree of sovereignty. Thus, the system could fall to pieces whenever it is faced with an unfavourable unilateral action of one of the partners in disobeying a consensual, joint decision.[19]

[16] The TA qualifies as a framework treaty, which is a form of instrument widely used at the present time, even though not easily identified in positive law. The Vienna Convention on the Law of Treaties makes no reference to such agreements. A characterisation of the concept of agreement or framework treaty referring specifically to the TA was given by JM Gamio in a paper delivered at the symposium 'Evaluation of MERCOSUR' held at the Artigas Institute of the Foreign Service in Montevidéo. In developing his theme on the legal and institutional aspects, Gamio referred to legal status of the TA, saying that: 'There is a fairly general agreement that the Treaty of Asunción is what is known as "a framework treaty". It is a very brief general agreement, whose development will be left to resolutions issued by institutional bodies'. See also S Abreu Bonilla, *MERCOSUR y la Integración*, 2nd edn (Montevidéo, FCU, 1991) 47. The author refers to the TA as a framework treaty: 'The Treaty of Asunción cannot be regarded as a final treaty establishing the MERCOSUR, but as the instrument of an international character intended to make possible its realization. In theory, this type of international agreements are called "framework agreements", as they only contain a set of general guidelines, which must be further developed and concretized by special agreements'.

[17] This peculiar feature of the TA sets it apart from other known integrationist experiments. If one thinks of the European Union, one recalls that it started with the Treaty of Paris (1951) which established the ECSC, and the Treaties of Rome (1957) that created the EEC and the EAEC. The three treaties were enacted as final agreements, with their institutions defined, which did not preclude later modifications, although the structure has remained virtually the same since its inception. Obviously in the European Union, as in MERCOSUR, the date of the agreements is not the same as the constitution of the common market, which can come into existence only after a long process. The experience of the Andean Community was similar, being agreed as a final text, but with the Cartagena Agreement in 1969 establishing new bodies within the original structure (ie the Commission and the Board; the Andean Parliament and the Court of Justice were created in 1979). However, such modifications do not indicate that the original Treaty relied upon transitional institutions. It is a similar situation in the case of the ALALC, the ALADI, the MCCA, the CARICOM and NAFTA. Looking for arguments justifying the framework treaty model that was adopted in the Treaty of Asunción, it was suggested that the previous failure of many integration experiments had been due to the rigidity of the tools used and the deadlines imposed, rather than merely creating the institutions and respecting the needs and requirements which might arise in the various stages. This was the opinion expressed by the Argentine Ambassador to MERCOSUR, Herrera Vegas, and Lic. A Mayoral, Secretary of Economic Relations of MERCOSUR, at the conference held under the auspices of the International Law Association, in the Federal Capital on 14 June 1995.

[18] J Perez Otermin notes that the intention of the negotiators was to respect the states' wishes not to transfer sovereignty, therefore the agreement could not clearly recognise the specifically supranational aspects that underpin the process. See J Perez Otermin, *El Mercado Común del Sur, desde Asunción a Ouro Preto: Aspectos Jurídicos Institucionales* (Montevideo, FCU, 1995) 13–14.

[19] In this sense, see Dreyzin de Klor, *El MERCOSUR: Generador de una nueva fuente de Derecho internacional privado* (n 10) 175–76; R Ruiz Díaz Labrano, *MERCOSUR, Integración y Derecho* (Buenos Aires, Ciudad Argentina, 1998) 483–93.

However, the need for the process to reach a certain maturity requires that some caution is observed, and it is important to bear in mind that a first intergovernmental stage is compatible with an embryonic phase of an integration process, particularly one being developed in a geographic context which still exhibits the problems caused by the broken intentions of previous economic integration attempts.[20]

III The Institutional Structure of MERCOSUR

To make the objectives of MERCOSUR a reality, a first institutional framework was established, with a temporary character and with the structure and competences necessary bearing in mind the required administration skills and autonomous practices. The structure put in place for the transitional period (which derives from the TA) established the administration and execution mechanisms necessary to perform the limited functions ascribed to MERCOSUR in this period,[21] those provided for in article 18 of giving shape to the commitment of the Member States, who summoned an extraordinary meeting with the objective of determining the definitive institutional structure, the specific attributions of each of the parties and the decision-making system.

In addition to this, at the 11th Meeting of the Common Market Group (CMG),[22] an ad hoc working group on institutional aspects was created and entrusted with the principal duty of studying the degree of achievement of the specified objectives.[23]

During the transitional phase, the regulations issued by the MERCOSUR Member States reflect their own positions in international relations with respect to the independence and sovereignty of each state. However, the nature and range of the proposals to strengthen international cooperation have overcome the difficulties found in achieving integration, and itself represents an instance of integration. From this point of view, it is important to reaffirm what was said at the beginning of this chapter; the adopted institutional structure is not that of a system of integration, it rather corresponds to a traditional intergovernmental organisation. The decision-making process is still typically intergovernmental, and the participants are accredited by their governments and consequently act and vote according to the instructions that they receive.

On the other hand, the organic structure of the subregional mechanism that is established by the TA, having also only a few members, has contributed to making the functioning of this initial scheme very dynamic.

Thus, in its first period,[24] MERCOSUR developed an integrated model with two political bodies, the CCM and the CMG, having decisive power, and a third body without

[20] cf R Alonso García, *Tratado de Libre Comercio, Mercosur y Comunidad Europea. Solución de controversias e interpretación uniforme* (Madrid, McGraw Hill, 1997) 141. With a similar viewpoint, P de Almeida, 'Mercosul: situação atual, cenários previsíveis, desenvolvimentos prováveis', paper delivered at ILA Conference, São Paulo, 1999.

[21] TA, art 9.

[22] The executive organ of MERCOSUR will be analysed below to address the institutional structure in particular. The 11th Meeting was held in Asunción on 21 and 22 April 1993.

[23] The rule reads in full: 'Before the establishment of the Common Market, on 31 December 1994, the States Parties will convene an extraordinary meeting to determine the final structure of the management bodies of the Common Market, as well as the powers specific to each of them and their decision-making system'.

[24] The transition appears from art 18, but can also be seen in TA, arts 3 and 14, and Annex III No 3.

decision-making capacity, the Joint Parliamentary Commission (CPC, Comissâo Parlamentar Conjunta) to be created in the future. An auxiliary body, the Administrative Secretariat, was established, whose function was to act as a collaborator with the CMG. In addition, one of the Annexes to the TA established the 10 subsidiary working groups of the CMG.

This structure was modified (although not substantially) by the provisions of the Ouro Preto Protocol (POP) and also by several intervening CCM Decisions. However, the changes were generally not hugely significant. The exception, to some extent, was the setting-up of the MERCOSUR Secretariat (particularly in the early period), and a further significant organic modification was the signing of the Inter-institutional Agreement between the CCM and the CPC, which had a very meaningful impact on the decision-making process of MERCOSUR and its effects.

A separate chapter of this book is dedicated to the dispute settlement procedure in MERCOSUR,[25] which was first regulated by Annex III to the TA and has been modified more than once, being currently regulated by the Olivos Protocol, which is the arena in which the case law of MERCOSUR is being created. Although I will make no further remarks on this topic (something that I have done elsewhere),[26] it is relevant to mention here the obvious institutional implications: being intimately interrelated with the structural scheme, the jurisdictional aspects of dispute settlement gained great importance.

IV The Ouro Preto Protocol on Institutional Structure

This legal instrument[27] is of considerable relevance for any analysis of the organic structure of the MERCOSUR process. However, the instrument was not able to keep up with the developments in MERCOSUR in the three years between the signature of the TA and of the POP, and as the integration process moved forward, the instrument could not assist in the advance towards supranationality. In effect, the POP expressly established that the model upon which MERCOSUR was based was intergovernmental, lest its members revisit this position.[28]

The Meeting of the Presidents of the Member States in this Brazilian city was of transcendental value for the integration process, as during the Meeting the Presidents approved vitally important instruments oriented towards putting into place a customs union between the states parties by 1 January 1995.

As a consequence of the detailed work required to be done by the ad hoc working group on institutional aspects, five working meetings and a preparatory meeting, entitled the 'Diplomatic Conference on Institutional Aspects of MERCOSUR' were held.[29] The Draft Protocol was approved at the Seventh Meeting of the CCM and was signed by the Ministers of Foreign Affairs and the Presidents of the Member States. It became the

[25] See Nadine Susani, Chapter 5.

[26] See eg my articles on this topic, 'El Protocolo de Olivos' (2003) 1 *RDPC* 567; 'El Reglamento del Protocolo de Olivos. Algunas anotaciones' (2004) 1 *RDPC* 2004 493.

[27] Approved on 17 December 1994; in force since 15 December 1995.

[28] See POP, art 2.

[29] It took place in Brasília between 5 and 7 December 1994.

Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR, also known as the Ouro Preto Protocol.[30]

The Protocol sought to reflect the will of the Member States to continue with the objectives established by the TA in order to complete the common market. The desired economic association had not been achieved under the initial integration model; it was decided to advance along similar lines but based on flexibility and gradualism. Following this, the integration process has now gone beyond what was then stipulated, and that was itself already beyond the integrationist goals of previous experimental zones. It can be seen that associations of this sort may be conceived as functioning under a predetermined model, however, they may not be able to function from the beginning in this way; rather, they may well need first to pass through less-developed degrees of integration.[31]

A Legal Nature of the Ouro Preto Protocol

The POP is far from being a definitive text on the institutional structure of MERCOSUR, not only because of the limited content of its provisions, but also because it maintains the intergovernmental system, which from the institutional point of view results in obstacles to the development and advancement of the integration process. Those who participated in the drafting argue, in defence of the adopted criteria, for the need to give an opportunity for the dynamic of MERCOSUR to develop itself from a more modest base. To establish a permanent supranational civil service (it is argued) would imply putting up barriers that would prevent access to the institutions by those who oppose the scheme.[32] The whole integration process would then close itself off from its opponents, and would risk becoming a pointless exercise by not being able to engage with the wider society and other governments.

In my opinion, one of the major flaws in the process was precisely this lack of firmness in taking such an important decision in defining the institutional structure of MERCOSUR. I have had the opportunity to consider this in detail and, even accepting the deep existing differences between MERCOSUR and the European Union, it is possible to look at the current situation to exemplify how a supranational permanent civil service with directing powers could have been established in the foundational Treaties.

Although digressing a little from my main theme, one of the suggestions which I most vigorously support is that MERCOSUR should finance the replacement or supplement (according to the case) of the intergovernmental staff who currently administer the process by supranational personnel with legislative competence, and thus assume the

[30] According to Ouro Preto Protocol, art 52.

[31] To substantiate these claims, the joint communiqué issued by the leaders of the process reiterated their 'conviction that integration helps to promote development and social justice and to banish economic backwardness' while also consolidating democratic processes. In this regard, the communiqué not only highlights the parties' success in achieving a significant breakthrough in the implementation of a customs union, and thus in setting the foundations of the common market, but also stresses the commitment of the four countries to overcoming the challenges of the integration process, and thus decisively altering the situation facing the regional and global economy.

[32] This was the opinion expressed by the Argentine Ambassador to MERCOSUR, Herrera Vegas, and Lic. A Mayoral, Secretary of Economic Relations of MERCOSUR, at the conference held under the auspices of the International Law Association, in the Federal Capital on 14 June 1995.

partial delegation of sovereignty that should be put into effect by the Member States. This is the only means by which the bloc will be able to develop its policies in an effective manner.

From another perspective, again following the analysis of its legal nature, we can say that the POP was intended as an integrating part of the TA. Among the themes that received special treatment in the debate that took place during the preparatory meetings for the Meeting of Ouro Preto was reform of the original Treaty, or its replacement by a new agreement. It was finally considered that it would be more practical to maintain it in force, even though opinions were divided between those who supported it (and who actually benefitted from its current format) and those who considered it preferable to abandon the then-existing instrument and elaborate a new text, which could include a general repealing clause for all the norms that they opposed. In fact, the position that prevailed was that the TA, as a foundational instrument of the subregional association, represented a symbol of the integration process.[33]

B Legal Personality of MERCOSUR

Among the chapters of the POP that stand out due to the significant effects of the norms contained within it, the one granting legal personality to MERCOSUR is particularly noteworthy. The bloc is authorised in its own right to 'carry out all the necessary acts for the development of its objectives, in particular to contract, acquire, or transport immovable and movable goods, exercise discretion, conserve funds and make transfers'.[34] MERCOSUR can also conclude establishment agreements.

For the organisation to have its legal personality recognised in international law means that it can be distinguished from its states parties—MERCOSUR has an existence apart from its Member States. This association created by the states is a legal person in public law, authorised to own property and to impose obligations on its Member States as an independent organisation.

V The Organs of MERCOSUR: The Treaty of Asunción to the Present Day

The designated organic structure is set out in the first chapter of the TA, but right from the beginning of MERCOSUR up until today, there have been regular structural changes within the bloc. Nevertheless, it is useful to present an overview explaining how the principal organs were created, as well as their composition and functions, and outlining the various modifications which have been made. Taking a structural overview will enable

[33] This can be seen in the records and documents of the preparatory meetings of the POP. See also Perez Otermin, *El Mercado Común del Sur, desde Asunción a Ouro Preto: Aspectos Jurídicos Institucionales* (n 18) 71. POP, art 53 establishes that from 26 March 1991, all provisions of the Treaty of Asunción that conflict with the terms of the Protocol and with the content of the Decisions adopted by the CCM during the transitional period are repealed.

[34] See POP, chapter 2, art 35.

us to make a critical analysis of the institutional structure, a subject that is central to consideration of the bloc, and which has generated innumerable debates and diverse opinions.

The initial organisational structure provided for in the TA was retained and amplified by the POP, respecting the criteria set out in the preparatory meetings for the creation of new instruments for the decision-making organs. The first article of chapter 1 of the POP ('Structure of MERCOSUR') lists the following institutions:

(1) the Council of the Common Market (CCM) (Consejo Mercado Comun);
(2) the Common Market Group (CMG) (Grupo Mercado Comun);
(3) the MERCOSUR Trade Commission (MTC) (Comision de Comercio del MERCOSUR);
(4) the Joint Parliamentary Commission (CPC, Comissâo Parlamentar Conjunta);
(5) the Socio-Economic Consultative Forum (FCES, Forum Consultivo Economico y Social); and
(6) the Administrative Secretariat of MERCOSUR (Secretaria Administrativa del MERCOSUR).

As can be seen, several of the original organs were retained: the CCM, the CMG, the CPC and the Secretariat.[35] The POP strengthened the role and specificities of each of those institutions, assigning them specific functions;[36] and the POP went on to establish as additional organs the MTC and the FCES (although in fact the MTC was created prior to this instrument by CCM Decision No 9/94).

The sole paragraph included in the last part of the chapter establishes the faculty to create auxiliary organs where necessary to achieve the objectives of MERCOSUR.

Under the provisions of both foundational documents, the elements of the institutional structure can be classified according to several criteria. In terms of their status, there are (a) the principal organs, expressly enumerated; (b) the dependent institutions, of secondary importance or instrumental, which have specific functions, some given by the TA and others created through the Decisions approved in different meetings of the CCM; and (c) the auxiliary organs, ie those that can be created according to the final paragraph of chapter 1 of the POP. As regards their functionality, there are: (a) decision-making organs: the CCM, CMG and MTC; (b) consultative organs: the CPC and FCES; and (c) technical organ: the Secretariat.

It has often been stated in the academic doctrine that, given the differing economic, political and legal factors in the Member States, it is essential to endow the regional member association with legislative competence and supranational jurisdiction; stable and independent organs as primary generators of direct and immediately applicable norms; and a court or tribunal of MERCOSUR with the power to interpret MERCOSUR law uniformly. All these things are required if one is to have the legal security necessary for the scheme.

[35] Among the agreements signed at the summit meeting held in Fortaleza in December 1996, the one which established the Secretariat in Montevidéo, Uruguay, is of peculiar significance. This body carries the responsibility of providing operational support and services to the other agencies of MERCOSUR. CCM Decision No 4/96 was issued for the purpose of giving effect to POP, arts 31 and 36.

[36] POP, chapter 1, ss. I, II, III, IV, V and VI make provision regarding the bodies mentioned in art. 1 (in the order listed), determining the quality, functions and powers of each.

Further important institutional changes were made in the years following the approval of the POP, but although significant, they still did not fully correspond to the magnitude of what was necessary at that time. The Permanent Review Court (PRC) (Tribunal Permanente de Revision) was not established as a permanent court, even if it can be considered the origin of an independent jurisdictional organ.

From the legislative perspective, some advances were also made, even if with marginal results, as one can see upon assessing the effect of the actions of the CPC in the long term,[37] which have turned this organ into the MERCOSUR Parliament.

The current organisation of the bloc was determined in great part by CCM Decision No 59/00, which provided for the restructuring of the dependent organs of the CMG and the MTC. This restructuring was complemented by other provisions aimed at strengthening the institutional structure.[38]

It should be noted that, in addition to the institutions enumerated in the POP, other MERCOSUR organs have been established, including the Forum of Consultation on Political Coordination (FCCP, Forum Consultivo de Concertacion Politica), the Commission of Permanent Representatives of MERCOSUR (CRPM, Comision de Representantes Permanentes del MERCOSUR) and the Meetings of Ministers (Reuniones de Ministros).

A Council of the Common Market

The CCM was established as the superior governing body of the bloc, to which was attributed the functions of the political conduct and decision-making to ensure the achievement of the objectives within the established periods for the definitive completion of the scheme. It is formed by the Ministers of Foreign Affairs and Economy of the Member States, who meet whenever convenient. The TA provides for the participation of the Presidents of the Member States once per semester, in order to give the process political impetus at the highest level. Provision is also made for the CCM to hold sessions with the attendance of other departments or authorities at the ministerial level.

This governing body issues Decisions, which are taken by consensus or by correlative vote; Decisions are numbered and specify the year in which they have been published. The TA did not provide that Decisions should specify the extent to which the norms are mandatory for the Member States, but this has been regulated by the POP.

As the TA gave no clear indication as to the seat for the meetings of the CCM, a practice has been established according to which the CCM meets in the country that holds the rotating presidency of the bloc. The competence of the CCM was not specified in the TA; generally, it is understood to correspondsto all the measures necessary in order to achieve the objectives in the TA. It has not been determined if this corresponds to the original intentions of the agreement, and this issue has not been free of heated debate, which has however been clarified by the POP and by the practice of the CCM.

In 1998, internal rules of procedure for the CCM were approved, making provision for the attributions and functions within the organ's competence, and complementing this

[37] As regards the CPC, see A Dreyzin de Klor, 'La necesidad de un Parlamento para el Mercosur' in *Hacia el Parlamento del MERCOSUR* (Montevidéo, KAS/MERCOSUR/CPC, 2004) 23–41.

[38] See, among others, CCM Decisions Nos 01/02, 16/02 and 30/02.

with other rules, such as establishing the possibility for the CCM to formulate recommendations, with the object of establishing general orientations, plans of action, or initial incentives that contribute to the integrationprocess.[39]

The following governing bodies are integrated into this part of the institutional structure: (a) the FCCP; (b) the CRPM; and (c) the Meetings of Ministers. During 2004, high level groups (GAN, Grupos de Alto Nivel) were also established, for example, creating a channel to the ad hoc group on the Guarani Aquifer (Acuífero Guaraní),[40] set up to examine the structure of the Common Economic Agenda (AEC, Agenda Economica Comun),[41] and the Programme of the Forum of Competitive Production Chains of MERCOSUR.

(i) Forum of Consultation on Political Coordination

This governing body was created to coordinate and systematise the actions of participants in the integration process, bearing in mind the importance of the political dimension. It was established in its current form in 1998,[42] even though its forerunners can be traced back to the Presidential Declaration on Political Dialogue between the Member States and the Presidential Declaration on Consultation and Political Coordination, also among the same countries.[43]

The recitals to the originating regulations emphasise the importance assigned to this forum's contribution to the consolidation and expansion of the political perspective, in providing a suitable environment to deepen the dialogue between the Member States and the associated countries on external political issues in relation to the common political agenda. This auxiliary assembly of the CCM is composed of high ranking officials of the ministries of the Member States and associated countries.

Some years passed between the creation of the FCCP and the approval of its internal regulations; this slow pace of reform makes it difficult for the forum to respond to current issues.[44]

When designing the programme for 2004–2006, the CCM underlined the necessity to proceed with the strengthening of this forum, in order to adapt it to the requirements of the political agenda calling for improvement of the process of negotiating, issuing and incorporating norms affecting the MERCOSUR citizen, in order to further MERCOSUR's educational, social and cultural integration.[45] The forum coordinates specialised meetings on issues such as prevention of the improper use of drugs and rehabilitation of drug users, the rights of women, and issues arising in the municipalities and other administrative divisions of MERCOSUR.

[39] CCM Decision No 19/02.
[40] CCM Decision No 25/04.
[41] CCM Decision No 05/04.
[42] Under CCM Decision No 18/98.
[43] The relevant declarations were issued at the 10th CCM Meeting held in San Luis, Argentina, 25 June 1996 and at the 12th CCM Meeting held in Asunción, 19 June 1997, respectively.
[44] It was only at the 25th CCM Meeting held in Montevidéo on 15 December 2003 that CCM Decision No 23/03 on the Regulation of the FCCP was passed, although previously there had been approved rules on coordination between the CMG and the FCCP.
[45] See the working programe for 2004–2006 at para 2.4.

(ii) Committee of Permanent Representatives of MERCOSUR

The CRPM was created in 2003 as a dependent governing body of the CCM, and it operates within the precise role determined by its title, being effectively a permanent governing body headquartered in Montevidéo. It is formed by representatives of the Member States who work as ambassadors of these counties to the ALADI, and it has a president elected by the superior governing body of the bloc.[46] The main function of the CRPM since its creation has been to represent MERCOSUR in its relations with third countries, groups of countries and international organisations. In addition to this primary function, its competences include assisting the CCM as required in its activities, undertaking initiatives on subjects related to the integration process, external negotiations, and the direction of the common market. It is tasked with working to strengthen the economic, social and parliamentary relations in the subregion through the establishment of relations with the CPC and FCES.[47] It also presents reports of its activities to the CCM each semester.

Various issues which have arisen since its creation have given rise to questions about its functions,[48] its budget, and its technical cooperation with other governmental bodies within the institutional structure of the bloc.

(iii) Meetings of Ministers

From the beginning of the establishment of the subregional bloc, it has been considered convenient to deal with certain topics at the ministerial level, or equivalent hierarchy, and for this reason these area meetings were initiated. It is fortunate that the inclusion in the institutional structure of various ministerial forums as dependent governing bodies of the CCM was approved from the commencement of the process, as they are essential to the achievement of the objectives of the scheme. The inclusion of such forums demonstrates that the bloc's agenda is not limited to economic matters, but includes extensive plans for the integration of education and culture, indicating the all-inclusive nature of the process.

The Meetings of Ministers can be complementary to or independent from those of the CMG. Nevertheless, this governing body coordinates and participates in the meetings of the Economic Ministers and Presidents of the Central Banks. The Eighth Meeting of the CCM on 4 and 5 August 1995 in Asunción reaffirmed Decision No 1/95 and the need to maintain the Meetings of Ministers within the organic structure. The Decision emphasised the advantages of the high-level treatment of specified topics in advancing the integration process. The Meetings of Ministers should function within the proposals, principles and institutional models that were determined in the TA and the Ouro Preto Protocol. The first meetings established were those of Ministers of Economy and Presidents of the Central Banks; Ministers of Education; Ministers of Justice; and Ministers of

[46] The president must be a prominent person, a national of one of the Member States, appointed by the CCM on a proposal by the Presidents of the Member States. The president performs his duties for a period of two years, which may be extended for another year. These powers include presiding over the work of the CRPM; representing the bloc in relations with third states, groups of states and international bodies as mandated by the CCM; participating in the meetings of the CCM and the Meetings of Ministers; coordinating the high-level groups on structural convergence and the financing of the integration process.

[47] CCM Decision No 11/03, art 4.

[48] For example, CCM Decision No 03/04.

Labour and Agriculture.[49] Later, meetings of Ministers of Interior, of Industry; of Culture, of Health, of Tourism, of Energy, of Social Organisation, and of the Environment were created. Today, some of these meetings are coordinated by the FCCP.[50]

B Common Market Group

The CMG is the executive governing body of MERCOSUR, coordinated by the Ministries of External Relations of the Member States and integrated with members of the Ministries of Economy and Central Banks; it is the most authoritative organ of the bloc.[51] Playing a central role in subregional integration, its key functions are:

(1) to monitor the completion of signed treaties;
(2) to take necessary measures to ensure the incorporation of Decisions adopted by the CCM;
(3) to propose concrete means to achieve the implementation of the commercial liberalisation programme, the coordination of macro-economic policies and the negotiation of agreements;
(4) to formulate work programmes to promote the advancement of the common market.[52]

Its powers include the possibility to create working subgroups necessary for the achievement of its objectives, and also the power to suggest reform or suspension of the powers of other governing bodies. Another important competence is the inherent one to elaborate and propose concrete means for the organisation of its own activities, with notificationto the representatives of other organisations of the public administration and of the private sector.

CMG Resolution No 1/91 concerns the internal rules of procedure of the CCM, which were approved by CCM Decision No 4/91. The rules of procedure establish in detail the functions and responsibilities of the CMG in relation to the CCM. The rules include the format of ordinary and extraordinary sessions, the requirement to frame objectives in terms of solutions that can be adopted by consensus among all Member States, the responsibility of elaborating the agenda for meetings of the CCM and coordinating the participants, as well as the duty to monitor the implementation of adopted Decisions. The CMG is also in charge of coordinating the Meetings of Ministers and of the Presidents of the Central Banks, and is empowered to organise, if considered necessary, specialised ad hoc meetings.

[49] In this regard, see CCM Decisions Nos 5/91 and 1/95.
[50] ie the Ministerial Meetings in the areas of Culture, Education, Interior, Justice and Social Development.
[51] It is composed of four members and four alternate members from each country, to be appointed by the respective governments.
[52] Ouro Preto Protocol, arts 13 and 14.

(i) National Sections of the Common Market Group

The national sections of the CMG are composed of the main and alternate representatives of each Member State who constitute the CMG. These sections were created in response to perceived national needs at the very beginning of the integration process.[53]

The attributes of the national sections are determined by the CCM. First, they are competent to receive the complaints of private parties who consider themselves to have been harmed by the application of MERCOSUR law by a Member State, where the MERCOSUR norm was applied by legal and administrative means that have restrictive or discriminatory effects. The relevant national section for these purposes will be located in the Member State in which the individual resides or has his seat of business, which will thereby be responsible for receiving the claim. This competence was established with the active participation of the MTC, and later by the ratification of the Olivos Protocol on Dispute Settlement. The intervention of the national section requires certain conditions to be fulfilled, and generally involves a discretionary decision. National sections frequently take up complaints on behalf of industry in one of the participating countries to try to prevent imports that provoke dumping or have negative effects within the respective Member State.

(ii) Dependent Governing Bodies of the Common Market Group

The CMG is an integrated structure made up of dependent and auxiliary governing bodies, the working subgroups (SGT, Sub-Grupos de Trabajo),[54] as follows: SGT No 1 on Communications; SGT No 2 on Institutional Aspects;[55] SGT No 3 on Technical Rulings

[53] The rules of procedure of the CMG, in art 2, provide: 'The members and alternates of each State Party shall constitute, for all intents and purposes, the respective National Section of the Common Market Group'.

[54] Based on the understanding that the coordination of macro-economic and sector policies would require the creation of working subgroups, Annex V of the founding treaty provided that within 30 days of its establishment, the CMG should form the 10 groups that have been listed. Subsequently, in the exercise of its powers, the CMG instituted a series of changes. The current organisational chart shows the existence of 14 SGTs. SGTs are empowered to request the establishment of committees or groups of experts, in some cases ad hoc, who are assigned specific areas of action. The SGTs base their activities on the objectives and timetables approved in meetings, on a consideration of how best to perform the functions assigned to them. The privilege to determine their own working is recognised by the regulations of the executive body of the bloc.

[55] This SGT is of particular interest for the purposes of this chapter, so it is worth explaining a little of its background. SGT No 2 was created by CMG Resolution No 7/93 with the principal task of focusing on the topics in TA, art 18. Having considered the work to be performed within its remit, the Argentine delegation presented a paper entitled 'Institutional Aspects: Preliminary Reflections' at a meeting held in Asunción on 20 April 1993. This proposed to initiate a series of studies on the effects of the successive decisions which had been taken aimed at institutional development of the common market. In particular, the document stated that: 'Upon completion of the transition on 31 December 1994, [the bloc] should establish the means to strengthen institutions and prevent any reneging on commitments made by that date'. The document also stressed that the existing background in the field of integration, both in Latin America and elsewhere, demonstrated that there was no default institutional model with respect to the governing bodies of the scheme. The current model allowed the possibility of exercising a great deal of latitude in designing the institutions most suited to the states parties' needs, opportunities and idiosyncrasies. The paper went on to say that in the case of MERCOSUR, there seemed to be no doubt that it would benefit from the experience accumulated during the years of transition in terms of the functioning and effectiveness of the bodies established by the TA: the CCM, the CMG and the Secretariat. From that experience it was possible to infer that future bodies should operate: (1) on a permanent basis, or (2) based on meetings which would take into account the hierarchy of the organs. The experience had shown that as progress is made in the integration process, the tasks for these organs multiply, including the actions necessary for the implementation and monitoring of each other. The document also referred to the need to reflect on the nature of future institutions, providing different options. See MERCOSUR Secretariat, *Proceedings of the Ninth Meeting of the CMG* (Montevidéo), Annex VII, 41.

and Compliance Assessment; SGT No 4 on Financial Matters; SGT No 5 on Transportation; SGT No 6 on Environment; SGT No 7 on Industry; SGT No 8 on Agriculture; SGT No 9 on Mining and Energy; SGT No 10 on Labour Issues, Employment and Social Security; SGT No 11 on Health; SGT No 12 on Investments; SGT No 13 on Electronic Trade; SGT No 14 on Monitoring the Economic and Commercial Situation. There are also committees working within these subgroups;[56] these specialised meetings[57] were created to assist the subgroups and other governing bodies such as the Technical Meeting on the Incorporation of MERCOSUR Regulations. The list of committees is as follows: Automotive; Technical Cooperation; Directors of Customs; Animal and Plant Health. Among the ad hoc subgroups are committees on Biotechnical Agriculture; the Tobacco Trade within MERCOSUR; Government Procurement; Concessions; Border Integration; External Relations; Health; the Sugar Sector; and the Social Labour Commission.

To enhance the credibility and effectiveness of MERCOSUR, a proposal has been approved for further analysis of the structure of the dependent governing bodies of the CMG and of the MTC.

C MERCOSUR Trade Commission

In 1993, the CCM approved the creation of the MTC, which was later put into effect by CCM Decision No 9/94.[58] It is treated as a governing body of intergovernmental character that was created with the main objective of assisting the executive governing body of MERCOSUR. It is empowered to adopt guidelines and to carry out proposals within its assigned competence.

Its core function is to monitor the implementation of the instruments adopted for the common commercial policies agreed by the Member States for the functioning of the customs union; and to take measures to give general effect to the common commercial policies as regards the trade within MERCOSUR and with third countries. Since its

[56] Upon the recommendation of the SGTs, the CMG can create commissions to optimise performance in relation to the activities to be carried out. These commissions are composed of government officials appointed by each Member State according to the directives of the rules of procedure of the CMG.

[57] When discussing the powers of the CMG above, we mentioned the possibility of convening specialised ad hoc meetings. These are to help the CMG carry out its intensive executive tasks. Many specialised meetings have in fact been convened under this power. These include meetings on the following topics: Family Farming; Film and Audiovisual Authorities; Science and Technology, Social Communication; Cooperatives; Public Defending Officers; Infrastructure Integration; Joint Trade Promotion and Tourism.

[58] Provision was originally made in CCM Decision No 1/93. Then, in the Sixth CCM Meeting, held in Buenos Aires on 5 August 1994, CCM Decision No 9/94 was passed, which provided: 'Article 1: The MERCOSUR Trade Commission shall be created as an intergovernmental body responsible for assisting the executive body of MERCOSUR, to ensure the implementation of the instruments of the common trade policy agreed by the States Parties for the functioning of the Customs Union, and to monitor and review the issues and matters relating to common trade policies, intra-MERCOSUR and trade with third countries. Article 2: The structure and functioning of the MERCOSUR Trade Commission is approved and is attached to this Decision as an annex. Article 3. The MERCOSUR Trade Commission will be coordinated by the Ministries of Foreign Affairs of States Parties. Article 4: The MERCOSUR Trade Commission shall begin operating on 1 October 1994 and shall hold its meetings at least monthly'. As expressed in its text, the Decision has an annex entitled 'Structure and Operation', which contains five chapters on (1) its nature and composition; (2) its duties, responsibilities and powers; (3) its operation; (4) its organisation; and (5) the resolution of disputes. Directives Nos 1/94 and 5/96 contain the rules of procedure, and Directive No 6/96 approved the mechanism of consultation for the MTC. On the MTC generally, see H Alegría, 'El Mercosur hoy: La realidad, pragmatismo e ideales' (1995) *La Ley, Suplemento Especial, 60 Aniversario* (Buenos Aires) 5.

creation, it has developed a substantial operation that characterises this governing body as the leading institution in the implementation of commercial integration policies. Its role is fundamental in the process in assisting the CMG, and it goes far beyond the duties which might ordinarily be expected of a coordinating governing body.

It is comprised of four members (and four alternates) for each Member State and holds ordinary meetings once a month, with the power to call other meetings if so requested by the CMG or any of the Member States.

The functioning of the MTC is regulated by CCM Decisions Nos 59/00, 10/02, 16/02 and 30/03. Its competences also include related issues as regards relations with third countries, international organisations and trade agreements; making pronouncements at the request of the Member States about the fulfilling of the AEC and other instruments of the common commercial policy; and assisting the evolution and administration of the AEC. It has a duty to provide the CMG with all the information corresponding to these issues and to propose norms for the revision and modification of the existing rules on matters within its competence.

Its internal structure consists of technical committees (CT, Comites Tecnicos) as follows: CT No 1 on Tariffs, Nomenclature and Market Classification; CT No 2 on Customs Affairs; CT No 3 on Norms and Commercial Disciplines; CT No 4 on Public Policies and Distorted Competition; CT No 5 on Competition Defence; CT No 7 on Consumer Defence. This structure is completed by the Committee on Commercial Defence and Safeguards.

D From the Joint Parliamentary Commission to the Parliament of MERCOSUR

The parliamentary governing body appears in the founding agreement under the sub-heading 'General Dispositions'. The sole article determines the necessity of creation of a parliamentary organ with the objective to facilitate the advancement of the common market. It imposes on the executive powers of the Member States the task of keeping the respective legislative powers informed of the evolution of the integration process.[59] It is worth mentioning that the apportionment of seats in the parliamentary governing body does not take into account the traditional role of governing bodies in representing national governments through its constituting members.[60]

The CPC was never meant to assume a predominant role, even though it was eventually included in the institutional flow-chart of MERCOSUR set out in the POP. Such inclusion, however, did not imply the granting of decision-making powers. Its most significant attribute is its consultative function in the law-making process, which signals the consultative character of the body in practice.

On 14 December 2006, in a formal meeting in Brasília, the Parliament of MERCOSUR was officially established. Present at the event were members of the CPC and of the political authorities of all of the MERCOSUR Member States, who were unanimous in praising the role of the new parliamentary governing body in improving the relations

[59] TA, art 24.

[60] As to the development of this organ of MERCOSUR, see my article 'El Parlamento para el Mercosur: Parte de una reforma integral' (2004) 3 *RDPC* 581.

between citizens and the bloc, increasing social representation and enhancing the dialogue between national governments. They also emphasised the parliamentary responsibility to contribute to the advancement of the economic integration and the construction of a MERCOSUR legal order.

Although it seems unlikely that a parliamentary governing body could function as an institution to drive the process forward in an essentially presidential regional bloc, which is still undecided about the type and intensity of the integration it is looking to achiever, one has appreciate that MERCOSUR is an evolving process in which institutions could grow in importance in the future, rather than focusing on the institutional history of MERCOSUR.

Like other 'modern myths', the idea of 'Parliament' has been consolidated through history as an answer to the European *bourgeoisie*'s need to legitimise a new capitalist production system, and new socio-political regimes that would be formally democratic, and would require an instrument of representation of the general will. Following this abstract and dogmatic discourse, the institutions of the modern state have for centuries been regarded as the only organisational form considered possible for life in a democratic society. However, the MERCOSUR Parliament does not follow the model that corresponds with other integration processes.

The MERCOSUR Parliament is the third of its type, and we cannot identify it as corresponding to those that exist in the European Union and the Andean Community. While it is true that the European Parliament did not have the same attributes or competences throughout its history, there are in any event structural differences with regard to the institutionalisation of MERCOSUR.

The history of the CPC shows that the concern with creating a Parliament began in 1991 with the negotiations of the Treaty of Asunción itself, when parliamentarians of the Member States met and proposed the immediate creation of a Parliament, but this idea was put on hold for a long time. However, the parliamentarians continued to meet as a commission during the following 15 years of MERCOSUR; in 1999, they put the topic back on their agenda and in 2004 decided to focus their full attention on the project and to elaborate a draft instrument creating the new parliamentary governing body of the bloc

The attributes of the MERCOSUR Parliament are marked by attempts to reduce the monopoly of power by national executive branches in all areas of the governance of MERCOSUR, since it is considered that the CPC did not have significant competence. The Parliament is also seen as a means to counteract the emerging democratic deficit in MERCOSUR, giving more legitimacy to legal rules adopted within the bloc. These are the functions traditionally performed by any Parliament, and constitute the essence of the existence of such an institution.[61]

Certainly, the internal politics involved in the integration process should not lead to attempts to manage the bloc through a single entity, but one must still accept that the end-result of the process accurately reflects the effects of the ideological alignments involved in the establishment of MERCOSUR.[62]

[61] See A Dreyzin de Klor, 'Avances y retrocesos de los esquemas subregionales', paper delivered at a conference on 'Los retos de la integración en el continente americano', organised by División de Estudios de Posgrado de la Facultad de Derecho de la UNAM, México, 8–10 November 2004.

[62] Along the same lines, J Woischnik states that, in the construction of MERCOSUR, too often the interests of the Member States prevail, along with an entrenched concept of sovereignty. See J Woischnik, 'Consolidación institucional del Mercosur' (2004) 1 *Diálogo Político* (Buenos Aires) 159.

The Parliament's announced independence from national politics should be seen as the beginning of the end with respect to the traditional dynamics of fulfilment of Member States' obligations, in addition to an enhancement of citizens' democratic experience. Unfortunately, this has not to date been characteristic of the scheme; we cannot be unaware of the manifest deficiency in achieving these goals in the 17 years of MERCOSUR's existence, or of the multiple accomplishments which would be required by this ideal.[63]

However, from its very beginning the bloc has been impregnated with a noticeable eagerness for integration, seen in the recited purposes used to encourage and inspire in the founding agreement, especially in its Preamble. Various sectors of society adopted postures very different from those of the governments attempting to dictate the regional experience, and this had favourable effects on the economic and judicial operators, marking a strong separation from the situation which applied in the mid-1980s. This attitude translated into a new impetus for the intergovernmental negotiations, linked to changed social and economic circumstances.

To constitute the initial consultative governing body, the members of the CPC, parliamentarians appointed by the Member States, approved the body's rules of procedure,[64] in which they established the composition of the body, the mode in which it would function, and its competences.

The idea of institutionalising the CPC re-emerged in 1999, and a year later a proposal was agreed to bring this idea into reality.[65] It accompanied the relaunching of the bloc with the aim of reaffirming its primary objectives, operating along clearer lines in order to strengthen the model. The proposals offered by parliamentarians from Argentina and Brazil in the CPC were particularly significant, as they proposed the goal of creating a parliamentary governing body; however, in 2002, new socialist governments came into power in Argentina and Brazil and it was unclear what their policy might be. But in fact there developed a new impulse, on the one hand, to reactivate the strategic association between these two states and, on the other hand, to strengthen the subregion bearing in mind the global environment.

Following CCM Decision No 49/04, meetings were held to establish common guidelines for advancing the process, in which under article 2 the CPC was invested 'as a preparatory commission, to carry out all of the actions that are necessary for the installation of the Parliament of MERCOSUR'.

[63] On the topic, see A Dreyzin De Klor and D Fernandez Arroyo, 'O Brasil frente á institucionalizacão e ao directo do Mercosul' (1993) 1(1) *Revista de Integração Latino-Americana* 21; JA Morande, 'Notas y alcance sobre el Estado. Nación en la política mundial del presente: una reflexión desde las relaciones internacionales' (2004) 37(145) *Estudios Internacionales* (Universidad de Chile, April–June) 51; R Rusell and JG Tokatlian, *El lugar de Brasil en la política exterior argentina* (Buenos Aires, FCE, 2003).

[64] The essential points of the rules of procedure refer to the composition of the body; its operational modalities: advisory, deliberative and formulation of proposals; and the powers assigned to it, in particular: to monitor the progress of the integration process and report on it to the respective national legislative organs; to request information from the institutional bodies on the plans and programmes for political, economic, social and cultural development; and to conduct studies aimed at harmonising the laws of the Member States. Subsequently, the rules of procedure were the subject of various reforms, available at www.mercosur.net.uy.

[65] At the 15th Meeting of the CPC held in Santa Fé, Argentina added to the agenda a draft amendment to the POP that included the creation of a specialised technical group to study and work on the proposal.

The date foreseen for the coming into existence of the Parliament was 31 December2006, with the CPC charged with the elaboration of the Constitutive Protocol of the MERCOSUR Parliament.

Guidelines for the work were presented by the Secretary of the CPC at a meeting in Montevidéo during March 2006, with the principal tasks being 'to adapt the operation of the CPC into a preparatory commission (political group in charge of the installation of the MERCOSUR Parliament) as determined in the Presidents Meeting of the CPC (16/2/05 Montevidéo), and to prepare a report for the Executive Meeting at Asunción'.

(i) The Parliament Today Under its Constituent Protocol

The general characteristics of the governing body are as follows:

— It is the governing representative of the national governments of Member States.
— Its members are to be directly elected.
— It consists of a single chamber.
— Before its final definitive implementation, there will be two transitional stages: 2007–2010 and 2011–2014.
— Its headquarters are in Montevidéo, Uruguay.

It has the following objectives and principles:

— to represent the people of MERCOSUR, respecting all political ideologies;
— to further the sustainable development of the region, with social justice and respect for the cultural diversity of its populations;
— to guarantee the participation of the actors of civil society in the regional integration process;
— to stimulate the formation of a collective conscience of values for citizens and communities with respect to the integration;
— to stimulate pluralism and tolerance as guarantees of the diversity of political, social and cultural expressions of the people of the region;
— to enhance the transparency of the information and decisions to create trust and facilitate the participation of citizens;
— to strengthen and deepen the integration process of MERCOSUR in order to contribute to the construction of the South American continent;
— to promote a balanced institutional framework and make MERCOSUR more efficient so as to facilitate the creation of effective norms that guarantee a legally secure environment;
— to reflect the pluralism and diversity of the region, contributing to democracy, participation, representation, transparency and social legitimacy;
— to ease cooperation among national parliaments, allowing the advancement of the proposed objectives of harmonising national legislation in the pertinent areas and to expedite the incorporation of MERCOSUR rules.

It has the following fundamental competences:

— to ask for written information or opinions of the decision-making and consultative bodies of MERCOSUR established in the POP about issues linked to the development of the integration process;

— to receive, to initiate and finalise each semester information from the rotational presidency of MERCOSUR in order to inform on completed activities;
— to issue declarations, recommendations and reports about questions linked to the development of the integration process, on its own initiative or on the application of other bodies of MERCOSUR;
— to elaborate reports on all MERCOSUR norms that require legislative approval in one or more Member States for their valid entry into internal law;
— to propose draft MERCOSUR norms for the consideration of the CCM, with reports every six months on their development;
— to request consultative opinions from the Permanent Review Court

During the first transitional stage, 2007–2010:

— It has an equal composition, with 18 members for ever country.
— Election of members is indirect: the national parliaments designate some among their members as representatives of the MERCOSUR Parliament.

During the second transitional stage, 2010–2014:

— Its composition will be based on citizen representation criteria, characterised by a reduced proportional apportionment, given the significant population differences among the Member States.
— Direct elections of members should take place before 31 December 2010. From 2014, there will be a designated 'MERCOSUR Citizen Day' in order to hold the elections for MERCOSUR parliamentarians simultaneously in all Member States.

It is intended that the creation of the MERCOSUR Parliament will fulfil the following purposes:

— enabling civil society to acquire a voice in the regional integration process;
— allowing the citizens of the region under construction to participate in the setting of priorities, indentifying and defining interests and objectives from a common perspective and from a common political area;
— providing a firm foundation for social control;
— enabling a greater involvement of the political actors in the decision-making process of MERCOSUR, bringing greater democratic legitimacy, transparency and new elements to help to optimise the governability of MERCOSUR;
— establishing a rational balance of powers in the institutional framework of MERCOSUR, which previously did not exist.

The creation of the MERCOSUR Parliament is an important step, which should however be approached with caution, as it creates a scenario of opportunities which may be seized or wasted.

E Socio-Economic Consultative Forum

The FCES is the governing body representing the social and economic sectors of the MERCOSUR Member States. It has consulting functions and acts through recommendations to the CMG. It meets every six months but extraordinary meetings are held when deemed necessary.

The FCES was created under the revision of the POP of 31 May 1996, which constituted this forum and enacted its rules of procedure which determine its composition, structure, function and main commitments.

The FCES is composed of the same number of representatives from each Member State, having a total of 36 members who are national delegates chosen by representative organisations, such as trade unions, NGOs, etc. This internal structure facilitates a focus on topical areas with respect to the social aspects of the integration, as well as on the consolidation of the customs union, the strengthening of the process, and MERCOSUR's external relations. Its work is complemented by the Mixed Committee CES (*Centro de Estudos em Sustentabilidade*, or Sustainability Studies Center, a research center under the Getúlio Vargas Foundation in Brazil)–FCES.

The forum's work programme for 2004–2006 focused particularly on the extension of the participation of civil society in the integration process, which is in general the basis for proposals presented by this consulting organisation.[66]

F MERCOSUR Secretariat

The TA provided for the creation of an Administrative Secretariat, which was intended to be the second most important executive governing body of MERCOSUR (after the CMG).

During the transitional stage, among the functions attributed to the Secretariat was to act as custodian of all the documentation of the regional association, and to have responsibility for carrying out the necessary communications and activities for the development of the negotiations of the bloc. This task was assigned with the goal of avoiding problems of miscommunication that might constitute an obstacle to the advancement of the process.

The Internal Rules of Procedure of the CMG extended the functions of the Secretariat. These include exercising the role of a communications centre; facilitating direct contact among participants of the CMG; organising the logistical aspects of the meetings of the executive governing body; and carrying out other tasks requested by the CMG.

In 2002, MERCOSUR began a process of reform and rationalisation to provide the required legitimacy for the institutions of the bloc, and this task was primarily assigned to the Secretariat, which was provided with a technical sector under the proposal of the Uruguayan chancellor, Didier Opertti Badan. CCM Decision No 30/02 created a mechanism for the selection and hiring of the technical consultants and stipulated the attributions that this sector should have.

This provision, which aspired to strengthen the structure of the regional undertaking through the creation of a technical sector, was very well received, and was undoubtedly a necessity for the advancement of the consolidation of the bloc. It was intended that the Secretariat's technical expertise would grow substantially, with its experts—two specialists in international law and two specialists in international economics—giving advice and technical support to the other governing bodies of the bloc.

In the exercise of their functions, the group of specialists are involved in a series of activities, including preparing working documents; compiling information and making

[66] The proposal in question, of 3 October 2003, was presented to the CMG, see CCM Decision No 26/03, art 2.1, Participation of civil society.

proposals; drafting reports in respect of issues of interest for the strengthening of the integration process; carrying out evaluations and elaborating periodic assessments of the evolution of MERCOSUR; verifying the important variables that affect the process and the degree of implementation of the integration commitments undertaken.

In their reports, the specialists are specifically tasked to identify the various pitfalls, legal loopholes and specific difficulties of the process, as well including issues that are of common interest. The specialists' main functions are to propose, according to a regional perspective, actions to be carried out by the governing bodies with decision-making ability in the integration scheme, and to carry out studies of interest for the process, with a comparative focus not only on MERCOSUR but also on other experiences of regional integration developed elsewhere.[67]

To ensure that the system was effective in practice, the CCM dedicated special attention to the selection and hiring of the specialists, requiring candidates to demonstrate that they possessed the competences and technical capacity necessary for the job. The organisation of the selection process was handled by a Commission of Integrated Selection, comprised of designated representatives from each Member State and the Director of the Secretariat, which used a combination of curriculum analysis and aptitude tests.

Considering that MERCOSUR lacks a supranational character, and that the decisions adopted within the bloc sometimes respond to the political will expressed by the governments of the Member States, it is important to stress that the rules adopted for the designation of the Secretariat personnel do not suffer from such inconsistencies. Despite fears being expressed in relation to possible political influence in the selection process, it should be emphasised that on this occasion MERCOSUR acted with transparency, fulfilling the established guidelines, with sufficient notice and ample publicity, and the selection process proceeded with maximum impartiality, respecting all of the approved rules.[68]

Such an objective selection mechanism, which follows the methods of designation of specialists in many of the Member States, should become normal process within the bloc. MERCOSUR should implement this type of procedure for all personnel selection, not only to help generate optimism about the long-term prospects for the desired regional development, but also so that the bloc will enjoy internal and external credibility.

The Secretariat itself is composed of a director, who is appointed by the CMG and holds office under CCM rules for a two-year term,[69] and three sectors: Technical Consultancy, Administration and Support, and Documentation and Guidelines.

[67] It is noteworthy that the first six-monthly report prepared by the specialists was of the utmost importance for those analysing the integration process. This document was highly instructive and reflected an analysis of the functioning of the bloc from all sides, as regards both its progress and its setbacks.

[68] The process consisted of anonymous written evaluations and interviews, with each candidate individually and in private, focused on the scientific topics covered in the programme. After a far from simple task for the selection commission, given the quality of applicants, which in many cases included members of existing working groups of the various committees of MERCOSUR, the appointed specialists (in the legal field: Alejandro Perotti (Argentina) and Deisy Ventura (Brazil), and in the economic field: Oscar Robledo Stark (Paraguay) and Marcel Vaillant Mayor (Uruguay)) possess recognised qualifications and professional prestige. On this process, see A Dreyzin de Klor and D. Fernández Arroyo, 'El MERCOSUR por el camino de la transparencia?', available at www.relnet.com.br/index40.lasso.

[69] Notwithstanding this rule, the extension of the mandate of the Director, Reginaldo Arcuri (2003–2005) was agreed under CCM Decision No 24/03, so as to provide continuity to the work being developed to consolidate the process under a common perspective. His successor, José Buttner Limprich, remained in office for the two years prescribed (2006–2007).

The technical sector was installed in the headquarters of the Secretariat in Montevidéo in October 2003. Fulfilling one of its assigned tasks, the specialists wrote two reports, in July and December 2004, which were presented to the Meetings of the CCM in Puerto Iguaçu and Ouro Preto, respectively.

The first report was initially made public by being put on the Secretariat's website, which was an extremely useful contribution to the development of the integration process; however, it was later removed from the website. The second report has not yet been made public, so it is not possible to have access to its contents.[70] I disagree with this trend towards retaining confidentiality, as transparency is fundamental to a process with integrationist characteristics and reflects the policies that have enabled the institutionalisation of MERCOSUR.

VI Some Reflections on the Future

The achievement of the objectives of MERCOSUR[71] requires an analysis of its institutional competences and of the technical process and how it operates in practice. For a number of reasons, we can justifiably argue that advancement of the integration process requires the shaping of a strongly-based structure in which MERCOSUR's governing bodies are reviewed by the legislative and judicial authorities, in order to strengthen the process and give it the currently lacking legitimacy. However, Member States have not yet delegated authority to supranational governing bodies. The significance of the creation of the Permanent Review Court in introducing supranational elements to the bloc is still unclear; further analysis on this subject must be carried out elsewhere, and we are currently unable to determine with any certainty whether or not the PRC could be considered a supranational legal body.

Regional integration is generally viewed as one of the phenomena capable of bringing about the consolidation of democratic politics. From this viewpoint, despite scepticism from various sectors, has emerged a favourable climate for integration, which has seen general agreement on the advantages of the process and obtained the reciprocal support of the governmental elements, which form the foundations of democratic stability in the region. Giving stronger force to these arguments, integration is generally viewed as a means to achieve 'a developed economy with social justice'.[72]

Today, these arguments lead us to consider the MERCOSUR model as an effective mechanism to achieve the necessary reforms in, and to strengthen, the Member States involved. Through this process, countries find the opportunity to take action jointly with respect to the issues regarding which they have made commitments; as a consequence, it is important to stress the relevance of integration as an effective instrument to strengthen Member States politically through participation in the subregional bloc.

This view did not prevail during the first years of the bloc, however, and it was only through radical alterations in the institutional structure of the bloc that the aims of

[70] CMG Resolution No 06/04. Note of the National Coordinator of CMG, Macedo Soares, in the office of President Pro Tempore (2 September 2004).

[71] Objective set out in TA, Preamble and art 1.

[72] Formula contained in the introductory part of the TA.

economic integration could find a well-suited institutional environment within which they could fully blossom. The 1990s was permeated by unilateral state decisions that harmed political integration.

The last two years have been key in relaunching the bloc; this has been particularly influenced by a noticeable change in the attitude of the Presidents of the Member States observed in recent meetings.

This has resulted in bringing to an end the transformation of MERCOSUR's institutional apparatus. The only governing bodies now endowed with decision-making powers (that is to say, with the capacity to enact legally binding rules) are the CCM, the CMG and the MTC.

The numerous institutional designs of the past highlighted sectors of society whose involvement the Member States wish to stimulate by furthering their participation at the heart of the MERCOSUR governing bodies. It was from this dialogue that the decision arose to bring to an end institutional modifications that were not oriented towards giving more democratic legitimacy to the bloc. An increase in legitimacy requires a move towards new, simpler institutions that are more inclusive.

Convinced of this need to modify the institutional structure of the organisation, formulations have been put forward that articulate the opportunity to effect such a transformation through reform characterised by a refusal to recognise institutional governing bodies which are not structured so as to move away from questions of self-interest.[73]

A reflection of the importance now placed on the development of this approach is manifested through the elaboration of a series of drafts through which Member States have sought to determine global guidelines for the advancement of integrated reform. The communiqué issued at the meeting held in Puerto Iguazu operates as a source of inspiration, signalling the Member States' desired goal of expansion of the bloc, making a revision and updating of the original instruments essential as a means of achieving this objective and formulating a structure capable of confronting the challenges presented in the future.[74]

Based on a profound conviction of the need to revisit regional alliances in a globalised world in which only as part of a larger association is it possible for states to assert themselves, the CCM agreed the 2004–2006[75] programme of work referred to above. This document contains provisions that hint at a concern over the lack of legitimacy and of citizen participation.

These proposals to bring about structural changes were received with enthusiasm in many interested sectors as a solution to MERCOSUR's problematic status quo, with the belief that strengthening the integration process would be enhanced by institutional reform.

Nevertheless, citizens in general are not imbued with the in-depth knowledge of MERCOSUR's functioning (at least, such knowledge cannot be taken for granted) that would allow ready acceptance of reforms that seem on one level only to create a new

[73] The many questions that must be decided in respect of future MERCOSUR governing bodies include their structure, which headquarters to allocate in each case, the linkage with civil society, the criteria for hierarchies, the system for approving decisions, and the legislative process.

[74] The meeting was held on 8 July 2004. Communiqué available at www.secretaria.net.uy.

[75] CCM Decision No 26/03.

political bureaucracy. It is accordingly vital to incorporate citizens effectively into the integration process, and to contemplate the future trends of active participation of the population as a necessary and indispensable condition.

During the meeting that took place in Ouro Preto in December 2004, the Member States announced important proposals to advance the integration process. We may well ask, however, what has in practice been achieved? As regards institutional reform, the Decision creating the MERCOSUR Parliament included only limited provisions, leaving decisive action in the hands of the governing bodies, and leaving the national parliaments of each Member State with greater convenience to act through the powers that such parliaments recognise. One essential lesson for the future for governments wishing to advance integration, is that the governing bodies of the bloc must be all-inclusive.

In conclusion, it has been seen that, during the 10 years following the creation of the original institutional structure, there were certain expectations (reflected in the Presidential Declaration of Iguazu) that institutional reform would be successfully completed. A lack of agreement among the representatives of the Member States, however, dissipated the reform efforts.

At the beginning of the process, the intergovernmental model provided support for this state of affairs, and this model was partly sustained by the lack of maturity of national governments enabling them to contemplate coexistence in a process regulated by supranational governing bodies.

Seventeen years after the signing of the TA, MERCOSUR is still highly dependent on the Member States, which makes it difficult to choose representatives for the bloc, or to establish an independent judiciary, jeopardising the judicial security that MERCOSUR needs. It remains a testimony to the failure to create supranational bodies with decision-making powers, and it has resulted in the adoption of decisions that have generated even greater confusion in the institutional structure, at the same time radically limiting the powers of the Secretariat.

The institutionalisation of the bloc is an aspect that the national governments should pay special attention to. Overcoming the current unsatisfactory state of affairs requires political will, and a willingness to look at the integration process through the lens of the benefits it generates. It is essential to move on from an unproductive debate which swings between extremes of rhetoric and actual practice, by fostering actions consistent with the signing of the Treaty of Asunción and all that the completion of the common market implies.

4

Sources of Law in MERCOSUR

Analysis of the Current Situation and Proposals for the Future

MARÍA BELÉN OLMOS GIUPPONI

I Introduction: MERCOSUR as A New Legal Order

The establishment of the Common Market of the Southern Cone (MERCOSUR) in 1991 represented the formation of a new legal order.[1] Indeed, the integration process created through the Treaty of Asunción (TA) included the basis for the establishment of a new legislative order. Over the past years, as the legal personality of MERCOSUR was reinforced, there were also important changes in the law.

To some extent, the past and the future development of MERCOSUR relies on the level of the commitment of the Member States expressed in the fulfilment of law, particularly in this phase of its evolution, in which we cannot speak of a supranational MERCOSUR legal system, at least, if we compare it to EU law. Even so, according to the final outcome outlined in the founding treaties (the integration and the harmonisation of the internal legislations) in a broader sense, we will refer to the MERCOSUR legal system as MERCOSUR community law.[2]

There are various sources of law in MERCOSUR, comprising not only the founding treaties but also the norms integrating the secondary law. In fact, from the beginning the Treaty of Asunción established that the main bodies of this organisation have legislative competence to rule on various aspects involved in the achievement of the common market.

Almost all binding MERCOSUR secondary norms must be transformed into national legislation. That is, most of the MERCOSUR laws integrating the secondary law of MERCOSUR must be internalised with adequate implementing measures adopted by each Member State.

The most problematic issue remains the lack of supremacy of MERCOSUR laws, as it is still an intergovernmental organisation in which we cannot observe the delegation of sovereignty.

[1] JA Vervaele, 'Mercosur and Regional Integration in South America' (2005) 54(2) *International and Comparative Law Quarterly* 387.

[2] J Kleinheisterkamp, 'Legal Certainty in the Mercosur: the Uniform Interpretation of Community Law' in *NAFTA: Law and Business Review of the Americas* (Winter 2000) 1–34 at 8.

The need for a permanent judicial organ in the institutional setting of MERCOSUR makes things even more difficult. The establishment of the Permanent Review Court was a step in the right direction, in order to provide for a consistent interpretation of the law of MERCOSUR, but many uncertainties still remain.

This chapter deals with the relevant issue of the sources of law in MERCOSUR. First, I will outline the main instruments and provisions forming part of the Law of MERCOSUR (primary and secondary law). Secondly, I will analyse the main features and hierarchy of MERCOSUR community law at the present stage of its evolution. Thirdly, I will address the question of interpretation and enforcement. Finally, I will draw the main conclusions from this analysis.

II Sources of MERCOSUR Community Law: Primary and Secondary Law

According to the definition provided by M. Benzig, under international law 'a source of law must by definition be one that produces binding abstract and general rules'.[3] According to the definition provided, another distinction to be made is between the primary and the secondary law of an international organisation.

Similarly to other international organisations, the institutional set-up and the main law-making process of MERCOSUR were established in the founding treaties. During the first phase, the so-called 'period of transition' which ran from the signing of the Treaty of Asunción until the entry into force of the Protocol of Ouro Preto (POP),[4] the sources of law in MERCOSUR were defined by the Treaty of Asunción. With the redefinition of the organisational structure brought into operation by the POP, the MERCOSUR legal order was also modified. In fact, the POP reformed the entire institutional set-up and the MERCOSUR legal system. In the following paragraphs we will examine the MERCOSUR primary and secondary law.

Over the past years, two important modifications with clear impact on MERCOSUR community law must be noted. It can be said that these two modifications go in the direction of the '*approfondissement-élargissement*' in the European Union's terminology. First, the institutional innovation introduced after the relaunching of the process in 2000 must be noted as an incentive for the improvement of MERCOSUR's legal system.[5] This relaunching determined the introduction of the Permanent Review Court through the Olivos Protocol in 2002, through which the dispute settlement system gained in certainty. Furthermore, the establishment of the MERCOSUR Parliament (in 2006) which replaced the Joint Inter-Parliamentary Commission also brought modifications to the MERCOSUR

[3] See M Benzing, *International Organizations or Institutions, Secondary Law* (Heidelberg, Max Planck Institute for Comparative Public Law and International Law and Oxford, Oxford University Press, 2009) available at www.mpepil.com.

[4] The Additional Protocol concerning the Institutional Structure of MERCOSUR was signed on 17 December 1994. The text of the treaty is available at (1995) 34 *International Legal Materials* 1244. The Protocol of Ouro Preto (POP) entered into force on 15 December 1995.

[5] CCM Decision No 23/00, Relanzamiento del MERCOSUR incorporación de la normativa MERCOSUR al ordenamiento jurídico de los Estados partes, available at www.mercosur.int/msweb/Normas/normas_web/Decisiones/ES/Dec_023_000_Relanzamiento_Incorp-Normativa_Acta%201_00.PDF.

legal system. Secondly, a further recent modification to be acknowledged as relevant is the accession of Venezuela to MERCOSUR as a Member State. The incorporation of this new state implied the redefinition of the contours of the *acquis communautaire* of MERCOSUR. Even if the Treaty of Asunción has foreseen this possibility, in practice, the accession of Venezuela to some extent happened unexpectedly quickly. According to the accession framework agreement, Venezuela must gradually incorporate the norms already adopted within MERCOSUR to progress to 'full' membership. It is foreseeable that once this process will be completed, the original MERCOSUR legal system will change significantly.

A MERCOSUR Primary Law

As in other integration processes, in MERCOSUR the primary law consists of the founding treaties. These are formally international treaties which must be ratified by the Member States to enter into force. MERCOSUR primary law covers an array of issues, such as commerce, culture and education. Frequently, these treaties are called 'Protocols' (article 41 POP). This article identifies the sources of MERCOSUR law including the Treaty of Asunción, its protocols and the additional or supplementary instruments, as primary sources of MERCOSUR community law.

Among the key instruments integrating the MERCOSUR primary law (core MERCOSUR law), we can include:

— the Treaty of Asunción and its five Annexes (1991);
— the Ouro Preto Protocol (1994);
— the Brasília Protocol on the Resolution of Disputes (1991);[6]
— the Olivos Protocol for the Resolution of Disputes (2002);[7]
— the Protocol establishing the MERCOSUR Parliament (2005).[8]

Thus, the primary law is formed by these documents, international agreements adopted under international law and approved by each Member State. In other words, MERCOSUR primary law includes the agreements adopted within the framework of the Treaty of Asunción, including all the Protocols.

There is no doubt about the legal value and applicability of the primary law. In this regard, the traditional norms of public international law are applied to the signature and to the entry into force of the treaties. With respect to the domestic effects of the primary law, these must be determined in accordance with the constitutional law of each state party to the treaties. And these domestic effects will depend on the national legal systems and, more specifically, on the approach to international law (dualist or monist) they adopt.

With regard to the agreements integrating MERCOSUR primary law, formally, they are treaties with a dual function.[9] On the one hand, these agreements have a public

[6] The Brasília Protocol is available at www.sice.oas.org/Trade/MRCSR/brasilia/pbrasilia_e.asp.
[7] The Olivos Protocol is available at http://untreaty.un.org/unts/144078_158780/5/7/13152.pdf.
[8] CCM Decision No 23/05, Protocolo Constitutivo del Parlamento del Mercosur. The Protocol is available (in Spanish) at www.parlamentodelmercosur.org.
[9] On the relationships between MERCOSUR and internal legal orders, see JC Cassagne, 'El Mercosur y las relaciones con el derecho interno', *La Ley* 1995-C, 875–82.

international law nature and, thus, impose obligations on states parties. On the other hand, these agreements are also internally applicable to citizens.

In addition to that, it must be noted that parallel agreements have been concluded with the associate countries.[10] These parallel agreements were signed by MERCOSUR acting as an international subject. The basis for the participation of the associated countries was established through the Decision adopted by the Council of the Common Market. According to the special status of these third states, they can participate in meetings in an ad hoc capacity. Commentators agree on recognising these agreements as a part of community law with limitations according to article 41 II POP, and they are, therefore, under the same rules.[11]

B MERCOSUR Secondary Law

Whereas MERCOSUR primary law consists of international treaties, MERCOSUR secondary law is the one produced by the main bodies of MERCOSUR. It can be said that MERCOSUR secondary law derives from primary law, in the sense that the allocation of legislative competences and the form that these acts may take are defined in the founding treaties. Within MERCOSUR, the competence to adopt legal acts is shared by different bodies.

According to the Protocol of Ouro Preto, the three bodies with legislative power are:[12]

(a) the Council of the Common Market (CCM);
(b) the Common Market Group (CMG);
(c) the MERCOSUR Trade Commission (MTC).

As regards the competences of the Council of the Common Market, it has developed a clear role with regard to MERCOSUR primary law, because it has 'to supervise the implementation of the Treaty of Asuncion, its protocols, and agreements signed within its context'.[13] Among its legislative functions there is that of ruling on proposals submitted to it by the Common Market Group. In addition, it exercises the legal personality of MERCOSUR and can conclude agreements with third countries or international organisations. The legislative acts emanating from the CCM take the form of Decisions 'which shall be binding upon the States Parties'.[14]

Among the functions of the Common Market Group, those of a legislative nature include:[15]

— to propose draft Decisions to the Council of the Common Market;
— to approve or reject MERCOSUR norms as proposed by the CCM.

[10] MERCOSUR and Chile signed the Acuerdo de Complementación Económica Mercosur–Chile on 25 June 1996 and, respectively, MERCOSUR did the same with Bolivia by concluding the Acuerdo de Complementación Económica Mercosur–Bolivia on 17 December 1996.

[11] See Kleinheisterkamp, 'Legal Certainty in the Mercosur' (n 2).

[12] Apart from the three bodies mentioned, the institutional sett-up of MERCOSUR is completed with the Economic and Consultative Forum, the Administrative Secretariat, the Parliament and the Permanent Review Court.

[13] Article 8 POP.

[14] Article 9 POP.

[15] Article 14 POP.

The Decisions of the Common Market Group take the form of Resolutions which are binding upon the states parties.[16] As an executive function, the Common Market Group must take the measures necessary to enforce the Decisions adopted by the CCM.

It is also necessary to mention that in the international sphere, the CMG can also negotiate agreements on behalf of MERCOSUR with third countries, groups of countries and international organisations when such duty is expressly delegated to it by the CCM and within the limits laid down in special mandates granted for that purpose. In these cases, the CMG will sign such agreements. Also when authorised by the CCM, the Common Market Group may delegate these powers to the MERCOSUR Trade Commission.

With regard to the MERCOSUR Trade Commission,[17] article 20 POP states that 'the decisions of the MERCOSUR Trade Commission shall take the form of Directives or Proposals. The Directives shall be binding upon the States Parties'.[18]

Therefore, MERCOSUR secondary law consists of these various acts laid down by MERCOSUR bodies. The agreements with third countries and international organisations must also be included in MERCOSUR secondary law. With regard to the acts passed by these organs endowed with the power of decision, different acts can be outlined. Within MERCOSUR secondary law we can distinguish between Decisions, Resolutions and Directives (article 41 POP).

The creation and operation of the Parliament introduces a significant change if we compare it with its predecessor.[19] Furthermore, the active participation of the Parliament in the law-making process would fill the void of the democratic deficit by representing the interests of MERCOSUR citizens.[20]

According to the Protocol establishing the Parliament of MERCOSUR, this body will have advisory as well as normative functions. Article 19 of the Protocol stipulates that the acts that the Parliament can adopt are opinions, statements, recommendations, reports and provisions. In this list it is necessary to distinguish between the acts adopted by the Parliament in the legislative process and the drafting of rules to be subsequently adopted by other bodies.[21] Moreover, in an advisory role, it is expected that the Parliament will give advice, prepare reports, and adopt statements and recommendations. With regard to the procedural aspects, the regulation of the MERCOSUR Parliament determines the participation of this legislative body in the law-making process. The intervention of the

[16] Article 15 POP.

[17] The MERCOSUR Trade Commission was an innovation of the Protocol of Ouro Preto. It has a function in the dispute settlement mechanism (see below).

[18] Article 16 POP stipulates: 'III. It shall be the task of the MERCOSUR Trade Commission, a body responsible for assisting the Common Market Group, to monitor the application of the common trade policy instruments agreed by the States Parties in connection with the operation of the customs union, as well as to follow up and review questions and issues relating to common trade policies, intra-Mercosur trade and third countries. To take decisions connected with the administration and application of the common external tariff and the common trade policy instruments agreed by the States Parties. VI. To report to the Common Market Group on the development and application of the common trade policy instruments, on the consideration of requests received and on the decisions taken with respect to such requests'.

[19] CM Díaz Barrado and MB Olmos Giupponi, 'El establecimiento del Parlamento del Mercosur: Reflexiones desde la experiencia europea' in *Breviario de Relaciones Internacionales* (Centro de Estudios Avanzados, 2007) available at www.cea.unc.edu.ar/boletin/n-anteriores/009/articulo1.pdf.

[20] MB Olmos Giupponi, *Mercosur y ciudadanía, en América Latina, Hacia su Unidad: Modelos de integración y procesos integradores* (Valencia, Pre-textos, 2008).

[21] See the details of the functions of the Parliament of MERCOSUR at www.parlamentodelmercosur.org. The internal organisation of the Parliament is regulated by MERCOSUR/PM/SO/DISP 07/2009.

Parliament is prescribed in respect of Decisions, Resolutions and Directives issued by the Council of the Common Market, the Common Market Group or the MERCOSUR Trade Commission, respectively, in the event that they require involvement of national parliaments in the implementation of standards. In addition to these legislative functions, the Parliament may also request an advisory opinion from the Permanent Review Court.[22] In our comparison between the European Parliament and the 'brand-new' MERCOSUR Parliament in 2006, we suggested progressively increasing its functions following the experience of the European Parliament.[23] At this stage, the MERCORSUR Parliament has only formal legislative powers; to develop these it is necessary to modify the legislative procedure and guarantee coordination with other MERCOSUR bodies such as the CCM.

To date, the relationship in terms of legislative powers has remained cryptic. The constitution of the high level group on the relationship between the CCM and the Parliament (Grupo de Alto Nivel sobre la Relación Institucional entre el Consejo del Mercado Común y el Parlamento del MERCOSUR-GANREL) is intended as the first step toward a more detailed definition of the different competences among MERCOSUR bodies.[24]

After considering the legislative competence of different MERCOSUR bodies, it is worth analysing in detail the types of legal acts of MERCOSUR. In order to do so, we have to differentiate between the different categories mentioned above.

Decisions Through its Decisions, the CCM sets out the general policies for the integration process. These norms are connected to the development of a community policy in a specific issue. They are addressed to all Member States, which may need to modify their own law in order to comply with them. Taking into account the various matters addressed in the different Decisions approved up to now, these comprise a vast range of issues, such as the creation of ministerial meetings, negotiations with the European Union and the adoption of other protocols. Decisions are particularly useful when the aim is to harmonise national laws within a certain area or introduce legislative change.[25]

Resolutions Resolutions are adopted by the CMG and are binding on all Member States.[26] The resolutions cover an array of subject matters related to freedom of circulation within the MERCOSUR area, eg commercial aspects, documents required for MERCOSUR citizens,[27] budgetary aspects and relations with third states.

[22] See Protocol establishing the Parliament of MERCOSUR, art. 13. For more on the advisory role of the Permanent Review Court, see Nadine Susani, Chapter 5.

[23] CM Díaz Barrado and MB Olmos, 'El establecimiento del parlamento del MERCOSUR: reflexiones desde la experiencia europea' in 6 *Breviario de Relaciones Internacionales* (Centro de Estudios Avanzados, Universidad Nacional de Córdoba) available at www.cea.unc.edu.ar/boletin/n-anteriores/009/articulo1.pdf. On the evolution of the competences of the Parliament in the legislative procedure, see A Rasmussen and M Shackleton, 'The Scope for Action of European Parliament Negotiators in the Legislative Process: Lessons of the Past and for the Future', University of Copenhagen/European Parliament paper prepared for the Ninth Biennial International Conference of the European Union Studies Association, Austin, Texas, 31 March–2 April 2005, available at http://aei.pitt.edu/2983/01/EUSA_Rasmussen_and_Shackleton1.txt.

[24] The group was established by CCM Decision No 47/08, available at: www.mercosur.int/.

[25] See, eg CCM Decision No 08/95, Protocolo de armonización de normas sobre propiedad intelectual en el Mercosur, en materia de marcas, indicaciones de procedencia y denominaciones de origen.

[26] The various resolutions adopted by the Common Market Group are available at www.sice.oas.org/trade/mrcsrs/resolutions/indice.asp.

[27] See, eg Resolución sobre los documentos de cada Estado Parte que habilitan en tránsito de personas en el MERCOSUR (Derogación de la Res GMC No 75/96).

Directives Directives differ from Decisions and Resolutions in two important aspects: they regulate specific technical commercial issues and in many cases they are not meant to be incorporated (ie they are of a self-executing nature).[28] Article 20 POP stipulates that Directives are binding on all Member States.

All these different acts integrating MERCOSUR legislation must meet the formal requirements established by article 39 POP in order to become applicable: 'The content of the Decisions of the Council of the Common Market, the Resolutions of the Common Market Group, the Directives of the MERCOSUR Trade Commission and the Dispute Settlement Arbitration Rulings shall be published in full, in Spanish and Portuguese, in the MERCOSUR Official Journal, together with any instrument which, in the view of the Council of the Common Market or the Common Market Group requires official publicity'.[29]

Just as in the European Union, within MERCOSUR we can also recognise 'atypical acts' or, in other words, acts which originated at different levels whose legal nature is not clear.[30] Take, for instance, the Socio-Laboral Declaration, which was adopted by the Member States as a programmatic document, but was nevertheless frequently interpreted, and applied, by national courts.[31]

Whereas the MERCOSUR primary law is undoubtedly binding and there is no need for the Member States to undertake internal measures, Decisions, Resolutions and Directives must be 'internalised'. In other words, this law of integration which is set out by the organs needs to be transformed into national laws by each individual Member State. The following section addresses the internalisation and the hierarchy of MERCOSUR law, two closely linked issues.

C Main Features of MERCOSUR Community Law

The recognition of the legislation emanating from MERCOSUR as community law has generated a vast academic literature. The main position emphasises that MERCOSUR's legal system is still intergovernmental since Member States have not as yet given up sovereign powers. The main argument in this direction underlines that not even the POP has provided the bodies with supranational powers. In the case of the law emanating from MERCOSUR bodies, the recognition of the typical features of community law in European terms (direct effect and supremacy) is very controversial.[32] As J Kleinheisterkamp

[28] See D Ventura and AD Perotti, 'El Proceso Legislativo del Mercosur', 63, available at www.kas.de/wf/doc/kas_5232–544–1-30.pdf.R.E.

[29] See Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR, Protocol of Ouro Preto, available at www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp.

[30] In the European Union, the atypical acts are 'legal instruments which do not feature in the nomenclature of Article 249 of the Treaty establishing the European Community (EC Treaty)': see European Union http://europa.eu/scadplus/leg/en/lvb/l14535.htm. Some of these acts are mentioned in the Treaty, such as Rules of Procedure, while others have emerged in practice.

[31] HR Mansuetti in his dissertation has examined in detail the implications of the Socio-Laboral Declaration. The full text (in Spanish) is available at http://200.16.86.50/digital/34/Tesis/Mansueti1–1.pdf. HR Mansueti, 'Naturaleza jurídica y proyección institucional de la declaración sociolaboral del Mercosur' (Tesis (doctorado), Facultad de Derecho y Ciencias Políticas, Universidad Católica Argentina, Buenos Aires, 2002).

[32] According to the doctrine of the European Court of Justice established through its case law in *Van Gend en Loos* (Case 26–92, 1963 European Court Reports 3) and *Costa v ENEL* (Case 6–64, 1964 European Court Reports 585). By direct effect we understand that citizens have rights under community law which they can invoke before the national courts and, therefore, they can apply community law. Supremacy means that the norms belonging to

recalls, 'the entire legal system of the Community, from a narrow point of view, so far only represents a construction of public international law, raising doubts about the justification to speak of a Community law as a legal order (*sui generis*) independent from classical public international law'.[33] Scholars agree that, at the current stage, MERCOSUR law can be considered as a law of integration which is a specialised category within public international law.[34]

In our view, even if the law of MERCOSUR cannot be considered community law in the European Union's sense, the latest developments allow us to refer to it as a law of integration, or in a broad sense to be community law in *status nascendi*. To properly assess the nature of the legal order created by MERCOSUR it is necessary to bear in mind the main objective of the Treaty of Asunción: with the formation of MERCOSUR, Member States envisaged the creation of a common market (article 1).[35] The accomplishment of this objective implies the commitment of Member States to 'harmonise their legislation in the relevant areas to achieve the strengthening of the process of integration' and in the long run the creation of community law. Accordingly, in the following paragraphs, we will, first of all, examine the features of the law of MERCOSUR in the light of the case law; and secondly, focus on the analysis of the supremacy of MERCOSUR law over the legislation of Member States.

(i) The Progressive Affirmation of an Autonomous MERCOSUR Community Law

In the series of arbitral decisions which have been issued, different elements reinforcing the notion of a MERCOSUR community law can be identified.[36] Two awards in particular are noteworthy. The first, issued in 2005 by an ad hoc arbitration court, underlined the different norms to be taken into account in solving a dispute between two different Member States (in the light of article 19 of the Protocol of Brasília).[37] The court clarified (on the basis of the previous awards) that, apart from MERCOSUR norms, courts should apply the traditional norms and principles of public international law, but always in accordance with the MERCOSUR legal system. This implicitly recognised that the MERCOSUR legal system is something more than a typical public international legal order.

The second decision, delivered in the controversy *Prohibition on the Importation of Retreaded Tyres from Uruguay* (2005), emphasised the idea of the law of MERCOSUR as an autonomous legal order. In this case, the Permanent Review Court stated:

> The Court is aware that notwithstanding the fact that the principles and provisions of international law are included in the Olivos Protocol as one of the laws to be applied (Art. 34), its application must be only on a subsidiary (or in the best case supplementary) basis and only where

community law take precedence over national norms. Some scholars also distinguish direct applicability as another feature related to the execution of the norms, in the case of those which are self-executing.

[33] Kleinheisterkamp, 'Legal Certainty in the Mercosur' (n 2).

[34] See M Klumpp, 'La efectividad del Sistema Jurídico del Mercosur' in M Basso (ed), *MERCOSUR-Mercosul, Estudos em homenagem a Fernando Henrique Cardoso* (Sao Paulo, Atlas 2007) 91.

[35] Moreover, the POP emphasised the need for the harmonisation of laws between Member States.

[36] It is important to highlight that the Protocol of Brasília in its art. 19 distinguishes the sources of law applicable to resolve the disputes, and so does the Olivos Protocol in art. 34.

[37] Laudo arbitral de 5 de agosto de 2005 'controversia sobre medidas discriminatorias y restrictivas al comercio de tabaco y productos derivados del tabaco' (Uruguay v Brazil).

applicable to the case, and never as a direct and first choice, as in the case of a law on integration (which is MERCOSUR law) or a Community law (such as a recommendation), which is not yet the case with MERCOSUR law due to the absence of supranationality. To sum up, the law of integration has and should have sufficient autonomy from other branches of law.[38]

(ii) The Question of the Supremacy of MERCOSUR Law

This is a key issue in order to achieve the status of community law. When referring to the supremacy of the legal norms integrating MERCOSUR community law, this must be analysed in the light of the basic principles laid down in the agreements, in particular, the idea of the integration as a continuous and progressive process aimed at creating a common market and giving rise to community law. So far, the supremacy of MERCOSUR primary and secondary law has been interpreted according to each constitutional system and the different solutions adopted.

If we examine the different constitutional provisions of the MERCOSUR Member States, we can distinguish various positions with regard to the law of MERCOSUR.[39] Summing up the main positions, the differences among systems can be identified as follows:

Argentina The Argentinean Constitution adopts the monist theory in international law which recognises the supremacy of legal acts arising from MERCOSUR rules. Thus, since the entry into force of MERCOSUR regulations, they should take primacy over others, and therefore, may take a constitutional or a supralegal form, considering their authority. The problem relating to the interpretation of (prevalent) MERCOSUR norms may be solved in the light of article 75, paragraphs 22 and 24 of the Constitution. This article provides for the predominance of treaties and rules adopted under these treaties.

Brazil The Brazilian Constitution takes a dualist position in the recognition and internalisation of norms into the domestic legal order. This leads (in some cases) to a conflict between the internal legislation and international law. The problem is determined by the need for parliamentary approval of the norms derived from MERCOSUR bodies. Similarly, article 84, paragraph 8 of the Brazilian Constitution stipulates that the President may conclude treaties, conventions and international covenants, from the moment they are endorsed by the federal legislature of National Congress. This issue raises serious problems as regards incorporating the rules arising from MERCOSUR. Therefore, MERCOSUR norms in Brazil, once internalised, rank below the constitutional norms and must take the form of ordinary law. It should be mentioned that the treaties are incorporated by decree sanctioned by the President of the Republic and may be implemented by regulation.[40] International standards integrated into Brazilian domestic order take the form of a legislative decree issued by the executive (presidential decree). As for other rules, internalisation is operated through various forms of administrative acts based on the content of

[38] *Prohibition on the Importation of Retreaded Tyres from Uruguay* (2005).

[39] L Klein Vieira and CA Gomes Chiappini, *Análise do Sistema de Aplicação da normas emanadas dos Órgãos do Mercosul nos ordenamentos jurídicos internos dos Estados partes*, Centro Argentino de Estudios Internacionales (www.caei.com.ar), Programa Derecho Internacional, available at www.caei.com.ar/es/programas/di/55.pdf. See also Martha Olivar, Chapter 10.

[40] Also, the rules of the MERCOSUR are conditional and depend on a complex act resulting from the combination of the competence of Parliament and the President. The President of the Republic puts forward international acts (Federal Constitution, art. 84.VIII), while the Congress is solely qualified to endorse them (art. 49.I). Integration into the regulatory body also requires enactment, the act that determines the standard of promulgation, by executive decree.

the presidential decrees, which, as discussed, are used to pass the originating standards and regulations or tariff measures derived from the institutions. These '*portarias*' (the name given to the administrative acts issued by the ministers or secretaries of state and other authorities), are used in many cases to incorporate MERCOSUR norms.[41]

Paraguay This Member State recognises the supremacy of international treaties, confirmed by article 137 of the National Constitution of Paraguay and paragraph 141 of this provision. With regard to the procedure for the incorporation of MERCOSUR norms, it follows a process of shared competence between the executive and legislative branches, but with emphasis on the consideration of the international norm as superior to national norms.[42] In this way, after following the legislative procedure established by the Constitution, MERCOSUR norms enter into force within the Paraguayan order as a constitutional or supralegal norm. They may take the form of an act to amend the Constitution or any other form indicating the special nature of the act to keep the status of legislation transposed and applied within the national system. It should be noted that the Constitution of Paraguay states that any MERCOSUR norm, once incorporated by the decree of the President, will assume the form of law with primacy over the national legislation.

Uruguay The Constitution of the Republic of Uruguay (1997) also provides a procedure for the recognition of an international treaty or act. According to the articles 168, paragraphs 20 and 85.7, the executive may sign agreements or treaties which require also parliamentary ratification. The question which raises doubts concerns the validity of the rule after its adoption by the competent authorities. The Uruguayan Constitution did not anticipate a solution because there is no provision for the hierarchical position of international and MERCOSUR norms in the internal legal system. Additionally, article 239 states that the Constitution is the supreme law of the legal system, and as such all other acts must be consistent with it. The absence of an explicit provision has lead to a judicial interpretation which favours the treaty. However, the jurisprudence on the matter has not been harmonised in one sense, which causes even more uncertainty. With regard to the incorporation of the resulting norm, it can take the form of law or administrative act, depending on the subject; these may also include the executive decree, ministerial resolutions and ordinances.

Venezuela As for the Venezuelan constitutional provisions concerning community law, it must be noted that in its Preamble the Venezuelan Constitution (1999) recognises regional integration as one of its main objectives.[43] In addition, article 153 provides that 'the Republic shall promote and encourage Latin American and Caribbean integration including the economic, social, cultural, political and environmental aspects', whereas article 154 states that the treaties concluded by the Republic must be approved by the National Assembly before its ratification by the President. Once ratified, the treaties are incorporated into the internal legal order and they have prevalence over national laws.[44]

[41] This is the case of those norms relating to MERCOSUR technical regulations.

[42] In practice, the need for the adoption of acts by international law is not defined by the formal quality or the form of consultation that has been assigned, but given its content, is linked to the legal nature of the rule.

[43] A Brewer Carias and J Kleinheisterkamp, 'Unification of Laws in the Venezuelan Federal System', paper delivered at the conference Uniform Law and its impact on National Laws and Possibilities, International Academy of Comparative Law, Centro mexicano de Derecho Uniforme, Instituto de Investigaciones Jurídicas, UNAM, Mexico City, 13 November 2008.

[44] CA Romero, MT Romero and E Cardozo, 'La política exterior en las constituciones de 1961 y 1999: una visión comparada de sus principios, procedimientos y temas' in (2003) 9(1) *Revista Venezolana de Economia y Ciencias Sociales* 163.

Considering these constitutional provisions (articles 153 and 154), scholars agree on recognising the features of self-execution and direct applicability in the case of norms emanated from the Andean Community.[45] Therefore, this would also seem to be, *mutatis mutandis*, the case of MERCOSUR norms currently applicable in the Venezuelan legal order.

As one can observe, the absence of a genuinely supranational law has lead to a specific problem: differences in the hierarchy and in the internalisation of rules in each state. In this process of internationalisation, each Member State is free to select the forms it considers more appropriate for the norm to enter into force. This specific form selected will determine the position of the Community law in the internal legal order. On the other hand, and so far, the transposition process has been ad hoc.[46] There have even been Resolutions giving no indication as regards internationalisation—in fact, a considerable number of norms do not lay down any kind of provision for their internalisation.[47] Different attempts to solve this complex situation have been made up to the present, with no success in providing a clear system. A good starting point could have been article 42 POP, but this provision is extremely confusing. In fact, an examination of the article shows that it stipulates that the acts adopted by MERCOSUR bodies are mandatory and, only 'if necessary', need to be incorporated by each Member State into their national legal systems according to their requirements. This ambiguity gives rise to different interpretations on the part of scholars.[48] The broad interpretation of this article has contributed to the development of the so-called 'doctrine of simultaneous effect' (*vigencia simultánea*).[49] As J Bergamaschine states, the lack of supranationality and the current system of internalisation has allowed authors to talk about limited supranationality, which would consist of the norms coming into force simultaneously.

As can be seen after this brief review of the legal systems of Member States in relation to the MERCOSUR legislation, the importance of establishing a successful community institutional structure and means of implementation must be emphasised. Adopting an effective implementation system does not necessary mean establishing a single procedure for each state, but recognising that certain norms are immediately applicable. At the same time, it would be advisable to create a single regulatory framework in the case of those norms which require transposition, to reduce the risk of legal uncertainty and excessive delay. In order to adopt the principles of supremacy, direct effect and direct applicability, these principles need to be stated in the Treaty of Asunción and different standards or categories of norms should be distinguished, according to the issuing body, the subject

[45] See J Petit and E Caliguri, 'La Constitución Venezolana de 1999: Una herramienta eficaz para la integración andina', available at www.unc.edu/depts/diplomat/archives_roll/2002_04–06/caligiuri_venez/caligiuri_venez.html.

[46] On the transposition process, see www.cari.org.ar/pdf/normas-mercosur.pdf.

[47] A Perotti and D Ventura have analysed these cases in detail, see D Ventura and AD Perotti, 'El Proceso Legislativo del Mercosur', available at www.kas.de/wf/doc/kas_5232–544–1-30.pdf.R.E. See also A Perotti and D Ventura, *Primer Informe sobre la aplicación del derecho del MERCOSUR por los Tribunales Nacionales y sobre la aplicación del derecho nacional a través de los mecanismos de cooperación jurisdiccional internacional de Mercosur*, Estudio 003/04 (Montevideo, Secretaría del Mercosur, 2004).

[48] Even if there were attempts to correct this initial lack of clarity in the legislation through the adoption of various Decisions issued by the Council (Decisions 20/02 and 22/04), the situation is still confusing. See, eg CCM Decision No 23/00; CCM Decision No 20/02; CCM Decisions No 07 and No 08/03; CCM Decision No 22/04.

[49] J Bergamaschine Mata Diz, 'El Sistema de Internalización de normas en el Mercosur: la supranacionalidad plena y la vigencia simultánea' in (2005) 11(2) *Revista Ius et Praxis* 227, available at www.scielo.cl/scielo.php?pid=S0718–00122005000200007&script=sci_arttext.

matter and the addressee. Likewise, it will be indispensable to make the aims of the norms explicit so that once incorporated into the internal procedures of each Member State, they achieve the outcomes desired. With the adoption of an effective system, the legal instruments emanating from MERCOSUR—Decisions, Resolutions and Directives—would, thus, have a common legal basis regarding their implementation and the actions to be taken by each Member State in order to internalise them.

III The Interpretation and Enforcement of MERCOSUR Community Law

As regards the enforcement of MERCOSUR community law, taking into account the 'constitutional asymmetries' analysed above, it is quite difficult to ensure a uniform degree of compliance.[50] In fact, the constitutional systems, the internal hierarchy of the norms and the solutions adopted by Member States are diverse. Whereas Argentina and Paraguay reformed their Constitutions in order to bring them in line with the community law of MERCOSUR, the hierarchy of MERCOSUR community law is still debatable in other Member States. On the other hand, the reports issued by the Administrative Secretariat of MERCOSUR indicated that an important number of secondary norms were not internalised by Member States. Moreover, in some cases, the norms have been modified before their internalisation.

Domestic constraints make compliance with MERCOSUR law more difficult. E Buscaglia reminds us that even if legal convergence is a trend in Latin America, the case of MERCOSUR illustrates how sometimes internal crises or prevalent national interests interfere with legal harmonisation.[51]

Similarly, there is no specific mechanism to control the enforcement of MERCOSUR law in the Member States aside from the arbitral procedure outlined in the Olivos Protocol.[52] Consequently, the only means to control the implementation of MERCOSUR law is through the dispute settlement mechanism. It should be pointed out that this mechanism has its inconveniences, especially in a controversial area such as trade law, in which there is a permanent difficulty in bringing MERCOSUR laws in line with WTO legislation.[53]

The awards issued by different ad hoc arbitration courts constituted for the resolution of the disputes and, recently, by the Permanent Review Court laid down a minimum legal basis in order to assess the compliance of Member States with the law of MERCOSUR. In particular, during the controversy *Prohibition on the Importation of Retreaded Tyres from Uruguay* (2005), the Permanent Review Court adopted a clear position with regard to the

[50] See C Pena and R Rozemberg, 'Mercosur: a Different Approach to Institutional Development', available at www.focal.ca/pdf/mercosur.pdf.

[51] E Buscaglia and W Ratliff, 'Law and Economics in Developing Countries' in *Legal and Economic Integration: the Cases For and Against Legal Transplant* (Hoover Press, 2000) ch 2, 31–54.

[52] Unlike the European Union and the Andean Court of Justice, in MERCOSUR a specific procedure to judge non-compliance with community law is lacking.

[53] See J Qin, 'The Mercosur Exemption Reversed: Conflict Between WTO and Mercosur Rulings and its Implications for Environmental Values', *ASIL Insights*, 23 January 2009, available at www.asil.org/insights070905_update.cfm. See also Samantha Ribeiro, Chapter 7.

violation of community law. In its considerations, the Court analysed the compliance of Member States with MERCOSUR law, emphasising that within the Andean Court of Justice (TJCA, Tribunal Andino de Justicia) and the European Court of Justice, there have been several cases in which, once the infringement was confirmed before the community court, the defendant member state had struck down the infringing rule and adopted a new one aimed at responding to the challenge made by the other member state.[54] Therefore, the Court has preferred the thesis adopted by the TJCA as regards the continued non-compliance, stressing that in the cases of violation of community law, the object of prosecution is the behaviour regardless of the forms and instruments of which it consists.

A closely linked issue is the interpretation of MERCOSUR community law, because it affects the enforcement of the law of MERCOSUR. In other words, how the law of MERCOSUR is interpreted will allow us to examine its effectiveness in practice.

The sources of primary law have been applied by national judges. Even if the agreements have the nature of public international law rules, they grant rights and impose duties directly on the citizens of the Member States. National judges and domestic courts have also applied MERCOSUR secondary norms in various cases to solve disputes between private parties. The lack of coherence amongst different interpretations leads to legal uncertainty.

As a matter of interpretation, the absence of a permanent court of justice *stricto sensu* makes things even more difficult in MERCOSUR.[55] Nevertheless, the dispute settlement mechanism (with its clear limitations) has contributed to some extent to the fostering of a common interpretation of MERCOSUR law. The first arbitration awards in MERCOSUR laid down the basis for a uniform interpretation.[56] Under the Protocol of Brasília mechanism (1994–2002), 11 arbitral awards concerning different aspects of MERCOSUR law were handed down.[57] As RE Vinuesa states, 'all awards were founded on pre-existing MERCOSUR law as well as general principles of international law'.[58]

With the new system established by the entry into force of the Olivos Protocol (2002), Member States seek to provide for a homogeneous interpretation of MERCOSUR law. In the reshaped structure, the Permanent Review Court has as its main function to guarantee the uniform interpretation of MERCOSUR law. The creation of the Permanent Review Court introduced a sort of preliminary ruling system. Under the Olivos Protocol, the Court may issue advisory opinions (preliminary rulings) following a request by authorised bodies of MERCOSUR or the Member States jointly, and also when requested by the domestic Supreme Courts of the Member States.[59] Consequently, the Court can come to a decision on the scope of a MERCOSUR norm when there is a possible conflict with

[54] Original text in Spanish, author's translation.

[55] See MB Olmos Giupponi, 'El Tribunal del Mercosur' in *Tribunales Internacionales* (Madrid, Thomsom-Aranzadi, 2008).

[56] D Ventura, 'First Arbitration Award in Mercosur: a Community Law in Evolution?' (2000) 13 *Leiden Journal of International Law* 447.

[57] The awards are available (in Spanish) at www.mercosur.int/msweb/portal%20intermediario/es/controversias/laudo.html.

[58] See www.kas.de/wf/doc/kas_5232–544–1-30.pdf. RE Vinuesa, 'Enforcement of Mercosur Arbitration Awards within the Domestic Legal Orders of Member States' (2004–2005) 40 *Texas International Law Journal* 425. See also EJ Cárdenas and G Tempesta, 'Arbitral Awards under Mercosur's Dispute Settlement Mechanism' (2001) *Oxford Journal of International Economics* 442.

[59] Olivos Protocol, art. 3. Rules of Procedure for the Request of Advisory Opinions to the Permanent Tribunal of Revision by the Superior Tribunals of the Member States, CCM Decision No 02/07, adopted on 18 January 2007.

another domestic or community norm. In any case, the decisions adopted are not binding on MERCOSUR bodies, Member States or national Supreme Courts.

Over the past two years, the Permanent Review Court has had occasion to clarify the interpretation of MERCOSUR community law by exercising such advisory competence. In the first preliminary ruling issued in 2007, the Court specified the nature and the function of the preliminary ruling system, stressing that this is a mechanism to enhance the cooperation between the national and the community judge which aims to provide a uniform interpretation of community norms.[60] On that occasion, the Court also pointed out that, unlike in the MERCOSUR system, in both the European Union and the Andean Community preliminary rulings are binding. In addressing the request, the Court examined carefully the predominance of MERCOSUR community law over domestic legislation and public and private international law norms. More recently, Advisory Opinion 1/2008 emphasised the primacy of MERCOSUR community law, holding that MERCOSUR norms, once internalised in accordance with articles 38–42 of the Ouro Preto Protocol and the Constitutions of Member States, take precedence over domestic legislation.[61]

IV Concluding Remarks: Some Reflections on the Future of Mercosur and the Establishment of a 'True' Community Law

MERCOSUR, as a new integration process in Latin America, is one of the most successful experiences of the new millennium. At its commencement, MERCOSUR fulfilled expectations about the establishment of a customs union. The initial legal architecture was adapted to a pragmatic and intergovernmental process.

Over time, improvements in the MERCOSUR legal system have been closely linked to the evolution of economic integration. In fact, the development of this new legal system depends to some extent on the deepening of the integration and the achievement of a common market.

The evolution of community law in MERCOSUR shows how the legal system attempted to adapt to each stage of the integration process. In many regards, the current period can be seen as a turning point for the MERCOSUR legal system. After more than 15 years, with the latest institutional changes and the incorporation of a new Member State, it seems that a revision of the whole legislative procedure is required.

The dispute settlement decisions issued by the ad hoc arbitration courts and the Permanent Review Court have contributed to laying down the basis for MERCOSUR community law. However, the lack of a permanent judicial set-up determined a weak response to cases of non-compliance with the legal system.

Even though the establishment of the MERCOSUR Parliament represents an important contribution to the development of MERCOSUR law, the nature of the legislative powers

[60] Advisory Opinion 1/2007, originated in the request of the Paraguayan Supreme Court, available at www.mercosur.int/msweb/portal%20intermediario/PrimeraOpinionConsultiva-Versionfinal.pdf.

[61] Advisory Opinion 1/2008, issued following the request of the Supreme Court of Uruguay, available at http://asadip.files.wordpress.com/2009/04/oc-1–2008-ms-primacia-d-del-ms.pdf.

of the Parliament are uncertain. In particular, it is difficult to predict how all these changes will be implemented in the legislative process. It is clear that such legal uncertainty is a consequence of a currently fragile system.

To date, MERCOSUR is still an intergovernmental process. So far, Member States have not agreed on granting MERCOSUR supranational powers. The transposition process is far from clear, efficient and transparent. Various attempts have been made to provide an improved mechanism.

The future improvement of the integration depends on the improvement of MERCOSUR community law, which means also recognising a greater level of supranationality. This is a 'chicken or egg' question, as it is not clear whether it is necessary to reform the treaties first or change the political will of the states.

To conclude, it is important to bear in mind that the construction of a common legal order is not only necessary to achieve the common market, but also represents the basis for a deeper integration aiming at creating an authentic supranational community beyond the economic goals.

5

Dispute Settlement

NADINE SUSANI

The first international jurisdiction was born in Latin America. The Central American Court of Justice, known as the Court of Cartago, was formed in 1907[1] to resolve disputes between five Central American nations: Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. Despite the existence of the Central American Court of Justice, states of the South American continent such as Argentina, Brasil, Uruguay and Paraguay have never looked favourably upon the use of a court to settle their disputes.[2] These states were usually more favourable to a conciliation approach or an arbitration method. This is the reason why the experiences of continental integrations in the commercial sphere were weakly institutionalised at the time. The Latin American Free Trade Association (ALALC, Asociación Latinoamericana de Libre Comercio),[3] created in 1960 and replaced in 1980 by the Latin American Integration Association (ALADI, Asociación Latinoamericana de Integración),[4] was even not endowed with an initial dispute settlement mechanism.

In such a context, when MERCOSUR was formed in 1991, the founding states decided to establish a common market but they could not agree on a definitive procedure for dispute settlement. They were very ambitious on the issue of economic integration objectives but they were only able to achieve weak institutionalisation, with a temporary system of dispute settlement. Annex III of the Treaty of Asunción established a system whereby states which could not settle disputes by negotiations could bring them before the Common Market Group (CMG) for an attempt at first mediation. If this body failed, the affair had to be sent to the Council of the Common Market Council (CCM). In fact, the more important political arm of MERCOSUR was in charge of settling such unresolved disputes. The result is that resolution of disputes was subject to the will of the states.

[1] Treaty of 20 December 1907. This court was dissolved in 1918.

[2] These states have never followed the Andean or Central American conceptions in the sphere of dispute settlement.

[3] The ALALC was established by the Montevidéo Treaty, signed on 18 February 1960, by Argentina, Brasil, Chile, Mexico, Paraguay, Peru, Uruguay, Colombia and Ecuador (1961), Venezuela (1966) and Bolivia (1967). The dispute settlement Protocol was approved only in 1967 in Asunción and it entered into force in 1971. It proposed to solve members' disputes by negotiations. If they failed, disputes were to be presented before the Permanent Executive Committee which could propose a mediation. If no solution was reached, states could send the dispute before an arbitral tribunal. The weakness of its institutionalisation is generally seen as the cause of its failure, see F Orrego Vicuña, 'Contemporary International Law in the Economic Integration of Latin America: Problem and Perspective' in J Rideau (ed), *Aspects juridiques de l'intégration économique*, (Sijthoff Leiden, International Law Academy of The Hague, 1972) 155–57.

[4] The ALADI was established by the Montevidéo Treaty, signed on 13 August 1980. It contains no dispute settlement mechanism. It had to await the adoption of Resolution No 114 of the Representative Committee of 22 March 1990 for the inclusion of a very elementary dispute settlement mechanism.

This weight of tradition is not the only factor that has contributed to the low level of MERCOSUR's institutionalization. There was an ideological reason as well. In the neo-liberalism era of the early nineties, the leaders of the four MERCOSUR states parties were convinced that a 'real' economic integration had to precede the institutionalisation. They took the opposite view of the functionalist theory in which institutionalisation is considered as a lever of economic integration.[5] In the early days of MERCOSUR, states wanted to have the freedom to liberalise trade, at their free will, without an enforced system.

Owing to the imperfections of the original temporary mechanism established at Asuncion,[6] and as the economic integration progressed, the dispute settlement system has been revamped. The evolution of the mechanism since the Treaty of Asunción is striking. On 17 December 1991, the MERCOSUR Member States signed the Brasília Protocol which introduced, after a conciliatory stage, the possibility of resorting to an ad hoc arbitration court. The introduction of a jurisdictional step in the dispute resolution was not the only innovation established in Brasília. The scope of application of the system has also been considerably expanded. A procedure can be triggered not only by a state party, when they consider that another state party has failed to respect a MERCOSUR rule,[7] but also by private persons (individuals or corporations). In this last case, they 'shall file their claims with the National Chapter of the CMG of the State's Party where they have their usual residence or place of business'.[8] Private persons are not able to complain against a simple violation of MERCOSUR's law. They have to prove that they have been prejudiced by the adoption or application, by a state party, 'of legal or administrative measures having a restrictive, discriminatory or unfair competition effect in violation'[9] of the law of MERCOSUR. Even though the appearance of these integration actors in settlement disputes is one of the most important steps established in Brasília, the restrictions placed on the initiation of the procedure limit the role played by private persons in this field.[10]

This new concept of the settlement of disputes has taken a long time to gain recognition. The Brasília Protocol came into force only on 24 April 1993. The first dispute concerning the *Insertion of Some Types of Papers in the 'Adecuación' Regime* opposing Argentina and Uruguay was presented to the MERCOSUR political bodies during the

[5] For Ernst Haas, who has adapted Mitrany's theory, integration can only be a process in which 'States cease to be wholly sovereign … merge and mix their neighbours so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts between themselves', EB Haas, 'The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing' (1970) XXIV-4 *International Organisations* 710. See also B Rosamond, *Theories of European Integration*, European Union Series (Macmillan Press LDT, 2000) 33–35.

[6] For H Gros Espiell, Uruguayan former Foreign Affairs Minister, this system was an embryonic one, (1991) 'El Tratado de Asunción y algunas cuestiones jurídicas que plantea' (1991) *Revista da Informação Legislativa (Brasilia)* 111 at 222.

[7] Brasília Protocol, art 1 replaced by Olivos Protocol, art 1.

[8] Brasília Protocol, art 26 was replaced, without modification, by Olivos Protocol, art 40, para 1. With this rule, private persons only play a role in the initiation of the procedure. The fact that the national courts of a state can refuse a claim without any justification has been criticised, see B Garré Copello, 'Solución de controversias en el Mercosur' in MC Vazquez (ed), *Estudios pluridisciplinarios sobre el Mercosur* (Montevidéo, Fundación cultura universitaria, 1995) 219; RX Basaldúa, *MERCOSUR y el derecho de la integración* (Buenos Aires, Abedel Perrot, 1999) 613.

[9] Olivos Protocol, art 39. In one of the ad hoc arbitration court's opinions, the proof of the damage is a condition for the reception of the claim, *Subsidies to the Production and Exportation of Pork, Argentina v Brazil*, award of 27 September 1999, paras 34–39.

[10] Only 5 cases out of 33, presented before the MERCOSUR bodies, have been triggered by a private person.

CMG meeting of 1996. The first decision was not rendered by an ad hoc arbitration court until 28 April 1999 in the case related to the *Application of Restrictive Measures to Reciprocal Trade*.

With the increased interactions and extent of integration, the MERCOSUR states parties decided to adjust the settlement of disputes system to the needs of the integration with the adoption of the Olivos Protocol that replaced the Brasília Protocol. In this new stage of integration, considered the real one, Member States decided to go further in the unification of MERCOSUR jurisprudence. They created the Permanent Review Court, which has two principal functions. On the one hand, it is in charge of deciding, in the last resort, on legal issues.[11] This kind of appeal process marks a considerable step in the conception of an integrated dispute settlement system. It permits the unification of jurisprudence that could be threatened by the ad hoc arbitration courts. On the other hand, the Permanent Review Court is in charge of rendering consultative opinions at the request of states, MERCOSUR bodies and the Supreme Courts of the Member States, opening a path that is likely to ensure the effective and uniform application of community legislation and to prevent divergent interpretations throughout the entire territory of MERCOSUR.

Despite such significant improvements in the extent of economic integration and the widespread utilisation of these new instruments,[12] the MERCOSUR dispute settlement system is far from being perfect. In fact, it cannot be compared with the European Union or Andean mechanisms, for two principal reasons. First, the MERCOSUR system has only been conceived as a process for resolving disputes between the Member States. It excludes all recourses (which may be qualified as objective recourses)[13] intended to ensure the existence of a perfect legal order in the European or Andean community, such as actions for failure to fulfil member states' obligations,[14] actions for the annulment of measures adopted by an institution[15] or actions for the review of the lawfulness of community institutions' failures to act.[16]

The second important source of weakness of the MERCOSUR dispute settlement system lies in the absence of exclusivity of the mechanism. Contrary to the European or Andean rules that were established to give a real authority to the integration courts by the way of an exclusive jurisdiction clause,[17] the drafters of the Olivos Protocol took the opposite view and offered the states parties a dispute settlement option. As article 1, paragraph 2 of the Olivos Protocol states, 'disputes falling within the scope of application of this Protocol that may also be referred to the dispute settlement system of the World

[11] Olivos Protocol, art 17, para 2: 'the remedy shall be limited to legal issues dealt with in the dispute and to the legal interpretations set out in the award of the Ad Hoc Arbitration Court'.

[12] Up to 30 November 2008, 13 awards had been rendered by an ad hoc arbitral court and 3 by the Permanent Review Court (these numbers do not take into consideration the clarification of awards). One consultative opinion has been rendered by the Permanent Review Court.

[13] N Susani,*Le règlement des différends dans le Mercosur. Un système de droit international pour une organisation d'intégration*, (Paris, L'Harmattan, April 2008) 53–58.

[14] Article 226 (ex art 169) of the EC Treaty as modified in Nice and art 23 of the Cochabamba Protocol for the creation of the Court of Justice of the Andean Community of 26 May 1986, entered into force in August 1999.

[15] Article 230 (ex art 173) EC or Cochabamba Protocol, art 17.

[16] Article 232 (ex art 175) EC or Cochabamba Protocol, art 37.

[17] Article 292 (ex art 219) EC or Cochabamba Protocol, art 42. For an analysis, see N Lavranos, 'The Scope of the Exclusive Jurisdiction of the Court of Justice' (2007) *European Law Review* 32 at 83–94; Case C-459/03 *Commission v Ireland*, 30 June 2006, ECJ.

Trade Organisation or other preferential trade systems that the MERCOSUR State Parties may have entered into, may be referred to one forum or the other, as decided by the requesting party'.[18] This possibility inevitably allows negative consequences. This inter-institutional clause authorises a MERCOSUR state to send a dispute that interests the MERCOSUR Member States and the law of MERCOSUR to another system, in particular, the WTO system. Now, in accordance with article 3.2 of the WTO Dispute Settlement Understanding (DSU), WTO's panels and the Appellate Body are only able to resolve disputes within the WTO provisions in accordance with customary rules of interpretation of public international law. In consequence, they will not be able to interpret the legal relations existing between MERCOSUR Member States in the light of the objectives of this organisation. The WTO panels only have to consider the objective of trade liberalisation of the WTO and not the integrating aspects included in the concept of a common market, central to the MERCOSUR system. In conclusion, the option offered by article 1 of the Olivos Protocol authorises a MERCOSUR Member State to avoid the MERCOSUR dispute settlement process if its jurisprudence could be a disadvantage for it. This risk is not just theoretical. Argentina recently decided to refer its dispute with Brazil concerning the *Anti-dumping Measures on Resins* directly to the WTO.[19] This rule risks being conducive not only to the loss of respect for the MERCOSUR dispute settlement system, but also to the appearance of some discordant jurisprudences in relation to the obligations between MERCOSUR Member States.

The future success of the MERCOSUR dispute settlement mechanism will depend on the decision of the Member States to use it. To understand the advantages and problems which may influence MERCOSUR Member States in their willingness to have confidence in the MERCOSUR mechanism, it is necessary to consider the MERCOSUR system in more detail. This chapter therefore will proceed to show how the judicial aspects of the procedure have been improved, and to examine the new advisory competence of the Permanent Review Court. These two aspects are essential to accompany the integration effort.

I Improvements in Court Procedures for Settling MERCOSUR Disputes

In MERCOSUR, the role of the judges has been constantly expanded since the adoption of the Brasília Protocol. Nevertheless, it is not the only method to settle disputes in this organisation.[20] Under the Olivos system, arbitrators cannot be requested directly. First, as is usual in international law, states, or national courts in the case of a claim presented by a

[18] Olivos Protocol Regulation, art 4, paras 4 and 5. This article obliges MERCOSUR Member States to select only one mechanism. States are not allowed to send a dispute to both systems, as occurred when the Brasília Protocol was still in force in the case concerning the *Poultry Anti-Dumping Duties*.

[19] Case DS355 WTO, 26 December 2008. To justify this decision, A Chiradia, Secretary of Foreign Minister, explained that Argentina did not want to lose any time, 'Argentina va a juicio contra Brasil', *Clarín*, 10 January 2007.

[20] Mediation has always been the MERCOSUR priority. Two other diplomatic dispute settlement procedures have been created beyond the Olivos Protocol's area of application. On the one hand, the Ouro Preto Protocol, adopted on 17 December 1994, established two levels of official mediation, first before the MERCOSUR Trade Committee (MTC) and in a second step before the CMG. On the other hand, a very informal procedure, the

private person, must 'endeavour to settle [the dispute] through direct negotiations'.[21] Then, if the states involved in the dispute cannot reach an agreement, the claiming state has, since the adoption of the Olivos Protocol, a choice. It can send the dispute directly to the Permanent Review Court[22] or ask the CMG to attempt conciliation in a multilateral framework,[23] before the initiation of the ad hoc arbitration procedure.

Since the beginning of MERCOSUR, states have preferred to try to find a solution by diplomatic means, even if, in practice, this method of dispute settlement has seemed largely inefficient. No disputes have been solved by negotiations and the CMG has very rarely been successful in resolving a case.[24] That is the reason why the Olivos Protocol was established to improve the judicial attributes of the MERCOSUR dispute settlement system. There are three aspects to this improvement: an ad hoc arbitration procedure; the creation of a motion for review before the Permanent Review Court; and a judicial mechanism to ensure the enforcement of awards.

A The Ad Hoc Arbitration Procedure

In general, arbitration supposes that the parties in the dispute remain free to organise all the procedurals aspects. In MERCOSUR, the necessity of finding a quick solution encourages a strict institutionalisation of the process. In fact, the rules concerning the appointment of arbitrators, their task and the applicable law are designed not only to make this ad hoc procedure more efficient, but also to acquire more stability.

Under article 10, paragraph 1 of the Olivos Protocol, the ad hoc arbitration court is made up of three arbitrators. Each state involved in the dispute must appoint one arbitrator. The third one, who must not be a national of one of the states involved in the dispute, is appointed, in conformity with the paragraph 2 of the same article, by an agreement between the parties to the case. If they are unable to reach a solution, the third arbitrator will be appointed by the Administrative Secretariat. In MERCOSUR, all the arbitrators have to be selected from a permanent list drawn up long before the dispute.

consultation procedure, was elaborated before the MTC by Directive No 13/95, replaced by Directive No 17/99 of 15 November 1999. More than 500 consultations have been presented since 1995, see Susani, *Le règlement des différends dans le Mercosur* (n 13) 195–97.

[21] Olivos Protocol, art. 4; Olivos Protocol, art 41 for the procedure initiated by a private person.

[22] Olivos Protocol, art 23. This possibility did not exist under the Brasília Protocol. Although it has never so far been used, it is a significant step towards the creation of a judicial dispute settlement system.

[23] Olivos Protocol, arts 6 and 7. Mediation by the CMG includes the possibility of requesting expert advice (ibid art 6, para 1, or arts 40, para 1 and 42, para 2). This possibility is an obligation in the framework of the private person proceedings (ibid art 42, para 2). Neither the expert opinion nor the CMG's recommendation (ibid art 7, para 1) are compulsory. In the case of the private person proceedings, the situation is different. Olivos Protocol, art 44, para 1(i) states that 'if a unanimous opinion were to declare the admissibility of the claim filed against a State Party, any other State Party may request the adoption of corrective measures or annulment to reverse the challenged measures. If this request is not complied with within fifteen (15) days, the claiming State Party may resort directly to the arbitration procedure, as provided for in Chapter VI of this Protocol'.

[24] Only two disputes were solved by mediation under the Ouro Preto Protocol rules. The dispute concerning the *Marketing of Table Salt*, between Argentina and Uruguay, was submitted to the MTC on 20 September 1996 and stayed before MERCOSUR bodies for 23 months. Finally, a partial solution was reached. The second dispute related to the *Application of Minimum Specific Importation Duties (DIEM) to the Intra-Zonal Trade*, between Paraguay, on the one hand, and Brazil and Uruguay, on the other. The proceedings before MERCOSUR bodies lasted 18 months.

In fact, the arbitrators' impartiality is of fundamental importance in conferring authority on the arbitration award. To guarantee the arbitrators' independence, article 11 of the Olivos Protocol established an original mechanism of national lists. Each Member State has to present several lists. The state nominates 12 arbitrators to be included in an arbitrators list filed with the Administrative Secretariat of MERCOSUR and four for the third arbitrators list. The *curriculum vitae* of each candidate has to be provided.

However, presentation of the list does not mean that the nomination is definitive. In the case of the simple arbitrator, article 11, paragraph 1(i) of the Olivos Protocol states that 'within thirty days, each of the State Parties may request additional information on the persons appointed by the other States Parties to be included in the list'. Even if this request has no legal consequences, it encourages the MERCOSUR Member States to be rigorous in their selection of arbitrators. In the case of the third arbitrator, each state can ask for more information or, under article 11, paragraph 2(ii), point 1, 'make well-grounded objections to the designated candidates', if it considers that the candidate is not qualified, or is partial and functionally dependent on the central public administration of the Member States. Such objections are a bar to the nomination of the arbitrator concerned. This mechanism has the advantage of ensuring that arbitrators are, almost invariably, accepted by all Member States. In consequence, it reduces the likelihood of possible complaints about the incompetence or lack of impartiality of an arbitrator,[25] when the ad hoc arbitration court is constituted.

The rules for appointing arbitrators, together with a clear definition of the ad hoc arbitration court's remit,[26] strongly encourage states to reach an agreement on how the court should be organised. The result is greater institutionalisation of the arbitration proceedings.

Once the members of the ad hoc arbitration court have been appointed, under article 15, paragraph 1 of the Olivos Protocol, at the request of the interested party and whenever well grounded suppositions exist that the continuation of a given situation may cause severe and irreparable damage, the court can take provisional measures to prevent the damage. If such measures are not needed, the court must issue an award within a period of 60 days, which, in conformity with article 26 of the Olivos Protocol, is binding on the states involved in the dispute and is in the nature of *res judicata*.

A state involved in the dispute may apply to the same ad hoc arbitration court for a clarification of the award, an option frequently taken up in MERCOSUR,[27] but any further explanation by the judge does not change the substance of the decision. Since the adoption of the Olivos Protocol, parties may, within 15 days of the notification of the award, file a motion for review with the Permanent Review Court against the award of the ad hoc arbitration court.

[25] These arbitrators' qualifications are required by Olivos Protocol, art 35.

[26] In conformity with Olivos Protocol, art 34, the ad hoc arbitration courts (like the Permanent Review Court) have to settle the dispute on the basis of the Treaty of Asunción, the Protocol of Ouro Preto, the protocols and agreements executed within the framework of the Treaty of Asunción, the Decisions of the CCM, the Resolutions of the CMG and the Directives of the MTC, as well as the applicable principles and provisions of international law. Nevertheless, parties can ask the courts to decide on the dispute *ex aequo et bono*.

[27] Olivos Protocol, art 28.

B Creation of a Motion for Review Before the Permanent Review Court

In the case of the Permanent Review Court, composed of five arbitrators, each state designates one arbitrator and his alternate, in accordance with article 18, paragraph 2 of the Olivos Protocol.[28] The fifth arbitrator, the chairman, has to be designated unanimously by the four Member States from a special list. To establish that list, article 18, paragraph 3 specifies that each state proposes two candidates. Objections can be made by the other states as described above.[29] This presiding arbitrator is particularly important because he enjoys the entire confidence of all Member States. The current president is the Paraguayan Dr José Antonio Moreno Ruffinelli.

Although this tribunal is called 'permanent', it is of a hybrid nature, half ad hoc arbitration, by reason of some arbitral attributes. Pursuant to article 20, paragraph 1 of the Olivos Protocol, its awards are made by a reduced chamber of three arbitrators when the dispute involves two states.[30] The plenary instance is reserved for disputes involving more than two states, a situation provided for by article 20, paragraph 2 of the Olivos Protocol.[31] The article adds that states may decide on another composition. In the case relating to the *Distortions to Free Movement Due to Road Blocks*, Argentina and Uruguay asked for the plenary form.[32]

The special authority of the Permanent Review Court, above all when all the arbitrators are present to take a decision, is fundamental because of the importance of its remit. Indeed, in accordance with article 23 of the Olivos Protocol, states can directly ask the Court to resolve a dispute after a negotiation stage. This function, which has never been used since the Court's creation, is far from being the most significant one. In fact, like the Appellate Body of the WTO, the Permanent Review Court was established to offer the MERCOSUR Member States a possibility of presenting a motion for review against the awards of the ad hoc arbitration court. In this case, 'the remedy shall be limited to legal issues dealt with in the dispute and to the legal interpretations set out in the award of the Ad Hoc Arbitration Court'.[33]

The Permanent Review Court is never called upon to judge a case for a second time, as an appellate body generally does. Its remit consists in giving a correct interpretation of MERCOSUR law. It checks that the ad hoc arbitration courts have correctly applied the MERCOSUR regulations. This explains why, as article 17, paragraph 3 of Protocol Olivos

[28] With a view to the enlargement of MERCOSUR, art 1 of the Protocol which modified the Olivos Protocol, adopted on 18 January 2007, states that the Permanent Review Court will be composed of one arbitrator per Member State. If the number of arbitrators becomes an even number, a procedure has to be established pursuant to art 3 to establish an odd number.

[29] Olivos Protocol, art 18, para 3.

[30] This clause states that 'two of them shall be nationals of each of the States participating in the dispute and the third one, to be the Presiding Arbitrator, shall be chosen by the Director of the Administrative Secretariat of MERCOSUR by means of a draw among the remaining arbitrators that are not nationals of the States involved in the dispute'. It is interesting to note that the fifth arbitrator of the Permanent Review Court is not automatically the president of the Permanent Review Court chamber which is going to render the decision.

[31] When Venezuela becomes a full member of MERCOSUR, the Permanent Review Court will comprise seven arbitrators. In consequence, there will no longer be plenary chambers, but only formations with five members.

[32] , *Argentina v Uruguay*, Permanent Review Court, award of 6 July 2006, point III-1.

[33] Olivos Protocol, art 17, para 1. In the case relating to the *Prohibition on Importing Retreaded Tyres from Uruguay*, the Permanent Review Court specified what a legal question means, see *Uruguay v Argentina*, Permanent Review Court, award of 20 December 2005, 2, point 3.

states, the Court cannot review an award made by an ad hoc arbitration court on the basis of *ex aequo et bono* principles. It provides legal expertise to avoid any threat to the coherence of the legal system.[34] This function gives it a unifying function, fundamental to an integration organisation[35] and constitutes real progress in the MERCOSUR dispute settlement mechanism. Since the creation of the Permanent Review Court, two motions for review have been presented,[36] showing the central role that the Court is set to play in the MERCOSUR dispute settlement system.

C Creation of a Judicial Mechanism to Ensure the Enforcement of Awards

In the international sphere, mechanisms designed to ensure the enforcement of awards are generally weak because of the impossibility, in any case, of forcing a state to implement the court's decisions. Compliance with the solution dictated by the court depends on the goodwill of the responsible state. The authors of the Olivos Protocol have tried to improve the Brasília Protocol's award enforcement mechanism with the creation of a system having a judicial character. Nevertheless, its efficiency is far less than in the European Union, where the European Court of Justice can order a penalty payment to be paid by a Member State which fails to take the necessary measures to comply with the court's judgments.[37] The system adopted by MERCOSUR involves greater difficulties of enforcement.

In conformity with article 27 of the Olivos Protocol, if the responsible state does not comply, totally or partially, with the award in the term fixed, the state benefiting from the award is authorised to adopt compensatory measures. Under article 30, paragraph 1 of the Olivos Protocol, this state, if it believes that the action of the responsible state does not comply with the award, can refer the matter to the ad hoc court or to the Permanent Review Court. With this procedure, the benefiting state has the opportunity to refer the question of the non-compliance with the award to a court and to obtain a judicial acknowledgement of non-compliance, which may exert an additional political pressure on the responsible state.

Otherwise, or simultaneously, the state benefiting from the award can take compensatory measures. The utilisation of such measures is regulated by article 31 of the Olivos Protocol. First—and the Permanent Review Court has recently reiterated the importance of this condition—these measures have to be adopted 'with the aim of complying with the award'.[38] Secondly, as specified in paragraph 2 of that article, the compensatory measures, such as the interruption of concessions or other similar obligations, have to concern, if possible, 'similar obligations in the same sector or sectors affected' by the responsible state.

[34] H Masnatta, 'Perspectivas para el sistema definitivo de solución de controversias en el Mercosur' (2002) 5 *Revista de derecho del Mercosur* 254.

[35] In A Perotti's opinion, this function confers on the Permanent Review Court a communitary vocation, 'Proyecto de reformas al Protocolo de Brasilia. ¿Una nueva ocasión perdida?' (2001) 2 *Revista de derecho internacional y del Mercosur* 139.

[36] *Distortions to the Free Movement Due to Road Blocks, Argentina v Uruguay*, Permanent Review Court, award of 6 July 2006, and *Prohibition on Importing Retreaded Tyres from Uruguay, Uruguay v Argentina*, award of 20 December 2005.

[37] Article 228(2) EC.

[38] Olivos Protocol, art 31, para 1. *Prohibition on Importing Retreaded Tyres from Uruguay, Argentina v Uruguay*, Permanent Review Court, award (Excess on the implementation of the compensatory measures) of 6 June 2007, 9, II, paras 10.1–10.3.

It is only if suspensions within the same sector are considered 'impracticable or ineffective' that a Member State benefiting from the award 'may interrupt concessions or obligations in another sector'. Thirdly, the state adopting such measures has to respect the principle of proportionality with regard to the consequences arising from failure to comply with the award. With these rules, inspired by the WTO dispute settlement system,[39] the Olivos Protocol attempts to avoid abuses in the implementation of compensatory measures.

In conformity with article 32, paragraph 2 of the Olivos Protocol, compliance with this regulation may be examined at the request of the responsible state if it considers that the applied compensatory measures are excessive. This proceeding was used by Argentina in the case concerning the *Prohibition on Importing Retreaded Tyres from Uruguay* against the compensatory measures adopted by Uruguay. Using the criteria of article 32 of the Olivos Protocol, the Permanent Review Court ruled that the measures taken were in conformity with MERCOSUR legislation.[40] At the same time, the Court established clearly that ah hoc arbitration courts have to be rigorous and severe with states that are reluctant to comply with a MERCOSUR award and, in so doing, the Court presented itself as the protector of the MERCOSUR legal system.

The legal protection surrounding the enforcement of the awards of the ad hoc arbitration court and of the Permanent Review Court, attests to the progress made at Olivos in the dispute settlement system. Nevertheless, this mechanism is far from being totally satisfactory and some difficulties have arisen in respect of various decisions.[41] On the one hand, compensatory measures are, in fact and by nature, legal trade distortions, whereas MERCOSUR's philosophy advocates free trade.[42] On the other hand, from a more practical point of view, some authors have denied the equity and positive impact of compensatory measures. To Professor Suzana Czar de Zalduendo, for example, these kinds of measures are only efficient when a state benefits from significant external trade. A small country would meet with difficulties in adopting compensatory measures likely to affect the trade of a larger country.[43]

Despite these worrying disadvantages, the MERCOSUR settlement dispute system is, in many aspects, more efficient than international dispute settlement mechanisms used to be. Indeed, its judicial character makes it really useful in the settlement of disputes. To complete this process, states have recently established a mechanism able to safeguard legality.

[39] WTO Dispute Settlement Understanding, art 22.6.

[40] *Prohibition on Retreaded Tyres from Uruguay, Argentina v Uruguay*, Permanent Review Court, award (Excess on the implementation of the compensatory measures) of 6 June 2007, 10, IV.

[41] eg, in the case relating to *Phytosanitary Products*, the ad hoc arbitration court ruled that Brazil had to incorporate several CMG Resolutions concerning phytosanitary certificates in its legislation. Nevertheless, some Argentinean producers continued to complain about the Brazilian regulation.

[42] The same disadvantage has been stressed in the WTO's framework, see J Pauwlyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules—Towards a More Collective Approach' (2000) 94(2) *AJIL* 343.

[43] S Czar de Zalduendo, S (2008) 'Regulación internacional de los conflictos comerciales: ¿Señal de fortalecimiento institucional?' in *Densidades* (Buenos Aires, 2009) 22.

II The Consultative Opinion Before the Permanent Review Court: A Step Towards Safeguarding Legality

By June 2000, after MERCOSUR Member States had decided to improve the Brasília system, the creation of an instrument able to give a uniform interpretation of MERCOSUR law in all the integrated territory was a priority[44]—indeed, it was a necessity. Since the implementation of the customs union, the number of MERCOSUR regulations invoked before national courts has been constantly growing.[45] Unfortunately, in early 2002, during the Olivos negotiations, the only thing that states agreed was the creation of a consultative opinion procedure, leaving its organisation to a later CCM decision. This regulation was adopted on 15 December 2003,[46] outlining the proceedings. It was only with the CCM's Decision No 2/07 of 18 January 2007 that this mechanism was precisely organised with the adoption of the Regulation on the consultative opinions requested from the Permanent Review Court by national supreme courts of MERCOSUR States Parties ('Olivos Protocol Regulation').[47] The numerous hesitations which have needed to be overcome show the states' reluctance to accept the mechanism.

Although it has been a long time coming, one of the most important decisions taken by MERCOSUR Member States in Olivos was the opportunity offered to national Supreme Courts and the MERCOSUR states and bodies to request legal advice from the Permanent Review Court.[48] Since then, national courts have become official players in protecting MERCOSUR's legality.[49] If, during a trial, a doubt is raised about the interpretation of one of MERCOSUR's regulations, the national court can, in accordance with article 3 of the Olivos Protocol Regulation, request that the Permanent Review Court issue a consultative opinion on the question. This procedure looks like a vague attempt to establish a reference for a preliminary ruling which represents an important instrument in all integration processes. Indeed, by means of references for preliminary rulings, the courts of integration communities give a uniform interpretation of the law in all the integrated territory. In

[44] CCM Decision No 25/00, Improvements of the Dispute Settlement System, art 2.

[45] A Perotti and D Ventura, *Primer informe sobre la aplicación del derecho del Mercosur por los tribunales nacionales y sobre la aplicación del derecho nacional a través de los mecanismos de cooperación jurisdiccional internacional del Mercosur*, Estudio No 3/04 (Secretaria del MERCOSUR, October 2004) available at www.mercosur.org.uy.

[46] CCM Decision No 37/03, Regulation of the Olivos Protocol.

[47] National courts were waiting for this regulation with impatience. That is the reason why the first request for a consultative opinion arrived before the Permanent Review Court on 21 December 2006, in other words one month before the adoption of the regulation on the consultative opinions requested from the Permanent Review Court by national Supreme Courts. In this first consultative opinion, the Permanent Review Court considered that the request was admissible even if the regulation was not applicable to the case. The Court decided to examine the request in the light of the Olivos Protocol Regulation, *Norte SA Importation Exportation v Nothia Laboratory*, Permanent Review Court, opinion of 4 April 2007, 2, point A.2.

[48] None of MERCOSUR's judicial actions permit a general defence of the legal system. In conformity with Olivos Protocol, art 1, para 1, a state has to be specifically concerned by another state's behaviour.

[49] Since 1993, there have been six national Supreme Court meetings. The last one took place in Asunción, on 21 and 22 November 2008, principally to discuss judicial collaboration. On that occasion, the Paraguayan Supreme Court adopted the internal procedure (rule No 549/08) of presenting to the Permanent Review Court a request for a consultative opinion. The Argentinean and Uruguayan Supreme Courts have already adopted the regulation.

MERCOSUR, however, the consultative opinion constitutes a progressive mechanism but which has a great many imperfections in terms of the procedure itself and its consequences. These gaps limit its impact.

A The Consultative Opinion Proceedings

The aim of consultative opinions is not only to give a uniform interpretation of MERCOSUR law that national courts have to implement during a trial. Requests for such opinions, as stated in article 2 of the Olivos Protocol Regulation (which focuses on the interpretation of MERCOSUR law) can also come from states or MERCOSUR's bodies. It is usual, in the international sphere, to allow players in an international organisation to request advice. In the case of MERCOSUR, article 3, paragraph 1 of the Olivos Protocol Regulation demands that states present a joint request. This condition reduces the likelihood of triggering this procedure, because all states have to agree about the necessity of the request. The MERCOSUR bodies,[50] for their part, make all their decisions by consensus, which means that none of the states' representatives must be opposed to the decision to request a consultative opinion from the Permanent Review Court.

As regards consultative opinions requested by national Supreme Courts, the Permanent Review Court gave some details of procedural rules when it delivered its first consultative opinion on 4 April 2007. First, in conformity with article 4, paragraph 1 of the Olivos Protocol Regulation, only the Supreme Courts may request a consultative opinion relating, exclusively, to the legal interpretation of MERCOSUR regulations which has arisen in the course of a case presented before a national court. In its first consultative opinion, the Court held that it could not be requested by the foreign ministry of the judge's native country. Like the reference for a preliminary ruling, this consultative opinion constitutes a judge to decide on procedure and only the Supreme Courts can present a request.[51] With this assertion, the Court has held that the consultative opinion is a way of organising judicial cooperation. Then, the role of each institution is clearly specified: as in the reference for a preliminary ruling, the Court will interpret MERCOSUR's rules, whereas the role of the national court is to use this interpretation to resolve the national case.[52] However, the procedure is much less efficient than the European or Andean preliminary ruling mechanism, because MERCOSUR's judges have no obligation to request such an opinion. A simple invitation to use the consultative opinion procedure is not enough to make this new mechanism part of the judge's habits.[53]

Secondly, article 4 of the Olivos Protocol Regulation provides that the Permanent Review Court's role in the proceedings consists in giving a legal interpretation of MERCOSUR law. Contrary to the European reference for a preliminary ruling, the Court's position concerning the validity of a measure is not mentioned in the Olivos Protocol Regulation. Nevertheless, in its first consultative opinion, the Court specified that it was

[50] The CCM, the CMG and the MTC are the bodies which are authorised to request a consultative opinion. Since the adoption of the Parliament Establishing Protocol on 8 December 2005, the Parliament is also able to present such a request (CCM Decision No 23/05, art 13).

[51] *Norte SA Importation Exportation v Nothia Laboratory*, Permanent Review Court, opinion of 4 April 2007, 10, point G.1.

[52] Ibid 4, point B.5.

[53] J Pertek, *La pratique du renvoi préjudiciel en droit communautaire. Coopération entre CJCE et juges nationaux* (Paris, Litec, 2001) 18.

competent, within the framework of this interpretative function, to declare that a MERCOSUR regulation which was not in conformity with MERCOSUR law could not be applicable. In that case, the Court established that several articles of the Olivos Protocol Regulation were not in conformity either with the Preamble to the Olivos Protocol or the CCM's Decision No 30/05 and asked the CMG and CCM to find a way to finance the consultative opinion proceedings.[54]

B Consultative Opinions as Simply Advice in the International Sphere

Even if the MERCOSUR states have instituted a court procedure making it possible for the Permanent Review Court to give a uniform interpretation of MERCOSUR law, they did not follow that logic through. Indeed, article 11 of the Olivos Protocol Regulation provides that 'States are not bound by the consultative opinions, which are not compulsory'.

This restriction on the impact of these opinions can be explained by the states' reluctance to allow a supranational court to interfere in the smooth running of national justice.[55] The fear born from the feeling that consultative opinions could pose a threat to state sovereignty is not well founded. In fact, the Permanent Review Court, like the European Court of Justice, does not interfere directly in the national justice system. They never give orders to the judge. The philosophy of the consultative opinion aims to establish cooperation between judges, not a hierarchy. The Permanent Review Court's function is to help national courts to apply the MERCOSUR rules as they have to be understood throughout all the integration territory, just as the MERCOSUR Member States with their sovereignty have decided.

Unfortunately, the fact that consultative opinions lack compulsory force could have negative effects. If states, and indeed their courts, are not bound by the Permanent Review Court's advice, we may worry about the impact of the consultative opinion in MERCOSUR. It may be feared that if a national court disagrees with the consultative advice, it may decide not to respect the international interpretation, which poses a risk for the MERCOSUR legal order. In its first advice, the Court criticised the lack of impact of consultative opinions. In the Court's opinion, the fact that national courts were not bound to request a consultative opinion and that, secondly, these opinions had no compulsory effects distorted the concept, the nature and also the objective of those proceedings.[56] Indeed, it appears that these rules 'are going against the objective of consulting national judges in the framework of the integration process which tends to interpret a community norm in a uniform manner in all the integrated territory, an objective which is declared in point 4 of article 2 of the Decision CMC 25/00'.[57] This declaration shows how much the Permanent Review Court disagrees with the MERCOSUR Member States' conception of the reference

[54] *Norte SA Importation Exportation v Nothia Laboratory*, Permanent Review Court, opinion of 4 April 2007, 13–14 point G, v–vii.

[55] eg art 92 of the Federal Constitution of Brazil lists those national courts able to hand down a judgment. For traditional scholarship, this clause must be interpreted as prohibiting an international court from interfering in the judge's function. This interpretation has been criticised by many Brazilian scholars: see M Monteiro Reis, *Mercosul, União Européia e Constitução. A Integração dos Estados e os ordenamentos jurídicos nacionais* (Río de Janeiro, Renovar, 2001) 326.

[56] *Norte SA Importation Exportation v Nothia Laboratory*, Permanent Review Court, opinion of 4 April 2007, 3–4 point B.3.

[57] Ibid 4, point B.4.

for a preliminary ruling mechanism and explains why it takes it upon itself to request MERCOSUR bodies to fill the gaps in the 2003 consultative opinion mechanism.

However—and it is absolutely not our intention to minimise the disadvantages of this consultative opinions procedure in the MERCOSUR integration process—advisory proceedings are not rare in international law. Sometimes they promote observance of the law and give rise to debates about legal questions. In Professor Laurence Boisson de Chazourne's opinion, 'advisory opinions might be a powerful tool. They might decisively influence the outcome of a dispute, or the way law is interpreted and the direction in which it will eventually develop'.[58] Where MERCOSUR consultative opinions are concerned, it is to be hoped that the authority of the Permanent Review Court will be enough to ensure they are respected by states, their courts and also, where appropriate, by the MERCOSUR executive bodies.

Even if this original type of proceedings is far from perfect, it constitutes progress towards the building of a dispute settlement system adapted to the integration process. MERCOSUR Member States are conscious that the dispute settlement mechanism (which is only a temporary one, as stated in article 53 of the Olivos Protocol) has to be effective. The CCM regularly requests the High Level Group for Institutional Reform (GANRI) to put forward suggestions for adapting the system to the needs of integration.[59] The improvement of consultative opinions will be an important step.

More generally, most scholarship is in favour of the creation of a MERCOSUR court which would be in charge of resolving all MERCOSUR disputes. More recently, on 28 November 2008, the MERCOSUR Parliament pronounced itself in favour of the establishment of a permanent court, which is of fundamental importance for MERCOSUR's development towards integration.[60] This could also be an asset in establishing MERCOSUR principles especially designed for its particular concept of integration.

[58] L Boisson de Chazournes, 'Advisory Opinion and the Furtherance of the Common Interest of the Human Kind' in L Boisson de Chazournes, C Romano and R Mackenzie, *International Organizations and International Dispute Settlement: Trends and Prospects* (New York, Ardsley Transnational Publishers Inc, 2002) 108.

[59] CCM Decision No 29/06, 15 December 2006; CCM Decision No 09/07, 18 January 2007.

[60] MERCOSUR Parliament, XV session, 28 November 2008.

6

Economic Freedoms in MERCOSUR*

FELIX FUDERS

According to article 1, paragraph 1, of the Treaty of Asunción, Member States are committed to the establishment of a common market, a European-law-based concept.[1] As neither the Treaty of Asunción nor the Treaty establishing the European Community (EC Treaty) clearly define the basic components of a common market, as a point of departure, it is essential that we establish a common frame of reference.

The yet-to-be-shaped common market represents a higher degree of integration than either a free trade zone or a customs union. A free trade zone exists when the customs and other restrictive trade regulations between and among Member States for goods produced have been abolished.[2] A customs union is achieved[3] when these same changed regulations apply to third party countries. For this reason, in comparison to a free trade zone, with a customs union, the origin of goods is irrelevant: once a good has entered the territory under the jurisdiction of the customs union, its circulation is unhindered. In the case of a common market, not only is there free movement of goods, but also of the workforce, services and capital, as is stipulated in the Treaty of Asunción in article 1, paragraph 2. Consequently, with across-the-board economic freedoms or a free market,[4] a unified market would exist for all Member States within the economic area.[5] The market freedoms established allow for private enterprise to evolve with a cross-border point of view and for greater integration. This is why such principles of economic freedom go to the heart of the domestic market.[6] In the following, I will examine to what extent MERCOSUR has put into practice the common market principles of freedom of trade and movement of goods, workforce and capital.

* For a more in-depth examination of economic freedoms, see F Fuders, *Die Wirtschaftsverafssung des MERCOSUR* (Berlin, Duncker and Humblot, 2008).

[1] HP Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen, Mohr Siebeck, 1972) 551.

[2] Article XXIV, para 8, lit b GATT.

[3] Article XXIV, para 8, lit a no II GATT.

[4] Both terms are synonymous, see M Schweitzer and W Hummer, *Europarecht* (Neuwied, Luchterhand, 1996) 330.

[5] Case C-15/81 *Gaston Schul v Inspecteur* [1982] ECR 1409, ECJ (the pagination of the European Court Report (ECR) and Official Journal (OJ) series refer to the German edition); M Schweitzer and W Hummer, *Europarecht* (Neuwied, Luchterhand, 1996) 328.

[6] W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004) 906.

I Freedom of Movement of Goods

The freedom of movement of goods is the core of any economic integration and an essential element of a competitive market economy-oriented economic constitution.[7] It will not be obtained by only eliminating customs, but also by removing any other direct or indirect trade restrictions, the so-called non-tariff trade barriers.[8] Article 1 of the Treaty of Asunción dictates the free movement of goods, services and of production factors. With regard to what constitutes a commodity, there are not only all import or export objects to consider, but also, as defined in customs nomenclature, objects which are of no value, for example, non-recyclable rubbish.[9]

A MERCOSUR Regulations Governing the Freedom of Movement of Goods

According to article 1 of the Treaty of Asunción and article 2, lit a, phrase 1 of the Trade Liberalisation Programme, the free movement of goods, services and of production factors is to be achieved by, amongst other things, the elimination of customs (*derechos aduaneros*), non-tariff trade barriers (*restricciones no arancelarias*) and by provisions of equal impact (*medidas equivalentes*).

A distinction between customs and charges having an equivalent effect, on the one side, and quantitative restrictions and measures having an equivalent effect, on the other, as is the case in the EC Treaty,[10] is not found in the Treaty of Asunción. In literature pertaining to MERCOSUR, not only customs equivalent provisions but also all non-tariff trade barriers are referred to under the term 'provisions with same effect' in the Treaty of Asunción.[11] The fact that these provisions encompass more than just customs equivalent provisions can be deduced from the contents of article 1 of the Trade Liberalisation Programme, which, besides the financial burden (to which, besides customs, also belong all provisions of equal impact)[12] prohibits 'all other restrictions on reciprocate trade'. Article 2, lit b of the Trade Liberalisation Programme defines non-tariff trade restrictions (*restricciones*) as any administrative, fiscal or other measure through which any Member State unilaterally hinders or impedes trade. Article 5 of the Treaty of Asunción proposes to establish a common market by the means stated in article 1 of the Trade Liberalisation Programme, more specifically, the abolition of customs, non-tariff trade barriers and

[7] PC Müller-Graff, 'Vorbemerkungen Art 28–31 EG' in H von der Groeben and J Schwarze (eds), *EU-/EG-Vertrag, Kommentar* (Baden-Baden, Nomos, 2003).

[8] C Waldhoff, 'Art 25 ECT' in Ch Calliess and M Ruffert (eds), *Kommentar zu EU-Vertrag und EG-Vertrag* (Neuwied-Kriftel, Hermann Luchterhand, 2002) 564–75; RX Basaldúa, *MERCOSUR y Derecho de la Integración* (Buenos Aireis, Abeledo-perrot, 1999) 114.

[9] RX Basaldúa, *MERCOSUR y Derecho de la Integración* (Buenos Aires, Abeledo-perrot, 1999) 116. Referring to the EC Treaty: Case C-2/90 *CEC v Belgium* [1992] ECR I-4431; Case C-324/93 *R v Secretary of State* [1995] ECR 1995 I-563. The term 'commodity' can include not only marketable goods, but also, as it is the case in European Union legislation, waste and by-products.

[10] Articles 25 and 28 EC.

[11] See RR Díaz Labrano, *MERCOSUR: Integración y derecho* (Buenos Aires, Intercontinental, 1998) 358, who deems special import allowances as measures having an effect equivalent to customs. The similarity to the EC Treaty is pointed out in RX Basaldúa, *MERCOSUR y Derecho de la Integración* (Buenos Aires, Abeledo-perrot, 1999) 158.

[12] Trade Liberalisation Programme, art 2 lit a.

measures having an equivalent effect, and adds a fourth obligation: the abolition of all other restrictions amongst Member States. The repetition in the phrasing leads one to believe that an equally strict abolition of any and all cross-national trade restrictions is the goal of MERCOSUR as, comparatively speaking, has been achieved in the European Union by the establishment of the Dassonville judgment[13] by the European Court of Justice. Diverse arbitration cases, specifically the first arbitration case, confirm this assumption. From the point of view of the sixth MERCOSUR arbitration court, the Treaty of Asunción prohibits 'virtual discrimination', or, any measures that produce a discriminating effect, whether or not they appear discriminating. It emphasises the absolute character of these restrictions as the essential norm in every integration system.[14] The eighth MERCOSUR arbitration confirms a virtual discriminating provision in Uruguay. Although cigarettes originating from Paraguay were subject to the same domestic taxation as domestic brands, the court ruled, however, that, through the use of the net weight pricing method with imported cigarettes, they had actually been overtaxed.[15]

Article 7 of the Treaty of Asunción expressly binds its Member States to equal treatment of locally produced and imported goods in regards to legal duties.[16] According to European Union legislation, discrimination against imported goods through higher domestic duties qualifies either as a duty with customs-equivalent effect or as a discriminating domestic levy according to article 90 EC.[17] Although both provisions complement one another, they also cancel each other out.[18] It is interesting to note that in article 7 of the Treaty of Asunción, equal treatment (*mismo tratamiento)* is dictated, whereas in the European Union, as well as in the Latin American Free Trade Association (ALADI, Asociación Latinoamericana de Integración) it is possible to place domestic goods at a disadvantage to imported goods.[19] The provision dictates equitable treatment in the levying of duties on goods, which is why the provision, just as in article 90 EC, does not ban discriminatory levying on, for example, savings balances.[20]

[13] Case C-8/74 *Dassonville* [1974] ECR 837.

[14] *Retreaded Tyres*, sixth MERCOSUR arbitration court, 9 January 2002, II.B.1.b. On MERCOSUR arbitration see also F Fuders, 'Four Years of the Olivos Protocol: How it has changed MERCOSUR's Dispute Settlement System' (2008) 20 *Lateinamerika Analysen* 205.

[15] *De Facto Discrimination*, eighth MERCOSUR arbitration court, 21 May 2002, Considerando sub-s A. For differentiation between measures having an effect equivalent to customs and measures having an effect equivalent to quantitative restrictions in EC law, see Case C-347/95 *Fazenda Pública v União das Cooperativas* [1997] ECR I-4911.

[16] Some authors argue for an obligation to apply the principle of the taxation of the country of destination, which does not distinguish between imports and exports, *cf* JP Montero Traibel, *MERCOSUR* (Montevidéo, FCU, 2000) 76; see also F Fuders, *Die Wirtschaftsverafssung des MERCOSUR* (Berlin, Duncker & Humblot, 2008) 247.

[17] *cf* Case C-28/96 *Fazenda Pública v Fricarnes* [1997] ECR I-4939.

[18] Referring to art 90 EC: Case C-90/79 *CEC v France* [1981] ECR 283; N Vaulont, 'Art 25 EC' in H von der Groeben and J Schwarze (eds), *EU-/EG-Vertrag, Kommentar* (Baden-Baden, Nomos, 2003).

[19] A Loschky, *MERCOSUR und EU* (Frankfurt, Viademica, 1998) 81; Case C-355/85 *Driancourt v Cognet* [1986] ECR 32310; R Streinz, *Europarecht* (Heidelberg, Müller, 2005) 310; Montevidéo Treaty (Constitutional Treaty of ALADI), art 46 prohibits member states from discriminating against imported products (*no menos favorable*). This phrasing is considered to be more accurate, see JC Lipovetzky and DA Lipovetzky, *MERCOSUR: Estrategias para la integración* (São Paulo, LTR, 1994) 138.

[20] Referring to art 90 EC, see Case C-267/86 *van Eycke v NV Aspa* [1988] ECR 4769.

The transporting of goods from one Member State to another via a third (non-member) country is considered as intra-MERCOSUR trade, if delivery cannot, for justifiable and valid geographical or transportation-related reasons, be carried out by a Member State.[21]

B The Trade Liberalisation Programme

As previously mentioned, the most important instrument required for dismantling trade restrictions within MERCOSUR is the adoption of the Trade Liberalisation Programme in the Treaty of Asunción.[22] This Programme calls for the abolition of customs and charges designed to achieve 'equivalent effect', as well as non-tariff trade barriers.[23] By 31 December 1994, all intra-MERCOSUR trade restrictions between Argentina and Brazil were to be lifted.[24] For economically-challenged Uruguay and Paraguay, several products were allowed to be excluded from customs exemptions until December 1995.[25]

C Exemptions

The Trade Liberalisation Programme is one of the few provisions in the Treaty of Asunción which requires no further ascertainment and, thus, is self-executing, as all Member States have transcribed the Treaty into national law. Although it was clearly stated in the provisions of the Trade Liberalisation Programme that, by the end of 1995, no intra-MERCOSUR tariffs are to exist, not all such tariffs have been abolished.

In the so-called Adjustment Ordinance (*régimen de adecuación*), according to Council of the Common Market (CCM) Decisions Nos 5/94 and 24/94, several products deriving from sensitive economic sectors that had previously qualified for exemption status were allowed to continue to be exempt from international tariff liberalisations even after 31 December 1994.[26] The exceptions were granted in order to allow Member States who were accustomed to practising protectionism the possibility to better adjust economically to the more competitive market conditions in other countries. The exempted commodities originated mainly from the agricultural, textile, timber and metal-working sectors.[27] The extended transitional period was in effect until the end of 1998 for Argentina and Brazil,

[21] CCM Decision No 1/09, art 14, lit b app.

[22] B Kraekel, *Der Abbau von Maßnahmen kontingentgleicher Wirkung als Instrument der Marktöffnung* (München, Herbert UTZ, 1997) 94.

[23] Trade Liberalisation Programme, art 1, in conjunction with art 3.

[24] Ibid art 1.

[25] Ibid arts 6 and 7.

[26] According to CCM Decision No 5/94, art 2, the list may only contain either products already included in the list of exemptions in ACE (Acuerdo de Complementación Económica) Treaty no 18 or products which have been subject to safeguarding measures.

[27] INTAL-BID, (1996) 1 *Informe MERCOSUR* 18. For Artgentina, there were 212, for Brazil 29, for Paraguay 432 and for Uruguay 958 exemptions in force.

and until the end of 1999 for Uruguay and Paraguay,[28] after which time diverse MERCOSUR arbitration court decisions reaffirmed the mandatory deadline for these exceptions and that there are to be no further justifiable restrictions of the intra-MERCOSUR trade.[29]

Just as the agricultural sector is independently regulated in the European Union,[30] the automobile and sugar industries are similarly regulated by exemption in MERCOSUR. Neither economic sector was included in the adoption ordinance and exceptions were recognised not only from intra-MERCOSUR trade, but also from the common external tariff.[31] This was due to the fact that Brazil and Argentina produce most of the automobiles and sugar in South America and that, to date, these two countries have not been able to come to an agreement on a common economic policy.[32] Regarding the automobile industry, a complete liberalisation had been scheduled for 31 December 2006[33] and, in fact, no internal tariffs have been in existence for automobiles and automotive parts since 1 February 2001.[34] At the same time, import quotas were to remain in effect until the end of 2006.[35] These provisions have yet to be transcribed into national law, and customs provisions therefore do conform to bilateral treaty.[36] With regard to the sugar sector, a taskforce, which is subject to the Common Market Group (CMG), has been given the task of devising a convergence plan by 2001. This, however, remains uncompleted to date,[37] and Member States are still able to impose customs on sugar from other Member States.[38] The plan of action from 2004–2006 envisioned a complete liberalisation of the sugar sector.[39] This also has not yet come to pass. Even though the timeframe for abolishing all exemptions from the free trade zone has been extended, and still today commodities originating from the automobile and sugar sectors are excluded from free trade, the vigorous cross-national customs abolition, as carried out in the transitional period, is seen as unique in the region.[40]

[28] CCM Decision No 24/94, art 3.

[29] *Non-tariff Trade Barriers*, first MERCOSUR arbitration court, 28 April 1999; *Retreaded Tyres*, sixth MERCOSUR arbitration court, 9 January 2002, III.D.2; *Anti-dumping Measures*, *fourth* MERCOSUR arbitration court, 21 May 2001.

[30] Articles 32–38 EC; see I Seidl-Hohenveldern and G Loible, *Das Recht der internationalen Organisationen* (Köln, Carl Heymanns, 2000). In EU law, it is prohibited to place customs duties or customs-equivalent duties on agricultural produce, see N Vaulont, 'Art 25 EC' in H von der Groeben and J Schwarze (eds), *EU-/EG-Vertrag, Kommentar* (Baden-Baden, Nomos, 2003).

[31] CCM Decision No 7/94, art 10.

[32] P Sanguinetti and M Sallustro, *MERCOSUR y el sesgo regional de la política comercial* (Buenos Aires, Univ Torcuato di Tella, Documento de Trabajo, Centro de Estudios del Desarrollo Internacional (CEDI),' 2000) 4.

[33] CCM Decisions Nos 70/00 and 4/01.

[34] CCM Decision No 70/0), art 1, in conjunction with appendix art 14.

[35] CCM Decision 70/00, appendix art 20 *et seq*. The Decisions should have been revised by 30 November 2003 according to CCM Decision 10/03, art 6, which, however, has not yet taken place.

[36] See MERCOSUR website, www.mercosur.int/msweb/principal/contenido.asp; Agreements PEC (Brazil–Uruguay) and CAUCE (Argentina–Uruguay), *cf* INTAL-BID, (1998) 4 *Informe MERCOSUR* 25.

[37] This is assumed to be the case since, after adoption of CCM Decisions Nos 19/94 and 16/96, there has been no further legislation covering regulations for the sugar sector.

[38] As is provided for in CCM Decision No 19/94, art 3.

[39] CCM Decision No 26/03, para 1.2.

[40] S Abreu Bonilla, *MERCOSUR: una década de integración* (Montevidéo, FCU, 2000) 35; positive: A Haller, *MERCOSUR* (Münster, Aschendorff Rechtsverlag, 2001) 50; U Wehner, *MERCOSUR* (Baden-Baden, Nomos, 1999) 169.

D Common External Tariff

A common external tariff is important not only to lend MERCOSUR economic weight as an economic block in international trade,[41] but also to facilitate the free movement of goods within MERCOSUR. A commodity which is produced outside of MERCOSUR and is imported into MERCOSUR will thereafter be freely available within MERCOSUR. In such cases, a common external tariff is essential; otherwise intra-MERCOSUR border control would remain necessary to prevent loopholes being used in the market, for example, goods being shipped to a Member State with a low external tariff to avoid a higher external tariff from another Member State.[42] Because any systematic border control aggravates the flow of goods,[43] a common customs policy is a prerequisite for the realisation of freedom of movement of goods.[44]

Contrary to the case of the abolition of internal tariffs, the Treaty of Asunción does not provide for an automatic assimilation of elevated external tariffs of Member States. Even before the end of the transitional period, a common external tariff for the majority of commodities was decided upon in CCM Decision No 22/94 and in accordance with article 1, paragraph 2 and article 5, lit c of the Treaty of Asunción. Appendix I to this Decision contains customs nomenclature with the respective tariff rates which were based on the so-called harmonised World Customs Organization System. This nomenclature bears a strong similarity to ALADI, as well as the so-called combined European Union nomenclature.[45] On 1 January, 1995, at the end of the transitional period, the common external tariff took effect for approximately 85 per cent of goods.[46] The exact tariff rate was modified by three governing bodies, namely by numerous Decisions of the CCM, Resolutions of the CMG and Directives of the MERCOSUR Trade Commission (MTC)[47] and rates currently range between 0 and 20 per cent, whereas the amount of external tariff tends to increase with the value of imports.[48]

[41] See Treaty of Asunción, art 5 lit c, in which the establishment of common external tariff is intended to strengthen Member States' ability to compete.

[42] W Weiss and C Herrmann, *Welthandelsrecht* (München, Beck, 2003) 244; M Herdegen, *Internationales Wirtschaftsrecht* (München, Beck, 1993) 158.

[43] PC Müller-Graff, 'Vorbemerkungen Art 28–31 EG' in H von der Groeben and J Schwarze (eds), *EU-/EG-Vertrag, Kommentar* (Baden-Baden, Nomos, 2003); Case C-190/87 *Oberkreisdirektor Borken v Moormann* [1988] ECR 4689.

[44] W Weiss and C Herrmann, *Welthandelsrecht* (München, Beck, 2003) 244; M Schweitzer and W Hummer, *Europarecht* (Neuwied, Luchterhand, 1996) 334 examine EU provisions together with the free movement of goods.

[45] RA Porrata-Doria, *MERCOSUR* (Durham, Carolina Academic Press, 2005) 51 points to the similarity to ALADI nomenclature. For EU nomenclature, see arts 1 and 3 of Council Regulation 2658/87/EC of 23 July 1997 pertaining to tariff and statistical nomenclature along with the common external tariff [1987] OJ L256/1 (last modified by Regulation 1969/93/EC [1993] OJ L180/9).

[46] CC Ameriso, *Coordinación de políticas tributarias para la constitución del mercado ampliado* (Buenos Aires, Ciudad Argentina, 1996) 87.

[47] The CCM determines general increases (see, eg CCM Decisions Nos 15/97, 6/01, 21/02), while the CMG stipulates alterations in customs nomenclature or in tariff rates for certain commodities, see, eg CMG Resolutions Nos 1/95, 17/02, 36/02, 39/02, 40/02, 51/02, 57/02, 4/03, 5/03, 19/03, 20/03, 21/03, 23/03, 1/04, 5/04, 14/04, 1/05, 2/05, 3/05, 12/05, 27/05, 41/05, 42/05, 59/05, 28/06, 29/06. The MTC has been empowered to undertake temporary cutbacks in import tariffs for individual goods in order to ensure supply, see CMG Resolution No 69/00. In the European Union, art 26 EC empowers the Council to determine the tariff rates based on European Commission recommendations.

[48] See www.mercosur.int/msweb/principal/contenido.asp. Lowest export tariffs are imposed on raw materials, mid-tariff rates on half-finished goods and export peak tariff rates on consumer goods. The highest rate ever imposed reached 23 per cent, see CCM Decision No 15/97. Customs rates may not in any case exceed 35 per cent

To date, there are exceptions to the common external tariff. A common settlement for the automobile and sugar sectors has still not come into force and special provisions have been applied to capital goods and goods from the IT and telecommunications sectors. At the beginning of 2006, trade in 1,624 goods was still affected by these special provisions. Member States have decided to find a mutual provision for goods originating from the IT and telecommunications technology sectors by the end of 2008.[49] It is now planned to bring external tariffs for the IT and telecommunications sectors in line with each other by 2011 (Brazil and Argentina) and by 2016 (Uruguay and Paraguay)[50] which, according to the original plan, actually should have been accomplished in January 2006.[51] Up to the beginning of this convergence plan, Member States are authorised to set their own tariff rates for IT and telecommunications goods.[52] The common regulations which have already been adopted for capital goods[53] are to come into effect by January 2011.[54] Until then, the national external tariffs for financial products remain valid.[55] For the economically weaker countries, specifically Uruguay and Paraguay, the possibility to impose external tariffs of merely 2 per cent exists for capital goods until 2014[56] and for IT and telecommunications goods until 2017.[57] Argentina and Brazil are also authorised to declare a 2 per cent tariff on capital goods not originating from MERCOSUR but only temporarily and only in certain cases until January 2013.[58]

In addition to these branch-specific or sectorial exemptions, Member States are granted the right to determine their own customs on commodities of their own choice, but only for a determined number of goods and only with approval from other Member States. The number of those commodities has, in fact, been reduced.[59] Until the end of January 2009, Argentina and Brazil are still permitted to determine their own tariff rates for 100 goods,[60] Uruguay for 225 goods[61] and Paraguay for 649 goods.[62] Beyond this deadline, Argentina and Brazil must successively dismantle the 100 exemptions to a maximum of 50 items by

of the value of the good and this maximum rate must be communicated to the WTO, see R Lavagna, 'La liberación comercial' in E Rimoldi de Ladmann (ed), *Mercosur y Comunidad Europea* (Buenos Aires, Ciudad Argentina, 1995) 36; P Sanguinetti and M Sallustro, *MERCOSUR y el sesgo regional de la política comercial* (Buenos Aires, Univ Torcuato di Tella, Documento de Trabajo, Centro de Estudios del Desarrollo Internacional (CEDI),' 2000) 9.

[49] CCM Decision No 61/07, art 2.

[50] CCM Decision No 13/06, art 2, para 2, in conjunction with CCM Decision No 39/05, art 2, para 2 and CCM Decision No 61/07, art 1.

[51] CCM Decision No 7/94, art 3 lit b.

[52] CCM Decision No 39/05, art 3, in conjunction with CCM Decision No 61/07, art 3 and CCM Decision No 58/08, art 10.

[53] See CCM Decision No 34/03 appendix.

[54] CCM Decision No 58/08, art 5, in conjunction with CCM Decision No 34/03, art 1.

[55] CCM Decision No 58/08, art 7.

[56] CCM Decision No 58/08, art. 8, in conjunction with CCM Decision No 34/03, arts 3 and 4.

[57] CCM Decision No 13/06, art 3, in conjunction with CCM Decision No 61/07, art 4 and CCM Decision No 58/08, art 12.

[58] CCM Decision No 34/03, appendix art 11, in conjunction with CCM Decision No 59/08, art 1.

[59] Because of the termination of the adaptation regime at the end of 2000 (see CCM Decision No 5/94, art 3, lit a, in conjunction with CCM Decision No 22/94, arts 4 and 5 and CMG Resolution No 48/94) and also because of the disapplication of exceptions at the end of 2005, see CCM Decision No 68/00, art 4, in conjunction with CCM Decision No 31/03, art 1 and CCM Decision No 33/03, art 5.

[60] CCM Decision No 38/5, art 1 and CCM Decision No 59/07, art 1.

[61] CCM Decision No 31/03, art 2, in conjunction with CCM Decision No 38/05, art 1.

[62] CCM Decision No 31/03, arts 2 and 3, in conjunction with CCM Decision No 7/94, art 4 sub-s 2 and CCM Decision No 38/05, art 1.

the end of 2010. Paraguay and Uruguay are allowed to apply the majority of their exemptions (Paraguay 549 and Uruguay 125)[63] until 2010 and from this date on until 2015, both countries are granted the right to determine their own common external tariffs for only 100 goods per country.[64]

Similiarly, there also exist special schemes for the import of certain commodities (*regímenes especiales de importación*) also known in the European Union.[65] In contrast to the European Union, however, the special import provisions in MERCOSUR remain largely one-sided, which is why they do not essentially differ from other exceptions from common external tariffs. However, MERCOSUR plans to approve only special provisions (*regímenes especiales comunes*) in the future.[66] Unilateral special schemes of import are therefore only permitted to stay in effect until the end of 2010 at the latest, with the stipulation that they were already in existence before the year 2000.[67] Beyond that, unilateral special import provisions can only be applied if there is minimal effect on the economy, if they serve public, not commercial interests[68] and if they appear on a list issued under CCM Decision No. 3/06. These special provisions include such goods as those belonging to diplomats that are imported on a temporary basis, or internationally traded works of art.[69] The Trade Commission is authorised to amend this list in certain cases,[70] which means that Member States can no longer enact unilateral special provisions on their own. In order to safeguard supply, exemptions have also been permitted here for Uruguay and Paraguay: Up till 2011 and under prior approval from the other Member States, Paraguay has been authorised to raise customs by no more than 2 per cent on a limited amount of raw materials and Uruguay has been authorised to raise customs by a maximum of 2 per cent on a limited amount of goods from the livestock sector.[71] Similarly, until the Treaty of Amsterdam, customs contingencies with lower tariff rates were also guaranteed in the European Union for individual states and commodities in order to avoid difficulties with supply.[72]

The Problem of Double Customs Duty

Regardless of how many intra-MERCOSUR borders must be crossed to reach the intended destination, external tariffs are reimposed at every intra-MERCOSUR border until final destination within MERCOSUR is reached. This reimposing of external tariffs is the chosen method of practice instead of merely reimbursing the difference between the already levied amount and the amount imposed by the Member State the commodity is

[63] CCM Decision No 31/03, arts 2 and 3, in conjunction with CCM Decision No 7/94, art 4 sub-s 2.

[64] CCM Decision No 59/07, art 1.

[65] See CCM Decisions Nos 69/00, 32/03, 33/05, 2/06, 3/06. Referring to the European Union, *cf* Regulation 2457/2001/EC [2001] OJ L331/8. In the Spanish version of the Official Journal, the special rules are referred to as 'régimen especial de importación'.

[66] CCM Decision No 69/00, art 2, in conjunction with art 12.

[67] CCM Decision No 69/00, arts 2, 9, in conjunction with CCM Decision No 33/05, art 2, CCM Decision No 14/07, art 2 and CCM Decision No 57/08, art 2.

[68] See third recital of the Preamble to CCM Decision No 3/06.

[69] CCM Decision No 3/06, appendix ch 1. Similar liberalisations are found in the European Union, as per arts 137–44 of the EU Customs Codex (Regulation 2913/92/EC [1992] OJ L302/1) for goods deriving from non-member states and which are temporarily brought into the Community, for example, professional equipment.

[70] CCM Decision No 3/06, arts 2–4.

[71] CCM Decision No 32/03, arts 1, 3 and CCM Decision No 32/03, art 4. Both countries must exhibit a list of goods, see CCM Decision No 33/05, arts 6, 7.

[72] Ex art 25 EC (Maasrtricht Treaty).

entering.[73] This practice is justified by the fact that an agreed-to list of external tariff-exempted goods has not been established.[74] This practice can be presumed to be linked to the still unanswered question: who is entitled to the MERCOSUR external-border-elevated tariff revenue, the country which initially imported the good or the country in which the import will be marketed? One solution could be to transfer the revenue to a common institute, as is done in the European Union.[75] Instead, in MERCOSUR, it has been decided to install an online customs clearing centre in order to be able to provide fair distribution of tariff revenue.[76] Not until after this has been accomplished[77] may third country goods circulate freely within MERCOSUR, just as goods produced within MERCOSUR's boundaries can circulate freely. Since January 2006, the multiple payment of duty is prohibited for third country imports bearing a common external tariff of 0 per cent[78] because of the fact that the mentioned distribution problem does not exist in this case. However, no abolition of multiple customs clearance is provided for goods contained in the common external tariff exemptions list.[79] Accordingly, multiple customs clearances are still being levied today on many goods which have been brought into MERCOSUR, which often serves to restrict intra-community trade.

Common external tariffs nowadays apply to the majority of the originally exempted goods. For the others, especially the IT and telecommunications sectors, concrete timetables exist. When taking into consideration the fact that significant differences in national external tariffs existed among individual Member States prior to the implementation of the common external tariff, this change can be considered a remarkable step forward. Brazil, being the financially strongest industrialised country in MERCOSUR, collected the highest customs revenue, in order to protect domestically produced goods. Being more dependent on imports, Argentina, Uruguay and Paraguay pursued a less protectionist policy. The so-called special schemes of import (*regímenes especiales de importación*) are also applied in the European Union; according to the EC Treaty in the Maastricht version, temporary, reduced import duties, which were implemented to safeguard supply, were possible. The categorical exemption of the automobile and sugar industries is comparable to the individually regulated agricultural sector in the European Union. However, by definition, the European Union is considered to be a customs union. Double customs duty on third country goods proves to be problematic. Despite proper import into MERCOSUR, these goods are not considered MERCOSUR commodities in the domestic trade, which is why MERCOSUR does not pose as a single market for such goods.

E Rules of Origin

In order to establish a common external tariff, the definition of unitarily valid rules of origin is necessary. Otherwise, it would be possible to impose varying tariffs on a certain

[73] S Abreu Bonilla, *MERCOSUR: una década de integración* (Montevidéo, FCU, 2000) 48; INTAL-BID, (1996) 1 *Informe MERCOSUR* 29.

[74] INTAL-BID, (1996) 1 *Informe MERCOSUR* 29.

[75] E Baldinelli, *La Argentina en el Comercio Mundial* (Buenos Aires, Atlántida, 1997) 180.

[76] CCM Decision No 54/04, art 4. The so called INDIRA system was established according to CCM Decision No 1/08.

[77] As at November 2009, this has not yet been the case. The current presidency *pro tempore* confirmed that the elimination of double customs duty is one of the most urgent tasks needing to be done.

[78] CCM Decision No 54/04, art 2, in conjunction with CCM Decision No 37/05, art 2.

[79] CCM Decision No 37/05, art 3.

product depending on which contracting MERCOSUR state was the destination. A uniform identification of goods which originate in MERCOSUR is especially essential for intra-MERCOSUR trade, as long as common external tariff exemptions exist.[80] So that a product can enjoy the benefits of free trade, a certificate of origin must verify that the good in question is a MERCOSUR-produced item.[81] In any case, the traditional stipulations of the country of origin are rendered difficult by the fact that due to lower shipping costs, products today are assembled from components originating from different countries, which makes determining the country of origin a complicated issue.[82] On the other hand, when rules of origin are falsely applied or abused, they could be categorised as non-tariff trade barriers, for instance, a good intentionally assigned to a certain country of origin in order to justify the collection of a higher customs duty. The rules of origin have already been recorded in Appendix II to the Treaty of Asunción and have been amended in numerous decisions of the CCM.[83] Currently, the guiding principle is that contained in CCM Decision No 1/09, which combines most of the valid provisions made hitherto into one provision.[84] Apart from the definition of MERCOSUR rules of origin (*Régimen de Origen MERCOSUR*), Decision No 1/09 regulates the issuance of certificates of origin and applies sanctions for counterfeits or incorrect examination of certificates of origin.[85]

MERCOSUR Rules of Origin according to CCM Decision No 1/09

As previously mentioned, rules of origin are necessary as long as exceptions to the common external tariff exist. It was pointed out that the control of certificates of origin within the common customs territory are not compatible with a customs union and poses a hindrance to free trade,[86] which is why Member States are authorised to request certificates of origin (even for intra-MERCOSUR produced goods) only until the end of 2010.[87] In point of fact, also in the European Union a so-called verification for the characteristics of a good classified as a common commodity can be requested.[88]

The analogy to the rules of origin as they are recorded in article 23 *et seq* of the EU Customs Codex (Commission Regulation 2913/92) is no coincidence.[89] Unlike the EU rules of origin, two internationally recognised commercial law principles regarding identification of origin of goods are, however, combined in MERCOSUR.[90] A commodity is considered of MERCOSUR origin, even if not all the material components originated

[80] E Baldinelli, *La Argentina en el Comercio Mundial* (Buenos Aires, Atlántida, 1997) 176.

[81] CCM Decision No 1/09, appendix art 18.

[82] RX Basaldúa, *MERCOSUR y Derecho de la Integración* (Buenos Aires, Abeledo-perrot, 1999) 306; D Hargain and G Mihali, *Circulación de bienes en el MERCOSUR* (Buenos Aires, BdeF, 1998) 32.

[83] See CCM Decision No 6/94 (modified by CCM Decisions Nos 23/94, 16/97 and 5/96, the latter in turn modified by CCM Directive No 8/97); CCM Decisions Nos 16/97, 21/98, 3/00, 41/00, 4/02, 24/02, 18/03; CMG Resolution No 27/01; CCM Directive Nos 12/96, 12/97, 15/99, 4/00; all rescinded by CCM Decision No 1/04, rescinded itself by CCM Decision No 1/09.

[84] As to which, the following CCM Decisions are to be observed: Nos 23/94, 17/03, 29/03, 41/04, 2/04, 3/05, 1/09.

[85] CCM Decision No 1/09, appendix art 1.

[86] INTAL-BID, (1997) 3 *Informe MERCOSUR* 20; E Baldinelli, *La Argentina en el Comercio Mundial* (Buenos Aires, Atlántida, 1997) 178.

[87] CCM Decision No 69/00, art 3 and CCM Decision No 18/03, appendix art 2, para 2, in conjunction with CCM Decision No 1/09, art 2.

[88] Regulation 2454/93/EC, art 313, para 2 (operational guidelines for Regulation 2913/92/EC pertaining to the Customs Codex of the Community [1993] OJ L253/1).

[89] J Vervaele, 'MERCOSUR' (2005) 54 *ICLQ* 399.

[90] D Hargain and G Mihali, *Circulación de bienes en el MERCOSUR* (Buenos Aires, BdeF, 1998) 298; J Witker, *Las reglas de origen en los Tratados de Libre Comercio* (Santiago de Chile, LexisNexis Conosur, 2002) 35.

from MERCOSUR states, if (1) either the final integral handling or processing took place within MERCOSUR, such that the new product came into being according to the customs nomenclature coding; or (2) the percentage of domestic material component amounts to at least 90 per cent.[91] The second criterion cannot be found in the EU Customs Codex. Special provisions (*requisitos específicos*) are valid for coal, iron and steel industry products, as well as for the IT and telecommunications sectors: both above-stated criteria must be regularly satisfied.[92] The Trade Commission has been authorised to determine for other commodities separate requirements of origin, which override the general rules of origin, in justifiable cases and in exceptional cases.[93] MERCOSUR is a preference zone within ALADI. ALADI Resolution No 78,[94] governing rules of origin, is only valid in the event that there is no existing MERCOSUR regulation already in place. Such MERCOSUR regulations are permitted to be stricter (but not more lax) than the ALADI regulations.[95]

F Non-tariff Trade Barriers

Classified under non-tariff trade barriers are: duties with customs-equivalent effect, quota limitations (quantitative restrictions on imports or transports), or measures having equivalent effects, such as border control harrassment.[96] Other forms of non-tariff trade barriers are discriminating domestic taxes placed on imported goods, unnecessary or duplicate health or veterinarian examintions or statistical charges, all measures that serve protectionism in a concealed or disguised[97] form. The prohibition of non-tariff trade barriers is, hence, understood as a catch-all clause to support action to support free trade, through the prohibition and/or repeal of all types of internal tariff duties.[98]

In the European Union, there is even a prohibition against regulations which, at face value, do not discriminate and are therefore not in support of protectionist ideals, but which are, however, capable of hindering 'directly or indirectly, actually or potentially, intra-community commerce' (*Dassonville*).[99] The actual occurrence of an action which causes an import barrier is not necessary.[100] That is, regulations which apply more or less

[91] Treaty of Asunción, appendix II art 1, lit c, in conjunction with CCM Decision No 1/09, appendix art 3, lit c.

[92] CCM Decision No 6/94, arts 4 and 5 and CCM Decision No 23/94, appendix I in conjunction with CCM Decision No 1/09, appendix.

[93] Treaty of Asunción, appendix II art 3, in conjunction with CCM Decision No 18/03, appendix art 3, lit g and art 5.

[94] Régimen General de Origen de la ALADI, Texto Consolidado y Ordenado de la Resolución 78 del Comité de Representantes que establece el Régimen General de Origen de la Asociación, que contiene las disposiciones de las Res. 227, 232 y de los Acuerdos 25, 91 y 215 del Comité de Representantes, available at www.aladi.org.

[95] ALADI Resolution No 78, art 6.

[96] Case C-128/89 *CEC v Italy* [1990] ECR I-3239.

[97] PC Müller-Graff, 'Vorbemerkungen Art 28–31 EG' in H von der Groeben and J Schwarze (eds), *EU-/EG-Vertrag, Kommentar* (Baden-Baden, Nomos, 2003); S Leible, 'Article 28' in E Grabitz and M Hilf (eds), *Das Recht der Europäischen Union: Kommentar* (München, Beck, 2006).

[98] Referring to the prohibition of quantitative restrictions in EU law, *cf* PC Müller-Graff, 'Vorbemerkungen Art 28–31 EG' in H von der Groeben and J Schwarze (eds), *EU-/EG-Vertrag, Kommentar* (Baden-Baden, Nomos, 2003).

[99] Case C-8/74 *Public Attorney's Office v Dassonville* [1974] ECR 837; Case C-313/94 *SNC v Ditta Fransa* [1996] ECR I-6039.

[100] Joined Cases C-1/90 and C-176/90 *Aragonesa v Publivia* [1991] ECR I-4151. *cf* A Epiney, 'Art 28 ECT' in Ch Calliess and M Ruffert (eds), *Kommentar zu EU-Vertrag und EG-Vertrag* (Neuwied-Kriftel, Hermann Luchterhand, 2002) 564–75.

equally to both domestic and imported commodities can, according to EU legislation, also hinder the import of goods in the event that the regulations of the exporting country differ. The virtual or actual hindrance of cross-national trade is due to the fact that foreign businesses are too little informed of domestic regulations in the target country and that additional costs result from this, which reveals the necessity of legal harmonisation.[101] In this way, different value added tax regulations which thereby brought about double taxation,[102] or environmental, health or consumer protection guidelines of varying strictness in the diverse Member States (for example, guidelines governing the contents or packaging of foodstuffs), might impair the free movement of goods, even though such guidelines are valid for both domestic and foreign commodities.[103] Even if market freedoms imply the prohibiting of discrimination as core content, in EU legislation today, they are understood as a prohibition on any restrictions whatsoever on trade.[104]

The abolition of non-tariff trade barriers is likewise considered to have as great a significance as the abolition of customs. Although all non-tariff trade barriers were also to be abolished by the end of the transitional period,[105] in contrast to the abolition of intra-community customs, no automatic effect is specified. The reason for this is logically related to the fact that the non-tariff trade barriers to be abolished first must be identified, which is proving to be a difficult and time-consuming task. Also time-consuming is the subsequent elimination of identified non-tariff trade barriers, which then makes revision of national regulations essential.

In CCM Decision No 3/94, parties have agreed not to impose any further restrictions on intra-MERCOSUR trade[106] and in addition, to eliminate 277 original non-tariff barriers (aside from the non-tariff trade barriers listed in ACE (Acuerdo de Complementación Económica) No 18)[107] which were to be eliminated by the end of the transitional period. This task has been assigned to expert committees, charged with regularly updating the list and monitoring compliance with it.[108] The original deadline to abolish all non-tariff trade

[101] In its *Cassis de Dijon* judgment, the European Court of Justice pointed out that the absence of legal harmonisation was one of the reasons for the existence of measures having an equivalent effect to quantitative restrictions, see Case C-120/78 *Rewe v Federal Superintendent of Monopolies on Brand Name Wines (Cassis de Dijon)* [1979] ECR 649; *cf* I Seidl-Hohenveldern and G Loible, *Das Recht der internationalen Organisationen* (Köln, Heymanns, 2000); D Langner, 'C. VI: Technische Vorschriften' in MA Dauses (ed), *Handbuch des EU-Wirtschaftsrechts* (München, Beck, 2006).

[102] RX Basaldúa, *MERCOSUR y Derecho de la Integración* (Buenos Aires, Abeledo-perrot, 1999) 121–55.

[103] RR Díaz Labrano, *MERCOSUR: Integración y derecho* (Buenos Aires, Intercontinental, 1998) 44; S. Abreu Bonilla, *MERCOSUR: una década de integración* (Montevidéo, FCU, 2000) 39.

[104] A Epiney, 'Art 28 EC Treaty' in Ch Calliess and M Ruffert (eds), *Kommentar zu EU-Vertrag und EG-Vertrag* (Neuwied-Kriftel, Hermann Luchterhand, 2002) 564–75; W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004) 167; A Brigola, *Das System der EG-Grundfreiheiten: Vom Diskriminierungsverbot zum spezifischen Beschränkungsverbot* (München, Beck, 2004).

[105] Treaty of Asunción, art 5, lit a; Trade Liberalisation Programme, art 10, para 2.

[106] CCM Decision No 3/94, art 4; CCM Decision No 17/97, art 6.

[107] Trade Liberalisation Programme, art 10, para 1.

[108] CMG Resolution No 123/94, arts 1 and 2, in conjunction with CMG Resolution No 32/95, art 1 and 2. Significant non-tariff import restrictions identified by the Technical Committee No 8 are, for Argentina: contingents for certain vehicle types and authorisation requirements for the import of fertilisers; for Brazil; health protection for foodstuffs, labelling and packaging regulations for fruit and vegetables and authorisation requirements for the import of weapons; for Paraguay: import ban on industrial wastes or hazardous wastes and registration requirements for pharmaceuticals; for Uruguay: registration requirements for pharmaceuticals, import regulations, particularly for agricultural produce, and authorisation requirements for the import of aircraft and weapons. Examples found in P Sanguinetti and M Sallustro, *MERCOSUR y el sesgo regional de la política comercial* (Buenos Aires, Univ Torcuato di Tella, Documento de Trabajo, Centro de Estudios del Desarrollo Internacional, CEDI), 2000) 15.

barriers, the end of 1994, was extended to 1999 for non-tariff trade barriers perceived to be especially important, and further negotiations have been scheduled for the respective expert committee in respect of the remaining ones.[109] The first MERCOSUR arbitration court confirmed that all non-tariff trade barriers should be eliminated by 31 December 1999, in other words, by the end of the alignment ordinance, as their continued existence would undermine the foundation of MERCOSUR.[110]

In the case of the European Union, the European Court of Justice's case law established what was to be understood to fall under the prohibition of quantitative restrictions and measures of equivalent effect, while in MERCOSUR, the concept of non-tariff trade barriers is defined by primary law and still-to-be-eliminated non-tariff trade barriers are identified on a list.[111] By virtue of the fact that these lists contain no conclusive itemisation of all detectable or hidden trade restrictions within MERCOSUR, but instead, only those already recognised, the identification of non-tariff trade restrictions is an ongoing, never-completed task. Until a comprehensive legal harmonisation takes place, domestic policy will continue to change and to evolve, new non-tariff trade barriers will continue to emerge.

However, granted that the process of eliminating hidden trade restrictions has moved ahead at a slower pace than the abolition of internal customs, considerable progress has been observed all the same.[112] By 1997, over half of the non-tariff trade barriers identified previously had already been eliminated.[113]

(i) Customs and Border Controls

The Recife Trade Agreement[114] regulates the way intra-MERCOSUR borders are controlled, with the intention of alleviating the flow of cross-border people and commodities. CCM Decision No 1/97 approved an Agreement of Cooperation between customs officials to deal with customs violations.[115] As was established by EU legislation, MERCOSUR also developed common customs declaration forms for goods to be declared[116] as well as for the temporary import of goods.[117] CCM Decision No 20/98 obligates Member States to secure as-quick-as-possible customs clearance procedures for exports and imports.[118] In addition to this, guidelines were issued for customs clearance[119] and designation of customs values.[120] Alongside the implementation of a common external tariff, the collaboration in customs matters is seen as an essential element of a customs union.[121] A comprehensive Customs Codex (*código aduanero*), comparable to the EU Customs Codex,

[109] CCM Decision No 17/97, arts 3 and 5.
[110] First MERCOSUR arbitration court, 28 April 1999 (non-tariff trade barriers).
[111] See CCM Decision No 27/07.
[112] With further references: J Vervaele, 'MERCOSUR' (2005) 54 *ICLQ* 404; RE Di Martino Ortiz, *Instituciones de la Unión Europea y del MERCOSUR* (Asunción, Intercontinental, 2000) 71–88.
[113] INTAL-BID, (1997) 3 *Informe MERCOSUR* 21.
[114] Adopted by CCM Decision No 5/93, expanded by CCM Decision No 12/93; a modified and condensed version was adopted by CCM Decision No 4/00, which was again amended by CCM Decision No 5/00.
[115] See CCM Decision No 5/03, which, among others, provides for a common approach against tobacco and livestock smuggling.
[116] The MIC/DTA (Manifiesto Internacional de Carga/Declaración de Tránsito Aduanero), see*f* CCM Decision No 2/99, appendix para 2.2; customs forms according to CCM Directive No 4/95.
[117] CCM Directive No 3/95.
[118] CCM Decision No 20/98, art 4.
[119] CCM Decision No 16/94, replaced by CCM Decision No 50/04.
[120] CCM Decision No 17/94. For EU law, *cf* Regulation 2913/92/EC, arts 28–36.
[121] A Haller, *MERCOSUR* (Münster, Aschendorff, 2001) 84.

of custom formalities, such as determining agreed upon methods for measurement of customs values, the installation of integrated customs points, the networking of data processing systems, rules of origin, as well as offences and penalties for violations, was established and was to come into effect by May 2008 at the latest.[122] At the time of writing, the Code has not yet come into force.

(ii) Technical Regulations, Consumer and Environmental Protection

As regards the alignment of technical norms, noticeable progress has also been charted.[123] In total, approximately 43 per cent of all CMG Resolutions fall under technical regulations.[124] Many Resolutions governing health and consumer protection issues, for example, the packaging of foodstuffs,[125] production and quality control of pharmaceuticals,[126] and limits for pesticide residue in foodstuffs[127] have been passed. CCM Decision No 6/96 adopted an agreement governing the implementation of health and plant protection measures, in line with the WTO, which defines the parameters in which Member States may implement health and plant protection methods. Previously, agreements had already been made amongst Member States concerning the implementation of health and plant protection measures,[128] which do not prohibit Member States from taking the necessary measures for the safeguarding of plants and animals. Concealed trade restrictions caused by unnecessary or duplicated health or veterinarian examinations should, however, be stopped.[129] Here, Member States are obligated to align health and plant protection measures as much as possible[130] and to accept examinations performed in other states as having the same value.[131] The later-established expert committee for plant and animal health and a customs officials committee are to monitor the operating methods of the respective national authorities and direct recommendations for common resolutions to the CMG.[132] As regards environmental issues, specifically how to deal with environmental offences, the parties have agreed to a standardised approach,[133] namely a skeleton agreement governing environmental protection issues.[134] In addition, the need for clean production processes (modelled after the German model)[135] has been decided upon. One could conclude, based on MERCOSUR rules and agreements (as in EU legislation)[136], that environmental protection, as a common interest, could constitute a limitation on the free movement of goods, hence, the need to harmonise environmental protection standards as much as possible.

[122] CCM Decision No 54/04, art 4, lit a; CCM Decision No 55/07, art 2.
[123] RE Di Martino Ortiz, *Instituciones de la Unión Europea y del MERCOSUR* (Asunción, Intercontinental, 2000) 71–88.
[124] S Abreu Bonilla, *MERCOSUR: una década de integración* (Montevidéo, FCU, 2000) 40.
[125] CMG Resolution No 3/92.
[126] CMG Resolutions Nos 4/92, 4/95.
[127] CMG Resolutions Nos 62/92, 23/94, 56/94.
[128] Adopted by CCM Decision No 6/93.
[129] CCM Decision No 6/93, appendix art 2, paras 1 and 4.
[130] CCM Decision No 6/93, appendix art 3, para 1.
[131] CCM Decision No 6/93, appendix art 4; CMG Resolution No 60/99.
[132] CMG Resolution No 87/00, arts 1–4.
[133] CCM Decisions Nos 10/00 and 14/04.
[134] CCM Decision No 2/01.
[135] CCM Decisions Nos 3/02 and 9/02.
[136] See Case C-2/90 *CEC v Belgium (Waste Transport)* [1992] ECR I-4431.

In response to the potential hindering effect that diverse domestic provisions regarding the transport of dangerous substances could have on the free exchange of commodities, the CMG passed an agreement concerning the cross-border movement of dangerous substances. This agreement is based on International Maritime Organization and International Organization of Civil Aviation recommendations.[137] Even if the enforcement of violations is to remain subject to domestic government policy,[138] the regulation decreases arbitrariness and diverse domestic penalties for the same types of violations and, thereby, lessens the amount of trade biases based on diverse Member State regulations.

(iii) General Service Levy

Charges levied at border crossings, which simply reflect a fee adequate to cover customs services, as expressly stated in article 2, lit a, phrase 2 of the Trade Liberalisation Programme, cannot be seen as non-tariff trade barriers.[139] The prerequisite of adequacy has to be interpreted *sensu stricto* so that admissible customs services are a matter of isolated cases.[140] A general service levy or fee amounting to up to 10 per cent of commodity value, as is the case in Argentina, which started levying a fee for all imported goods in 1961, was, however, criticised for being excessive[141] and therefore inconsistent with article VIII, paragraph 1, lit a GATT, as determined by a WTO panel in 1997.[142] This fee is also inconsistent with the mandate calling for uniform taxation of domestic and imported goods found in article 7 of the Treaty of Asunción, which, in turn, complies with article 90 EC and in which the eighth MERCOSUR arbitration court recognised a general prohibition on discrimination due to nationality, comparable to article 12 EC.[143] In consideration of these general service levies, the concept of 'customs' was revised to 'nominal total customs' (*aranceles nominales totales*) under CCM Decision No 5/94, with the addendum stating that, as in the case of Argentina, nominal total customs is defined as the sum of all common customs and the general service levy.

(iv) Coordination of Macro-economic Policy

The elimination of non-tariff trade barriers and the abolition of restrictions on other economic freedoms as described in article 1, paragraph 2 of the Treaty of Asunción represent a key component in support of macro-economic policy and, logically, must be accompanied by adjustments in related laws.[144] The goal of economic integration is to prevent such trade restrictions through common trade policies. In contrast to the EC

[137] CCM Decision No 2/94, appendix third recital.

[138] CCM Decision No 8/97, appendix art 3, para 2.

[139] D Hargain and G Mihali, *Circulación de bienes en el MERCOSUR* (Buenos Aires, BdeF, 1998) 153. Referring to fiscal statistics in detail, RX Basaldúa, *MERCOSUR y Derecho de la Integración* (Buenos Aires, Abeledo-perrot, 1999) 161. This is identical to the legal approach in the European Union, *cf* Case C-16/94 *Dubois v General Cargo (Thoroughfare Tolls)* [1995] ECR I-2421.

[140] As pointed out by the European Court of Justice, see Case C-63/74 *Cadsky v Instituto Nazionale* [1975] ECR 281.

[141] A Haller, *MERCOSUR* (Münster, Aschendorff, 2001) 63; CMG Resolution No 123/94, appendix I.

[142] WT/DS56/R, 25 November 1997. Similar to European Court of Justice case law, *cf* Case C-24/68 *CEC v Italy* [1969] ECR 193.

[143] *De Facto Discrimination*, eighth MERCOSUR arbitration court, 21 May 2002, Considerando A.i.

[144] CCM Decision No 3/94, third recital of the Preamble; pertaining to functional links between approximation of law and the elimination of non-tariff trade barriers, see S Feldstein de Cárdenas, 'El MERCOSUR: Bases para un instrumento de harmonización legislative' (2001) XLVII(122) *Revista de la Facultad de Ciencias Jurídicas y Políticas* 169.

Treaty,[145] the Treaty of Asunción does not foresee specific authorisation for the approximation of laws. The global obligation of essential harmonisation of 'relevant fields of law', contained in article 1, paragraph 2 of the Treaty of Asunción, in fact sets out specifics of the procedural tasks, rather than establishing their legal foundation, as exemplified by the EC Treaty's approach in article 3 defining community principles.[146]

In addition to the provisions which directly regulate cross-border trade, for example, the customs clearance of goods at borders, taxation laws must also be harmonised in order to secure uniform taxation of domestic and foreign goods.[147] As previously mentioned, this topic is addressed in article 7 of the Treaty of Asunción. The alignment of taxation law is considered to be one of the major challenges for MERCOSUR. The taxation systems are complicated and inefficient and have been diverted from their original structures and purposes by numerous reforms, which makes harmonisation difficult. Due to their federal constitutional structure, in Argentina and Brazil, it is possible to raise taxes at all governmental levels, making such alignment and harmonisation particularly problematic. In Argentina, Uruguay and Paraguay, on the other hand, value added tax is applied according to the destination-country principle which does not distinguish between imports and exports, and is therefore better adapted for emerging systems of integration. In Brazil, the land-of-origin principle is applied.[148] Furthermore, some Brazilian federal states raise their own value added taxes on certain goods if they are foreign imports, which is equivalent to a customs-equivalent levy. In this context, the standardisation of subsidies regulations is advisable. The promotion of exports represents a form of subsidy which not only distorts competition between Member States, but which can also serve as a non-tariff trade barrier.[149] Full or partial reimbursement of customs which are paid to another country[150] falls under such promotion of exports. Other types of export promotions are governmental loans with preferred conditions, tax deductions, or any form of governmental production subvention. Export promotion measures are, in fact, not strictly forbidden in MERCOSUR. They are still possible but only with approval of the other Member States, under CCM Decision No 10/94, article 2, and only since 1 January 1995, and are governed by GATT provisions.[151] According to CCM Decision No 10/94, expressly admissible for intra-MERCOSUR trade are the governmental granting of long-term credit at the usual international rate of interest; the reimbursement of indirect taxes, as long as taxation law

[145] Article 94 EC *et seq.*

[146] E Ramos da Silva, *Rechtsangleichung im Mercosul* (Baden-Baden, Nomos, 2002) 72. This is in line with the fact that there is no uniform legislation in MERCOSUR due to the non-direct effect of MERCOSUR law. Secondary MERCOSUR law must be transcribed by Member States into national law and functions therefore in a similar way to EU Directives. Powers granted to legislative organs are limited.

[147] JP Montero Traibel, *MERCOSUR* (Montevidéo, FCU, 2000) 33–59; RA Gionco, *MERCOSUR: Armonización de políticas fiscales y aduaneras* (Buenos Aires, Ciudad Argentina, 2003) 101; A Barreix and L Villela, *Tributación en el MERCOSUR: Evolución, comparación y posibilidades de coordinación* (Buenos Aires, BID-INTAL/ITD, 2003) 1–7.

[148] JP Montero Traibel, *MERCOSUR* (Montevidéo, FCU, 2000) 43–82.

[149] JA Benítez Gómez, *La supresión de las fronteras fiscales* (Montevidéo, FCU, 2005) 74; A Barreix and L Villela, *Tributación en el MERCOSUR* (Buenos Aires, BID-INTAL/ITD, 2003) 85. Referring to the relation of prohibition of subsidies to the free movement of goods, see W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004) 344.

[150] So-called 'drawback', see JP Montero Traibel, *MERCOSUR* (Montevidéo, FCU, 2000) 69.

[151] CCM Decision No 10/94, art 1. In particular, the WTO Agreement on Subsidies and Countervailing Measures is to be considered, as determined in *Export Allowances*, second MERCOSUR arbitration court, 27 September 1999.

is harmonised; as well as special tariff regulations which assist in determining value.[152] Such practices come into question if the application of the permitted subsidies requires coordination among Member States. This condition comes into play from the clear formulation of CCM Decision No 10/94, article 2, whereby the implementation of 'any' new export promotion measure after 1 January 1995 must be coordinated between the Member States. The position of the second MERCOSUR arbitration court was that all export or production promotion practices which are not expressly permitted[153] are subject to mandatory consultation.

Member States are under obligation to allow mutual monitoring of such measures and to make sure that no other further unforeseen export or production promotion within this provision compromises intraregional trade.[154] On the basis of CCM Decision No 10/94, the second MERCOSUR arbitration court ruled that a preliminary financing programme of exports to Brazil was an impermissible form of export promotion.[155] The loans were granted by private banks at interest rates considerably lower than the market standard. This was possible because the government had backed up the credit through a tax deduction.[156]

The alignment of fiscal regulations, especially significant to building a common market,[157] is, however, not a process that will be completed in the short term. In fact, it has been pointed out by European commentators that more than 50 years after the enacting of the EC Treaties, the legislative alignment has not been completed, nor was its completion foreseeable, or if it ever will be completed.[158]

(v) Intellectual Property Rights

The Protocol adopted among MERCOSUR states in 1995 governing the harmonisation of rights related to intellectual property, trademark protection and specification of origin,[159] and the 1998 Protocol governing design protection,[160] represent efforts both to establish minimal protection standards and to reduce distortions and restrictions found in inter-community trade. In this instance, the legal framework of the European Court of Justice[161] is somewhat problematic, in that that the property rights owner cannot oppose the import of goods which are brought into circulation by either the owner him/herself or with

[152] CCM Decision No 10/94, art 12, in conjunction with arts 4, 5, 6, 9, 10 and 11. As regards exports to non-member states, the Decision contains fewer restrictive requirements. It allows for the granting of governmental loans under usual market conditions, the deduction of indirect taxes for goods designated for export, a payment intermission of a maximum of five years or a retroactive reimbursement of direct or indirect taxes actually accumulated during production, as provided for under the provisions of GATT, see CCM Decision No 10/94, arts 4–7, 10 and 12. The validity of the relevant regulations in GATT is determined by CCM Decision No 10/94, art 1.

[153] *Export Allowances*, second MERCOSUR arbitration court, 27 September 1999.

[154] CCM Decision No 10/94, art 11, paras 1 and 2.

[155] *Export Allowances*, second MERCOSUR arbitration court, 27 September 1999.

[156] Ibid.

[157] That the dismantling of internal fiscal boundaries is required to achieve an area without internal frontiers is pointed out by JA Benítez Gómez, *La supresión de las fronteras fiscals* (Montevidéo, FCU, 2005) 72 and T Oppermann, *Europarecht* (München, Beck, 2005) 366.

[158] A Menéndez Moreno, *Aspectos jurídicos de la armonización fiscal de la Unión Europea* (Lex Nova, Valladolid, 1998); reproduced in LA Velasco San Pedro (ed), *MERCOSUR y Unión Europea: dos modelos de integración económica* (Espanha, Lex Nova, 1998) 293.

[159] Adopted by CCM Decision No 8/95.

[160] Adopted by CCM Decision No 16/98.

[161] Case C-19/84 *Pharmon v Hoechst* [1985] ECR 2281.

his/her agreement.[162] The legislative harmonisation concerning intellectual property in MERCOSUR is classified as being advanced.[163]

G Public Order Provision

According to the *Dassonville* judgment of the European Court of Justice, although public order provisions possess a legitimate foundation, many provisions governing environmental and consumer protection, regulating competition and similar matters, when treated differently by the Member States, pose an indirect (de facto, potential) barrier to cross-border trade.

Jointly, article 30 EC, article 2, lit b., phrase 2 of the Trade Liberalisation Programme, along with article 3, lit b, phrase 2 of the Agreement (in which MERCOSUR was recorded by ALADI Secretary as a preferred zone within ALADI)[164] clarify that the public order provisions listed in article 50 of the Treaty of Montevidéo (ALADI foundation treaty) pose no trade restrictions. Article 50 of the Treaty of Montevidéo indicates that no provision of the treaty is permitted to forbid any measure that governs the following matters:

(a) the protection of public morality;
(b) the implementation of national security regulations;
(c) provisions governing the import or export of weapons;
(d) safeguarding the life or health of humans, animals and plants;
(e) the import or export of gold and silver;
(f) the protection of artistic, historic and archaeological heritage;
(g) the export or use of atomic or radioactive substances or any other substance which can be implemented for the production of atomic energy.

Since MERCOSUR is a preferred zone within ALADI, these exceptions (which are similar to those found in article 30 EC) can also be regarded as being a possible justification for trade restrictions in MERCOSUR, which was substantiated by the first, sixth and eighth MERCOSUR arbitration courts.[165] Just as in the case law of the European Court of Justice, the arbitration clearly states that these exclusions are to be interpreted narrowly and that the principle of proportionality must apply. As specifically stated, Member States cannot assume the right of exclusionary competence on these sectors.[166]

Because governmental regulations in MERCOSUR, which fall under the exceptions, are not considered to be trade restrictions, there is a recognisable difference in substantive law between MERCOSUR and the European Union. While article 30 EC permits exemptions

[162] See art 13 of the Protocol governing the harmonisation of regulations for intellectual property, trademark protection and origin of goods.

[163] E Ramos da Silva, *Rechtsangleichung im Mercosul* (Baden-Baden, Nomos, 2002) 87. For more on intellectual property rights, see Félix Vacas Fernández, Chapter 18.

[164] ACE Treaty no 18(n 26).

[165] *Non-tariff Trade Barriers*, first MERCOSUR arbitration court, 28 April 1999; *Retreaded* Tyres, sixth MERCOSUR arbitration court, 09 January 2002, II.B.1.b); *De Facto Discrimination*, eighth MERCOSUR arbitration court, 21 May 2002, Considerando.

[166] Holding of the European Court of Justice referring to art 30 EC, see Case C-367/89 *Richardt* [1991] ECR I-4621.

from forbidden trade restrictions which are defined in articles 28 and 29 EC,[167] in MERCOSUR, governmental regulations which serve to safeguard all protected properties, listed in article 50 of the Treaty of Montevidéo, are not originally defined as trade restrictions. Just as in European law, in MERCOSUR recourse under public order provisions should not be possible if the protection concerned has already been commonly regulated. Otherwise, common provisions might become diluted through unilateral Member State regulation.

Whether, as in the European Union, an *actual* danger to a protected good must be convincingly demonstrated in MERCOSUR cannot be determined at this time. Due to the cultural and historical diversity among Member States, the existence of danger would probably be judged differently. Thus, the European Court of Justice deemed that a 100-year old regulation concerning the ingredients of beer could not justify any import restrictions since it could not be convincingly shown that additives used in imported beer were harmful to health.[168] The dispensation of justice rests upon the questionable principle of mutual recognition,[169] whereby lawfully fabricated and marketed commodities from one Member State are to be permitted in all other Member States. It is assumed that the product policies of each Member State satisfy the common interests of the other Member States, even if they fulfil only certain common standards.

Also questionable is whether the itemisation of named protected goods covered in article 50 of the Treaty of Montevidéo is conclusive, or whether in-depth deliberations addressing the issue of public wellbeing could result in arguments for trade restrictions. In the decision *Cassis de Dijon*, the European Court of Justice allowed for the justification of cross-border trade restrictions resulting from *non-discrimination*, in other words, uniformly, applicable measures in favour of urgent common welfare demands.[170] Up to now in MERCOSUR, there is no case law comparable to the *Cassis de Dijon* formula. In the Treaty of Montevidéo, the wording and systematics argue the case that the itemisation of protected goods listed in article 50 is to be viewed as being conclusive.[171]

[167] PC Müller-Graff, 'Vorbemerkungen Art 28–31 EG' in H von der Groeben and J Schwarze (eds), *EU-/EG-Vertrag, Kommentar* (Baden-Baden, Nomos, 2003); PC Müller-Graff, 'Vorbemerkungen Art 30 EG' in ibid.

[168] Case C-178/84 *CEC v FRG (Purity Regulations)* [1987] ECR 1227; similarly, Case C-407/85 *Drei Glocken v Centro-Sud (Pasta)* [1988] ECR 4233.

[169] S Leible, 'Art 14 EGV' in R Streinz (ed), *EUV/EGV-Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaften* (München, Beck, 2003). The principle of mutual recognition is called the principle of good faith or land-of-origin principle, see T Oppermann, *Europarecht* (München, Beck, 2005) 417.

[170] Case C-120/78 *Rewe v Federal Superintendent of Monopolies on Brand Name Wines (Cassis de Dijon)* [1979] ECR 649.

[171] See *Non-tariff Trade Barriers*, first MERCOSUR arbitration court, 28 April 1999, in which it was held that, after completion of the free trade zone, only those measures (*medidas*) mentioned in art 50 of the Montevidéo Treaty could be considered as justifiable. Admittedly, the wording of the decision is somewhat unclear, as art 50 of the Montevidéo Treaty does not specify 'measures', but instead, protected legal properties.

II Freedom of Movement of Workers

Although the freedom of movement of workers is not expressly mentioned in the Treaty of Asunción, it is undoubtedly a relevant issue for the common market.[172] Article 1 of the Treaty of Asunción addresses the required free movement of production factors, which, logically, includes both capital and labour. The freedom of mobility of the labour force is perceived as being the least developed economic freedom in MERCOSUR, which is not surprising, in that the European Union has only recently achieved true freedom of cross-border movement for workers.

The freedom of movement of workers is not to be understood as a general freedom, but rather a workers' right to accept paid employment in any of the Member States. A general freedom to relocate, independent of the acceptance of employment in another Member State, is a different issue. In MERCOSUR, this distinction is made clear in article 1 of the Treaty of Asunción, which, in contrast to article 3, paragraph 1, lit c EC, only provides for the free mobility of persons insofar as it concerns production factors.[173] The opening statement of the Preamble to CCM Decision No 12/91 sets the stage for the ultimate creation of a general or common freedom of mobility for the workforce. In the European Union, public policies addressing freedom of mobility for the labour force are moving in the direction of ever-increasing freedom of mobility.[174]

The basic principles of the freedom of mobility of the workforce is no different to that under European Union legislation, namely, the abolition of any type of discrimination due to nationality, regarding the possibility of acceptance of employment and working conditions. The initiation of the MERCOSUR passport,[175] the possibility for citizens of MERCOSUR to travel between Member States with only a personal identification card,[176] and preferential passport controls for citizens of MERCOSUR at harbours and airports,[177] will facilitate but not constitute total freedom of mobility of the workforce. The freedom of mobility of the labour force includes the worker's right to travel with his/her family and enter into another Member State and to take up residence. The right to have work qualifications and skills acknowledged, as well as the right to equal opportunity employment, especially compared with national counterparts, are also included in the freedom of mobility of the workforce. Equal opportunity employment refers to the absence of any type of discriminatory treatment, whether with regard to equal access to work, pay scales, skill enhancement, redundancies and/or social security issues.[178] Diverse legal and social systems make free employment choices and cross-border employment choices difficult,

[172] For more on the social law structure, see Hugo Roberto Mansueti, Chapter 14.

[173] See RX Basaldúa, *MERCOSUR y Derecho de la Integración* (Buenos Aires, Abeledo-Perrot, 1999) 134.

[174] T Oppermann, *Europarecht* (München, Beck, 2005) 518. This is particularly evident in the recently adopted Directive 2004/38/EC concering the rights of Union citizens and their family members to reside and move freely in the territory of member states [2004] OJ L158/77.

[175] CMG Resolution No 114/94.

[176] See CMG Resolution 75/96, appendix; CCM Decision No 10/06, appendix art 1; M Quiroga Obregón, *MERCOSUR* (La Paz, Los Amigos del Libro, 1997) 50.

[177] CCM Decision No 12/91, art 1; CCM Decision No 46/00.

[178] CE Echegaray de Maussion, *Libre circulación de trabajadores y profesionales* (Buenos Aires, Ciudad Argentina, 1996) 370; H Babace, *Empleo, migraciones y libre circulación de trabajadores* (Montevidéo, Faculdade de Derecho, Universidad de la Republica, 1995) 402–11; HR Mansueti, *Derecho del Trabajo en el MERCOSUR* (Buenos Aires, Ciudad Argentina, 1999) 95–132; HH Barbagelata, *El Derecho Laboral del MERCOSUR Ampliado* (Montevidéo, FCU, 2000) 24.

which, due to diversity in social systems, could result in the loss of possible entitlements, 'thus causing a worker to stray into unfavorable conditions'.[179] For this reason, an approximation or standardisation of laws governing workers' rights must accompany other policies seeking to facilitate the mobility of the workforce. Additionally, diverse social standards conceal the danger of a migration of workers from a country with low social standards to a country with higher social standards, with the consequence of massive social distortion, both in the country which is possibly experiencing an out-migration of its workforce and in the country in which the domestic workforce is being forced out of jobs by the foreign workforce. Therefore, systems of social security, especially working hours, workplace security standards, unemployment benefits, government aid, family retirement pensions, health and accident insurances, maternity leave, etc, need to be standardised. Concluded on 14 December 1997, the multilateral Agreement regarding social security in MERCOSUR[180] is the most significant body of rules and regulations concerning this issue to date.

A Multilateral Social Law Agreement

In contrast to other basic agreements between Member States, the term 'Agreement' was chosen over 'Protocol'. The choice of terminology emphasises that this workforce Agreement is unlike any other agreements titled 'Protocol', in that it is not a component of the MERCOSUR *acquis communautaire*[181] and that states joining MERCOSUR in the future do not enter into this Agreement *ipso facto*.[182] The fact that future members are not obligated to enter into this Agreement expresses the heightened sensitivity of laws governing labour force rights, benefits and responsibilities.

The Social Law Agreement obligates Member States in the same way as the similar EU Directive 883/04/EC governing the coordination of social security systems. It states that every non-native worker and his/her family members are granted the same rights, and the same commitments are required from them, in regard to social security, as is the case of the native worker.[183] In contrast to European law,[184] the Social Law Agreement in MERCOSUR proposes to guarantee the same rights to all native and non-native workers, whether or not they are citizens of a Member States. Since all MERCOSUR Member States have entered into this Agreement,[185] this would mean that no person working within MERCOSUR may be discriminated against with regard to social services and benefits compared with their national counterparts.

[179] Case C-232/82 *Baccini v Office National de L'Emploi* [1983] ECR 583.

[180] Acuerdo Multilateral de Seguridad Social del Mercado Común del Sur, adopted by CCM Decision No 19/97.

[181] MERCOSUR Protocols regularly contain an article that identifies the Protocol as a part of the Treaty of Asunción, see Ouro Preto Protocol, art 48; Competition Defense Protocol, art 33; Colonia Protocol, art 12, para 1 adopted by CCM Decision No 11/93; Protocol for Protection of Investment from Third Countries, art 4, adopted by CCM Decision No 11/94; Protocol for Common Education Policy, art 7, adopted by CCM Decision No 4/94.

[182] As expressly stated by Social Law Agreement, art 19. States which entered into the Agreement can absolve themselves from the obligations of the Agreement at any time without having to secede from MERCOSUR, see Social Law Agreement, art 18, para 2.

[183] Social Law Agreement, art 2, para 1.

[184] See Regulation 883/04/EC.

[185] See Social Law Agreement, art 19.

B Acknowledgement of Professional Degrees and Qualifications

Acknowledgement of professional qualifications and degrees received abroad serve as corollary legislation for the creation of labour mobility. The alignment of education systems, which was denoted as a goal of the common education policy very early on,[186] also contributes to the realisation of the freedom of labour mobility.

Formidable progress has been achieved with regard to access to universities, with the mutual acknowledgement of academic diplomas and certificates, along with the adoption of many supportive provisions.[187] Member States are required to acknowledge certificates of all forms of higher education, whether that be lower, middle, technical or non-technical vocational diplomas or certificates and, as previously stated, also university degrees.[188] In order to facilitate this process, school curricula in Member States must include the history and geography of all Member States.[189] The recognition of non-technical mid-level vocational certifications should be uncomplicated, ie without ministry legalisation or the necessity of translations being carried out by the respective government agencies responsible.[190] In contrast to EU legislation, Member State's cross-border school and university diplomas are only deemed equal when the intended purpose is further studies or post-graduate studies, but not when the intended purpose for a diploma or qualification is for career occupations.[191] Again, in contrast to EU legislation, an enterprise is thus under no obligation to acknowledge an educational degree or diploma from another Member State as being equivalent, which is why these provisions and regulations have had a limited impact on the freedom of mobility of the labour force. One would have to question why an enterprise would doubt the validity of a degree recognised by a governmental institution. When achieved, the goal of allowing educational qualifications to be acknowledged as equivalents in all spheres will represent a significant milestone toward achieving true freedom of mobility of the workforce.

In order to boost the exchange of researchers and university professors, Member States mutually recognise higher-level university diplomas and degrees.[192] This recognition applies only to university researchers and teachers. Recognition of such diplomas and degrees in other occupational spheres complies with the corresponding laws of that particular state.[193]

[186] The Plan Trienal de Educación was established by CCM Decision No 7/92, and provides for three goals as the basis for a common education policy: raising an awareness of the possibilities of integration, improvement in education, and approximation of educational systems. The following CCM Decisions are relevant to the common educational policy: Nos 25/97, 13/98, 15/01.

[187] Since 1998: CCM Decision No 13/98, appendix part 1, art 6.

[188] CCM Decision No 4/94, appendix art 1, para 1; CCM Decision No 7/95, appendix art 1; CCM Decision No 8/96, appendix art 1.

[189] CCM Decision No 4/94, appendix art 1, para 2.

[190] CCM Decision No 6/06, appendix lit c and d.

[191] CCM Decision No 4/94, appendix art 1, para 2 and art, 2 para 1; CCM Decision No 8/96, appendix arts 1 and 4.

[192] CCM Decision No 4/99, appendix art 1; obligations exist for the acknowledgement of the academic titles of master and doctor, see CCM Decision No 27/97, appendix art 1.

[193] Expressly stated in CCM Decision No 4/99, appendix art 5.

C Entry and Visa Stipulations

For residents of border regions, a personal identity card, which allows for accelerated border controls, has been developed.[194] The previously mentioned Recife Agreement regulates MERCOSUR border control methods, with the goal of facilitating the cross-border movement of goods *and* people.[195]

Initially, only artists, professors, scientists, athletes, journalists and specialised workers are permitted to work cross-border in their fields for 90 days without a visa.[196] Other citizens of MERCOSUR are only permitted to visit any other MERCOSUR state under tourist status for 90 days without the necessity of a visa.[197] For those occupational groups permitted to work without a visa, a stipulation is that they cannot draw their earnings from the country of entry, regardless of whether they are dependently employed or work on a freelance basis.[198] Formalities for entry into member states are also not requested in the European Union for up to a three-month period.[199] Unlike in MERCOSUR, this freedom of mobility also applies to third country family member nationals, and also in contrast to MERCOSUR, the three-month deadline may be extended if the job-seeker can verify having a reasonable prospect of being hired.[200]

Although the agreement governing the MERCOSUR visa,[201] according to the fourth paragraph of its Preamble, attempts to simplify the provision of services, it is also relevant to the freedom of mobility of the workforce. It allows the simplified issuance of a visa for business executives, management employees, authorised representatives, scientists, researchers, artists, athletes, professors, journalists and highly specialised workers for a total of up to four years.[202] The visa is issued independently of the fact of whether the earnings were drawn from the country of origin or from the host country or whether or not the particular worker is in an 'essential' occupation.[203] For several types of visa applicants, translated documents are not necessary. For visiting students and college lecturers and their families, the issuance of a visa is free of charge.[204] In consideration of the fact that educational degrees, in continuance of education, must be acknowledged, students in MERCOSUR experience a freedom of mobility which is similar to that enjoyed by students in the European Union. For requests for residence authorisations for stays extending longer than four years and for professions other than those previously listed, the national entry regulations of the entry state are applicable. Family members of those who enjoy the benefit of falling into the category of simplified visa issuance do not obtain a simplified method of gaining resident status, as is practised in the European Union.[205] In

[194] CCM Decision No 18/99, in conjunction with CCM Decision No 14/00.
[195] CCM Decision No 4/00, appendix art 4, lit a.
[196] Extendable to 180 days, see CCM Decision No 48/00, appendix art 2, para 1.
[197] CCM Decision No 10/06, appendix art 1.
[198] Expressly stated in CCM Decision No 48/00, appendix art 2, para 2.
[199] Regulation 2004/38/EC, art 6 para 1.
[200] Ibid art 6, para 2 and art 14, para 4, lit b. The Regulation appears to adopt European Court of Justice case law, see Case C-292/89 *R v Immigration Appeal Tribunal* [1991] ECR I-745; Case C-171/93 *Tsiotras v Stuttgart* [1993] ECR I-2925.
[201] Adopted by CCM Decision No 16/03.
[202] Agreement pertaining to MERCOSUR visas, arts 1 and 2, para 1.
[203] Ibid arts 2, para 1 and 3.
[204] CCM Decision No 21/06, appendix art 1.
[205] Regulation 2004/38/EC, art 7, paras 2 and 4.

MERCOSUR, an obligation to issue residence permissions for any period as long the citizen is employed in the respective Member State, as is the case under European law,[206] does not exist.

In comparison to the freedom of mobility enjoyed by workers in the European Union, MERCOSUR has experienced limited progress in streamlining entry regulations, an essential element for promoting freedom of mobility of the workforce. In the European Union, Member States are not permitted to demand visas or formalities of a similar type for entry from EU citizens,[207] and recently, the requirement of proof of employment guaranteed for a five-year period for residence authorisation[208] has been eliminated. In the European Union, a person does not lose his/her residence status in the case of involuntary unemployment or temporary disability. After five years of residency, permanent resident status must be granted, even if the person is no longer employed. In MERCOSUR, common regulations seem to be less necessary, due to the fact that Member States already have compatible immigration regulations. All four states distinguish between three types of entry: tourists, time-restricted residency and permanent residency. In all countries, a tourist is not permitted to work. The temporary visa is valid for a maximum period of six months in all Member States and does not extend beyond the occupation for which the visa was granted. All countries also grant unrestricted residence authorisation within the scope of employment, which also includes freelance positions.[209] In addition, it should be noted that a prohibition on discrimination based on nationality is a constitutional guarantee in all Member States.[210]

D Exemptions

The protected rights listed in article 50 of the Treaty of Montevidéo allow for a restriction of regulations limiting freedom of mobility of the workforce, as holds true for all other economic freedoms in MERCOSUR. Article 50 of the Treaty of Montevidéo states that no provision of the Treaty is to be in conflict with any measures that serve to safeguard the public order guarantees of legal protection stated therein. An even narrower interpretation of public order and security, as established by the European Court of Justice,[211] is hardly conceivable in MERCOSUR. In the European Union, even a violation of alien law registration requirements is not reason enough to deport an EU citizen, in that, according to national regulations, the registration is seen as being merely declaratory, since the right of residency is already granted by the freedom of mobility of the workforce provisions.[212]

[206] Ibid art 7.

[207] Ibid art 5, para 1, phrase 2.

[208] Directive 68/360/EC, art 6, para 1, lit b (now repealed).

[209] See H Babace, *La libre circualción de los trabajadores en el MERCOSUR* (Montevidéo, Faculdade de Derecho, Universidad de la Republica, 1995) 112; in great detail, MA Sardegna, *Las relaciones laborales en el MERCOSUR* (Buenos Aires, La Rocca, 1995) 68.

[210] CS Menem, *Qué es el MERCOSUR?* (Buenos Aires, Ediciones Ciudad Argentina, 1998) 192; E Holz, *Internalización y acuerdos de liberalización en servicios financieros* (Montevidéo, FCU, 2003) 59.

[211] Case C-473/93 *CEC v Luxemburg* [1996] ECR I-3207, see also W Brechmann, 'Art 39 ECT' in Ch Calliess and M Ruffert (eds), *Kommentar zu EU-Vertrag und EG-Vertrag* (Neuwied-Kriftel, Hermann Luchterhand, 2002) 564–75.

[212] Case C-363/*89 Roux v Belgium* [1991] ECR I-273; T Oppermann, *Europarecht* (München, Beck, 2005) 527–29; W Brechmann, 'Art 39 ECT' in Ch Calliess and M Ruffert (eds), *Kommentar zu EU-Vertrag und EG-Vertrag* (Neuwied-Kriftel, Hermann Luchterhand, 2002) 564–75.

On the other hand, a broadening of the protected rights listed in article 50 of the Treaty of Montevidéo, in order to meet urgent common interest demands, would be contrary to the general intent of the wording of the exemption regulations.

III Freedom of Establishment and to Provide Services

To distinguish the freedom of mobility of the workforce from the freedom of establishing an enterprise and of providing services is hardly possible in MERCOSUR. One reason is that there is no single, regulated agreement for the freedom of establishment. Another is that the most important social law agreement for the realisation of the freedom of mobility of the workforce in MERCOSUR is the Multilateral Social Law Agreement, which applies to all economic activities in MERCOSUR and is therefore also relevant for the freedom of establishment and services. In MERCOSUR, the term 'worker' is even more broadly defined than is the case in European law, where it is already considered to be too broad.[213]

According to article 1 of the Treaty of Asunción, the freedom to provide services is an integral part of the developing common market, but without an elaboration of the freedom of services. After an initial deadlock, a more complete definition was reached, with the adoption of the Service Protocol by the CCM,[214] which is in line with and inspired by GATS.[215] At the same time, it is stricter than GATS, in that it does not provide for exemptions according to the most-favoured-nation treatment principle.

A Montevidéo Protocol on Trade in Services

The Trade in Services Protocol was adopted on 15 December 1997 by the CCM and designates itself as an integral element of the Treaty of Asunción,[216] which is why the provisions contained therein qualify as primary law. The accession into MERCOSUR of a new Member State means *ipso jure* (by the fact itself) the automatic entry into the Trade in Services Protocol.[217]

(i) Concept of Services and Differentiation from Other Economic Freedoms

The concept of services is not defined in the Trade in Services Protocol, probably because arriving at such a definition is problematic. Even the EC Treaty describes the concept in vague, somewhat negative terms, as being merely a non-gratuitous service which is not governed by any other economic freedom regulations, thus in particular commercial,

[213] See KA Schachtschneider, 'Die Wirtschaftsverfassung der Gemeinschaft/Union' in KA Schachtschneider and A Emmerich-Fritsche (eds), *Das Verfassungsrecht der Europäischen Union*, Working Paper, University of Erlangen-Nürnberg (Nürnberg, 2005) 586.

[214] Protocolo de Montevidéo sobre el Comercio de Servicios del Mercado Común del Sur, adopted by CCM Decision No 13/97.

[215] G Vaneiro, *Comercio internacional de servicios comerciales: Regulación jurídica* (Montevidéo, FCU, 1999) 50; A Haller, *MERCOSUR* (Münster, Aschendorff, 2001) 72.

[216] Trade in Services Protocol, art 27. It came into force on 7 December 2005 according to CCM Decision No 49/08.

[217] Trade in Services Protocol, art 29.

industrial, mercantile, technical and freelance activities fall under this category.[218] In European law, the freedom of the provision of services is therefore understood as a catch-all clause which guarantees that any activity normally performed in exchange for payment is included.[219]

While the freedom to provide services encompasses cross-border sales of services or the temporary provision of a service by a person or a legal entity, the freedom of mobility of the workforce guarantees the freedom to take up dependent employment in another Member State.[220] The freedom to provide services is closely related to the freedom of establishment, in other words, the right to settle in another Member State for the purpose of providing a lasting service. The freedom of establishment is therefore viewed as an intrinsic component of the aspired-to common market, even though it is not expressly mentioned in the Treaty of Asunción. Support for this point of view is embedded in the fact that the Trade in Services Protocol neglects to distinguish between a permanent and merely temporary rendering of a service in another Member State and is, therefore, relevant to the freedom of establishment. Several measures are prohibited,[221] according to either the Trade in Services Protocol, the Competition Defence Protocol or subsidy regulations.

(ii) Personal Scope of Application

Those benefiting under the Trade in Services Protocol are natural persons whose nationality is of another Member State, or those possessing permanent residency status in a Member State, as well as all legal entities with headquarters in a Member State, who perform an economically sustainable activity in this or any other Member State and provide services across MERCOSUR borders.[222] Those benefiting under the Trade in Services Protocol in MERCOSUR can therefore also be third state nationals who reside in MERCOSUR[223] even if both the provider and receiver of a service are third state nationals. This arises from the fact that all trade in services among Member States, unrestrictedly, falls under the protection of the Protocol. Thus, the individual scope of application, governed by the MERCOSUR Trade in Services Protocol, is more extensive than the freedom to provide services offered by the European Union, where mostly only EU citizens benefit.[224] Enterprises such as offshore (mailbox) companies are excluded from satisfying the specifications that enterprises must follow in order to practise economically sustainable activities in MERCOSUR, by virtue of the fact that, in reality, such enterprises are headquartered in third (non-member) countries. In contrast to freedom of mobility of workers regulations, the Trade in Services Protocol is expressly not applicable to measures which affect natural persons' access to the labour market.[225]

[218] See art 50 EC.

[219] T Oppermann, *Europarecht* (München, Beck, 2005) 539.

[220] Which is why the Trade in Services Protocol is not expressly applicable to measures which govern the entry of natural persons into the labour market, see CCM Decision No 9/98, appendix governing the entry of natural persons, no 2.

[221] See Trade in Services Protocol, arts 12, 16 and 23, para 1, lit c.

[222] Derived from Trade in Services Protocol, art 2, no 2, in conjunction with art 18, no 1, lit f and h–k; see INTAL-BID, (1997) 3 *Informe MERCOSUR* 35.

[223] Mere residence in MERCOSUR is, as a result, not likely to suffice.

[224] Article 49, para 1 EC. However, the Council can conclude, under art 49, para 2 EC, that the scope of application of the freedom to provide services extends to family members from third countries.

[225] CCM Decision No 9/98, appendix pertaining to the entry of natural persons, no 2.

(iii) Substantive Scope of Application

The scope of application of the Trade in Services Protocol extends to all governmental measures which have the potential to restrict the freedom to provide services.[226] Governmental, administrative and local authority measures, as well as measures by non-governmental organisations which act on behalf of or via governmental concessions, all fall into this category.[227] The Trade in Services Protocol classifies measures as law, bylaw (or ordinance), administrative act or any other forms of governmental regulation.[228] The Trade in Services Protocol is not, however, applicable to state-rendered efforts in the exercise of sovereign power.[229]

(iv) Subject to Protection

The Trade in Services Protocol safeguards the providing of a service in one's own Member State and the marketing of this service in another Member State,[230] likewise, the providing of a service in another Member State via sales agencies, subsidiaries or sales representatives in another Member State[231] (denoted as the positive or active freedom to provide services).[232] In contrast to the freedom to provide services as practised in the European Union,[233] the providing of a service in another MERCOSUR Member State is an ongoing, not just temporary, concession. Due to this significant difference, a concise and universally-applicable differentiation of the principle of freedom of establishment is not possible in MERCOSUR. This is consistent with the fact that the freedom of establishment is not independently regulated. Presumably, in MERCOSUR, one would wish to avoid making a predetermined public distinction between what is to be a permanent activity and what is to be a temporary provision of services in another Member State.[234]

At the same time, the Protocol also protects the so-called negative or passive freedom to provide services, whereby the recipient of services is able to cross borders to seek service providers, for instance, for doctor's appointments, stays at a health spa, for study, business or cultural trips, as is the case in the European Union.[235] This includes the providing of a service in the homeland state for consumers of another Member State, as well as the providing of a service in another Member State for recipients from yet another Member State. This arrangement has been recorded since the European Court of Justice's 'tourist

[226] Trade in Services Protocol, art 2 no 1.
[227] Ibid art 2, no 3, lit a and art 2, no 1, para III.
[228] Ibid art 18, no 1, lit a.
[229] Ibid art 2, no 3, lit b.
[230] Ibid art 2, no 2, lit a.
[231] Ibid art 2, no 2, lit c, d and art 2, no 1, para IV, in conjunction with art 18, no 1, lit c.
[232] W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004) 932; T Oppermann, *Europarecht* (München, Beck, 2005) 539.
[233] For differentiation between the freedom to provide services and the freedom of establishment in EU law, see T Oppermann, *Europarecht* (München, Beck, 2005) 539; Case C-131/01 *CEC v Italy* [2003] ECR I-1659.
[234] Even in the European Union, there was intially considered to be no necessity to divide the services provided into two different chapters of the EC Treaty, see W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004) 945.
[235] Trade in Services Protocol, art 2, no 2, lit b; E Holz, *Internalización y acuerdos de liberalización en servicios financieros* (Montevidéo, FCU, 2003) 78.

guides' judgment as part of the EU freedom to provide services.[236] All cross-border issues accordingly fall within the Protocol's scope of application.[237]

Alongside measures that pertain to the immediate rendering of services, regulations which compromise either the conclusion of contracts, or payment, or use of services are prohibited.[238] Member States are obligated to facilitate the necessary capital transfers for payment of services rendered[239] and to omit measures which set limits on foreign capital expenditure or investment.[240] At this point, the interconnectedness of the four economic freedoms, particularly between the freedom to provide services and the free movement of capital, becomes apparent.

In support of these general obligations to ensure the freedom to provide services, the Trade in Services Protocol contains concrete prohibitive measures which, in EU law, were first derived from EC Treaty jurisdiction, and pertain to access to the provision of services markets.[241] The Protocol prohibits measures which require a certain legal form or which dictate the number of service providers or the number of persons who may work in a service-providing sector, or even the number of services to be provided. Also prohibited are provisions to control economic value, whether by specification of contingents, national monopolies, the awarding of exclusionary concessions or the requirement to verify the necessity of foreign services provisions.[242] Whether, as in EU law, a service provider is permitted to employ staff in the country receiving services without any special work permits and in accordance with the law of the Member State in which the provider is headquartered (land-of-origin principle), in order to protect the service provider from concealed discrimination (in the form of objective, although non-discriminately applicable measures)[243] remains unclear. Such a broad interpretation is problematic and can lead to an erosion of labour laws and social standards, particularly between countries in which considerable differences in earnings and therefore wage competition exist.[244] The argument against such a broad interpretation is the fact that no clause in the Trade in Services Protocol prohibits occupational licensing prerequisites, such as the necessity for certain certificates of proficiency, which, while applied non-discriminately to both domestic and foreign service providers, are still subject to homeland regulations. Non-discriminately applicable regulations, governing regimentation of occupational licensing and the practising of an occupation, which are already accommodated in the home country by the fulfilment of equivalent requirements, are perceived differently in MERCOSUR than

[236] Case C-398/95 *Grafeion v Ergasias* [1997] ECR I-3091.

[237] Indentical to EU law, see A Randelzhofer and U Forsthoff, 'Article 49/50' in E Grabitz and M Hilf (eds), *Das Recht der Europäischen Union: Kommentar* (München, Beck, 2006).

[238] Trade in Services Protocol, art 2, no 1, para II.

[239] Ibid art 4, no 1.

[240] Ibid art 4, no 2, lit f.

[241] These specific provisions appear to have been included due to the considerable asymmetry with regard to market access for financial services in Member States contained in the Trade in Services Protocol, see INTAL-BID, (1996) 1 *Informe MERCOSUR* 39.

[242] Trade in Services Protocol, art 4 no 2.

[243] Case C-164/99 *Portugaia Construções* [2002] ECR I-787; Case C-279/00 *CEC v Italy* [2002] ECR I-1425; see also W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004) 951–87.

[244] KA Schachtschneider 'Die Wirtschaftsverfassung der Gemeinschaft/Union' in KA Schachtschneider and A. Emmerich-Fritsche (eds), *Das Verfassungsrecht der Europäischen Union*, Working Paper, University of Erlangen-Nürnberg (Nürnberg, 2005) 592–95.

under European law,[245] in that such regulations are not viewed as being a restriction on the cross-border commerce of the provision of services.

(v) Most-Favoured-Nation Treatment and Non-discrimination

Articles 3 and 4 of the Trade in Services Protocol carry the well-known most-favoured-nation treatment principle over from the movement of goods expressly to the provision of services sector. Services and their providers from other Member States are not allowed to be presented in a more negative light than their domestic competitors or their third country competitors.[246] Discrimination against foreign services or their respective service providers is suspected in cases when the national measures in question alter competitive conditions in favour of domestic business rivals.[247] The most-favoured-nation treatment is only applicable to other MERCOSUR states, and not to other WTO members; consequently, MERCOSUR profits from GATS exemption article V.[248] Double taxation agreements (DTAs) with other Member States or third countries are also excluded from the most-favoured-nation treatment principle.[249] In addition, the Protocol does not constitute any obligation to guarantee any balancing out of disadvantages which result from the fact that it concerns a foreign-provided service.[250] Here, Member States reached a compromise on an issue which initially created controversy in the European Union.[251] The Member States are obligated to guarantee the freedom to provide services.[252]

(vi) Effectiveness

The Trade in Services Protocol obligates Member States to adhere to the fundamentally valid public law principle: the prohibition of arbitrariness. All national measures addressing the freedom to provide services must be executed in an objective and impartial way.[253] With this directive, Member States achieve, through national legislation, a legal, arbitrational or, by any other means, independent legal process which allows service providers to have national regulations verified for compatibility with Protocol provisions.[254] In the event that the granting of licences and/or administering of aptitude tests are necessary, for example in the catering trade, Member States have committed themselves to the principles of objectivity and transparency. Within this context, they propose to ensure that imposed regulations do not exceed the required minimum necessary and to ensure that the awarding (of licences or contracts) itself does not pose a hindrance to the free trade in

[245] Case C-124/97 *Läärä v Finland* [1999] ECR I-6067; Case C-231/03 *Coname v Comune di Cingia de' Botti* [2005] ECR I-7287; see PC Müller-Graff, 'Art 49 ECT' in R Streinz (ed), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaften* (München, Beck, 2003).

[246] Trade in Services Protocol, art 5, no 1.

[247] Ibid art 5, no 4.

[248] Trade in Services Protocol, fifth recital of the Preamble; W Greiner, *Die Interregionale Assoziierung zwischen der Europäischen Union und dem MERCOSUR* (Frankfurt, Lang, 2004) 94.

[249] Trade in Services Protocol, art 13, lit e. Also exempt are permissions that are granted to ease the exchange of goods in border regions and are limited to border-region locations, see ibid art 3, no 2.

[250] Ibid art 5, no 2.

[251] From the point of view of the European Court of Justice, 'specific requirements on the provider of the services cannot be considered incompatible with the Treaty where they have as their purpose the application of rules governing such activities', see Case C-279/80 *Webb* [1981] ECR 3305.

[252] Trade in Services Protocol, art 2, no 3, para 2; art 19, para 4.

[253] Ibid art 10, no 1.

[254] Ibid art 10, no 2.

services.[255] The regulation accordingly seeks to prevent the adoption of harassing administrative regulations.[256] A point of fact, however, is that every state reserves the right to define its own internal regulations governing the oversight of business activities.[257] Should a state acknowledge an educational qualification from another state, this state is not required (in contrast to EU legislation) also to acknowledge the same educational qualification from any other state.[258] However, every contractual agreement between states must give all other states at least the opportuniy to propose objective and effective agreements with each other on this topic.[259] The obligation to give every other state the possibility to hold negotiations concerning the acknowledgement of academic qualifications is in accordance with the most-favoured-nation treatment principle, which can be interpreted to require that acknowledgement of academic qualifications must also be possible for all other states. These guarantees are in place to ensure that the freedom to provide services is in place and operational. Of course, no state should be obligated to acknowledge an academic qualification as being on a par with an established standard when such is not the case.[260] The governmental and non-governmental agencies responsible should exchange views with corresponding authorities in Member States, in order to develop common regulations regarding the awarding of licences, etc, in a manner which would enable the free exchange of services.[261]

(vii) Additional Obligations

In addition to the Trade in Services Protocol directives, Member States have also agreed to specific commitments (*compromisos especícficos*) which are chosen by the states themselves.[262] During annual negotiations organised by the CMG, selected economic sectors are analysed to determine agreement with Protocol guidelines and, when indicated, agreements are made which are then adopted by the CCM.[263] The obligations agreed upon up so far essentially comply with those Member States have already agreed upon within the scope of GATS.[264] The argument has been raised that an attempt to push ahead with the freedom to provide services was premature, in that not all relevant issues could be resolved through a single instrument. Instead, the argument goes, it would have been better to adopt the European Union's chosen track, to initially settle sectorial agreements

[255] Ibid art 10, nos 3 and 4.

[256] This is expressly prohibited in the European Union by the European Court of Justice, see Case C-154/85 *CEC v Italy* [1987] ECR 2717.

[257] RR Díaz Labrano, *MERCOSUR: Integración y derecho* (Buenos Aires, Intercontinental, 1998) 344. Acknowledged by the European Court of Justice, see Case C-164/99 *Portugaia Construções* [2002] ECR I-787.

[258] Trade in Services Protocol, art 11, no 1, lit a; this can also be presumed from ibid art 6, under which the Member States 'may' (*podrán*) enter into bilteral treaties with respect to to the granting of licences and certificates of capability.

[259] Ibid art 11, no 1, lit b.

[260] As regards EU law, this is pointed out by PC Müller-Graff, 'Art 49 ECT' in R Streinz (ed) *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaften* (München, Beck, 2003); W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004).

[261] Trade in Services Protocol, art 11, nos 2 and 4.

[262] Ibid arts 4, no 1, 5, no 1, 7 and 19.

[263] Ibid art 19, in conjunction with arts 21 and 22, no 1, lit a. Up to now, Compromisos Específicos have been adopted by the following CCM Decisions: Nos 9/98, 1/00, 56/00, 10/01, 22/03, 29/04, 1/06.

[264] E Holz, *Internalización y acuerdos de liberalización en servicios financieros* (Montevidéo, FCU, 2003) 129–54.

in chosen sectors.[265] In view of the feasibility of scheduling negotiations for sectorial agreements, however, this argument appears unconvincing.

(viii) Public Order Exemptions

The Trade in Services Protocol provides for exceptions for the benefit of the safeguarding of morality, of public safety and order, of the life and health of humans, animals and plants, of data privacy, as well as safeguarding against the raising of direct taxes on services rendered from other Member States (as is also recognised in article 14, paragraph 1, lit a–e GATS).[266] However, the Protocol stipulates two caveats: exemptions from Protocol provisions in favour of morality and public order may only be implemented if there is an imminent threat and/or fundamental interests of the general welfare are sufficiently and grievously impaired.[267] In no case is an exception permitted to randomly or unjustifiably discriminate against foreign services providers or to create concealed restrictions on the freedom to provide services.[268] As in EU law,[269] public order provision may only be applied on condition of the principle of proportionality.[270] The provision that only 'sufficiently serious endangerment to fundamental interests of the general welfare' can constitute an exception to the Protocol provisions significantly reduces the possibility of a broad interpretation of the 'safeguarding of public order and safety' and is, therefore, an effective safeguard against the misuse of exemptions regulations.[271]

B Freedom of Establishment

It was previously mentioned that, in contrast to the EC Treaty, the freedom of establishment is not expressly mentioned in the Treaty of Asunción, but, nevertheless, is inherently linked to the purpose of forming a common market. The freedom of movement of production factors is explicitly guaranteed in article 1 of the Treaty of Asunción. The human workforce is a component of production factors, regardless of the type of occupation.[272] Freelance ('self-employment') activities in another Member State and, along with it, the necessary enterprise structure in that Member State, can be subsumed under this category.[273] The fact that the freedom of establishment is an integral part of the common market strategy is evident in the wording of article 2 of the Trade in Services Protocol, under which the scope of application of the Protocol extends to include the providing of a service in another Member State via a commercial (sales) agency (*presencia comercial*) or via individual presence of a natural (an actual) person.[274]

[265] RA Porrata-Doria, *MERCOSUR* (Durham, NC, Carolina Academic Press, 2005) 114.

[266] Trade in Services Protocol, art 13, lit a–d.

[267] Ibid art 13, lit a.

[268] Ibid art 13, para 1. *cf* similarities to art IV, para 1 GATS.

[269] Articles 46 and 55 EC.

[270] As regards EU law, see Case C-131/01 *CEC v Italy* [2003] ECR I-1659; see also PC Müller-Graff, 'Art 49 ECT' in R Streinz (ed), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaften* (München, Beck, 2003).

[271] Even the European Court of Justice stresses that the public order provision of art 46, para 1 EC is to be narrowly interpreted, see Case C-67/74 *Bonsignore v Chief Municipal Director Cologne* [1975] ECR 297.

[272] See F Fuders, *Die Wirtschaftsverafssung des MERCOSUR* (Berlin, Duncker & Humblot, 2008) 27, 297.

[273] Similarly, CE Echegaray de Maussion, *Libre circulación de trabajadores y profesionales* (Buenos Aires, Ciudad Argentina, 1996) 370–72.

[274] Trade in Services Protocol, art 2, no 1, para IV and art 2, no 2, lit c and d.

As in the freedom of movement for workers, the freedom of establishment is not a general, but an entrepreneurial freedom, because article 1 of the Treaty of Asunción only guarantees the freedom of movement of persons insofar they can be regarded as production factors. In the same way, article 43, paragraph 2 EC encompasses the freedom of establishment as the right to take up and pursue activities. In contrast to article 48 EC, article 2 of the Trade in Services Protocol in MERCOSUR stipulates that non-profit organisations are also free to benefit from the freedom of establishment provisions.[275]

C Further Provisions

In the agreement concerning the facilitation of entrepreneurial activities, Member States commit themselves not only to refrain from discriminating against foreign enterprises,[276] but to uncomplicate as much as possible the process for establishing a business and to issue required documents in a timely manner.[277] The agreement includes a commitment to issue visas, including those for family members, within a 30-day period.[278] Member States are requested to promote absolute harmonisation of efforts to achieve a state of entrepreneurial freedom.[279] In comparison with MERCOSUR, the European Union has achieved a more advanced and liberalised stage of freedom of establishment. With adherence to the concept of the so-called land-of-origin principle, diplomas, academic transcripts and certificates of competences and qualifications stemming from other Member States must be recognised.[280] The land-of-origin principle is intended to ensure that Member States do not restrict services provided across borders by placing demands which are not in accordance with those of the country of origin.[281] In fact, the land-of-origin principle avoids the need for elaborate negotiations regarding the cross-border alignment of legislation.[282] It leads, however, to problems arising from the interpretation and application of foreign laws and can significantly complicate labour market issues, namely having to deal with differences in zonal provisions of the country of destination, as well as those from the country of origin.[283] However, for liberty-dogmatic reasons, an alignment of Member States' legal statutes is preferred over a supranational imposed obligation to recognise foreign law.

[275] Ibid art 2, no 2, lit c and d, in conjunction with art 18, no 1, lit f, h and j.

[276] Agreement governing the facilitation of entrepreneurial/corporate activities, arts 1 and 4. Acuerdo para la facilitación de actividades empresariales en el MERCOSUR of 16 December 2004, adopted by CCM Decision No 32/04.

[277] Agreement governing the facilitation of entrepreneurial/corporate activities, art 3.

[278] Ibid art 4, lit b and c. Also in the European Union, the right of residence emanates from the freedoms of establishment and to provide services, see Directive 2004/38/EC; *cf* Case C-48/75 *Royer* [1976] ECR 497.

[279] Agreement governing the facilitation of entrepreneurial/corporate activities, art 5.

[280] Case C-131/01 *CEC v Italy* [2003] ECR I-1659; see also PC Müller-Graff, 'Art 49 ECT' in R Streinz (ed), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaften* (München, Beck, 2003); T Oppermann, *Europarecht* (München, Beck, 2005) 546.

[281] See above as regards the land-of-origin principle.

[282] The cumbersome decision-making process as regards approximation of law in the European Union is discussed by D Langner, 'C. VI: Technische Vorschriften' in MA Dauses (ed), *Handbuch des EU-Wirtschaftsrechts* (München, Beck, 2006).

[283] KA Schachtschneider 'Die Wirtschaftsverfassung der Gemeinschaft/Union' in KA Schachtschneider and A. Emmerich-Fritsche (eds), *Das Verfassungsrecht der Europäischen Union*, Working Paper, University of Erlangen-Nürnberg (Nürnberg, 2005) 595. Also in MERCOSUR literature, it is pointed out that migratory and native workers must be made subject to the same social protection standards, see H Babace, *La libre circualción de los trabajadores en el MERCOSUR* (Montevidéo, Faculdade de Derecho, Universidad de la Republica, 1995) 133.

Interestingly enough, the most-favoured-nation treatment principle is expressly excluded from this agreement. Rather, the agreement is applied without prejudice to other national regulations or bilateral agreements in a way which is most favourable to the recipients.[284] CCM Decision No 9/99 has already prohibited national measures which arbitrarily restrict cross-border access to markets for insurance providers.[285]

D Concluding Remarks

It has been pointed out that, despite the enactment of the Trade in Services Protocol, the service provision sector in MERCOSUR still remains virtually closed.[286] The fact that the European Court of Justice applies a much broader definition of the concept of 'provision of services', coupled with the fact that MERCOSUR has not yet committed to matching the European model, are factors which contribute to the above assessment. Even the provision of services in a third country reveals the extent of protection of the EU freedom to provide services when both contracting parties are based in the community.[287] It is questionable, however, whether such a broad interpretation of market freedoms (as currently practised in the European Union) could actually serve to restrict freedom and, if true, if it should be considered as a positive benchmark. The recently enacted Service Provision Directive[288] contains the material for a fundamental transition to the politically desired[289] country-of-origin principle, regardless of whether or not a stipulation of the target country actually restricts a service provider.[290] If all associated factors are referred back to the legal statutes of the country of origin, then, in the target country, the right of the public to pass legislation—which constitutes the core of freedom—is waived to the legislative body of the country of origin.[291] Only the target country's legislation carries democratic legitimation within its own borders, ie the country of origin does not have any authorisation to impose its will on the target country. Aside from this, it is feared that the Service Provision Directive could create an incentive to agencies providing services to move their headquarters to the Member State with the lowest wages and other social benefits, thereby stifling institutional competition.

In the European Union, the expansion of the originally applicable prohibition of discrimination governing both the freedoms to provide services and of establishment has lead to a prohibition on any restrictions whatsoever, so that businesses effectively

[284] Agreement governing the facilitation of entrepreneurial/corporate activities, art 10.

[285] CCM Decision No 9/99, appendix arts 1, no 1, and 2. To ensure the necessity of official authorisation so that it is not misused as a concealed market-access restriction, the Decision contains detailed provisions pertaining to the granting of operating licences, see ibid appendix art 3.

[286] J Vervaele, 'MERCOSUR' (2005) 54 *ICLQ* 397.

[287] W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004) 942; A Randelzhofer and U Forsthoff, 'Article 49/50' in E Grabitz and M Hilf (eds), *Das Recht der Europäischen Union: Kommentar* (München, Beck, 2006).

[288] Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 concerning services provided in the Single Market [2006] OJ L376/36.

[289] J Basedow, 'Dienstleistungsrichtlinie, Herkunftslandsprinzip und Internationales Privatrecht' (2004) *EuZW* 424, points out that the land-of-origin principle cannot be derived directly from primary law.

[290] L Albath and M Giesler, 'Das Herkunftslandprinzip in der Dienstleistungsrichtlinie–eine Kodifizierung der Rechtsprechung' (2006) *EuZW* 38, 41; R Streinz, *Europarecht* (Heidelberg, Müller, 2005) 371.

[291] KA Schachtschneider 'Die Wirtschaftsverfassung der Gemeinschaft/Union' in KA Schachtschneider and A. Emmerich-Fritsche (eds), *Das Verfassungsrecht der Europäischen Union*, Manuskript des Lehrstuhls für Öffentliches Recht der Friedrich-Alexander Universität Erlangen-Nürnberg (Nürnberg, 2005) 598.

established in a member state must be recognised in an unlimited fashion in all other states.[292] Such a freedom to choose any corporate law[293] is actually contrary to the EC Treaty.[294] The resulting process of 'company law shopping' forces national authorities to readjust their corporate laws, in order to avoid locational disadvantages resulting from the competition between the respective systems.[295]

IV Free Movement of Capital

The free movement of production factors guaranteed in article 1 of the Treaty of Asunción includes the production factor *capital*. Therefore, the free movement of capital is subsumed amongst the desired goals of the common market.[296] As will be discussed later, the free movement of monetary transactions is also safeguarded in MERCOSUR. In European law, the distinction between capital and monetary transactions is increasingly viewed as being unimportant. The free movement of monetary transfers is now treated as a subtopic of the application of the term 'the free movement of capital'.

The free movement of capital has the indirect function of facilitating other economic freedoms by removing restraints to monetary transfers between Member States.[297] In addition to this basic function, numerous other associated functions have been facilitated by the free movement of capital.

A Definition and Delimitation from Other Economic Freedoms

The terms 'capital movement' and 'monetary transfers' are defined neither in the Treaty of Asunción nor in the EC Treaty. Since capital movement is an economic concept, it has not received in-depth treatment in EU law for some time. More recently, the European Union has reached a concensus on the concept of the 'free movement of capital', which is now understood to include any transactions crossing the borders of Member States, namely,

[292] R. Freitag, Der Wettbewerb der Rechtsordnungen im Internationalen Gesellschaftsrecht' (1999) *EuZW* 268; P Behrens, 'EuGH klärt Niederlassungsfreiheit von Gesellschaften' (2002) *EuZW* 737.

[293] KA Schachtschneider, 'Die Wirtschaftsverfassung der Gemeinschaft/Union' in KA Schachtschneider and A Emmerich-Fritsche (eds), *Das Verfassungsrecht der Europäischen Union*, Manuskript des Lehrstuhls für Öffentliches Recht der Friedrich-Alexander Universität Erlangen-Nürnberg (Nürnberg, 2005) 605–8.

[294] Article 293, point 3 EC instructs member states to negotiate the mutual acknowledgement of corporations; see also PC Müller-Graff, 'Art 48 ECT' in R Streinz (ed), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaften* (München, Beck, 2003).

[295] In France, law-makers have established the 'One Euro SARL', a legal form of organisation comparable to the British limited company (Ltd); for a critical view see KA Schachtschneider, 'Die Wirtschaftsverfassung der Gemeinschaft/Union' in KA Schachtschneider and A Emmerich-Fritsche (eds), *Das Verfassungsrecht der Europäischen Union*, Manuskript des Lehrstuhls für Öffentliches Recht der Friedrich-Alexander Universität Erlangen-Nürnberg (Nürnberg, 2005) 610.

[296] C Salomão Filho and J Samtleben, 'Der Südamerikanische gemeinsame Markt und seine neue Verfassung' (1992) 46 *WM* 1351.

[297] M Quiroga Obregón, *MERCOSUR* (Los Amigos del Libro, La Paz, 1997) 48, deems restrictions on freely fluctuating exchange rates to be a non-tariff trade barrier; referring to the freedom to provide services see E Navarro Varona, quoted from RX Basaldúa, *MERCOSUR y Derecho de la Integración* (Buenos Aires, Abeledo-perrot, 1999) 131; R. Olivera, 'Los mercados de capitales en el proceso de integración regional' in H Arbuet Vignali *et al* (eds), *IV encuentro internacional de derecho para América del Sur: El desarollo de la integración hacia el siglo XXI: Mercosur, balance y perspectivas* (Montevidéo, FCU, 1996) 299.

acquisitions, amortisations and transfers of monetary value or tangible means.[298] This could also include compensation for products and services rendered or for investments realised within the scope of freedom of establishment, although the necessary transactions are already covered under the respective market freedoms. Due to the basic function of the free movement of capital, an overlapping of applicability with other market freedoms is unavoidable.[299] The free movement of capital includes such measures as those which define methods of payment, for instance, banking charges for foreign money transfers. If the monetary transfer itself is hindered, then the regular practices of other economic freedoms are adversely affected.[300]

Difficulties in the classification of the free movement of goods only arise in cases in which the definition of those goods includes property rights (property law), for example, commercial papers, which transcend borders. The classification will depend on whether the commercial transaction or the transfer of assets is more pertinent.[301] The trading of collector's coins, for example, is not protected by the freedom to move capital if the coins are purely collector's items and are no longer considered a medium of payment.[302] The cross-border transfer of real capital (capital equipment), in the form of production machinery, is protected under the free movement of goods.[303]

Most problematic is the differentiation between the freedom to move capital and the freedom of establishment, since facilities of a subsidiary require constant capital investments. Direct investments, which contribute to corporate performance, are assigned to the freedom of enteprise,[304] whereas portfolio investments, which serve financial investments, are protected under the free movement of capital.[305] Admittedly, a strict distinction between a pure financial investment and an investment which is supposed to support corporate performance is, in practice, difficult to make.

With regard to the freedom to provide services, overlapping scopes of application are frequently encountered, particularly concerning financial services, in that provision of services and movement of capital are combined into one. Financial services are therefore classified based on the basic economic freedom within whose scope of protection the economic focal point mainly falls. In the event that no focal point is recognisable, the freedom to provide services becomes secondary, according to the EC rule of conflict under article 50, paragraph 1.[306]

[298] JCW Müller, *Kapitalverkehrsfreiheit in der Europäischen Union* (Berlin, Duncker & Humblot, 2000) 156–58, 198; W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004) 1031–33; see also Directive 88/361/EC governing implementation of Art 67 EC [1988] OJL178/5.

[299] A Haratsch, C Koenig and M Pechstein, *Europarecht* (Tübingen, Mohr Siebeck, 2006) 388; see also Case C-367/98 *CEC v Portugal (Golden Stock I)* [2002] ECR I-4731.

[300] W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004) 1052; Case C-203/80 *Casati* [1981] ECR 2595.

[301] W Kiemel, 'Art 56 EC' in H von der Groeben and J Schwarze (eds), *EU-/EG-Vertrag, Kommentar* (Baden-Baden, Nomos, 2003).

[302] Case C-7/78 *Thompson* [1978] ECR 2247.

[303] A Haratsch, C Koenig and M Pechstein, *Europarecht* (Tübingen, Mohr Siebeck, 2006) 387; W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004) 1039.

[304] Case C-208/00 *Ueberseering BV/NCC* [2002] ECR I-9919.

[305] A Haratsch, C Koenig and M Pechstein, *Europarecht* (Tübingen, Mohr Siebeck, 2006) 389; Case C-35/98 *Staatssecretaris van Financiën/Verkooijen* [2000] ECR I-4071 (dividend payments fall under the extent of protection of the free movement of capital).

[306] A Haratsch, C Koenig and M Pechstein, *Europarecht* (Tübingen, Mohr Siebeck, 2006) 390; JCW Müller, *Kapitalverkehrsfreiheit in der Europäischen Union* (Berlin, Duncker & Humblot, 2000) 193. The European Court

Difficulties in differentiating the free movement of capital from the freedom of movement for workers can be encountered when, for instance, foreign exchange regulations restrict the transfer or transportation of earnings acquired in a Member State cross-border to the home country.[307] In contrast, real estate acquisitions by migrant workers in another country fall under the freedom of mobility of the workforce.[308]

B Scope of Free Movement of Capital in MERCOSUR

MERCOSUR is considered a preference zone within ALADI, and the most-favoured-nation treatment principle, which is defined in article 48 of the Treaty of Montevidéo,[309] governs the free movement of capital within ALADI: capital originating out of another ALADI member state enjoys the same rights as capital originating in any other MERCOSUR Member State.

Article 1, paragraph 1, phrase 3 of the Treaty of Asunción provides for the coordination of money, currency exchange and capital markets policies among Member States. This regulation recognises that the realisation of the free movement of capital requires the coordination of macro-economic policies and a harmonisation of capital market regulations, as well as compatible currency exchange policies.[310] For these reasons, the exchange of information regarding regulations and structures in capital markets was recognised as an essential function and initiated in the early stages of MERCOSUR's formation.

The protection of domestic and foreign investments and of private property is interrelated with the free movement of capital. Therefore, two Protocols have been enacted: the Colonia Protocol for the promotion and protection of investments in MERCOSUR[311] and the Protocol for the protection of third countries' inventments.[312] Both Protocols aim to attract foreign direct investment.[313] This objective is linked to the modernisation of economies and the improvement in standards of living.[314] Both Protocols seem to have achieved their goal, substantiated by the new boom of foreign direct investment in

of Justice applies a conflict rule which deems both economic freedoms to be cumulatively applicable, see Case C-484/93 *Svensson and Gustavsson/Ministere du Logement* [1995] ECR I-3955.

[307] The European Court of Justice has clarified that monetary transfers do not fall under the protection of freedoms which are legal grounds for payment, but rather fall under the protection of the freedom of monetary transfers, see Joined Cases C-358/93 and C-416/93 *Bordessa* [1995] ECR I-361.

[308] Regulation 1612/68/EC, art 9, para 1 [1968] OJ L257/2; W. Kiemel, 'Art 56 EC' in H von der Groeben and J Schwarze (eds), *EU-/EG-Vertrag, Kommentar* (Baden-Baden, Nomos, 2003); W Frenz, *Europäische Grundfreiheiten* (Berlin, Springer, 2004) 1045.

[309] ALADI Foundation Treaty.

[310] RR Díaz Labrano, *MERCOSUR: Integración y derecho* (Buenos Aires, Intercontinental, 1998) 317.

[311] Protocolo de Colonia para la promoción y protección recíproca de inversiones en el MERCOSUR (Intrazona), adopted by CCM Decision No 11/93.

[312] Protocolo sobre promoción y protección de inversiones provenientes de estados no partes del MERCOSUR, adopted by CCM Decision No 11/94.

[313] D Hargain and G Mihali, *Circulación de bienes en el MERCOSUR* (Buenos Aires, BdeF, 1998) 198; RA Porrata-Doria, *MERCOSUR* (Durham, NC, Carolina Academic Press, 2005) 114. For more on the foreign direct investment in MERCOSUR, see Diego Fraga Lerner, Chapter 16.

[314] See CCM Decision No 11/93, first recital of the Preamble; CCM Decision No 11/94, first recital of the Preamble.

MERCOSUR.[315] Since the liberalisation of direct investment can be regarded as an element of the free movement of capital,[316] both Protocols have a key role to play.[317]

(i) The Colonia Protocol

The Colonia Protocol was adopted by the CCM on 17 January 1994.[318] According to article 12, the Colonia Protocol is directly linked to and supportive of the Treaty of Asunción, which is why the provisions stated therein qualify as primary law. The accession of a new Member State into MERCOSUR denotes *ipso jure* accession into the Colonia Protocol.[319] The Protocol was initially devoted to the defining of terms and, in doing so, defines its territorial and personal scope of application. It defines the term 'investment' generally as being any assets that are invested in a MERCOSUR Member State by an investor headquartered in another MERCOSUR Member State.[320] In contrast to article 56 EC, the Colonia Protocol guarantees the free movement of capital within MERCOSUR, but does not, however, address investments from MERCOSUR Member States into third (non-party) countries, or vice versa. However, for the protection of investments originating from third countries, the Protocol enables Member States to negotiate individual agreements with third countries concerning the liberalisation of capital flow.

(ii) Protocol Governing the Protection of Investments from Third Countries

The Protocol of 5 August 1994 governing the protection of investments from third countries regulates the protection of investments originating from non-member states.[321] This Protocol is a virtual verbatim copy of the Colonia Protocol.

(iii) CCM Decision No 8/93

Although CCM Decision No 8/93 only adopted a recommendation for a minimum rule for capital markets, it attracts special attention, since in the European Union, similar guidelines led to an extensive merging of financial markets (into a 'European financial market') and in doing so, smoothed the way to the common currency.[322] The main objective of the recommendation was to establish a unified access to information relevant to assets. Issuing houses of bonds and commercial securities should be obligated to display

[315] *cf* UNCTAD (United Nations Conference on Trade and Development), *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D* (2005) 62, 66, 68.

[316] See no I of nomenclature in Directive 88/361/EC [1988] OJ L178/5; A Haratsch, C Koenig and M Pechstein, *Europarecht* (Tübingen, Mohr Siebeck, 2006) 388; R Bieber, A Epiney and M Haag, *The European Union* (Baden-Baden, Nomos, 2005) 404; Case C-503/99 *CEC v Belgium (Golden Stock III)* [2002] ECR I-4809.

[317] As estimated by W Greiner, *Die Interregionale Assoziierung zwischen der Europäischen Union und dem MERCOSUR* (Frankfurt, Lang, 2004) 96.

[318] See CMG Resolution No 7/93, which recommended to the CCM to accept these regulations.

[319] Colonia Protocol, art 12.

[320] Ibid art 1, no 1.

[321] See also RA Porrata-Doria, *MERCOSUR* (Durham, NC, Carolina Academic Press, 2005) 118.

[322] Directive 89/646/EC of 15 December 1989 governing the coordination of legal and administrative regulations for the taking up of and excercising of an activity by lending institutions [1989] OJ L386/1; Directive 89/299/EC of 17 April 1989 concerning the equity capital of lending institutions [1989] OJ L124/16; Council Directive 89/67/EC of 18 December 1989 concerning a solvency ratio for lending institutions [1989] OJ L386/14; Directive 2001/34/EC of 28 May 2001 concerning the authorisation of commercial papers for official stock market valuation and concerning publication of information [2001] OJ L184/1.

openly, in a standardised format, information concerning their business processes, management structure and financial status,[323] at regular intervals.[324] Reasons for diverse standards of financial accounting in MERCOSUR must be pointed out to the investor.[325] Moreover, the recommendation contains, among other things, uniform minimal standards concerning trade, invoicing and execution of maturity and storage of bonds and commercial securities.[326] Incorporated companies can have their shares traded on any exchange market in any Member State.[327] The enforcement of these regulations can be endorsed. Investments are becoming more comparable and risks are becoming easier to estimate, which should significantly strengthen the confidence of potential investors.[328]

(iv) Further Decisions of the CCM

CCM Decision No 10/93 governs the application of criteria, set by the Basel Committee of Bank Supervision (BCBS), concerning the minimum reserve for risk venture capital (so-called Basel I criteria) for MERCOSUR.[329] Over the last decades, the Basel I criteria have become a standard for the banking and finance sectors, particularly in industrialised, but also in newly emerging, countries[330] and they also have been implemented in all MERCOSUR Member States. CCM Decision No 12/94 defines the validity of internationally recognised bank supervision guidelines for MERCOSUR. CMG Resolution No 1/96 was adopted to establish uniform international classification standards concerning debtors and credit risks, which all Member States had adopted by 2000.[331] CCM Decision No 8/99, which reflects the influence of the work of the Basel Committee in Europe, obligates regulating authorities to cooperate.[332] CCM Decision No 9/99 prohibits arbitrary restriction of access to insurance markets by insurance agencies of other Member States.[333] It is expressly prohibited to place insurance companies from third countries in a less favourable position than those which are based in MERCOSUR.[334] In the battle against money-laundering, it was agreed that central banks would work together;[335] however, concrete regulations and guidelines for implementing this cooperation have not yet been established.[336]

[323] CCM Decision No 13/94, appendix para 2, which amends CCM Decision No 8/93.
[324] CCM Decision No 8/93, appendix para 1.3.
[325] Ibid para 1.3.2.
[326] Ibid para 5.
[327] Ibid para 1.2.3.
[328] RA Porrata-Doria, *MERCOSUR* (Durham, CA, Carolina Academic Press, 2005) 99.
[329] CMG Resolution 51/93 was previously adopted recommending the CCM to accept these provisions. It is questionable whether the intended modifications of the original recommendations (Basel II) are automatically applicable to MERCOSUR or whether a new CCM Decision must be adopted which expressly prescribes this.
[330] As regards the Basel criteria, see E Holz, *Internalización y acuerdos de liberalización en servicios financieros* (Montevidéo, FCU, 2003) 30.
[331] E Holz, *Internalización y acuerdos de liberalización en servicios financieros* (Montevidéo, FCU, 2003) 73–123.
[332] D Zavala, 'Servicios financieros en el Mercosur' in H Arbuet Vignali *et al* (eds), *IV encuentro internacional de derecho para América del Sur: El desarollo de la integración hacia el siglo XXI: Mercosur, balance y perspectivas* (Montevidéo, FCU, 1996) 309–20.
[333] CCM Decision No 9/99, appendix art 2, para 1.
[334] Ibid art 1, para 3.
[335] See Agreement for the cooperation of central banks to counteract money laundering, adopted by CCM Decision No 40/00.
[336] Little progress in the battle against money laundering is noted by J Vervaele, 'MERCOSUR' (2005) 54 *ICLQ* 404 (with further references).

C Concluding Remarks

The regulation of the capital market is an important instrument for preventing inflation and is an essential element for maintaining the sovereignty of Member States. In literature concerning MERCOSUR legislation, it is pointed out that the overcoming of national resistance to the actualisation of the free movement of capital is apparently more difficult than the realisation of other economic freedoms.[337] Therefore, it is not surprising that the free movement of capital in MERCOSUR is still impeded by many restrictions,[338] particularly in comparison to the common financial market which is enforced by European Monetary Union in the European Union.[339] Nevertheless, significant progress has been made in the direction of harmonisation of capital market regulations, and the previous assessment, that the freedom to move capital is far from being actualised,[340] is no longer accurate.

The fact that in MERCOSUR, Member States opted for the more specific prohibition of direct discrimination, in contrast to a more all-encompassing prohibition of any kind of restriction at all, as is practised in the European Union, is not necessarily disadvantageous. A globally tailored free movement of capital, which would enable the capital owner to have the right to make use of his/her capital anywhere in the world, is considered to be inconsistent with the social principle[341] and a nation's existence as a state.[342] The unrestricted free movement of capital, as practised in the European Union, the 'European Capital Union',[343] is seen by some as a primary cause for the current employment woes in Germany. Even for MERCOSUR, the competition between Member States to deregulate and the accompanying dwindling of political influence on national market capital structures could prove to be a possible threat to the national financial systems. In particular, the danger of snowballing effects in finance markets during crises deems a far-reaching integration of capital markets in MERCOSUR inadvisable, unless and until economic stability is attained in all Member States. A modest legal harmonisation is to give priority to the unlimited liberalisation of financial sectors, particularly in view of current developments in financial markets.[344]

[337] R Olivera García, 'Los mercados de capitales en el proceso de integración regional' in H Arbuet Vignali *et al* (eds), *IV encuentro internacional de derecho para América del Sur: El desarollo de la integración hacia el siglo XXI: Mercosur, balance y perspectivas* (Montevidéo, FCU, 1996) 306; with further references A Haller, *MERCOSUR* (Münster, Aschendorff, 2001) 51.

[338] Overview by E Holz, *Internalización y acuerdos de liberalización en servicios financieros* (Montevidéo, FCU, 2003) 89–123, 154.

[339] KA Schachtschneider, *Grenzen der Kapitalverkehrsfreiheit* (Berlin, Duncker & Humblot, 2002) 258.

[340] J Vervaele, 'MERCOSUR' (2005) 54 *ICLQ* 408.

[341] As regards the so-called social priniple, see F Fuders, *Die Wirtschaftsverafssung des MERCOSUR* (Berlin, Duncker & Humblot, 2008) ch 3 n 52.

[342] KA Schachtschneider, *Grenzen der Kapitalverkehrsfreiheit* (Berlin, Duncker & Humblot. 2002) 263; KA Schachtschneider, 'Die Wirtschaftsverfassung der Gemeinschaft/Union' in KA Schachtschneider and A Emmerich-Fritsche (eds), *Das Verfassungsrecht der Europäischen Union*, Working Paper, University of Erlangen-Nürnberg (Nürnberg, 2005) 616.

[343] KA Schachtschneider, *Grenzen der Kapitalverkehrsfreiheit* (Berlin, Duncker & Humblot, 2002) 257.

[344] E Holz, *Internalización y acuerdos de liberalización en servicios financieros* (Montevidéo, FCU, 2003) 156.

V Summary

The movement of goods has been liberalised to a large extent and considerable progress has been observed in the other economic freedoms as well. Except for products of the automobile and sugar industries, MERCOSUR has made significant progress toward establishing a free trade zone, bolstered by the abolition of numerous exemptions as of January 2006, and the actualisation of the customs union. Many of the existing common external tariff exemptions, for example, the special schemes for importation of certain commodities (*regímenes especiales*), also exist in the European Union, which is nevertheless considered as a customs union and common market.[345] Further external tariff exemptions, particularly those for finance products and products stemming from the telecommunications sector, are temporary. The progress in approximation of laws in MERCOSUR is classified as being advanced.[346] The fact that non-tariff trade barriers still exist is not yet sufficient cause to deny MERCOSUR common market status. The experience of the European Union has shown the process of abolition of all non-tariff trade barriers to be a painstaking one,[347] which remains as an overriding objective[348] that will probably never really be completed, in that new governmental measures often result in new restrictions in commerce.

Undoubtably, in MERCOSUR, the movement of goods is still restricted by the double customs duty that is still possible on commodities from third countries, as well as by the requirement to carry certificates of origin for intra-MERCOSUR produced goods. Restrictions in MERCOSUR also exist for cross-border movement of capital and for the free mobility of the workforce (which incidentally also took longer to develop in the European Union).[349] In truth, the full-fledged commitment to the free movement of capital was not acknowledged in the European Union as being an essential component of economic freedom until it was so stated in the Maastricht Treaty in 1992. Up to that point, a mere limited freedom of monetary transactions was in effect. A completely integrated capital market has not yet evolved in Europe.[350] In specific terms, the financial services market is considered to be incomplete; in the European financial sector, an extensive market foreclosure[351] still exists and certain restrictions to the free movement of monetary transactions are held to be unavoidable in the forseeable future.[352] In the European Union, even the free movement of the workforce, as well as the freedom of establishment and

[345] T Oppermann, *Europarecht* (München, Beck, 2005) 408–10; as in 1972, long before the enactment of the the Maastricht Treaty, see HP Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen, Mohr Siebeck, 1972) 545.

[346] See J Samtleben, 'Das internationale Prozess- und Privatrecht des MERCOSUR' (1999) *RabelsZ* 8.

[347] Restrictions on the freedom of movement of goods can still be identified today, see R Streinz, *Europarecht* (Heidelberg, Müller, 2005) 369.

[348] T Oppermann, *Europarecht* (München, Beck, 2005) 418.

[349] J Vervaele, 'MERCOSUR' (2005) 54 *ICLQ* 399; F Fuders, *Die Wirtschaftsverafssung des MERCOSUR* (Berlin, Duncker & Humblot, 2008) ch 2, IV.4.

[350] See F Fuders, *Die Wirtschaftsverafssung des MERCOSUR* (Berlin, Duncker & Humblot, 2008) ch 2, IV.4.

[351] T Oppermann, *Europarecht* (München, Beck, 2005) 377–492.

[352] For the safeguarding of national fiscal law, public order, external political relations to third countries or the battle against money laundering, see T Oppermann, *Europarecht* (München, Beck, 2005) 490.

services, are still exposed to bureaucratic hurdles.[353] The EC Treaty has relegated agriculture to an independent section,[354] which ultimately serves the purpose of excluding this section from liberalisation.[355] Nevertheless, the European Single Market has been regularly considered to be completed since the Maastricht Treaty declared it to be so by 31 December 1992.[356] This, despite the still uncompleted approximation of laws in the European Union[357] and despite still existing differences in the national laws regulating budgetary, fiscal, economic and welfare policies.[358] The road to a comprehensive legal harmonisation is still characterised as being a 'long and difficult path'.[359] In this regard, it has been pointed out that concerted efforts were required to ultimately produce the federally desired equalisation of living conditions, even in homogeneous federal states, as in the United States (since 1787) or in the German Reich (since 1871), which is why patience must accordingly be exercised also in the European Union.[360] Thus, as has been stated, the creation of a European Single Market remains a task in progress,[361] which is why realisation of the European Single Market has to be understood to be more of a programmatic concept than the completion of the liberalisation process.[362]

Considering the imperfection of the European common market, it is arguable that MERCOSUR is also nearing the integration stage of a common market, even though a synchronisation of market freedoms (as is the case in the European Union)[363] still remains a distant goal. The sugar and automobile industries, the sectors exempted from the free trade zone and from the common external tariff, are comparable to the independently-regulated EU agricultural policy. Customs union exemptions that are still in place are either temporary or they exist as they do in the European Union. The continued existence of numerous non-tariff trade barriers in MERCOSUR is, according to the above asessment, not detrimental. Ultimately, the enforcement of the prohibition of measures having an equivalent effect to quantitative restrictions, for unspecified time periods, remains a priority. If a common market was defined with the condition of the removal of all market freedom restrictions, than this stage of integration would probably never be obtainable. Even in the Federal Republic of Germany, there are national regulations which the European Court of Justice could possibly interpret as prohibited restrictions, if such

[353] T Oppermann, *Europarecht* (München, Beck, 2005) 556; R Streinz, *Europarecht* (Heidelberg, Müller, 2005) 370, E Ramos da Silva, *Rechtsangleichung im Mercosul* (Baden-Baden, Nomos, 2002) 105.

[354] Article 32 *et seq* EC.

[355] Even though according to art 32, para 1 EC agriculture is part of the common market, arts 33–38 EC provide for numerous special regulations which, according to art 32, para 2 EC, have primacy over the common market regulations in their respective areas of application. Article 36 EC only permits the application of EC competition law insofar as the Council permits this. See also R Streinz, *Europarecht* (Heidelberg, Müller, 2005) 322–419; T Oppermann, *Europarecht* (München, Beck, 2005) 442.

[356] Article 14, para 1 EC.

[357] T Oppermann, *Europarecht* (München, Beck, 2005) 405.

[358] Ibid 367.

[359] Ibid 405.

[360] Ibid 405.

[361] Ibid 409–42; R Streinz, *Europarecht* (Heidelberg, Müller, 2005) 367; Niall Ferguson, 'Erfolgreich, aber nicht geliebt', (2007) 12 *Welt am Sonntag* 17.

[362] T Oppermann, *Europarecht* (München, Beck, 2005) 422.

[363] A Haratsch, C Koenig and M Pechstein, *Europarecht* (Tübingen, Mohr Siebeck, 2006) 282; A Brigola, *Das System der EG-Grundfreiheiten* (München, Beck, 2004) 45.

restrictions fell under its jurisdiction.[364] For this reason, an objective freedom of movement in all areas will not be achievable, even if the establishment of a United States of Europe some day comes into being.

The restriction of the liberalisation of economic freedoms in MERCOSUR to the most-favoured-nation treatment principle and the non-discrimination principle, which is in contrast to the prohibition of any kind of restrictions, as established by the European Court of Justice, is not necessarily disadvantageous, since, as pointed out, the development of European Union economic freedoms often produced negative consequences. In particular, the land-of-origin principle, derived from articles 47, paragraph 2 and article 55 EC, and the obligation to acknowledge the legislation of the land of origin in the country of destination, can be detrimental to the principle of state autonomy, which, in turn, is the premise of freedom, since the constitutional right to legislate is not an alienable right, but is the most personal of all rights.[365] The broad interpretation of basic economic freedoms overturns the necessary democratic principle of limited power.[366] Even if the land-of-origin principle avoids many laborious negotiations concerning the approximation of laws, such negotiations are preferred, as their outcome should be a high level of protection for health, consumer and environmental issues[367] without violating democratic principles. The constitutionally required subsidiarity principle, as stipulated in article 5, paragraph 2 EC, does not seem to be a point of contention for the European Court of Justice.[368] The subsidiarity principle gives preference the local entity and, in so doing, not only guarantees a greater proximity of law to relevant issues, but also gives priority to individual rights and freedoms.[369] But a general rule of argument, '*in dubio pro communitate*', contradicts the subsidiarity principle and is, therefore, incompatible with the constitutional principle of integration.[370] A general preference in favour of principles contained within the

[364] For example, the craftsman's obligation to register with local trades registers, which makes the acceptance of a contract in another (federal) state outside the relevant chamber's area more difficult. The European Court of Justice deems the obligation to register with skilled trades registers as inconsistent with EU law if registry requirements pertaining to the occupation have been fulfilled, see Case C-58/98 *Corsten* [2000] ECR I-7919; Case C-215/01 *Schnitzer* [2003] ECR I-14847.

[365] I Kant, *Metaphysik der Sitten*, reproduced in G Hartenstein (ed), *Immanuel Kant's sämmtliche Werke – In chronologischer Reihenfolge* (1868) bd VII, s 160; on this see also F Fuders, *Die Wirtschaftsverafssung des MERCOSUR* (Berlin, Duncker & Humblot, 2008) ch 1 III 1.a).

[366] KA Schachtschneider, 'Die Wirtschaftsverfassung der Gemeinschaft/Union' in KA Schachtschneider and A Emmerich-Fritsche (eds), *Das Verfassungsrecht der Europäischen Union*, Working Paper, University of Erlangen-Nürnberg (Nürnberg, 2005) 623–26.

[367] As EU law has demonstrated, see D Langner, 'C. VI: Technische Vorschriften' in MA Dauses (ed), *Handbuch des EU-Wirtschaftsrechts* (München, Beck, 2006).

[368] KA Schachtschneider, 'Die Wirtschaftsverfassung der Gemeinschaft/Union' in KA Schachtschneider and A Emmerich-Fritsche (eds), *Das Verfassungsrecht der Europäischen Union*, Working Paper, University of Erlangen-Nürnberg (Nürnberg, 2005).

[369] KA Schachtschneider, *Prinzipien des Rechtsstaats* (Berlin, Duncker & Humblot, 2006) 45, 63.

[370] KA Schachtschneider, 'Die Wirtschaftsverfassung der Gemeinschaft/Union' in KA Schachtschneider and A Emmerich-Fritsche (eds), *Das Verfassungsrecht der Europäischen Union*, Working Paper, University of Erlangen-Nürnberg (Nürnberg, 2005) 626.

economic freedoms[371] is not sustainable, since exceptions evolve to protect principles with constitutional status, particularly fundamental rights or essential interests of the Member States.[372]

However, MERCOSUR arbitration reveals that MERCOSUR Member States seem to have understood the impact on fundamental rights to freedom and democracy. The second arbitration court[373] under the Olivos Protocol justified the restriction of the fundamental freedom of assembly with other fundamental freedoms protected by the economic freedoms. In an instance similar to the *Schmidberger* case of the European Court of Justice,[374] environmental activists had closed one of the principal traffic arteries between Argentina and Paraguay. In a dogmatic and in-depth process of argumentation, which could serve as an archetype for European jurisprudence, the court gave a judgment that could be seen as the trumping of a constitutionally guaranteed fundamental freedom by a market freedom. In contrast to EU case law, according to this arbitration, fundamental freedoms do not provide a justification for restrictions on economic freedoms, which indirectly implied a prevalence of economic freedoms over fundamental freedoms. Instead, economic freedoms might justify the restriction of fundamental freedoms, since economic freedoms, as any law, are the material expression of fundamental freedoms, especially the freedom to exercise a profession.[375] Following this argument, fundamental rights, which enjoy constitutional status, are linked to *other* fundamental rights and are realised through economic freedoms.

In this context, the argumentation of the first arbitration under the Olivos Protocol was already remarkable, where the arbitration court had to resolve conflicts between the freedom of movement of goods with the fundamental right to life and physical integrity. Although the verdict was overturned by the newly inaugurated appellate body, the way in which the court arbitrated the points of conflict between the freedom of movement of goods with the protection of health is, however, notable. The court recognised that the freedom of movement serves social interests but is not an end in itself. As the consequences of science are not always predictable with certainty, politics should take this uncertainty into account. That is to say that the court ascribed a high priority to the principle of prudence and reversed the burden of proof:[376] the manufacturer must demonstrate that its product is not environmentally harmful. Such a very courageous jurisprudence in favour of health and environmental protection is not as yet established in European jurisdiction and could be seen as an orientation for European legal practice.[377] The fundamental right to health and physical integrity is, according to the prevailing

[371] Case C-53/80 *Kaasfabriek Eyssen* [1981] ECR 409, Advocate General Warner, Opinion of 27 November 1980.

[372] KA Schachtschneider, 'Die Wirtschaftsverfassung der Gemeinschaft/Union' in KA Schachtschneider and A Emmerich-Fritsche (eds), *Das Verfassungsrecht der Europäischen Union*, Working Paper, University of Erlangen-Nürnberg (Nürnberg, 2005) 626.

[373] *Environmental Activists*, second MERCOSUR arbitration court under the Olivos Protocol, 6 September 2006.

[374] Case C-112/00 *Schmidberger/Austria* [2003] ECR I-5659.

[375] *Environmental Activists*, second MERCOSUR arbitration court under the Olivos Protocol, 6 September 2006.

[376] *Retreaded Tyres*, first MERCOSUR arbitration court under the Olivos Protocol, 25 October 2005.

[377] This, however, was in relation to technologies with truly incalculable consequences, and was not relevant to the harmfulness of retreaded tyres, which was the subject matter of the case and the reason why the Permanent Review Court rightly judged that the arbitration was disproportionate, see *Retreaded Tyres*, first MERCOSUR Permanent Review Court, 20 December 2005.

opinion, only restrictable within narrow limits.[378] The question, therefore, is why technologies like genetic engineering or digital mobile communications systems are not forbidden. According to the public law principle '*in dubio pro securitate*', new technologies should be banned as long as danger to the life of people and animals cannot be undoubtedly excluded. But studies demonstrate danger emanating from such technologies,[379] that is to say, that doubts about the safety of these technologies actually do exist. That the MERCOSUR arbitration court referred to the uncertainty of such technologies and allowed this uncertainty as a justification for restricting the free movement of goods is, given the importance of the fundamental right to life and physical integrity, a point to be noted.

[378] See, eg HD Jarass, *EU-Grundrechte* (München, Beck, 2005) 123.

[379] A Bortkiewicz, M Zmyslony, A Szyjkowska and E Gadzicka, 'Subjective Symptoms Reported by People Living in the Vicinity of Cellular Phone Base Stations' in (2004) 55 *Medical Practice* 345; R Santini, M Seigne and L Bonhomme-Faivre, 'Investigations on the Health of People Living Near Mobile Telephone Relay Stations: Incidence According to Distance and Sex' in (2002) 50(6) *Pathol Biol (Paris)* 369; D Saxena, S Flores, G Stotzky, 'Transgenic plants: Insecticidal toxin in root exudates from Bt corn' in (1999) 402 *Nature* 480; JD Nordlee, SL Taylor, JA Townsend, LA Thomas, RK Bush, 'Identification of a Brazil nut Allergen in Transgenic Soybeans' in (1996) 334(11) *New England Journal of Medicine* 726; JE Losey, LS Rayor, ME Carter 'Transgenic pollen harms monarch larvae' in (1999) 399 *Nature* 214.

7

MERCOSUR and the WTO

A Review of the Relations in the International Trading System

SAMANTHA S MOURA RIBEIRO*

'Systema autem resultat ex tribus elementis: Unitas principii, varietas objectuum, harmonia inter partes'[1]

I Introduction

In November 2001, only two months after the terrorist attacks of September 11, the WTO member states convened what was to be the first meeting of the Doha Development Round with the goal of achieving ambitious objectives in the liberalisation of trade. This context, in which the whole world was feeling insecure, afraid and impotent, with a strong tendency to look for safety through isolation, may not have been the best moment to undertake negotiations on global trade issues, or globalisation in general. However, the opposite in fact occurred and the negotiations received an extra boost: as terrorism began to be seen as a consequence of market exclusion and a manifestation of despair by those who had nothing to lose, economic development was chosen as the main strategy in the fight against terrorism. The elimination of world poverty and the promotion of world development became urgent priorities on the global trade agenda.

Despite the fact that the Doha Round has not yet been concluded,[2] the reflections provoked and stimulated by the establishment of the negotiations in this context have served to remind the global community of the major strategic role the global trade system has to play in the struggle to secure fundamental rights, including the right to a dignified life, for everyone.[3]

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[1] I Sasso, *Dal Definitiones et Theses Philosophiae Scholae*, Pasta VII Typis Seminarii.

[2] The last meetings ended on 29 July 2008 without an agreement having been reached.

[3] In the sense used by Jürgen Habermas: everyone is potentially capable of acting with autonomy by giving and criticising reasons for holding or rejecting claims, so that open and democratic procedures are always desirable. See, eg J Habermas, 'O Estado Democrático de Direito: Uma Amarração Paradoxal de Princípios Contraditórios?' in *Era das Transições* [*Zeit der Übergänge*] (Flávio Beno Siebeneichler (trans), Río de Janeiro, Tempo Brasileiro, 2003) 153–73.

Indeed, when the World Trade Organization (WTO) was created as the main result of the Uruguay Round, it was already stated in the Preamble to its Constitutive Agreement that, besides the openness of the global market, the WTO should also aim to guarantee sustainable development and promote 'positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development'.[4]

Nevertheless, it seems that this Preamble has been forgotten in the day-to-day practice of the world trade system; and, even worse, that in the actual global trade scenario, this provision is not sufficient to promote fundamental rights and development.[5]

The international legal system, as well as the world trade system, has been confronted with a massive proliferation of treaties and international courts that often compete and conflict, breaking the unity of the international legal system[6] and constantly challenging the capacity of the traditional Westphalian state-centred approach to fighting poverty and providing for and promoting the rights and inclusion of all the citizens of the world.

The multiplication of regional agreements is not in itself negative; on the contrary, it can arguably make the multilateral system stronger and more efficient.[7] Moreover, the proliferation of courts and tribunals shows that the solution of conflicts through the resort to jurisdictions is considered to be efficient and trustworthy and generates enriching dialogues through reasonable disagreement. However, conflicting rulings of competing jurisdictions create incompatible obligations for states, the possibility of forum shopping, and undermine overall credibility in the international courts' authorities and in international law's consistency.[8] This situation affects the legal security of the system and renders it less effective in the promotion and protection of its goals.

This normative landscape, where there is a multilateral trade system coexisting with several regional trade systems without effective provisions to regulate the eventual overlapping of jurisdiction, makes clear that there is a need to develop specific methods in order to overcome this fragmentation, under the principles that should guide the whole system.

[4] Preamble to the Agreement Establishing the WTO, 15 April 1994.

[5] The present order under which national sovereignties are shared and the regulations go beyond borders affecting citizens and private actors in general, the legal provisions created for a purely Westphalian interstate context, must be reinterpreted with the aim to fit into a community of states and citizens. This argument will be developed further below.

[6] The problem of the fragmentation caused by the proliferation of legal systems with conflicting norms and jurisdictions has been given great attention, not only in the field of trade but also with respect to its relations with human rights, the environment, labour etc. See, eg Francesco Francioni *et al*, *Organizzazione Mondiale del Commercio e Diritto della Comunità Europea nella Prospettiva della Risoluzione delle Controversie* (Milano, Giuffrè Editore, 2005); Joost Pauwelyn, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge, Cambridge University Press, 2003); and Lawrence Boisson Chazournes, Cesare Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (New York, Transnational Publishers, 2002).

[7] To this effect, see Valentin Zahrnt, 'How Regionalization can be a Pillar of a More Effective World Trade Organization' (2005) 39(4) *Journal of World Trade* 671.

[8] In the same direction, see Nikolaos Lavranos, 'The Solange-Method as a Tool for Regulating Competing Jurisdiction among International Courts and Tribunals', article written as part of the author's NWO-sponsored research project 'Competing Jurisdiction Between the ECJ and Other International Courts and Tribunals' (2005–09) *Loyola Int'l & Comparative Law Review* 57.

Bearing in mind that the international trading normative framework, the international institutions and their dispute settlement mechanisms are not *ends* in themselves, but *means* to ensure and protect relevant public goods, it is clear that the methods must be such as to promote the system in conformity with the principles that should give unity to it, such as the protection of fundamental rights and the rule of law.

In this context, this chapter will focus on the relation between MERCOSUR[9] as a regional agreement and the WTO. More specifically, I will propose a reflection on the consequences of the lack of cooperation between their respective dispute settlement bodies for the possible characterisation of the international trading system as such, and for the achievement of the goals that supposedly (should) guide this system.

In order to be able to delineate the relation between MERCOSUR and the WTO, it is important to have a brief look at the possible approaches to the relation between the WTO and regional trade agreements in general, followed by the specific legal provisions related to this very specific relation. This will be the subject of the next section.

Then, in the following sections I will discuss the cases that in my view are the most illustrative of the problems of lack of coherence and cooperation between MERCOSUR's and WTO's dispute settlement mechanisms. The cases chosen are the MERCOSUR and WTO disputes related to (1) the Argentine anti-dumping measures on poultry from Brazil; and (2) the Brazilian ban on the importations of retreaded tyres. These cases will be helpful to observe how the relation between MERCOSUR and the WTO is played out in the practice of the settlement of disputes and how this relation could be constructed in a different and more desirable way.

Finally, I will dedicate the concluding remarks to reflections on the systemic institutional consequences of addressing the relation between the WTO and the regional agreements in their impact on the relation between the WTO and MERCOSUR, and also the systemic consequences of this relation as regards the promotion and achievement of the values that are, or should be, the true goal of the international trading system.

II Preliminary Overview

MERCOSUR has the nature of a regional trade agreement, which means that it was created as an exception to the principle of the most-favoured-nation (MFN),[10] under the discipline of article XXIV GATT. However, the creation of MERCOSUR was notified to

[9] MERCOSUR (Common Market of the South) was created in 1991 by means of the Treaty of Asunción. It was originally formed by four Member States: Brazil, Argentina, Uruguay and Paraguay. On 7 December 2005 (CCM Decision 28/05) the Member States accepted the protocol of adhesion from Venezuela. The full membership of Venezuela, however, is still depending on ratification by Brazil and Paraguay. See the process of adhesion, available at www.mercosur.int/msweb/portal%20intermediario/pt/index.htm.

[10] According to this principle, embodied in article 1 GATT, every member of GATT is obliged to extend any concession granted to another member to all members.

GATT in 1992 under the enabling clauses,[11] even though the Committee on Regional Trade Agreements (CRTA) has not yet issued an official approval.[12]

According to article XXIV GATT, the main requirements a regional trade agreement (RTA) or a customs union should meet in order to be approved by GATT/WTO are the following:[13]

(a) to cover substantially all the trade;[14]
(b) to remove all tariffs and quantitative restrictions in a reasonable length of time;
(c) not to generate more barriers to third countries who are also members of the WTO.

In fact, there is some ambiguity and complexity in the relationship between the multilateral and the regional agreements in the trading context. On the one hand, there is no hierarchy in international law: all the international agreements and treaties concerning the same law matter, despite being regional or multilateral, have the same weight. Supposedly, then, the RTAs, free trade areas and customs unions are independent and have the autonomy to establish their own rules and their own mechanism for the settlement of commercial disputes between their members.

On the other hand, however, the fact that those agreements have to be approved by GATT/WTO and that they are 'taken under the umbrella' of the multilateral system in some sense gives the impression of a relation of subordination with respect to the WTO. When WTO law sets the requirements that the RTAs have to meet in order to be tolerated by the WTO multilateral regime, that implies a superiority of the multilateral system over regional arrangements.[15] In addition to this, even though the regional agreements have independent mechanisms for the settlement of disputes that are recognised by the GATT/WTO, the WTO Dispute Settlement Body (DSB) has never refrained from ruling on a trade dispute because the dispute had already been settled by a regional tribunal.

There are, therefore, two possible approaches: one that keeps to the idea of giving the same weight to all international agreements, ie once the RTAs, free trade agreements and customs unions are created with their independent legal frameworks and mechanisms for settlement of disputes, they are independent. This implies that the relationship between the WTO and those agreements should be one of dialogue and coordination, on one side, and competition and conflict, on the other.[16] The second way to approach the relation

[11] In 1996, the WTO General Council established a Committee on Regional Trade Agreements (CRTA) with the function of analysing the regional agreements and their systemic implications for the multilateral trading system (WT/L/127). The objective is to ensure the transparency of RTAs and allow members to pose questions about the consistency of the agreement with the WTO rules. The CRTA has the duty to elaborate a report after the factual assessment based on the information provided by the parties to the agreement and on the debate with the other WTO members. However, due to the lack of consensus about the interpretation of the WTO rules and to the lack of WTO rules concerning the RTAs, no report has been finalised under this system. For further information on this see www.wto.org/english/tratop_e/region_e/regcom_e.htm.

[12] See WTO Secretariat, 'Trade Policy Review of Brazil' (2004) *Trade Policy Review* 21.

[13] See article XXIV GATT and the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, both available at www.wto.org. For a further study of the interpretation of article XXIV GATT, see also the leading case *Turkey—Restrictions on Imports of Textiles and Clothing Products*, WTO/DS34, Appellate Body and Panel Reports adopted on 19 November 1999.

[14] Article XXIV:8 GATT and under GATS it should cover substantial sector of services, article V:1a.

[15] Isabelle Van Damme, 'Role of Regional International Law in WTO Agreements' in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford, Oxford University Press, 2006).

[16] Those approaches are also called 'WTO dualism' and 'WTO monism' respectively. See N Lavranos and N Vielliard, 'Competing Jurisdictions Between Mercosur and WTO' in *The Law and Practice of International Courts and Tribunals* (Martinus Nijhof Publishers and L&P, 2008) 226–27.

between the WTO and the regional agreements is taking the RTAs as subsystems of the WTO. In other words, the former are totally subordinated to the WTO, which is supreme.

In this chapter, I propose to analyse how the relation between MERCOSUR and the WTO can be defined and what the consequences of this definition are. In order to achieve this aim, I will pass now to a brief outline of the specific rules related to the choice of forum between MERCOSUR and the WTO which will help to draw the framework of this relationship.

Regarding competing jurisdiction for the settlement of trade disputes, in the MERCOSUR framework, the Protocol of Olivos[17] contains a forum choice clause in article 1.2. According to this provision, a MERCOSUR Member State can always choose whether to resort to the MERCOSUR system for the settlement of disputes or to a different mechanism to which it is a party, such as the multilateral dispute settlement system of the WTO. However, once the choice has been made and the procedures started, the party cannot resort to a second forum.

The WTO's dispute settlement mechanism, in its turn, claims to have compulsory and exclusive jurisdiction to rule on complaints that evoke WTO law.[18] 'By simply alleging that a measure affects or impairs its trade benefits, a WTO member is entitled to trigger the … WTO dispute settlement mechanism, excluding thereby the competence of any other mechanism to examine WTO law violations'.[19]

As a result, if the same state starts the procedures under the RTA and then raises the same issue starting a dispute in the WTO, the WTO panel will not refuse to rule on it because there is no WTO provision that requires it to do so. In any case, any state dissatisfied with the situation could theoretically resort to the RTA tribunal again in order to seek compensation for the breach of the regional provision. However, it is important to bear in mind that if a WTO provision may be invoked, there is no way for a party to avoid WTO jurisdiction. According to article 11 of the Dispute Settlement Understanding (DSU), which demands an objective assessment of the related facts and law, the WTO panel may inquire about a member state's actions in another forum.

In order to sketch the relationship between MERCOSUR and the WTO from the point of view of practice, the two following groups of trading disputes will be very helpful. The first group of disputes concerns the Argentinean application of anti-dumping measures on poultry imported from Brazil. These disputes raise clear instances of the problems in question in the sense that they relate directly to the forum choice clause and, also, to the issue of the application of WTO law by MERCOSUR, as well as the influence of a MERCOSUR ruling on the WTO.

The second group of disputes, the MERCOSUR and WTO cases challenging the Brazilian import ban on retreaded tyres, raises issues linked to the deeper conceptualisation of the international trade system. Although they are not disputes that would demand the application of the forum choice clause—the parties are not the same and the applicable law is not formally the same (MERCOSUR norms, WTO agreements)—yet, the interests and values to be balanced are the same, and one of the parties is the same and

[17] This Protocol superseded the Protocol of Brasília and has regulated the settlement of disputes since 2004.

[18] See the Understanding on Rules and Procedures Governing the Settlement of Disputes.

[19] Kyang Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction Between the World Trade Organization and Regional Trade Agreements' in Bartels and Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (n 15).

subjected to both jurisdictions. Those cases provoke reflections on the possible ways the relation between MERCOSUR and WTO should (not) be built depending on the approach considered to be more legitimate: hierarchical or not.

III Case Study 1: The Poultry Disputes

The disputes between Argentina and Brazil over the application of anti-dumping measures on poultry imported from Brazil started in 2001 under the then-existing MERCOSUR system for the settlement of disputes.[20] Brazil challenged the Argentinean law that imposed anti-dumping duties on the imports of poultry from Brazil.[21] Argentina's main argument was dedicated to justifying the measures, but it also raised the preliminary claim that there were no MERCOSUR norms regulating this matter, and therefore the arbitration court had no jurisdiction over the matter and should refrain from ruling on the dispute. The court found that, although there were no specific norms on the matter in MERCOSUR, the court could still decide by applying judicial precedent and the GATT/WTO norms on RTA, as well as the general principles of international law.

According to article 19 of the Protocol of Brasília, disputes shall be settled on the basis of the application of the laws, decisions, Resolutions and Directives found in the MERCOSUR framework, as well as the application of principles and dispositions of international law. The arbitration court, as a consequence of the application of this clause, along with Annex 1 to the Treaty of Asunción and the Regime of Final Completion of Customs Unions, rejected the preliminary claim brought by Argentina.[22] On the merits, the court found that the anti-dumping measures were not compatible with the free movement of goods in the intra-zone area—the only exceptions were the ones prescribed in the WTO rules.[23] However, after analysing the process of investigation which Argentina had carried out, the court did not consider it to be inconsistent with the MERCOSUR norms and did not order Argentina to repeal the measure.

Brazil disagreed with this interpretation and resorted to the WTO DSB,[24] claiming that Argentina had acted inconsistently with the anti-dumping agreements.[25] As the case had

[20] This was the system created under the Brasília Protocol of 1991, which preceded the currently existing system created by the Olivos Protocol. For more details on the two systems, and a comparison of the relevant changes, see Nadine Susani, Chapter 5.

[21] See MERCOSUR, Laudo do Tribunal Arbitral ad hoc do MERCOSUL Constituído para Decidir sobre a Reclamação Feita pela República Federativa do Brasil à República Argentina sobre a *Aplicação de Medidas Antidumping contra a Exportação de Frangos Inteiros, Provenientes do Brasil (Res 574/2000) do Ministério de Economia da República Argentina* [Award of the ad hoc MERCOSUR Arbitral Court Constituted to Decide on the Complaint made by the Federated Republic of Brazil to the Argentinean Republic on the *Application of Anti-Dumping Measures against the Export of Poultry coming from Brazil (Res 574/2000) of the Ministry of Economy of the Argentinean Republic*], 21 May 2001. Available at www.mercosur.int.

[22] Ibid para 132 *et seq.*

[23] Article XXIV:8 GATT.

[24] *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WTO/DS 241, Panel Report adopted on 19 May 2003.

[25] At this time there was no organ of appeal within the MERCOSUR framework and also under the Protocol of Brasília, there was no provision on the choice or exclusiveness of forum. The Protocol of Olivos that created the Permanent Review Court and introduced the forum choice clause entered into force only in 2004. One of the main reasons for the insertion of the clause was the attitude of Brazil in resorting to the WTO forum afterwards. The efficiency of the clause was revealed to be very limited, however, as was highlighted above.

already been ruled on by the MERCOSUR mechanism, Argentina asked the WTO panel to refrain from ruling on the case and consider the proceedings and interpretation of MERCOSUR. Argentina supported the view that the panel should recognise that Brazil had failed to act in good faith[26] and then confirm the supremacy of the ruling of the MERCOSUR arbitration court.

The WTO panel found that, to be judged as having failed to act in good faith, the member state must at least have violated a substantive provision of the WTO Agreements and Argentina had not claimed that any WTO provision had been breached. If it had alleged that general clauses of the WTO Agreement had been breached, the findings could have been different.

Another flaw in the claims made by Argentina, according to the panel, was that:

> Argentina has not relied on any statement or finding in the MERCOSUR Tribunal ruling to suggest that we should interpret specific provisions of the WTO agreement in a particular way. Rather than concerning itself with the interpretation of the WTO agreements, Argentina actually argues that the earlier MERCOSUR Tribunal ruling requires us to rule in a particular way. In other words, Argentina would have us apply the relevant WTO provisions in a particular way, rather than interpret them in a particular way. However, there is no basis in Article 3.2 of the DSU, or any other provision, to suggest that we are bound to rule in a particular way, or apply the relevant WTO provisions in a particular way. We note that we are not even bound to follow rulings contained in adopted WTO panel reports, so we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies.[27]

As was argued by the United States (among the third party representations),[28] 'The Panel's role is to make findings in light of the WTO covered agreements'. In its conclusion, the WTO panel decision condemned the Argentinean measure, contrary to the findings at the MERCOSUR level.

The panel did not exclude the possibility of taking into account the RTA interpretation as a precedent, or at least one aspect to be considered in their interpretation. As has been pointed out above, the RTA could be used in the process of the WTO interpretation as a relevant general law related to the case and helpful in the determination of the text and context of the provisions and intentions important for the decision. However, the direct application of a provision of an RTA by a WTO panel in order to refrain from ruling in a case where a breach of a WTO law provision is alleged seems to be a very unlikely prospect.

In this case it is clear that the WTO panel chose not to consider MERCOSUR and the WTO as part of the same system. It adopted the approach that sees the regional agreement as an independent and self-contained regime[29] and reaffirmed the WTO itself as another system that respects the existence of the separate regional systems; however, in the case of the overlapping of rules and jurisdiction, it was not ready to defer to the rulings of a

[26] Panel Report (n 24) para 7.19. Argentina alleged that, in the framework of MERCOSUR, it was a standing practice to accept the obligations deriving from the rules in force, including the Treaty of Asunción and the Protocol of Brasília. In Argentina's view, a state that had recourse to the regional mechanism to settle a dispute and then, dissatisfied with the outcome, resorted to another forum was not acting in good faith, especially if it omitted any reference to the previous procedures and its outcome.

[27] Panel Report (n 24) para 7.41 (footnote omitted).

[28] Ibid para 7.30.

[29] See B Simma and D Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' in (2006) 17(3) *European Journal of International Law* 483.

regional dispute settlement organ. If the multilateral system encompasses the regional systems with the same rules and disputes, the WTO will always be supreme and will not refrain from ruling on any disputes in which a member evokes WTO law.

The next section turns to the analysis of the retreaded tyres disputes and will provide more material to draw conclusions about the current profile of the relation between MERCOSUR and the WTO.

IV Case Study 2: The Retreaded Tyres Disputes

Before analysing the consequences of the retreaded tyres disputes from the perspective of the relation between MERCOSUR and the WTO, it is important to summarise the facts of the cases.

In August 2001, Uruguay resorted to the MERCOSUR mechanism for the settlement of disputes challenging a Brazilian law that prohibited the issue of import licences for retreaded tyres. Brazil had previously banned the import of used tyres (Portaria DECEX 8/91) and another law (Portaria SECEX 8/2000) was enacted which included retreaded[30] tyres in the definition of used tyres for the purposes of the earlier law.

Uruguay had been exporting retreaded tyres to Brazil and alleged that the second administrative instruction (Portaria) was a new restriction and contravened the MERCOSUR prohibition on new restrictions on intraregional trade flows (Decision 22/2000). Brazil did not raise any environmental argument and based its whole defence on the claim that the second Portaria had only an interpretative character and could not be seen as a new restriction.

The juridical discussion in the MERCOSUR arbitration court was based on the assessment of whether the second Brazilian Portaria constituted a new restriction, or whether it frustrated the legitimate expectations of Uruguay in such a way as to raise the applicability of international law principles, such as estoppel.[31] The decision went in favour of Uruguay, and Brazil was ordered to change its legislation, lifting the ban on imports of retreadded tyres from MERCOSUR countries.[32]

Consequently, in order to comply with its obligations under MERCOSUR, on 8 March 2002 Brazil issued Portaria SECEX 02/2002 which created an exception to the previous Portarias and by this means eliminated the ban on retreaded tyres imported from

[30] Retreaded tyres are used tyres that have been through a process that enables them to be used again. Their useful life is shorter than that of new tyres.

[31] Or *nemo potesta venire contra factum proprium*: it prohibits inconsistency, in the sense that the allegations or actions of one party must not go against the direction of previous allegations or actions, so as to contradict the other party's legitimate expectations of continuity. This is a concept that has been repeatedly debated in MERCOSUR's dispute settlements, with conflicting results.

[32] Laudo Del Tribunal Ad Hoc Del Mercosur Constituido para Entender de La Controversia Presentada por La República Oriental Del Uruguay a La República Federativa Del Brasil sobre *Prohibición de Importación de Neumáticos Remoldeados Procedentes Del Uruguay* [Award of the ad hoc MERCOSUR Arbitral Court Constituted to Decide on the Complaint made by the Oriental Republic of Uruguay to the Federated Republic of Brazil on the *Import Ban on Retreaded Tyres from Uruguay*], January 2002. Available at www.mercosur.int.

MERCOSUR countries.[33] The result was that Brazil kept the restriction on the imports of retreaded tyres but with an exemption in respect of the MERCOSUR countries. In addition, the Brazilian national courts gave injunctions which allowed national retreaders to import used[34] tyres.[35]

Facing this situation, in June 2005 the European Communities (EC) resorted to the WTO mechanisms for the settlement of disputes challenging the Brazilian restrictive measures.[36] The EC's main allegations were that (a) the restrictions were of a quantitative type forbidden by the WTO rules; and (b) the restrictions violated the principles of MFN and national treatment by differentiating among Brazilian, MERCOSUR, and other producers. In summary, in the view of the EC, Brazil was acting inconsistently with articles I:1, III:4, XI:1 and XIII:1 GATT 1994.

Brazil defended its measure, claiming that the measure was in fact restrictive but the restrictions were necessary to protect public health and the environment.[37] It justified the measure invoking article XX(b) and (d) GATT and the MERCOSUR exemption by article XXIV, since it was a measure adopted pursuant to Brazilian obligations under MERCOSUR.

[33] This exception was maintained in Portarias SECEX 17/2003 and 14/2004. Moreover, Presidential Decree 4592 of February 2003 exempted the retreaded tyres imported from MERCOSUR countries from the financial penalties set out in Presidential Decree 39192 for the import of retreaded tyres.

[34] Used and not retreaded tyres.

[35] Despite the prohibition on imports of used tyres through national regulations, the Brazilian domestic courts gave injunctions in favour of the national retreaders which sought judicial remedies against the prohibition. Hence in September 2006, the Brazilian government resorted to the Supreme Court in order to stop such injunctions given in defiance of national environmental policy and the relevant national regulations. The main applicable law was the Brazilian Federal Constitution (in particular art 170, which states that the economic order should be founded and organised in conformity with, among others, the principles of economic freedoms (IV) and environmental protection (VI); art 196, which provides that the right to have a healthy life shall be granted by the state which must implement social and economic policies in order to reduce the risk of diseases; art 225, which states that everyone has the right to a balanced environment and the state has the duty to protect and preserve it for the present and future generations). The decisions that allowed the imports were based on the similarly constitutional principles of isonomy and free trade (arts 5 and 170.IV of the Constitution): isonomy because the domestic retreaders argued that they were not allowed to import used tyres to retread themselves while the retreaded tyres from other MERCOSUR countries were imported onto the Brazilian market, and yet the potential environmental damages would be the same. In the judicial proceedings against the injunctions, the government alleged that the injunctions were incompatible with the fundamental rights embodied in the Brazilian Constitution. And also, that the possibility of such injunctions damaged the image of Brazil within the international community, since they made the ban unjustifiable. Against the argument concerning the MERCOSUR exemption raised by the national retreaders to show a failure to respect the principle of isonomy, the government alleged that the acceptance of retreaded tyres from MERCOSUR countries was a consequence of the compliance with a MERCOSUR ruling, and that the volume of the imports from MERCOSUR countries was very small and could not be compared to the consequences of the imports of used tyres from all over the world. The judicial discussion focused entirely on weighing and balancing the constitutional principles. According to the government, the protection of the environment could not be put aside in order to enforce free trade. Although there is no hierarchy among constitutional principles or rights, the protection of health and environment as human rights may be considered to have more weight, taking into consideration, for instance, that only the international treaties concerning human rights can be incorporated into the national order as constitutional norms, whereas other international treaties, such as the ones related to trade, had the force of federal law. No decision has yet been issued in this case. For further details see *Arguição de Descumprimento de Preceito Fundamental* (ADPF 101). Available at www.stf.jus.br.

[36] *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO/DS332, Appellate Body and Panel Reports adopted on 17 December 2007.

[37] For a further understanding of the health and environmental issues related to the problem of waste tyres, especially in the case of Brazil, in which the problem has reached epidemic proportions, see the Panel Report (n 36) and also see Lavranos and Vielliard, 'Competing Jurisdictions Between Mercosur and WTO' (n 16) 205–34.

The panel accepted the Brazilian justification on grounds of environmental and health protection (article XX GATT),[38] but the panel considered that the injunctions given by domestic courts were making the implementation of the measure inconsistent. So, in order to bring the measure into conformity with the GATT, Brazil should go further in its trade restrictions and eliminate the possibility of used tyres being imported through judicial authorisation. The MERCOSUR exemption was not condemned because the panel considered that it was not an arbitrary decision, but merely compliance with a MERCOSUR ruling, and also because this exception generated a volume of imports that was not enough to undermine Brazil's chosen level of environmental protection.

In sum, even though Brazil had lost the case objectively, the measure was considered in principle to be necessary and legitimate and all Brazil was required to do was to be more efficient in the implementation of the measure.

The EC was not satisfied with some of the interpretations given by the panel and decided to appeal, being partly successful before the WTO Appellate Body. The final conclusion was that the Brazilian import ban was necessary within the meaning of article XX(b) GATT; however, the manner of application of the import ban adopted by Brazil did not satisfy the requirements of the *chapeau* of article XX GATT.

At this point, the Appellate Body not only condemned the injunctions given by the domestic courts but also the MERCOSUR exemption, stating that even though the exemption was the consequence of a MERCOSUR ruling it went against the goal of the Brazilian environmental policy. The Appellate Body concluded that the exemption was not a proportional means to achieve the goal sought, as it went directly against it. The exemption made inconsistent the form of implementation of the measure that was in principle necessary. This fact generated unjustifiable discrimination and disguised restriction on international trade.

Whilst the WTO panel respected the MERCOSUR ruling as a reason capable of justifying the Brazilian measure, the WTO Appellate Body did not take the ruling into consideration as a relevant reason for the method chosen by the Brazilian government to apply the ban. The consequences of the findings of the Appellate Body's report make it even more challenging to delineate the relationship between MERCOSUR and the WTO, as it generates a practical conflict. Brazil is subject to both jurisdictions and cannot comply with both at all times.

The Appellate Body itself was careful to highlight that it realised that there appeared to be such a conflict, but, in its point of view, there was no necessary divergence between the provisions and interpretations under MERCOUSUR and under GATT/WTO.[39] The Appellate Body offered two reasons to justify this view.

First of all, the Appellate Body recalled that Brazil had chosen not to invoke environmental policy to justify the import ban challenged before the MERCOSUR arbitral

[38] Article XX GATT: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: … (b) necessary to protect human, animal or plant life or health; … (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices'.

[39] Appellate Body Report (n 36) para 234.

tribunal, although there is in the Treaty of Montevidéo (incorporated in Annex I to the Treaty of Asunción) one article similar to article XX(b) GATT. Article 50(d) of the Treaty of Montevidéo establishes the same exception as that in article XX(b) GATT. It states that the agreement should not be interpreted as an obstacle to measures aiming at the protection of human, animal or plant health or life.[40] According to the Appellate Body, the fact that Brazil might have raised a defence related to this article in the MERCOSUR arbitral proceedings, but had chosen not to do so, showed that there may not be a conflict between the WTO and MERCOSUR.

Moreover, the Appellate Body noted that the interpretation of article XXIV:8(a) GATT, combined with article XX GATT, would exempt Brazil, to the extent necessary to achieve the objectives aimed at by the measure (the import ban) meeting the requirements of article XX, from the obligation to eliminate all the restrictive regulations of trade within the customs union. In other words, Brazil would be able to keep some restrictions on commerce within the customs union, if the restrictions were necessary for the effectiveness of the valuable objective to be achieved. As a consequence, in the Appellate Body's opinion, if MERCOSUR is consistent with article XXIV GATT, and if the Brazilian import ban is necessary within the meaning of article XX(b) GATT, Brazil would not be obliged to eliminate the import ban on retreaded tyres imported from MERCOSUR countries, since this elimination goes against the objective of the measure, protected by article XX(b) GATT.[41]

Against the first argument, there is the MERCOSUR dispute between Uruguay and Argentina in 2005.[42] In this case, Uruguay also challenged an Argentinean measure that prohibited imports of retreaded tyres and Argentina did invoke in its defence article 50 of the Treaty of Montevidéo, justifying its measures on the grounds of protection of human, animal and plant health and life.

The ad hoc arbitration court took into account the precautionary principle in environmental law and found that the Argentinean defence on the ground of article 50 of the Treaty of Montevidéo justified the measure that was restrictive but necessary to protect the environment. Uruguay presented an appeal[43] and the Permanent Review Court, after

[40] Treaty of Montevidéo, art: 'No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding: … (d) Protection of human, animal and plant life and health'. (The Treaty of Montevidéo was signed in 1980. It establishes the main guidance on the integration process in Latin America.)

[41] Appellate Body Report (n 36) para 234 note 445.

[42] Laudo do Tribunal Permanente de Revisão constituído para Entender no Recurso de Revisão Apresentado pela Republica Oriental do Uruguai contra o Laudo Arbitral do Tribunal Arbitral Ad Hoc datado de 25 de Outubro de 2005 na Controvérsia *Proibição de Importação de Pneumáticos Remodelados Procedentes do Uruguai* [Award of the Permanent Review Court Constituted to Decide on the Appeal Presented by the Oriental Republic of Uruguay against the Award of the ad hoc MERCOSUR Arbitral Court of 25 October 2005 on the Dispute *Import Ban on Retreaded Tyres from Uruguay*], December 2005. Laudo do Tribunal Ad Hoc do Protocolo de Olivos, Constituído para Decidir sobre a Controvérsia apresentada pela República Oriental do Uruguay contra a República da Argentina sobre *Prohibición de Importación de Neumáticos Remoldeados* ['Award of the ad hoc MERCOSUR Arbitral Court Constituted to Decide on the Complaint made by the Oriental Republic of Uruguay to the Republic of Argentina on the *Import Ban on Retreaded Tyres from Uruguay*], January 2005. Both available at www.mercosur.int/msweb/portal%20intermediario/pt/index.htm.

[43] At this point, the MERCOSUR Permanent Review Court (PRC) had been established in 2004 under the provisions of the Olivos Protocol.

having defined the criteria to be met by the measure,[44] considered the measure to be restrictive of commerce and discriminatory and considered that the environmental reason was not a good justification and was not proportionate. The Permanent Review Court considered that the measure did not reduce the environmental harm and that the precautionary principle could not be applied since the harm was not serious or irreversible.

Furthermore, the ban was not considered proportionate because (1) it eliminated the imports of an international product which was as safe as the domestic equivalent; (2) it did not prevent the alleged damages or make a great contribution to their elimination; and (3) it was too restrictive and was not the only measure available to protect the environment.

In addition, the Permanent Review Court, quoting the Guide to the Concept and Practical Application of Articles 28–30 EC,[45] stated that although life and health rank first among the values which are protected, and it is for member states to decide the level of protection to be assured, restrictions to intra-Community trade can only be made if health and life cannot be as effectively protected by other non-restrictive measures. This being said, despite the environmental claims, the Permanent Review Court reversed the MERCOSUR arbitral court's findings and found instead that the Argentinean ban violated the norms of MERCOSUR and should be brought in conformity with those norms.

This case raises the question of whether the WTO Appellate Body would have respected the MERCOSUR ruling as a justification had the environmental arguments been raised, even though the MERCOSUR court had not considered this reason proportionate. If Brazil had not been inconsistent in its defence before each of these bodies, would the Appellate Body have adopted a different position?

In general terms, the panel adopted a posture of more cooperation, since it refrained from assessing the MERCOSUR ruling, while the Appellate Body adopted a more far-reaching position against the principle of cooperation and beyond its legitimate powers when it evaluated the Brazilian defence strategy.[46] The Appellate Body avoided reviewing MERCOSUR's ruling but discussed the way Brazil had implemented it and evaluated the Brazilian strategy of defence in MERCOSUR. Also, it is important to highlight that the arbitration report on what reasonable period of time Brazil should have to implement the WTO decision considered that the time requested by Brazil to renegotiate the MERCOSUR regime on tyres should not be factor in the definition of the timeframe allowed for the implementation of the decision.[47]

The main conclusion is that the ruling issued by MERCOSUR was indeed one of the reasons why the Brazilian ban could not be justified. After this decision had been issued, there were two alternatives for Brazilian compliance: the first option available to Brazil was to lift the import ban, renouncing the fundamental right to pursue its chosen level of

[44] According to PCR Decision 01/2005, paras 9–18, the evaluation should follow four steps: (1) assessment of whether the measure is restricted to commerce; (2) evaluation of whether the measure is discriminatory; (3) assessment of the reasons given for the measure; and (4) assessment of the proportionality of the measure in relation to the goal to be achieved.

[45] European Commission, DG Internal Market, January 2001, at 20.

[46] See Lavranos and Vielliard. 'Competing Jurisdictions Between Mercosur and WTO' (n 16) 205–34.

[47] DS 332: *Brazil—Measures Affecting Imports of Retreaded Tyres*, Arb 2008 2/23, Doc. WT/DS332/16, of 29 August 2008, 26. Available at www.wto.org/english/news_e/news08_e/332arb2_e.htm.

environmental protection (of human, animal and plant life or health). The second alternative was to bring the import ban into conformity with the GATT.

As the Brazilian government claimed, the lifting of the import ban would result in Brazil becoming a major deposit of waste tyres, with terrible consequences to the environment and to the health of its population. Since this situation seems to be precisely what the Brazilian government intended to avoid, the first option was unlikely to be considered.

Concerning the second alternative, the practical consequence is that Brazil was put in a *sui generis* situation where it had to choose between the MERCOSUR ruling and the WTO Appellate Body decision. The concrete consequence of the WTO Appellate Body's decision is that if Brazil wants to comply with its obligations under the GATT 1994, it will have to stop complying with the ruling issued by the MERCOSUR arbitration court.

The WTO panel, whose findings adopted the approach of treating the MERCOSUR ruling as a given fact and an indisputable reason for the adoption of domestic measures, had its position overruled by the findings of the Appellate Body. These findings deserve highlighting because they completely ignored the MERCOSUR ruling and stated that compliance with the rule of a regional court was not enough to justify a domestic measure.

Once again, the final decision made it clear that the WTO Dispute Settlement Body adopted a position of supremacy, with no deference or respect towards the MERCOSUR ruling. The way in which the Appellate Body assessed the Brazilian defence in the MERCOSUR dispute, and the way it did not consider the MERCOSUR ruling as a reasonable justification for the adoption of a measure by a MERCOSUR Member State, can only be explained by an approach that considers the relationship between the WTO and MERCOSUR as a vertical hierarchical relation where the WTO retains the power of the supreme ruling.

V Concluding Remarks

By analysis of the final conclusions of the two cases, it is possible to conclude that the relationship between MERCOSUR's and the WTO's dispute settlement bodies is addressed in a vertical way that is closer to a relation of subordination than to a relation of coordination or cooperation.

A more efficient way to promote harmony in directing the efforts of every part of a settlement system to important values, such as human rights, seems to be through judicial cooperation, with the application of methods such as the '*Solange* method', which was developed in Europe to solve the conflicts of jurisdiction within the European Community.

This method determines that cooperation should be promoted, but must be conditional on the effective and practical protection of human rights. National courts cooperate with the European Court of Justice 'as long as' the constitutional rights of citizens are protected with at least the same intensity as they are in the national system, and the European Court of Human Rights exercises judicial self-restraint 'as long as' the human rights guarantees of the European Convention on Human Rights are respected. This model contributed to the progressive extension of the protection of human rights in EU law and may contribute

to a citizen-oriented conception of the rule of law, and to the constitutional protection of participatory, deliberative and cosmopolitan democracy.[48]

Since the Preamble to the Vienna Convention on the Law of Treaties and article 1 of the UN Charter demand that Member States interpret and apply international law by peaceful means and in accordance with principles of justice, the *Solange* method is arguably part of the international rule of law and, as such, it is binding on all judges facing problems of conflicting jurisdictions.[49]

In the case of the WTO retreaded tyres disputes, for instance, the application of the methods of cooperation would have forced the WTO Appellate Body to give a more consistent solution to the disputes, making clear the respect for the MERCOSUR ruling. The WTO Appellate Body could have balanced the rights to free trade and the rights to environmental protection and, in order to respect the MERCOSUR agreement and ruling, could have assessed whether in fact the quantitative approach could not be applied and the imports from MERCOSUR were really damaging to Brazil's chosen level of environmental protection. If not, the WTO could have used the quantitative approach to make the MERCOSUR ruling consistent with the WTO decision.

Although this approach of cooperation appears to be the ideal one (since it would be more efficient in the promotion of human rights), bearing in mind these decisions, the only way to maintain the idea of the international trading system as a *system* is to accept this relation of subordination, and see the WTO as an organ of 'quasi-revision' of the MERCOSUR procedures and rulings. In a system, if a subject X is obliged to undertake an action, this action cannot be prohibited within the same system, unless the prohibition comes as an overrule of the obligation by a superior organ or law. Otherwise the coherence and consistency of the system is undermined in its essence.

Although it is possible to accept the WTO DSB as the supreme organ in the international trading system, the consequences of this relation of subordination as it is currently maintained are not positive. As regards its institutional aspects, this relation, since it is not stated clearly, generates inefficiency in certain regional rules, such as the ones related to the choice of the forum, which creates insecurity for the members subject to the system.

In addition, the consequences concerning the balancing of values (trading and non-trading) and the achievement of the goals stated in the Preamble to the WTO Agreement are not positive, either. In the poultry disputes, the interpretation given to the breach of the principle of good faith demonstrated an outlook completely at odds with the systemic *telos* that a supreme organ should have when approaching a traditional principle of international law. Further, in the retreaded tyres case, the Appellate Body did not seem to

[48] The *Solange* method was created by the German Federal Constitutional Court (BVerfG) in order to reconcile its jurisdiction with the jurisdiction of the European Union concerning fundamental rights guarantees. From 1974 to 2005, in four judgments known as the *Solange* cases, the BVerfG used the *Solange* method in a flexible form, at times assuming or reassuming jurisdictional powers, as in *Solange I* and *III*, and at times giving up its jurisdiction in favour of the European Court of Justice's jurisdiction, as in *Solange II* and *IV*. The *Solange* method has enabled the BVerfG to advance or retreat in terms of cooperation with the European Court of Justice according to developments in EU case law in the area of the protection of fundamental rights: self-restraint is exercised as long as fundamental rights are effectively protected. 'In short, a high level of fundamental rights protection means limited interference from the BVerfG, while a low level of fundamental rights protection means more interference from the BVerfG': Lavranos, 'The Solange-Method as a Tool for Regulating Competing Jurisdiction among International Courts and Tribunals' (n 8) 57–58.

[49] See, eg E-U Petersmann, *Judging Judges: Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with 'Principle of Justice and International Law'?*, EUI Working Papers, Law 2008/1, 2.

consider seriously the practical and real consequences for the health of the Brazilian people and environment that should have been balanced with the restrictions to trade.[50]

It is vital to bear in mind the importance of the efforts undertaken to secure the operation of the international trading institutions within a system that allows compromises with the values and principles of the rule of law and human rights, as a consequence of the application not only of the Preamble to the WTO Agreement but also of the Vienna Convention on the Law of Treaties, along with the UN Charter. The international trading legal system has a systemic *telos* that goes far beyond trading and this *telos* should always be sought as a priority.

In practice, the MFN principle seems still to be the most significant principle outside the trading-oriented principles. As a result, it seems that any exception to it, even under article XXIV GATT, will only be accepted if it is entirely in conformity with GATT and defers to WTO law, interpretations and rulings.

However, if in the balancing of trading preferences and exceptions, the WTO has to be the supreme organ, this supremacy should be taken together with a commitment to the genuine promotion of the rule of law and human rights throughout the entire system. If this should prove not to be feasible, then there should be no possibility of considering international trade to be a legal system and the only option remaining would be to characterise it as nothing more than a space for disputes among short-term multilateral, regional and individual state's political and economic interests.

[50] For further development of these issues, see Lavranos and Vielliard, 'Competing Jurisdictions Between Mercosur and WTO' (n 16) 205–34.

8

External Relations

MARCÍLIO TOSCANO FRANCA FILHO

I Introduction: Regionalism in a Dynamic Context

Far from constituting a paradox or contradiction, regionalisation and globalisation are both convergent and complementary phenomena in the contemporary world. It is through the building of regional trade blocs that partner states and civil society actors can jointly devise the best and safest course of action. Regional trade blocs provide an acceptable setting for navigating in the highly risky global setting and for pursuing legitimate ends, such as economic stability, fair competitiveness, freedom of trade, while at the same time maintaining acceptable standards relating to health, safety, environment, human rights and consumer welfare. In other words, globalisation fosters simultaneously intraregional cooperation and extraregional interaction, in that it requires stronger actors and worldwide players to better face cross-border challenges. As evidence that the level of globalisation of the international economy and the degree of regionalism are complementary and mutually supportive, witness the rising number of regional trade agreements notified to the World Trade Organization (WTO) in recent years. According to the WTO Secretariat, in the period 1948–94, the GATT received 124 notifications of regional trade agreements, and since the creation of the WTO in 1995, over 260 additional arrangements have been recorded.[1]

It remains clear that globalisation encourages regionalism and that regionalism facilitates states' entrance in the global economy.[2] Instead of serving as a 'stumbling block' for multilateral liberalisation, regionalism (normally associated with adjectives like 'new', 'global', 'offensive', 'super' or 'open') is understood today as a 'stepping stone' for the formation of state-like multifaceted international partnerships, international organisations and other regional integration arrangements and focusing not only on commercial issues but also on other sectors such as development cooperation, political dialogue and exploration of common values. This observation holds true in the case of MERCOSUR, which began very early to be an important international actor, whose focus has always transcended mere intraregional trade goals. Clearly guided by this strategy, MERCOSUR has been engaged in recent years in the negotiation of several trade agreements, not only with individual countries but also with other regional integration arrangements.

[1] World Trade Organization, *Report of the Committee on Regional Trade Agreements to the General Council* (Geneva, WTO, 2007) 1. Also, Th Cottier and M Oesch, *International Trade Regulation* (London/Bern, Cameron May/Staempfli, 2005).

[2] L Gómez-Mera, 'How "New" is the "New Regionalism" in the Americas? The Case of MERCOSUR' (2008) 11 *Journal of International Relations and Development* 289.

This chapter examines in particular the external dimension of MERCOSUR action from a legal point of view. Its core objective is to clarify the nature of MERCOSUR's relationship with other international actors today. The methodological approach includes, first of all, analysis of the formal aspects of MERCOSUR's external relations (ie its legal bases according to the primary law), the issue of the legal personality of MERCOSUR and the MERCOSUR organs involved in this task. The second part of this chapter analyses briefly the material aspects of MERCOSUR's external relations, ie its practice regarding other blocs and third party states.

II Normative Foundations: Primary Law, Actors, Powers and Forms

According to public international law, legal personality is a fundamental requirement of international 'actorness' as it represents the potential ability to exercise certain rights and to fulfil certain obligations vis-à-vis other international subjects. In other words, there is no international legal capacity to exercise rights and enter into obligations without an established official legal identity. Although established in 1991, MERCOSUR was formally deprived of legal status until the signing of the Additional Protocol on the Institutional Structure of MERCOSUR (the so-called Ouro Preto Protocol) in 1994, article 34 of which finally stated that the bloc should possess legal personality in international law. This does not mean, however, that between 1991 and 1994, MERCOSUR had not had any de facto foreign or trade policy. Quite the opposite: at that time, the bloc tried to undertake a pragmatic policy of international recognition and very early had initiated dialogue with the European Community and the United States.[3] It should be acknowledged, however, that from a formal or legal point of view such initiatives were essentially those of the individual four participating Member States (Argentina, Brazil, Paraguay and Uruguay), rather than MERCOSUR as such.

With the introduction of the Ouro Preto Protocol, MERCOSUR was granted the generic capacity of possessing (and maintaining) rights and duties under international law (article 34) and of taking whatever action may be necessary to achieve its objectives, in particular, signing contracts, buying and selling personal and real property, appearing in court, holding funds and making transfers (article 35). More specifically, the bloc was granted the powers of making seat agreements or '*accords de siège*' (article 36). Following the MERCOSUR minimalist tradition, the Ouro Preto Protocol did not make any specific mention of the powers to negotiate and conclude agreements, to accede to conventions, to become a member or observer of an international organisation, to bring international claims and to send or receive diplomatic delegations. It does not mean, however, that MERCOSUR cannot exercise some of those specific competences under the doctrine of 'implied powers', but always in line with its own objectives, purposes and functions as stated in its primary law.[4]

[3] EHF Araújo, *O Mercosul: Negociações Extra-Regionais* (Brasília, Fundação Alexandre de Gusmão, 2008) 39.

[4] *Reparations for Injuries Suffered in the Service of United Nations*, Advisory Opinion [1949] ICJ Rep 174. See also MRT Silva, *Mercosul e Personalidade Jurídica Internacional* (Río de Janeiro, Renovar, 1999).

As an international organisation of regional integration, MERCOSUR follows the principles of specialty and proportionality, in that the bloc must exercise its competences and functions under the general framework of aims and goals stated in its primary law. In line with these arguments, MERCOSUR is responding to the pressures for the deepening of international economic relations by the exercise of its treaty-making power, the signing of new economic agreements and the fostering of its external dimension.

With the purpose of avoiding eventual problems of lack of competence, and due to the intergovernmental nature of MERCOSUR, all of the agreements signed by the bloc are in principle mixed agreements, ie signed by all the MERCOSUR Member States, mentioning the bloc as a contracting party and obeying the domestic requirements of internalisation. Regarding the format of the accords and the process of their negotiation, the primary law of MERCOSUR does not establish any standard procedure for the conclusion of the international agreements. Furthermore, the primary law does not establish general rules concerning the external representation of the bloc. This fact can be better understood when one considers the MERCOSUR tradition of giving priority to the function or end result, over that of stable forms or more solid institutionalisation. So, in order to pursue its own pragmatic objectives, the bloc has adopted different means, practices and formulas in its negotiations and agreements. This is especially true in terms of the process of coordination and definition of the role and status of MERCOSUR negotiators, which constitutes one of the most informal processes of South American integration.[5]

In general, the main actor of MERCOSUR's external policy is the Council of the Common Market (CCM), the superior organ of the bloc, with responsibility for the political leadership of the integration process and composed of the foreign and economic ministers of the Member States. The text of the Ouro Preto Protocol expressly attributes to the CCM the power to assume the legal personality of MERCOSUR (article 8.III) and the power to negotiate and sign agreements on behalf of MERCOSUR, with other countries, groups of countries and international organisations (article 8.IV). These last functions, however, may be delegated, by express mandate of the CCM, to the Common Market Group (CMG), the executive and technical organ of the bloc, coordinated by the ministries of foreign relations and economy and the presidents of the central banks (article 8.IV). It is evident that, due to the lack of supranationality in the bloc and the decisive role exercised by the individual ministries of foreign affairs through the coordination of all organs with decision-making power, in practice, the external relations function of MERCOSUR remains under the control of the individual partner states.[6]

Through the afore-mentioned delegation from the CCM to the CMG, which has had great application in practice, the CMG also exercises an important role in MERCOSUR external policy. According to article 14.VII of the Ouro Preto Protocol, the CMG can negotiate agreements on behalf of MERCOSUR; however, only with the participation of representatives of all the Member States and within the limits laid down in the special mandate granted for that purpose. When so authorised and mandated by the CCM, the CMG may also sign those agreements on behalf of MERCOSUR and/or delegate all those powers to the MERCOSUR Trade Commission (MTC) (Ouro Preto Protocol, article 14.VII). In 1995, with CMG Resolution No 34/95, the CMG created the Ad Hoc Group on

[5] Araújo, *O Mercosul: Negociações Extra-Regionais* (n 3) 235.

[6] D Ventura, *Las Asimetrías entre el Mercosur y la Unión Europea: Los Desafíos de una Asociación Interregional* (Montevidéo, Fundación Konrad-Adenauer, 2005) 154.

External Relations, whose specific objective has been the discussion of MERCOSUR's external relations with third party countries, groups of countries and international agencies. The importance of this Ad Hoc Group was reaffirmed through CCM Decision No 59/00.

In addition to those functions that can be delegated by the CMG, the MTC also has other relevant roles relating to the bloc's external relations: in general terms, the body is responsible for following up and reviewing questions and issues relating to common trade policies, intra-MERCOSUR trade and commerce with third party countries (Ouro Preto Protocol, article 16).

The Commission of Permanent Representatives of MERCOSUR constitutes another important organ with proactive and representative functions in the bloc's external relations. Officially, the main function of this Commission is to submit to the CCM new initiatives relating to the development of external negotiations and the empowerment of the process of regional integration (CCM Decision No 11/03, article 4.b). In reference to MERCOSUR's external relations, the Chairman of the Commission of Permanent Representatives has been the most visible face and main voice of the external policies, given that he acts as the contact person for the international dialogue on political and commercial matters—a kind of South-American 'Mister PESC', as pointed out by Ventura[7] in a comparison with the European High Representative for the Common Foreign and Security Policy (CFSP). Article 5 of CCM Decision No 11/03 provides that the President of the Commission of Permanent Representatives of MERCOSUR, when mandated by the CCM, may represent the bloc in relations with third countries, groups of countries and international organisations. Due to the *pro tempore* nature of MERCOSUR's presidency, with changes every six months, the presence of a permanent negotiator (ie with a two-year fixed appointment) can be a very positive influence in providing continuity in lengthy and complex negotiations.

III Material Aspects: Intra and Extraregional Relations

The Treaty of Asunción declares, among its basic postulates, the goal of adopting a common trade policy for MERCOSUR. This principle was reaffirmed in CCM Decision No 32/00, in which the bloc reiterated the commitment of Member States to jointly negotiate trade agreements. Both of these norms confirmed that the South American integration process was grounded on a commitment to becoming a negotiating bloc in the international arena. With this purpose and under the normative framework described above, MERCOSUR currently maintains relations with no less than 40 countries, international organisations and groups of countries throughout the world.

Considering that MERCOSUR has been very active in expanding commercial ties within Latin America, as well as with other partner-countries, the scenario is that of a 'spaghetti bowl', with highly diverse yet complementary components. Given the internal asymmetries of the bloc, the mechanisms, exceptions and timing for tariff reductions

[7] Ibid 155.

impacts each Member State differently.[8] Hence, there are various ways in which MERCOSUR may be involved in international negotiations. In general, this section summarises those trade ties from two perspectives: MERCOSUR's relations with third countries per se and relations with other international organisations, including regional economic blocs. For practical purposes, the group formed by individual countries with trade relations with MERCOSUR can also be split into two other subgroups: third countries that belong to the Latin American Integration Association (ALADI)[9] and third countries that do not belong to the ALADI. This section begins with a picture of the European Union–MERCOSUR relations, with a particular focus on economic implications and political consequences.

A MERCOSUR and the European Union[10]

Whereas throughout the second half of the twentieth century it was the United States, Europe and Japan that drove the world economy, today they are being joined by rapidly expanding economies like Brazil, Russia, India and China. This emergent scenario (with its commercial, political and strategic consequences) begs consideration of the logic of a more solid interregional partnership between MERCOSUR and the European Union, two key players that can impact the direction of integration processes associated with the current trade scenario and with evident historical, cultural and linguistic ties.[11] Nor should one forget that since the nineteenth century, MERCOSUR Member States have been a very common destination for substantial waves of European immigrants (such as Portuguese, Spanish, Germans, Italians, Polish, etc), one outcome of which has been the

[8] Araújo, *O Mercosul: Negociações Extra-Regionais* (n 3) 75.

[9] Asociación Latinoamericana de Integración, based in Montevidéo.

[10] On this topic, see also G Calfat and R Flôres Jr, 'The EU–Mercosur Free Trade Agreement: Quantifying Mutual Gains' (2006) 44 *Journal of Common Market Studies* 921; M Cienfuegos Mateo, *La Asociación Estratégica entre la Unión Europea y el Mercosur: en la Encrucijada* (Barcelona, CIDOB, 2006); A Di Filippo, 'Viabilidad y Perspectivas de Futuro de un Acuerdo entre Mercosur y la Unión Europea' in DO Obregón, *América Latina y la Unión Europea: una Integración Esperanzadora pero Esquiva* (San José de Costa Rica, FLACSO, 2008); U Diedrichs, *Die Politik der Europäischen Union gegenüber dem Mercosur–Die EU als internationaler Akteur* (Opladen, Leske+Budrich, 2003); F Duina, *The Social Construction of Free Trade: the European Union, NAFTA, and MERCOSUR* (Princeton, NJ, Princeton University Press, 2006); European Commission, External Relations Directorate-General, *Mercosur–European Community Regional Strategy Paper 2002–2006* (Brussels, European Commission, 2002); W Matiaske, H Brunkhorst, G Grözinger and M Neves, *The European Union as a Model for the Development of Mercosur? Transnational Orders Between Economical Efficiency and Political Legitimacy* (München, Rainer Hampp, 2007); P Kegel, 'O Marco Jurídico-Institucional da União Européia e sua Influência no Contexto das Negociações com o Mercosul' in M Marconini and R Flôres (eds), *Acordo Mercosul-União Européia: Além da Agricultura* (Sao Paulo, Konrad Adenauer Stiftung, 2003); GH Mann, *Transatlantische Freihandelszone* (Frankfurt am Main, Peter Lang, 2007); RA Porrata-Doria, Jr, *Mercosur: The Common Market of the Southern Cone* (Durham, NC, Carolina Academic Press, 2005); R Santaniello, 'Brevi Considerazioni su UE e Mercosur' in P Bilancia, *Federalismi e Integrazioni Sopranazionali nell'Arena della Globalizzazione: Unione Europea e Mercosur* (Milano, Giuffrè, 2006); Á Vasconcelos, 'European Union and MERCOSUR' in M Telò, *European Union and New Regionalism: Regional Actors and Global Governance in a Post-Hegemonic Era* (Aldershot, Ashgate, 2007); U Wehner, 'EU und Mercosur: Auf dem Weg zur Freihandelszone?' (2000) 46 *Recht der Internationalen Wirtschaft* 370; U Wehner, 'Spezifische Rechtsfragen des Mercosul und der EU-Mercosul-Beziehungen' in W Zippel, *Die Beziehungen zwischen der EU und den Mercosur-Staaten* (Baden-Baden, Nomos, 2002).

[11] A Martínez Puñal, 'El Mercosur y la Unión Europea ante la Construcción de una Asociación Interregional' (2003) XII *Anuario Argentino de Derecho Internacional* 49. See also A Martínez Puñal, *El Sistema Institucional del Mercosur: de la intergubernamentalidad hacia la supranacionalidad* (Santiago de Compostela, Tórculo Edicións, 2005).

strengthening of European commercial interests in the Southern Cone countries,[12] especially after the privatisation processes and economic stabilisation plans in Brazil and Argentina, which led to a drastic fall in inflation and spurred an increase in foreign direct investment.[13]

The spin-off from this trend was the 'interregionalism' movement, the phenomenon created in the 1990s by the European Union,[14] which seeks to institutionalise closer relations between economic blocs from different regions of the world.[15] This new form of international relations is put into practice through an innovative form of diplomacy, whose actors include not only Member States, but also enterprises, political parties, unions, professional organisations, subnational entities and, in particular, all non-governmental organisations.[16] As a form of 'open regionalism',[17] the driving force behind interregional arrangements is to prepare their Member States for further global integration and competitiveness.[18] Interregionalism also represents the worldwide promotion of the efficiency of the European model of integration, so that the European Union is becoming today 'the hub of a large number of interregional arrangements which, in turn, are strengthening its own regionalist ideology'.[19] Given its interregional policy, the European Union has currently formalised relations with virtually all regions in the world, through various multinational organisations, such as the African Union, the Andean Community (CAN), the South Asian Association for Regional Cooperation (SAARC), the Association of Southeast Asian Nations (ASEAN), the Central American Integration System (SICA), the North American Free Trade Agreement (NAFTA) and especially the Common Market of the South (MERCOSUR).

Diagonal transatlantic interregionalism started formally in 1992, less than a year after MERCOSUR's founding, when the European Commission signed its first agreement with the South-American bloc to provide technical and institutional support. The formalisation of that process was the Inter-institutional Cooperation Agreement between the MERCOSUR Council and the European Commission of 29 May 1992, whose practical objectives were basically technical assistance, personnel training and institutional support to the MERCOSUR Secretariat.[20]

[12] W Grabendorff, 'Mercosur and European Union: From Cooperation to Alliance' in R Roett (ed), *Mercosur: Regional Integration, World Markets* (Boulder, CO, Lynne Rienner, 1999) 97.

[13] C Sanchez Bajo, 'The European Union and Mercosur: a Case of Inter-Regionalism' (1999) 5 *Third World Quarterly* 927.

[14] As a result of the end of the Cold War and the signing of the Treaty of Maastricht (1993), in the dawn of the 'New World Order', the European Union's external relations and foreign policies have expanded considerably. F Söderbaum and L van Langenhove, 'Introduction: the EU as a Global Actor and the Role of Interregionalism' (2005) 3 *Journal of European Integration* 249.

[15] M Doctor, 'Why Bother with Inter-Regionalism? Negotiations for a European Union–Mercosur Agreement' (2007) 45 *Journal of Common Market Studies* 281.

[16] Grabendorff, 'Mercosur and European Union: From Cooperation to Alliance' (n 12) 96.

[17] 'Open regionalism is conceptualised as a strategy to assure the insertion of LDCs [least developed countries] into a world conceived as multipolar, preventing their turning into a closed trading bloc': C Sanchez Bajo, 'The European Union and Mercosur: a Case of Inter-Regionalism' (1999) 5 *Third World Quarterly* 939.

[18] H Hänggi, R Roloff *et al* (eds), *Interregionalism and International Relations* (London, Routledge, 2006) 155.

[19] Söderbaum and van Langenhove, 'Introduction: The EU as a Global Actor and the Role of Interregionalism' (n 14) 251.

[20] Martínez Puñal mentions that the reciprocal interest between the European Union and MERCOSUR began on 29 April 1991, a month after the signing of the Treaty of Asunción, when the foreign ministers of MERCOSUR Member States met in Luxembourg with the European Commission President, Jacques Delors, in

In 1994, the European Commission presented a document entitled *The European Community and MERCOSUR: an Enhanced Policy*, in which the Commission declared that, despite the achievements enabled by the first inter-institutional agreement, this treaty was insufficient to promote the necessary strengthening of European Union–MERCOSUR relations, and proposed a new strategy divided into two stages. The first stage was the conclusion, in an intermediate term, of an interregional cooperation framework agreement, which would prepare the basis for bi-regional commercial liberalisation and continue to support the South-American integration process. The second stage involved a long-term objective, ie the creation of a bi-regional association between the blocs, with a solid political, economic, financial, social and cultural partnership.[21] These two stages would be institutionalised by two independent agreements and the second would be negotiated under the principles stated in the first. The European Council approved the Commission's strategy in December 1994, and, shortly thereafter, the transatlantic negotiations began.[22]

Current European Union–MERCOSUR relations are based on the ambitious interregional Framework Cooperation Agreement (FCA), which was signed on 15 December 1995[23] in Madrid and entered into force on 1 July 1999,[24] and which aims at strengthening the existing relations between the two blocs and at preparing the conditions enabling the creation of an ambitious interregional association in the future. Instead of a preparatory contract with a fixed timetable and a compulsory agenda, the interregional Framework Cooperation Agreement constitutes a clear obligation of means, by which the parties look forward to preparing the conditions for enabling the interregional free trade area to be created.[25] The treaty is a highly programmatic piece, born to be transitory and provisory, and neither contains any concrete easing of conditions of trade liberalisation nor sets any definite date for the intended transatlantic free trade area.[26]

The interregional FCA's legal status is that of a mixed agreement,[27] because of its broad political and economic content.[28] The signing partners are the European Community and its member states and the Common Market of the South and its states parties. The normative bases of the multilateral accord, containing 9 titles and 36 articles, include article 310 EC[29] and also Ouro Preto Protocol, article 8.IV.

order to discuss the possibility of creating a framework for a cooperation agreement between the two sides. Martínez Puñal, 'El Mercosur y la Unión Europea ante la Construcción de una Asociación Interregional' (n 11) 58.

[21] V Bulmer-Thomas, 'The European Union and Mercosur: Prospects for a Free Trade Agreement' (2000) 42 *Journal of Interamerican Studies and World Affairs* 1.

[22] European Commission, *The European Community and Mercosur: an Enhanced Policy* (Brussels, European Commission, 1994) 13–15; AR Hoffmann, *Foreign Policy of the European Union towards Latin American Southern Cone States, 1980–2000: Has it Become More Cooperative?* (Frankfurt am Main, Peter Lang, 2004) 23.

[23] Exactly the same day that the Ouro Preto Protocol of MERCOSUR came into force.

[24] [1999] OJ L112/65.

[25] W Faria, 'As Partes no Acordo Comunidade Européia–Mercosul' (2007) 1 *Revista de Estudos Europeus* 20.

[26] G Müller-Brandeck-Bocquet, 'Perspectives for a New Regionalism: Relations between the EU and the MERCOSUR' (2000) 5 *European Foreign Affairs Review* 569.

[27] Hänggi, Roloff *et al*, *Interregionalism and International Relations* (n 18) 162; Ventura, *Las Asimetrías entre el Mercosur y la Unión Europea* (n 6) 313.

[28] P Koutrakos, *EU International Relations Law* (Oxford, Hart Publishing, 2006) 150–52.

[29] The EU treaty-making power to sign the so-called 'association agreements' (in which are included the 'cooperation agreements', the weakest type of bilateral agreements entered into by the European Union) is based on article 310 EC: 'the Community may conclude with one or more States or international organizations

The FCA has three main areas: political dialogue, cooperation and trade. These three pillars should also be the basis for the future interregional Association Agreement. Given this broad objective, the interregional FCA can be classified, according to international relations theory, as a 'third generation agreement', ie very broad in its scope and with very few substantial commitments.[30] More practically, a Cooperation Council (assisted in the performance of its duties by a Joint Cooperation Committee) was established, with the institutional responsibility for the implementation of the Agreement and the supervision of the negotiations towards the bi-regional free trade area, the second stage of the strategic plan.

As mentioned above, ongoing political dialogue, to back up and consolidate closer political relations between the European Union and MERCOSUR and to set the stage for the establishment of the interregional association, is the first constitutive element of the Framework Cooperation Agreement (article 3 FCA). This political dialogue is conducted by means of contacts, information exchanges, consultations, meetings between the various MERCOSUR and EU bodies, diplomatic channels and specifically, within the Cooperation Council created by the FCA (article 3 FCA and Joint Declaration on Political Dialogue between the European Union and MERCOSUR). As a result, since 1996, many interregional meetings have taken place on different levels to further the aims of the FCA and also to coordinate the partners' positions on multilateral questions in international bodies.[31] As the objectives of EU foreign policy have expanded far beyond trade in its narrow sense in recent years, this political dialogue constitutes a useful tool to allow conversations on important topics such as development and security objectives, protection of human rights and the promotion of democracy,[32] the so-called 'political conditionalities'.

agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'. P Eeckhout, *External Relations of the European Union* (Oxford, Oxford University Press, 2005) 105–6 and 289.

[30] Martínez Puñal, 'El Mercosur y la Unión Europea ante la Construcción de una Asociación Interregional' (n 11) 54–56; Hoffmann, *Foreign Policy of the European Union towards Latin American Southern Cone States, 1980–2000* (n 22) 23. According to the classification given by Hoffmann and Martínez Puñal, basically taking into consideration the agreements' scope, the so-called 'first generation agreements' are the traditional 1960 and 1970s bilateral commercial treaties with reference to possible reciprocal cooperation; the 'second generation agreements', typical in the 1980s, contained a most-favoured-nation (MFN) clause and declarations about the intention to increase bilateral economic cooperation; the 'third generation agreements', used since the 1990s, are the broadest in scope and included political conditionalities regarding democracy, environment and human rights and could also be renegotiated with total flexibility, as set out in the so-called 'evolutionary clause'. In third generation agreements, one can see trade blocs becoming more proactive, engaging in interregional arrangements that can have effects at the global level. Söderbaum and van Langenhove, 'Introduction: the EU as a Global Actor and the Role of Interregionalism' (n 14) 257. The rationale for this is the fact that, commonly, negotiations for the establishment of integration arrangements spread beyond the purely economic and commercial aspects and into other areas of state action. To confirm this transcendence of the purely economic-commercial aspects in the processes of integration, there is the classic example of the German Customs Union (Zollverein), created by Prussian initiative in the nineteenth century, which, in addition to enhancing the economy of various German states, had a significant impact on the formation of the German national spirit (*Volksgeist*) and the unification of Germany led by Otto von Bismarck. Since Prussia vetoed the entry of Austria into the new Customs Union (a product of the thinking of the German economist Friedrich List), the Zollverein thus served as the main policy instrument for the inclusion of the other German states in the orbit of Prussian influence.

[31] S Santander, 'The European Partnership with Mercosur: a Relationship Based on Strategic and Neo-liberal Principles' (2005) 27 *Journal of European Integration* 294; Ventura, *Las Asimetrías entre el Mercosur y la Unión Europea* (n 6) 316.

[32] M Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 *Common Market Law Review* 555.

The second pillar of the FCA is the trade issue (trade in goods, trade in services and trade standards and disciplines). Regarding this second pillar, the FCA provides that the parties shall undertake to forge closer relations with the aim of encouraging both an increase and a diversification of trade, preparing for subsequent gradual and reciprocal liberalisation of trade (a future free trade area within the meaning of article XXIV GATT 1994), and promoting conditions which are conducive to the establishment of the interregional association (with the free trade area), while adhering to WTO rules concerning the sensitivity of certain goods (article 4 FCA). To be put into practice in the building of the future free trade area, those general aims have special significance in five fields, according to the FCA: (1) dialogue on trade and economic matters; (2) agri-food and industrial standards and certification; (3) customs matters; (4) statistical matters; and (5) intellectual property. Given these references to the WTO rules, the Doha Round impasse obviously has many negative consequences for the conclusion of the trade negotiations between the European Union and MERCOSUR.

In order to help the parties to expand their economies, increase their international competitiveness, foster technical and scientific development, improve their standards of living, establish conditions conducive to job creation and job quality and, finally, diversify and strengthen economic links between them (article 10 FCA), the FCA foresees, as a third pillar of action, solid cooperation between the two partners. This cooperation is foreseen in such fields as the promotion of business and investments, energy, transport, science and technology, telecommunications and information technology, environmental protection, combating drug-trafficking and institutional development of the regional integration process. Strategies to be employed include (a) arrangements for the exchange of information; (b) training and institutional support; (c) studies and joint projects; and (d) technical assistance. Especially in the field of promotion of investment, the FCA declares that the 'cooperation shall encompass measures promoting the development of a legal environment which is conducive to investment between the Parties' (article 12 FCA).[33]

It is worthy of mention that the cooperation established in the FCA has provided other benefits to the participants. On one hand, MERCOSUR benefits from the experience (and budget) of European integration and, on the other, the EU exports its regional governance model to MERCOSUR, along with competent technical assistance in the fields of technical norms, tariffs, agriculture, harmonisation, documentation and archives.[34] In fact, the cooperation chapter of the FCA contains the external dimension of the European Union's own project of internal market integration, given that it is a useful tool to allow the European Union to export 'market principles' and externalises origin on entry in the internal market.[35] In this way, the first (political dialogue), second (trade matters) and

[33] This 'rule-based approach' is part of the European strategy to 'succeed in the age of globalisation'. According to a recent communication of the European Commission, 'the global marketplace can work most effectively when there are common ground rules. The EU has a well developed regulatory regime based on years of experience in helping its Member States to reconcile their different approaches and find the right mix to allow trade to flourish while respecting a minimum set of standards for its goods in areas like health and safety. A new international approach focusing on regulatory cooperation, convergence of standards and equivalence of rules is emerging as a result of sectoral bilateral discussions with third countries. This approach should be further developed in the mutual interests of the EU and its partners'. European Commission, *The European Interest: Succeeding in the Age of Globalisation* (Brussels, European Commission, 2007) 5.

[34] Santander, 'The European Partnership with Mercosur' (n 31) 291.

[35] M Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 *Common Market Law Review* 557. Also, M Cremona, 'The External Dimension of the Single Market: Building (on) the Foundations' in

third (cooperation) pillars of the FCA have a mutually supportive relationship: regulatory cooperation may serve simultaneously to hinder non-tariff trade barriers as well as to improve proportionate regulations and legitimate aims.

On the basis of the 1995 Framework Cooperation Agreement and its three pillars, and after many discussions, the European Council approved on 13 September 1999 the negotiating directives leading to a future interregional Association Agreement between the European Union and MERCOSUR. Though still protected by the confidentiality clause, it is fair to say that the negotiating directives presented a very ambitious draft agreement, with provisions concerning the right of establishment and free movement of capital.[36] Once the green light was given by the Council, the European Union–MERCOSUR negotiations started in 2000 with the Bi-regional Negotiations Committee (BNC), the main forum for negotiations. As mentioned earlier, the agreement under negotiation consists of three parts: a chapter on political dialogue (with special reference to respecting human rights and democracy), another chapter on trade issues (establishing a WTO-compatible bi-regional free trade area) and a chapter on cooperation on a wide range of matters. There were 16 negotiation rounds within the BNC between the beginning of 2000 and the end of 2004, when the negotiations were suspended, after both partners had presented their complete proposals. The main obstacles to the continued progress of negotiations are, for the European Union, the level of market access for South American agricultural products,[37] especially in relation to durum wheat, beef and sugar; and, for MERCOSUR, the level of market access of the European industrial goods and services. In a simplified form, the main forces (pros and cons) in the negotiations discussed in the last eight years can be summarised as shown in Figure 8.1.

Figure 8.1 Political trends in the European Union–MERCOSUR negotiations

	In favour of the FTA	Contrary to the FTA
In the European Union	Industry and services lobbies	Agricultural lobbies
In MERCOSUR	Agricultural lobbies	Industry and services lobbies
Main argument for this position	Expanded market access	Unfair internal competition

The current uncertainty surrounding the future of the WTO Doha Round constitutes a clear external constraint to the European Union–MERCOSUR negotiations, in that the lack of multilateral guidelines can paralyse the bilateral discussion.[38] Under the so-called 'Lamy doctrine', new regional trade negotiations are strongly discouraged while the Doha

C Barnard and J Scott, *The Law of the Single European Market: Unpacking the Premises* (Oxford, Hart Publishing, 2002); European Commission, *Implementing Policy for External Trade in the Fields of Standards and Conformity Assessment: a Tool Box of Instruments* (Brussels, European Commission, 2001); European Commission, *Global Europe: Competing in the World—A Contribution to the EU's Growth and Jobs Strategy* (Brussels, European Commission, 2006).

[36] Ventura, *Las Asimetrías entre el Mercosur y la Unión Europea* (n 6) 339–42.

[37] According to the European Commission, Directorate-General for Trade, the European Union is MERCOSUR's first market for its agricultural exports, accounting for 38.5 per cent of total EU imports in 2006 (http://ec.europa.eu/trade/issues/bilateral/regions/mercosur/index_en.htm).

[38] It is not clear yet whether the Doha negotiating round definitely collapsed after the failure of the Geneva talks in July 2008. Since then, the key players, specifically, Brazil, India, the European Union and the United States, have reinitiated some preliminary talks in order to bridge their differences.

Round of WTO talks are underway (in other words, 'interregional trade strategies are perceived as second-best alternatives to global advances').[39] The wave of economic nationalism that invades the national markets in the current global crisis is another negative factor for the progress of negotiations. In contrast, the unfavourable North-American trade policy towards South America represents a positive external vector for the European Union–MERCOSUR negotiations; after all, MERCOSUR often saw the negotiations with the European Union as one of its weapons in bargaining concessions from the United States.[40] China's growing role as a powerful competitor in international trade, in the same way, can be seen as another positive influence, likely stimulating bi-regional negotiations in the near future.

Since May 2004, dialogue has been limited to informal technical meetings. Despite the absence of formal BNC meetings, on 2 August 2007, the External Relations Directorate-General of the European Commission launched the *MERCOSUR–European Community Regional Strategy Paper 2007–2013*, which provides a concrete action plan for EU cooperation with MERCOSUR in the next five years, as well as an assessment of the current stage of the negotiations between the two blocs.

According to the External Relations Directorate-General, among the three distinct chapters that the eventual European Union–MERCOSUR Interregional Association Agreement must have—the political chapter, the cooperation chapter and the trade chapter—the trade chapter will be the most complicated and the most difficult to resolve. In part, it calls for provisions:

> to include not only the Free Trade Agreement in goods and services but also cover, among other things, market access and rules on government procurement, investment, intellectual property rights, competition policies, sanitary and phyto-sanitary issues, technical barriers to trade, protection of geographical indications, business facilitation, trade defence instruments, a dispute settlement mechanism etc.[41]

Without a doubt, an eventual European Union–MERCOSUR Interregional Association Agreement will be very broad in scope (performing a so-called 'WTO plus' function), going far beyond the respective duties in WTO and without excluding any sensitive sector or product. Under these circumstances, the present scenario of the negotiations suggests that the political and cooperation chapters of a future Agreement are practically concluded.[42] The trade chapter negotiations, however, are far from any resolution. This being the case, work toward the completion of the whole accord is at a standstill, since the work methodology is the 'single undertaking' ('nothing is agreed until all is agreed', according to Doctor.[43] Given the close relationship between trade, cooperation and political dialogue, as shown above, it is easy to understand the rationale for this method—that the agreement should be understood, negotiated and implemented as an indivisible whole.

An eventual European Union–MERCOSUR Interregional Association Agreement would represent the biggest free trade area in the world and the first free trade agreement

[39] Hänggi, Roloff *et al*, *Interregionalism and International Relations* (n 18) 158.
[40] Bulmer-Thomas, 'The European Union and Mercosur' (n 21) 3.
[41] European Commission, External Relations Directorate-General, *Mercosur–European Community Regional Strategy Paper 2007–2013* (Brussels, European Commission, 2007) 21.
[42] Ibid 22.
[43] Doctor, 'Why Bother with Inter-Regionalism?' (n 15) 286.

between two customs unions.[44] The magnitude of this fact is enough to show how complex the negotiations between the two blocs are. It is of note that the European Union already has free trade agreements in place in Latin America with Chile and Mexico, two less complex economic partnerships. After two years of negotiations, for example, on 18 November 2002, the European Union and Chile signed an Association Agreement, which has been in force since 1 March 2005. The relations between the European Union and Mexico are regulated by the Economic Partnership, Political Cooperation and Cooperation Agreement (Global Agreement) signed on 8 December 1997 (after six years of discussion), which entered into force on 1 October 2000. Undoubtedly, the speedy conclusion of these two negotiations can be attributed to both the limited ambitions of Mexico's and Chile's agreements[45] and the fact that those countries represented fewer threats to European so-called 'sensitive' sectors, such as beef, cereals and sugar.[46]

MERCOSUR foreign ministers and the European Commissioner for Economic and Monetary Affairs, Joaquin Almunia, met in Montevidéo (Uruguay) on 17 December 2007 and renewed the commitment of MERCOSUR and the European Union to intensify bi-regional relations. The parties reaffirmed their strong political will to relaunch negotiations with a view to concluding the Interregional Association Agreement, while at the same time, emphasised that first priority will be placed on successfully concluding the WTO Doha Round of multilateral trade negotiations. In the first week of April 2008, European Union and MERCOSUR officials met in Brussels to assess the state of negotiations and the possibility of calling a summit in the near future. During the fifth European Union-Latin America Summit, in Lima, Peru, on 16–17 May 2008, the Heads of State reiterated their desire to conclude an association agreement between the two blocs but they set no deadlines. According to the joint declaration released after the MERCOSUR and the Troika of the European Union agreed to reactivate negotiations for an meeting, 'both sides underlined the importance of reaching an ambitious and balanced MERCOSUR–European Union Association Agreement and reiterated their commitment to carry negotiations through to a successful conclusion, as soon as conditions permit, on the basis of the work already done'.[47]

As seen above, both the European Union–MERCOSUR Interregional Framework Cooperation Agreement and all subsequent official documents mention that a deeper partnership between the blocs requires a stable and efficient legal environment in order to induce an increasing level of sustainable investments. Such an EU–MERCOSUR investment-friendly legal environment would have to include, for example, mutually agreed rules on government procurement, investment, intellectual property rights, competition policies, sanitary and phyto-sanitary regulations, technical barriers to trade, the protection of geographical indications, business facilitation, trade defence instruments, and even a dispute settlement mechanism. Versions of a majority of such rules already

[44] Ibid 282; Bulmer-Thomas, 'The European Union and Mercosur' (n 21) 1. Beyond MERCOSUR, the European Union has been negotiating free trade agreements with other integration arrangements, such as the Southern African Development Community (SADC), since 2002, and with the Association of Southeast Asian Nations (ASEAN), since 2007. AC Robles, Jr, 'EU FTA Negotiations with SADC and Mercosur: Integration into the World Economy or Market Access for EU Firms?' (2008) 29 *Third World Quarterly* 181.

[45] Doctor, 'Why Bother with Inter-Regionalism?' (n 15) 45 282.

[46] Hänggi, Roloff *et al*, *Interregionalism and International Relations* (n 18) 164.

[47] Joint Declaration, MERCOSUR–European Union Troika Summit, Lima, Peru, 17 May 2008, Document 9541/08 (Presse 132).

exist under other association agreements signed by the European Union, examples being the European Union–Chile Association Agreement; the European Union–Mexico Economic Partnership, Political Coordination and Cooperation Agreement; the European Union–Croatia Stabilisation and Association Agreement and the European Union–Macedonia Stabilisation and Association Agreement.

B MERCOSUR and Other Economic Blocs or International Organisations

Given the slow progress faced by MERCOSUR in the negotiations with the European Union, the South American bloc has tried to diversify its trade relations with other commercial partners all over the world. As a consequence, MERCOSUR is currently involved in a considerable number of negotiation processes at different stages: agreements already signed; agreements signed but in part pending for additional negotiations; negotiations ongoing; negotiations to be initiated based on framework agreements already signed; dialogue processes carried out with some regularity; dialogue processes more vague in nature; and finally, proposals for the opening of new negotiation processes, not yet confirmed by MERCOSUR.[48]

As an example, on 16 December 2004, following a previous framework agreement for the creation of a free trade area between MERCOSUR and South Africa, the South American bloc and the Southern African Customs Union (SACU, composed of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland) signed a preferential trade agreement (PTA) as a first step toward the creation of a free trade area. The PTA contained a main text and five annexes which created a legal basis to govern SACU and MERCOSUR trade relations. On 17–18 April 2008 in Buenos Aires, Argentina, both parties concluded a final round of negotiations and decided that a free trade agreement would replace the agreement signed in December 2004 in Belo Horizonte, Brazil.[49]

Another Framework Agreement on Economic Cooperation was signed between the Cooperation Council for the Arab States of the Gulf (CCG)[50] and MERCOSUR in May 2005, at the South America–Arab Countries Summit held in Brasília, Brazil. In order to enhance economic relations, in particular concerning trade in goods and services, as well as investments, the MERCOSUR and the European Free Trade Association (EFTA), composed of Iceland, Lichtenstein, Norway and Switzerland, signed a Declaration on Trade and Investment Cooperation and Action Plan, recognised as a first step towards a free trade agreement. MERCOSUR has also initiated trade talks with the Caribbean Community (CARICOM),[51] the Association of Southeast Asian Nations (ASEAN),[52] the

[48] Araújo, *O Mercosul: Negociações Extra-Regionais* (n 3) 66.

[49] All of the agreements and trade documentation mentioned here can be found on the MERCOSUR website (www.mercosur.int), ALADI's website (www.aladi.org) or in the Foreign Trade Information System (www.sice.oas.org) created and maintained by the Organization of American States.

[50] The CCG is made up of the United Arab Emirates, the Kingdom of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, Qatar and Kuwait.

[51] Currently the CARICOM has 15 full members: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat (a territory of the United Kingdom), Saint Kitts and

Australia–New Zealand Closer Economic Relationship Treaty Agreement,[53] the Community of Portuguese Language Countries (CPLP)[54] and the Central American Integration System (SICA).[55]

As regards international organisations, MERCOSUR as such is not yet a formal member or officially recognised observer of any international organisation. Nevertheless, there are many occasions when the Member States of the bloc have common positions on issues before multilateral bodies such as World Trade Organization, International Labour Organisation, International Telecommunications Union, World Customs Organisation and Universal Postal Union. On the other hand, MERCOSUR maintains some specific accords of cooperation with entities like the UN Food and Agriculture Organization, the Inter-American Development Bank, UNESCO and the Organization of the Convenio Andrés Bello.[56]

C MERCOSUR and ALADI Member States

The ALADI was created in 1980 by the Treaty of Montevidéo and today has 12 member countries, the four MERCOSUR Member States, plus Bolivia, Chile, Colombia, Cuba, Ecuador, Mexico, Peru and Venezuela. Among the general principles of this integration scheme are pluralism and flexibility in the political and economic convergence towards the formation of a future Latin American common market. These principles have allowed the signature of multiple forms of trade instruments, generally called Acuerdos de Complementación Económica (Economic Complementation Agreements, or simply ACE). Under the ALADI umbrella, up to now, MERCOSUR has signed eight ACE, with the following partners:

(1) Chile (ACE No 35), signed on 25 June 1996 in Potrero de los Funes, Argentina. The agreement aims at the establishment, in the near future, of a free trade zone between the parties. Currently, the process of tariff reductions is at an advanced stage. The text of the agreement is supplemented by a number of additional Protocols and entered into force on 1 October 1996.
(2) Bolivia (ACE No 36), signed on 17 December 1996 in Fortaleza, Brazil, and entered into force on 28 February 1997. It is another free trade agreement with a fixed timetable and some lists of exceptions.

Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago. MERCOSUR and CARICOM representatives met for the first time in 2004 with a view to launching negotiations for a free trade agreement.

[52] A memorandum of understanding was signed in August 2007, creating a mechanism for dialogue on ASEAN–MERCOSUR trade issues. The ASEAN members are Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Cambodia, Laos, Myanmar and Vietnam.

[53] A dialogue process started in 1994 relating to trade topics and other common interests.

[54] The CPLP is formed by Portugal, Brazil, East Timor, Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe. A proposal to negotiate a free trade agreement made by MERCOSUR in July 2004 has up to now received positive responses from only São Tome and Príncipe and Cape Verde.

[55] In October 2004, MERCOSUR initiated formal contact with the Central American Integration System (SICA), made up of Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. In February 2005, a Joint Declaration was issued recognising the initial steps taken towards integration.

[56] The Organization of the Convenio Andrés Bello is an international organisation headquartered in Bogotá, Colombia, which since 1970 has been involved in processes of educational, scientific, technological and cultural integration in Ibero America.

(3) Mexico (ACE No 54 and ACE No 55). ACE No 54 is a framework agreement that establishes a legal basis for trade relations between Mexico and the Member States of MERCOSUR and aims to lay out the groundwork for a possible free trade area in the future. It was signed during the MERCOSUR Presidential Summit that took place on 5 July 2002 in Buenos Aires, Argentina, and came into force on 5 January 2006. ACE No 55, signed on 27 September 2002 in Montevidéo, Uruguay, establishes a mutual reduction of import duties exclusively on products of the automotive sector (bilateral import quotas for tariff-free entry of automobiles). The agreement entered into force on 1 January 2003.
(4) The Members of the Andean Community (CAN), Bolivia, Colombia, Ecuador and Peru (ACE Nos 56, 58 and 59). Those agreements were signed on 6 December 2002, on 30 November 2005 and on 18 October 2004 respectively. These Agreements establish a free trade arrangement with a specific timetable and some lists of exceptions in trade liberalisation.
(5) Cuba (ACE No 62), in July 2006. The Agreement consolidated as multilateral the preferred nation status negotiated in the four bilateral agreements between the participant states of MERCOSUR and Cuba.

All of these negotiations have variable geometry and constitute, first, a deepening of an existing integration process, the ALADI, with arrangements based on history and models already familiar to the parties. Secondly, these trade talks are or may be part of the MERCOSUR efforts towards expansion.[57] In order to facilitate the contacts among MERCOSUR and other ALADI members, Brazil, Argentina, Paraguay and Uruguay have diplomatic missions working simultaneously on both integration arrangements.

D MERCOSUR and Non-ALADI Member States

As part of the South American efforts towards the deepening of South–South diplomacy, MERCOSUR has also signed trade agreements with India, Egypt, Morocco, Israel and Pakistan in recent years. These extraregional negotiations have contributed to diversifying and expanding trade opportunities, reinforcing the capability to attract international investments, and strengthening economic and political relations with non-traditional partners of the South American bloc.

A framework agreement had been signed between MERCOSUR and India on 17 June 2003 in Asunción, Paraguay. The main goal of this framework agreement was to create conditions and mechanisms for increasing trade (specifically by the mutual granting of tariff preferences) the ultimate objective of which is, in a second stage, to negotiate a free trade area between the two parties. As a follow-up to the framework agreement, a PTA was signed in New Delhi on 25 January 2004. The aim of this PTA was not only to grant reciprocal fixed tariff preferences but also as an instrument to consolidate a political relationship. Closer ties between MERCOSUR and India would arguably bring indirect political benefits, for instance fostering the India–Brazil–South Africa Dialogue Forum (IBSA).[58]

[57] Araújo, *O Mercosul: Negociações Extra-Regionais* (n 3) 239.
[58] South Africa is a member of SACU.

The above-mentioned method was adopted by MERCOSUR and Egypt to negotiate a free trade agreement, on the basis of discussions held at the G-20 meeting in November 2003. On 7 July 2004 in Puerto Iguazú, Argentina, a framework agreement was signed between MERCOSUR and the Arab Republic of Egypt during the 26th Meeting of the Council of the Common Market. As a first step towards the objective of providing the conditions and mechanisms to negotiate a free trade area, the contracting parties agreed to conclude a fixed preference agreement (yet to be concluded).

On 26 November 2004, in Brasília, Brazil, the MERCOSUR countries signed another framework trade agreement, this time with the Kingdom of Morocco, the objective of which was to establish the conditions for the negotiation of a free trade agreement. The first round of negotiations was held in Rabat, Morocco, on 11 April 2008. A framework trade agreement was also signed between MERCOSUR and Pakistan on 20 July 2006 in Cordoba, Argentina. The signing of the Agreement initiated the process of negotiations between Pakistan and MERCOSUR to conclude a preferential trade agreement, which will ultimately lead to another free trade agreement.

The development of trade negotiations with Israel seems to have progressed more swiftly. On 8 December 2005 in Montevidéo, Uruguay, MERCOSUR signed a framework agreement whose objective was to provide the conditions and mechanisms to negotiate a free trade agreement with Israel. CCM Decision No 22/05 approved the initiative to negotiate the free trade agreement. After five rounds of negotiations, MERCOSUR and Israel signed a free trade agreement on 18 December 2007. Araújo[59] points out that the agreement with Israel was in fact a natural consequence, as a matter of equilibrium, of the previous agreement signed between MERCOSUR and the Gulf Cooperation Council.

Beyond these agreements, MERCOSUR also has initiated exploratory dialogues with Panama,[60] Trinidad and Tobago,[61] Guyana,[62] Singapore,[63] Dominican Republic,[64] Russia,[65] Jordan, Turkey,[66] Lebanon,[67] Palestinian Authority,[68] Iran,[69] South Korea,[70]

[59] Araújo, *O Mercosul: Negociações Extra-Regionais* (n 3) 101.

[60] On 20 June 2005, there was a meeting of foreign ministers of MERCOSUR and Panama, when the parties set out a work programme for negotiations towards a trade agreement. The first technical meeting took place in April 2006.

[61] Memorandum of Understanding between MERCOSUR and the Republic of Trinidad and Tobago on Trade and Investment, signed on 28 June 1999.

[62] Memorandum of Understanding between MERCOSUR and the Cooperative Republic of Guyana on Trade and Investment, signed on 28 June 1999.

[63] Singapore and MERCOSUR signed a Memorandum of Understanding on Trade and Investment Cooperation on 24 September 2007 in New York, during a United Nations General Assembly session.

[64] On 8 December 2005, the Dominican Republic and MERCOSUR signed a Joint Statement with the objective of continuing to deepen the political and economic dialogue between both sides.

[65] Memorandum of Understanding for the Establishment of a Mechanism of Political Dialogue and Cooperation between MERCOSUR and the Russian Federation, signed on 15 December 2006 in Brasília, Brazil.

[66] On 30 June 2008, leaders of the South American bloc meeting at a summit in Tucumán, Argentina, signed framework agreements on the preparation of free trade treaties with Turkey and Jordan.

[67] The Lebanese proposal to negotiate a free trade agreement with MERCOSUR was made in August 2004. MERCOSUR has not yet defined its position.

[68] The Palestinian proposal to negotiate a free trade agreement with MERCOSUR was made in July 2006. MERCOSUR has not yet offered an answer.

[69] The Iranian proposal to negotiate a free trade agreement with MERCOSUR was made in September 2006. MERCOSUR has not yet offered an answer.

[70] MERCOSUR and Korea initiated a joint study on the possibility of a free trade agreement in 2005. There have been two meetings of the joint study group up to now: the first in May 2005 in Asunción, Paraguay, and the second in August 2005 in Seoul, Korea.

China,[71] Japan,[72] United States[73] and Canada.[74] MERCOSUR has been a key player in initiating these processes, a clear indicator of the proactivity of the bloc in terms of external relations.

IV Concluding Remarks

Taking all of the above into consideration, it is clear that MERCOSUR's leaders are committed to its involvement as a significant player worldwide. MERCOSUR is an indisputable global trader. In recent years, due to political convergence between the South American Presidents (particularly Lula, Kirchner and Tabaré Vázquez) and the intensification of South–South relations, there has been a significant expansion of the bloc's trade talks, reflecting a commitment to broaden the opportunities for business (and political influence) in addition to the traditional partners from the developed areas, such as the United States and the European Union. In these negotiations, however, it remains clear that an impediment to greater progress is the problem of the lack of institutional development of MERCOSUR. Given the dramatic social and economic asymmetries that still exist at the intra-bloc level and the usual practice of national governments to commit to an intergovernmental and consensual model *à la* WTO, the international negotiations of the bloc are still characterised by complex and relatively unstructured decision-making processes that often hamper the progress of new partnerships. Although, from a technical standpoint, the Ouro Preto Protocol has endowed MERCOSUR with a legally recognised personality, granting the bloc authority to act on its own behalf, the excessively informal intergovernmental structure of MERCOSUR prevents, from a political point of view, the separation of the will of MERCOSUR from that of the individual Member States. This fact has weakened the position of MERCOSUR as a real global player, ie as a relevant actor on the international scene, not just in the economic sphere.

[71] Process of dialogue launched in 1997, with five high-level meetings held since then. China raised the idea of a free trade agreement and MERCOSUR of an agreement on tariff preferences. There is still no decision.

[72] The First Japan–MERCOSUR high-level official consultation was held as an intergovernmental conference in São Paulo in October 1996. Since then, the talks between the two parties have aimed at activating dialogue and promoting closer cooperation.

[73] The so-called Rose Garden Agreement (or '4 + 1 Agreement'), signed with the United States on 19 June 1991.

[74] A Trade and Investment Cooperation Arrangement and Action Plan were signed between Canada and MERCOSUR on 16 June 1998, in Buenos Aires, Argentina. In February 2005, the parties held preliminary discussions. It is important to observe that the bilateral negotiations with the United States and Canada represent a MERCOSUR effort to find a substitute for the negotiations regarding the Free Trade Area of the Americas (FTAA), talks on which collapsed in 2004. Araújo, *O Mercosul: Negociações Extra-Regionais* (n 3) 64.

9

MERCOSUR Compared

PHILIPPE DE LOMBAERDE, FRANK MATTHEIS AND
CHARLOTTE VANFRAECHEM

I Introduction

The aim of this chapter is to address, assess and typify MERCOSUR in a comparative perspective. We will explain how MERCOSUR compares with other schemes of regional integration and regional governance. We shall do this not by (merely) juxtaposing this and other regional initiatives and pointing to differences and similarities in a number of dimensions and aspects of the respective processes, but by reviewing a representative sample of comparative research involving MERCOSUR, from different disciplinary angles. This should allow us to draw more robust conclusions in terms of differences and similarities between MERCOSUR and other regional processes. The chapter is organised thematically, covering the different (relevant) aspects of the regional integration process. This is preceded by a note on comparison and a short discussion of the place of MERCOSUR in comparative analyses. It is followed by a concluding section.

II A Note On Comparison

The comparative approach has mainly been employed in order to explain social phenomena. The object of comparison in political science has chiefly been the nation-state due to its sovereign entity and empirical facilitation. Modes of regional governance are usually less structural than long-term institutionalised state systems and therefore harder to grasp, as they usually constitute alternating regimes of a supra- or transnational nature. Moreover, comparative work on regional integration evidently requires knowledge of at least two distinct regions so as to avoid idiosyncratic explanations. These difficulties might explain why comparative works only occupy a limited space within the broader literature on MERCOSUR.

Comparative analysis of regionalism or regional integration goes back to the neofunctionalists who, back in the 1960s, started to explore the conditions for regionalism in regions other than Europe. Haas, Schmitter and Dell explicitly addressed this question in a

Latin American context.[1] They explored which functional areas were relevant candidates for initiating regional cooperation and whether the (structural and process) conditions existed for spillovers and the automatic politicisation of the process to happen. Nye also conducted studies along these lines, covering cases from different continents, including the Organization of American States (OAS).[2]

On the occasion of the Madrid Conference on Optimum Currency Areas of 1970, Kafka, within a different theoretical framework, compared the conditions for monetary integration in Latin America with those in Europe. He reached the conclusion that 'Latin America is obviously not an optimum currency area either now or for the foreseeable future. The same is true of its subdivisions … In fact, many Latin American countries are only gradually acquiring the characteristics of optimum currency areas'.[3]

The remainder of the 1970s and 1980s, however, did not register much scholarly activity in the field of comparative regionalism. This was so for various reasons. On the one hand, there is the fact that neo-functionalism lost its primacy as a theoretical framework, not only challenged by other perspectives (intergovernmentalism, in the first place), but also from within.[4] On the other hand, both in Europe and elsewhere, regional integration processes demonstrated little dynamism. This situation started to change in the late 1980s and early 1990s, when we observe a renewed interest in the regional phenomenon in both the academic and political communities. A proliferation of new regionalist initiatives and the deepening of existing schemes were accompanied by the further development and proliferation of theoretical frameworks to study these, a sharply increasing quantity of empirical research and (later) a renewed interest in comparative research.[5]

In the remaining sections of this chapter we will present an overview of what we consider are the main results of this more recent comparative literature, insofar as MERCOSUR is included as one of the comparators. We feel, however, that some consideration of the use of the comparative method in the study of regionalism has its

[1] EB Haas and PC Schmitter, 'Economics and Differential Patterns of Political Integration: Projections about Unity in Latin America' (1964) 4 *International Organization* 259; SS Dell, *A Latin American Common Market?* (Oxford, Oxford University Press, 1966); PC Schmitter, 'A Revised Theory of Regional Integration' (1970) 4 *International Organization* 836.

[2] JS Nye, 'Comparing Common Markets: a Revised Neo-Functionalist Model' (1970) 4 I*nternational Organization* 796; JS Nye, *Peace in Parts: Integration and Conflict in Regional Organization* (Boston, MA, Little, Brown and Company, 1971).

[3] A Kafka, 'Optimum Currency Areas and Latin America' in HG Johnson and AK Swoboda (eds), *The Economics of Common Currencies* 210 (Cambridge, MA, Harvard UP 1973).

[4] EB Haas, *The Obsolescence of Regional Integration Theory* (Berkeley, CA, Institute of International Studies, University of California Press, 1975); S Breslin and R Higgott, 'Studying Regions: Learning from the Old, Constructing the New' (2000) 3 *New Political Economy* 333.

[5] See, eg, L Fawcett and A Hurrell (eds), *Regionalism in World Politics: Regional Organization and International Order* (Oxford, Oxford University Press, 1995); A Gamble and AJ Payne, *Regionalism and World Order* (New York, St Martin's Press, 1996); B Hettne, A Inotai and O Sunkel (eds), *Comparing Regionalisms: Implications for Global Development* (Basingstoke, Palgrave, 2001); M Bøås, M Marchand and T Shaw, *The Political Economy of Regions and Regionalism* (Basingstoke, Palgrave Macmillan, 2005); W Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge/New York, Cambridge University Press, 1999); M Schulz, F Söderbaum and J Öjendal (eds), *Regionalization in a Globalizing World: a Comparative Perspective on Actors, Forms and Processes* (London, Zed Books, 2001); S Breslin, C Hughes, N Philips and B Rosamond (eds), *New Regionalisms in the Global Political Economy* (London, Routledge, 2002); F Laursen, *Comparative Regional Integration* (Aldershot, Ashgate, 2003); F Duina, *The Social Construction of Free Trade: the European Union, NAFTA, and Mercosur* (Princeton, NJ, Princeton University Press, 2005); M Farrell, B Hettne and L Van Langenhove (eds), *The Global Politics of Regionalism: Theory and Practice* (London, Pluto Press, 2005); A Acharya and A Johnston (eds), *Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Oxford, Oxford University Press, 2007).

place here. Among some regionalism scholars, there is a growing critical stance (and often concern) observable with respect to comparative research. We share this critical attitude and will point to a number of issues that problematise the comparative approach and which should be born in mind when interpreting the results of the studies that have compared (benchmarked, evaluated) the MERCOSUR experience with (and against) other experiences, the European experience in particular. We do not, however, thereby adhere to the extreme positions that posit either that the European case is the (only) benchmark against which to assess other experiences or, at the other extreme of the spectrum, that regional experiences are not comparable at all.

Before engaging in comparative research or analysing the results of comparative research, one should consider at least the following issues. First, comparative research does not always make the underlying concept of 'region' explicit. Various definitions of 'region' are possible and are in current use. These definitions can focus on different essential characteristics, such as a region's character as a non-sovereign governance system, its intergovernmental and/or supranational organisational characteristics, its additive character (in the sense that regions can be understood as fully including a number of states), a regional identity, and so on. And, obviously, combinations of the above are perfectly possible. Good practice, which is not always followed, is to explicitly define the concept of 'region' and base the comparative study on it.

Secondly, the European case (more specifically, the European Union) is an important case of regionalism and is logically considered as an important comparator. This should not, however, be permitted to condition the mind too much. Regional governance is likely to come in different forms as a hybrid phenomenon. Especially, one should be cautious of statements using the European case as 'the' benchmark.

Thirdly, another side of the problem of Euro-centrism is related to the fact that most of the theoretical frameworks that have been developed so far were built on (or at least, inspired by) the European experience. Applying these frameworks a-critically to other situations is possibly (probably) problematic. Our position is that some theoretical frameworks are more general than others, the more specific ones being those that critically depend on characteristic properties of the European case (institutions, values, history, geography, etc). The more general frameworks (eg fiscal federalism or optimum currency area theory) certainly have particular potential in comparative studies. But general formulations of neo-functionalism are also, in our opinion, justifiable frameworks for comparative research.[6]

Fourthly, more attention should be paid to case selection criteria in comparative research. This is often done on an ad hoc basis.

And fifthly, the complementary value of comparative case-study methods and larger scale quantitative research strategies should be appreciated, the restriction obviously being the limited number of possible cases. We do not argue that everything can be quantified, but when it makes sense to compare values of variables and when it can be done, it should be done. It helps to provide a sense of proportion and tests also certain prejudices or 'accepted truths' about the relative 'success' or 'failure' of certain regional schemes compared to others.

[6] See, eg, A Malamud and PC Schmitter, *The Experience of European Integration and the Potential for Integration in South America*, 6 IBEI Working Papers (2007).

III Mercosur in Comparative Analysis

Collective efforts in edited books to deal with comparative regional integration mostly follow the pattern of having area experts writing a chapter on their respective region. The extent and quality of the actual comparison depends largely on a coherent approach of the authors and on the editor's concluding chapter. In the case of the comprehensive volume *Comparative Regional Integration*, the editor Finn Laursen does not draw comparative conclusions but tries to bring together the various types of regional experiences and the numerous explanations brought forward in the book.[7] He argues that a sensible comparison is indeed possible, although the European Union remains the main point of reference for him.

Hugon *et al* provide an example of comparative regional integration not going beyond the name. In an otherwise useful descriptive mapping of the various regionalist phenomena in the South (including MERCOSUR), the claim of the work to be a comparative study was not met. It remained the task of the reader to draw any comparisons, as the alignment of integration descriptions did not provide any comparative argument and even the conclusion was limited to the Sub-Sahara.[8]

More literature can be found on European Union–MERCOSUR comparisons. On the one hand, the large community of EU studies provides for spillover effects to address other regions, specifically those that tend to be geared to the European Union. Inversely, MERCOSUR specialists often regard the European Union as a natural comparative case. Apart from the inspiration of EU bodies and rules, the influence of European circles on the academic elites in MERCOSUR remains a prevalent feature, despite the significant cultural influence of the United States.

Accordingly, comparisons between North and South America, and specifically between MERCOSUR and the North American Free Trade Agreement (NAFTA), represent a significant share of the comparative literature. This has been facilitated by the image portrayed of one America within the Free Trade Area of the Americas (FTAA) negotiation process, but also by the divergence of the two projects which started almost simultaneously but under different premises.

The case of the Association of Southeast Asian Nations (ASEAN) has also received a fair share of attention. The basic assumption is usually that East Asia has been significantly more successful than South America in advancing regional economic integration and development. The emerging question thus mainly focuses on how to achieve similar success in MERCOSUR. Although this assumption implies a previous comparative exercise, the policy-making focus limits the possibility of establishing a comprehensive foundation for comparison on equal terms.

Virtually absent from the comparative literature are the regions of Central Asia, South Asia and the Arab world, where tangible economic integration projects are scarce. Furthermore, the Sub-Saharan region also remains a black spot, despite the many regional endeavours. If anything, MERCOSUR is perceived as an exemplary case from which to draw lessons for regional organisations such as the Southern African Development Community (SADC).

[7] Laursen, *Comparative Regional Integration* (n 5) 283.
[8] P Hugon (ed), *Les économies en développement à l'heure de la régionalisation* (Paris, Karthala, 2002).

IV Origins of Regional Integration

With respect to MERCOSUR, a first set of comparative papers deals with the origins of the regional integration processes. They differ with respect to the factors and variables the authors consider as key explanatory factors.

A recent historical comparison between the European Union and MERCOSUR is presented by Hardt. He compares regional integration processes by singling out two preconditions for regional integration efforts. In his view, the first condition for an integration effort is the presence of traditional rivalries that threaten regional stability.[9] While the European Union offered an opportunity to supersede the historically problematic relationship between France and Germany, MERCOSUR is essentially seen as a compromise between Brazil and Argentina.[10] Both the European Union and MERCOSUR faced threats of aggression.

According to Hardt, a second precondition for regional cooperation is the presence of a market failure. In post-war Europe, the market had to be completely rebuilt; in the MERCOSUR case, the massive failure of economic policy resulted in a debt crisis and created deep and definitive market failures for Brazil and Argentina.[11] In contrast to the European Union and MERCOSUR, NAFTA and ASEAN are trade blocs without defined goals of deeper integration.[12]

Guedes de Oliveira offers a slightly different perspective.[13] He is also convinced that the historical background and context is important in order to understand regional integration. He also considers security as an explanatory factor for regional integration, but focuses on infrastructure instead of market failure as a second factor. He also compares MERCOSUR with the European Union. For Guedes de Oliveira, the first driver behind MERCOSUR was security. However, the underlying concept is wider than Hardt's and includes also economic security. In turn, economic security has internal dimensions (for example, the Parana hydroelectric plant), but also external dimensions (the fear of losing economic importance in a context of globalisation). The second explanatory factor is the need felt by Brazil and its partners to use common natural resources and enhance regional infrastructure, which is similar to the forces behind the creation of the European Coal and Steel Community (ECSC).

A different stance is taken by Malamud, who does not deny the importance of economic and security factors, but highlights political factors and the role of leadership in explaining the establishment of MERCOSUR. When comparing MERCOSUR with other regional integration processes, he comes to the conclusion that 'inter-presidentialism' played a

[9] BD Hardt, 'A Comparative Analysis of Integration Efforts in Europe and South America', paper presented at the MPSA Annual National Conference, Chicago, 2008, at 15.

[10] Ibid.

[11] Ibid 15.

[12] Ibid 16.

[13] MA Guedes de Oliveira, *Mercosur: Political Development and Comparative Issues with the European Union*, Jean Monnet/Robert Schuman Paper Series 19 (2005).

crucial role in the creation of MERCOSUR, in combination with the role of chief executives. This methodology draws partly on the supranational governance approach and partly on the intergovernmental approach.[14]

Malamud compares MERCOSUR with the Andean Community (CAN) and with the Central American Common Market (CACM).[15] In each of these three integration processes, presidential intervention played a major role. For MERCOSUR, it played a major role in the first stage of integration; the Argentinean and Brazilian presidents had a personal influence on the process of integration.[16] According to Malamud, MERCOSUR is the region in which the influence of the chief executives, who are the connection between institutions and leadership, is most apparent.[17] But the presidents of the Member States were not only responsible for the creation of MERCOSUR; they also shaped institutional incentives and restrictions that supported the process of regional integration.[18] Presidential intervention boosted the process of integration of MERCOSUR and shaped its outcome, with presidents acting not only as decision-makers but also as dispute settlers and guarantors of commitments.[19]

Presidential intervention was, for the Andean Community, more important in the deepening of the integration process and less for its original creation.[20] The active participation of the presidents in the integration process has been a crucial factor in the consolidation and deepening of the Andean Community. In the CACM, presidential intervention provided a basis for the region to overcome its traditional weaknesses. The reasons for establishing the CACM were more political than in the other regions, where the economic aspect was more important.[21] The presidents of the Member States of MERCOSUR, CAN and CACM also played a role in the further development of regional integration.

In another article, Malamud compared the influence of the chief executives from NAFTA and ASEAN with the three Latin American integration processes compared above.[22] The ASEAN integration process was established for security reasons and the presidents did not have an influence on the integration process as in Latin America.[23] The principal objective for integration between the NAFTA member states was to establish a free trade area. The US president does not have as much influence as his counterparts in the other regions on the American continent.[24]

[14] A Malamud, 'Presidentialism in Mercosur: a Hidden Cause for a Successful Experience' in F Laursen (ed), *Comparative Regional Integration: Theoretical Perspectives* (Aldershot, Ashgate, 2003) 61, 66; A Malamud, 'Presidential Diplomacy and the Institutional Underpinnings of Mercosur: an Empirical Examination' (2005) 40 *Latin American Research Review* 140.

[15] A Malamud, 'Presidentialism and Mercosur: a Hidden Cause for a Successful Experience' in F Laursen (ed), *Comparative Regional Integration: Theoretical Perspectives* (Aldershot, Ashgate, 2004).

[16] Malamud, 'Presidentialism in Mercosur' (n 16) 64.

[17] Malamud, 'Presidentialism in Mercosur' (n 17).

[18] Malamud, 'Presidentialism in Mercosur' (n 16) 64.

[19] Malamud, 'Presidential Diplomacy and the Institutional Underpinnings of Mercosur' (n 16) 148.

[20] Malamud, 'Presidentialism in Mercosur' (n 17).

[21] Ibid.

[22] A Malamud, 'Jefes de gobierno y procesos de integración regional: las experiencias de Europa y América Latina' in P De Lombaerde, S Kochi and J Briceño Ruíz (eds), *Del regionalism latinoamericano a la integración interregional* (Madrid, Siglo XXI, 2008).

[23] Ibid 14.

[24] Ibid 14–15.

Briceño examined in his paper the extent to which 'strategic regionalism' has influenced the creation of NAFTA and MERCOSUR and points to some differences.[25] 'Strategic regionalism' is understood as state-market-led regionalism promoted by nation-states and multinational firms.[26]

In his view, NAFTA is an alliance established between the United States and the multinational firms. The US multinationals were the key actors in the design of the strategic regionalism, because internationally oriented economic sectors lobbied the US government to foster policies to expand their presence in overseas markets.[27] In the case of MERCOSUR, it was Brazil which played a role in the design of a convergence of interests between Brazil and Argentina. However, Brazil rejected participation in a North–South strategic regionalist initiative.

Finally, Botto shows that in sequential regional integration processes, earlier processes influence the course of later processes.[28] According to her, the European Union played a crucial role in the definition of the integration model in MERCOSUR, especially through its support for epistemic communities with influence in governmental circles in Brazil and Argentina.

V Internal Structural Asymmetries

There is no consensus in the literature on the role played by internal asymmetries in the development of regional cooperation and integration. Whereas internal asymmetries skew the distribution of gains (and costs), it may also provide a basis for regional leadership, capable of steering the regional integration process.[29]

In a paper by Fabbrini, it was suggested that the degree of symmetry in terms of economic power and trade capability between the members of a regional organisation can explain the institutional differences between regional organisations.[30] Fabbrini compared ASEAN, Asia-Pacific Economic Cooperation (APEC), NAFTA, MERCOSUR and the European Union. He differentiated between a hierarchical and a horizontal structure of integration.

NAFTA and MERCOSUR represent a hierarchical model of integration. They are both homogeneous regional organisations in terms of the political systems of their members,

[25] J Briceño Ruíz, 'The Strategic and Societal Interactions in the New Regionalism: Comparing the EU, NAFTA and Mercosur', paper presented at the ISA 49th Annual Convention on Bridging Multiple Divides, San Francisco, 2008.

[26] Ibid 4.

[27] Ibid 10. On the role of multinational companies in the political economy of NAFTA, see also P De Lombaerde, 'La economía política del ingreso de Canadá al tratado de libre comercio de América del Norte (NAFTA)' in P De Lombaerde (ed), *Integración asimétrica y convergencia económica en las Américas* (Bogotá, Universidad Nacional de Colombia/Antropos, 2002).

[28] M Botto, 'The Role of Epistemic Communities in the "Makability" of MERCOSUR' in P De Lombaerde and M Schulz (eds), *The EU and World Regionalism: the Makability of Regions in the 21st Century* (Aldershot, Ashgate, 2009).

[29] P De Lombaerde, 'Integración asimétrica' in P De Lombaerde (ed), *Integración asimétrica y convergencia económica en las Américas* (Bogotá, Universidad Nacional de Colombia/Antropos, 2002).

[30] S Fabbrini, 'European Regionalism in a Comparative Perspective: Features and Limits of the New Medievalist Approach to World Order', paper submitted at the third Pan Hellenic Conference on International Political Economy, Charokopeion University, Athens, 2008.

but quite asymmetrical in terms of power relations between them.[31] They represent a hierarchical model of integration because, in the case of NAFTA and MERCOSUR, there is a dominant power, the United States and Brazil, respectively.[32] This stands in contrast with the horizontal structure of ASEAN and APEC, where no dominant power is present and where the member states are not all democratic.[33] Also, no compliance mechanisms or supranational institutions have been established and there is a lack of an Asian identity and support for working together.[34] The European Union also has a horizontal structure, but different from that of ASEAN and APEC. The European Union has a horizontal structure because of its decision-making power shared by a plurality of institutions.[35] The asymmetrical relationship among the MERCOSUR countries and the hierarchical structure of MERCOSUR is seen by Fabbrini as an obstacle to the creation of supranational authority.[36]

In another work by Mukhametdinov, a comparison is made between MERCOSUR and the European Union.[37] Mukhametdinov is also convinced about the sharp asymmetry within MERCOSUR due to the absolute predominance of Brazil, which is unfavourable for policy harmonisation. The asymmetry reduces the strength of the institutional cohesion of the regional integration process. In contrast, the European countries have more equal sizes and the balance of power is more even, which allows greater scope for mutually acceptable compromises.[38]

Hardt added another difference between the European Union and MERCOSUR with regard to asymmetry, the difference in political homogeneity between the two blocs.[39] The EU member states have similar forms of government, with the same political structures and shared values and norms. This made the process of integration much easier between the European states compared to the integration between the MERCOSUR Member States. Within MERCOSUR, there has been much political disunity and there is a difference in the values and norms they are seeking to promote.[40] The accession of Venezuela is likely to further accentuate these differences.

On the other hand, however, Feng and Genna argue that the democratisation in Uruguay and Paraguay led the way for their membership.[41] In their reading, homogeneity of domestic economic and political institutions and the process of regional integration

[31] Ibid 18.
[32] Ibid 18–19.
[33] Malamud, 'Jefes de gobierno y procesos de integración regional' (n 24) 14.
[34] Fabbrini, 'European Regionalism in a Comparative Perspective' (n 32) 16.
[35] Ibid 8.
[36] Ibid 19.
[37] M Mukhametdinow, 'Regional Cohesion, Mercosur and the European Union: Variation among the Factors of Regional Cohesion' (2007) 42 *Cooperation and Conflict* 212.
[38] Ibid 213. See also J Grieco, 'Systemic Sources of Variation in Regional Institutionalisation in Western Europe, East Asia and the Americas' in E Mansfield and H Milner, *The Political Economy of Regionalism* (New York, Colombia University, 1997) on regional hegemonic leadership in NAFTA, MERCOSUR and the European Union.
[39] Hardt, 'A Comparative Analysis of Integration Efforts in Europe and South America' (n 11) 19.
[40] Ibid 20.
[41] Y Feng and GM Genna, 'Regional Integration and Domestic Institutional Homogeneity: a Comparative Analysis of Regional Integration in the Americas, Pacific Asia and Western Europe' (2003) 2 *Review of International Political Economy* 278.

reinforce each other. In other words, if domestic institutions remain heterogeneous between member states during the process of regional integration, the likelihood of further integration will be reduced.[42]

VI Cultural Homogeneity or Heterogeneity

In order to explain the dynamics of regional integration, De Lombaerde and Pineda Castaño gave the concept of cultural differences a more operational character.[43] They calculated indicators of cultural homogeneity and heterogeneity on the basis of bilateral cultural differences. For this operationalisation, they took the empirical results of Geert Hofstede as a starting point.[44] Hofstede identified and validated four fundamental dimensions of national cultural differences. The scores on the four dimensions were obtained for 50 countries and three regions on the basis of questionnaires.

The first dimension, power distance, is the extent to which the less powerful members of organisations and institutions (such as the family) accept and expect that power is distributed unequally. The degree to which individuals are integrated into groups is the second dimension and can be individualistic or collectivist. In the case of individualism, the ties between the individuals in societies are loose. On the collectivist side, there are societies in which people from birth are integrated into strong families and groups. Another fundamental issue for any society is related to the gender distribution of roles. Therefore, Hofstede calls this third dimension masculinity versus its opposite, femininity. The last dimension, uncertainty avoidance, indicates to what extent a culture programmes its members to feel either uncomfortable or comfortable in unstructured situations (situations that are unknown, surprising or different from usual).

De Lombaerde and Pineda regrouped the data for the most important regional integration processes in the world.[45] In general, they concluded that the Andean Community, the G-3 and MERCOSUR have the highest level of cultural homogeneity. Within NAFTA and the European Union there are significant cultural distances between the Member States. The European Union is the regional integration process with the highest level of bilateral cultural distances. In other words, the European Union has the highest level of heterogeneity.[46]

[42] Ibid 284.

[43] P De Lombaerde and G Pineda, 'Diferencias culturales e integración económica regional. Hacia una operacionalización de los conceptos' in P De Lombaerde (ed), *Integración asimétrica y convergencia económica en las Américas* (Bogotá, Universidad Nacional de Colombia/Antropos) 143.

[44] G Hofstede, *Culture's Consequences, Comparing Values, Behaviors, Institutions, and Organizations across Nations* (Thousand Oaks, CA, Sage Publications, 2001); G Hofstede and G-J Hofstede, *Cultures and Organizations: Software of the Mind* (New York, McGraw-Hill, 2004).

[45] De Lombaerde and Pineda, 'Diferencias culturales e integración económica regional' (n 45) 143.

[46] Ibid 145–46.

VII Institutions Compared

The most prominent difference singled out by academics when they compare institutional structures of regional integration schemes is related to the difference between supranational and intergovernmental structures. It is observed then that as opposed to the supranational structure of the European Union, MERCOSUR is an association of states with only an intergovernmental character. It has no executive authority and all the institutions are intergovernmental.[47]

In contrast, the Andean Pact established two main institutions; the Commission and the Junta, with respective majority-rule voting and binding supranational authority. Politically, the institutional structure of the Andean Community is broader and deeper than any other in Latin America, as it has indeed been since its very origins. It is also the second region in the world according to the level of formal institutionalisation, after the European Union. The process of institutional development of the CACM has been cumulative and non-centralised and the institutions did not emerge as a coherent system, but were built through disparate stop-and-go processes.[48]

Malamud compared NAFTA's and ASEAN's institutional structure with the Latin American cases. ASEAN established an intergovernmental mechanism, with the foreign ministers taking the decisions.[49] In the NAFTA integration process, the structure, which is also intergovernmental, and evolution depend mostly on the United States.

Malamud and de Sousa made a comparative analysis of five regional parliaments: four Latin American cases and the European Parliament.[50] The main differences between the Latin American parliaments and the European Parliament were related to institutional development due to the maturity gap.[51] They also noticed a wide disparity regarding the level of integration; while the European Union established a common market, none of the Latin American parliaments have yet reached that level. Besides that, there was also a difference in regimes, the European countries having parliamentary or semi-parliamentary regimes, whereas all the Latin American countries have presidential ones. More specifically, the Parliament of MERCOSUR was the only parliament that took decisions by consensus. Another unique characteristic of MERCOSUR was the creation of ad hoc committees.[52] All the other parliaments have standing committees.

Vázquez provides a comparative framework for understanding the new political and institutional configurations that are emerging in the European Union and MERCOSUR.[53] To make this comparison, Vazquez concentrates on three topics. First, the type of political and institutional construction is compared. Within the European Union, there are tensions between supranational and intergovernmental issues that lead to a situation in

[47] A Malamud, 'Regional Integration in Latin America: Comparative Theories and Institutions' (2004) 44 *Sociologia. Problemas e Práticas* 135.

[48] Ibid.

[49] Ibid 14.

[50] A Malamud and L de Sousa, 'Regional Parliaments in Europe and Latin America: Between Empowerment and Irrelevance' in A Ribeiro Hoffmann and A van der Vleuten (eds), *Closing or Widening the Gap? Legitimacy and Democracy in Regional International Organizations* (Aldershot, Ashgate, 2007).

[51] Ibid 98.

[52] Ibid 96.

[53] M Vázquez, *The Parliamentary Dimension of Regional Integration: a Comparison of the European Union and MERCOSUR*, CIES E-Working Paper 2 (2005).

which the decision-making powers are variously distributed among the Union's institutions. For MERCOSUR, the situation is different; MERCOSUR is a combination of presidential diplomacy with an intergovernmental institutional and legal architecture.

The second comparison made by Vázquez concerns the characteristics of the relationship between the executive and the legislative branches at multiples levels.[54] In the European Union, the division between executive and legislative power is diffuse, because the European Commission, which is the executive institution, shares its power with the Council of Ministers, which is the main element in the community legislative power. In addition, the distribution of power between the institutions depends on this issue. These two considerations limit the power of the Commission and the Parliament, two supranational institutions. In an intergovernmental structure, as that in place in MERCOSUR, the members of the decision-making bodies (CCM, CMG and the MTC) are made up of members of the national executive branches. When the integration bodies have the ability to create binding rules for Member States, the competencies of the national parliaments will be transferred to the regional level. Also the MERCOSUR Joint Parliamentary Commission (JMC)'s performance is limited because of the treaties. This means that representation in MERCOSUR is limited to the executive issues. The last part of the comparison made by Vázquez focuses on the parliamentary dimension of the two integration processes.[55] In the European Union, the representation of the popular will is important because decisions are made more and more at the regional level. In the case of MERCOSUR, there is no representation of the popular will at the regional level. In addition, the JPC, the institution that represents the will of the parliaments of Member States, does not have control, legislative, creative or co-decision power.

In a recent study, Filadoro compared the General Secretariat of the Andean Community (SGCAN) with the Secretariat of MERCOSUR.[56] He compared the budget, the functions, the development of rules, and the production of documents of the two Secretariats. While the MERCOSUR Secretariat had a budget of approximately US$1 million and a staff of 26 officials, the resources of SGCAN were based on a budget of approximately US$7 million and had a staff of 180 officials.[57]

Filadoro considers the MERCOSUR Secretariat, which has administrative and technical responsibility, as a 'weak' Secretariat, while SGCAN, with its administrative, technical, propositional and executive functions, is considered to be a 'strong' Secretariat.[58] MERCOSUR does not have the capacity to intervene nor the power to propose, while SGCAN participated more actively in the decision-making process at the regional level because it has the power to propose and the capacity to be active during the meetings.[59] The MERCOSUR Secretariat only participates indirectly, by providing administrative support, in the dispute settlement process of MERCOSUR, while SGCAN has a more visible participation because it shares the administrative tasks with the Court of CAN and is active within the dispute settlement process.[60]

[54] Ibid 16.
[55] Ibid 17.
[56] MJ Filadoro, 'Incidencia de las Secretarías del Mercosur y de la CAN en los respectivos procesos de integración regional', UNU-CRIS Working Papers 10 (2009).
[57] Ibid 8.
[58] Ibid 9–10.
[59] Ibid 87.
[60] Ibid 88.

Filadoro also compared the production of documents by the two Secretariats. In the period between 2003 and 2006, SGCAN published more documents than the MERCOSUR Secretariat (629 against only 280). The MERCOSUR Secretariat covered relatively more institutional subjects than SGCAN, which focused more on specific subjects, such as technical information, controls of legal consistency, semiannual reports, training programmes and documents of joint work with other international organisations.[61] They both received technical support for these subjects. Both the MERCOSUR Secretariat and SGCAN dealt with the subject of the establishment of a customs union in a significant number of their documents, but in both cases this objective was limited by politics.[62] Another comparison Filadoro makes is the difference in the development of rules of the two Secretariats. In CAN, there was a greater development of rules than in MERCOSUR in the same period.[63] In the case of CAN, the institutions with decision-making capacity created a greater number of rules on a greater diversity of themes, while within MERCOSUR fewer rules were developed on a lesser number of subjects.[64]

In spite of the fact that there are differences in the development of the institutional mechanisms of MERCOSUR and CAN, there are also similarities. The two Secretariats are similar in their particular competences with reference to the role that the two organs play in the incorporation and publication of the rules. Both Secretariats are formed by independent officials of the member states, and have the objective of identifying the common interest of the integration process.[65] The relation of the two Secretariats with their respective member states, and with the institutions with decision-making capacity in the process of integration, is different in the two cases. The positions of the member states with respect to the institutionalisation of the integration process and the establishment of a Secretariat are heterogeneous, but no state has voted against such establishment.[66] In MERCOSUR, the smaller Member States offered greater support for the development of a Secretariat with ample functions, whereas in the Andean Community, the member states with a relatively greater size were greater supporters of the Secretariat.[67] In this regard, the formal and functional limitations of the MERCOSUR Secretariat are consistent with the positions of the large states, which support it but prefer not to expand its powers.[68]

The volume edited by Bowles *et al* comprises a collection of chapters by area specialists dedicated to the relation between regions and globalisation.[69] In the concluding chapter by Bowles and Veltmeyer, the chapter on South America by Vizentini was put into comparative perspective.[70] A number of commonalities between MERCOSUR and other regions were sketched. Most regions outside North America and Western Europe were

[61] Ibid 57.
[62] Ibid 57, 84.
[63] Ibid 45.
[64] Ibid 46.
[65] Ibid 37.
[66] Ibid 83.
[67] Ibid 84.
[68] Ibid 88.
[69] P Bowles, H Veltmeyer, S Cornelissen, N Invernizzi and K-L Tang, *Regional Perspectives on Globalization* (London, Palgrave Macmillan, 2007).
[70] P Bowles and H Veltmeyer, 'The Lexicon of Globalization: Comparative Regional Perspectives' in P Bowles, H Veltmeyer, S Cornelissen, N Invernizzi and K-L Tang, *Regional Perspectives on Globalization* (London, Palgrave Macmillan, 2007); P Vizentini, 'The Crisis of Neoliberal Globalization: a Perspective from South America' in P Bowles, H Veltmeyer, S Cornelissen, N Invernizzi and K-L Tang, *Regional Perspectives on Globalization* (London, Palgrave Macmillan, 2007).

considered to be experiencing a neo-liberal type of globalisation brought about by external actors such as international finance institutions or Western powers.[71] MERCOSUR was identified as a regional integration process similar to most in Africa and Asia, which aim to enable a deeper integration into the world economy. However, MERCOSUR at the same time resembles the European type, as it wishes to retain regional autonomy, especially vis-à-vis continental endeavours by the United States.[72] While, in other parts of the world, the region corresponds to a regional integration process or vice versa, the various projects in play beyond MERCOSUR, such as FTAA and ALBA (Alternativa Bolivariana paras las Américas), contribute to a less clear-cut scenario.[73] Although similar neo-liberal policies and international institutions have impacted upon most of the developing world, in South America both the rapidity and depth of the economic transition and the strength of popular resistance have been manifested more forcefully than in other regions.[74]

Finally, Bélanger compares the incompleteness of NAFTA and MERCOSUR.[75] Both are integration schemes between asymmetrical powers, but have opposite models. The NAFTA treaty is a very unique combination of precision and comprehensiveness with minimal governance mechanisms.[76] MERCOSUR, in contrast, has a low degree of completeness and highly developed organs empowered with secondary ruling authority.[77]

VIII The Social Construction Of Regional Integration

Duina offers a systematic comparative analysis of regional market building across the world.[78] In his book *The Social Construction of Free Trade: the European Union, NAFTA and MERCOSUR*, Duina tries to demonstrate that market building is a process of social construction.[79] The focus of the book is on two major areas of difference among regional trade agreements (RTAs). The first difference concerns the legal system. In any market, sustainable buying and selling requires that participants share some basic understanding of the world. Standardisation is the best process to achieve this, and therefore definitions and normative viewpoints about the world must be brought into alignment. The primary tool for standardisation at the regional level has been law.[80] The second claim in Duina's book concerns the responses of societal organisation to regional organisation. Different interest groups, businesses and state units develop regional structures and programmes in different RTAs.[81]

[71] Bowles and Veltmeyer, 'The Lexicon of Globalization' (n 72) 208.
[72] Ibid 210.
[73] Ibid 213.
[74] Ibid 214.
[75] L Bélanger, 'The Ex Post Politics of Trade Agreements: NAFTA, MERCOSUR and WTO Compared', paper presented at the ISA 49th Annual Convention on Bridging Multiple Divides, San Francisco, 2008.
[76] Ibid 14.
[77] Ibid 15.
[78] FG Duina, *The Social Construction of Free Trade* (Princeton, NJ, Princeton University Press, 2006).
[79] See also P De Lombaerde, 'Book Review of Duina's *The Social Construction of Free Trade: The European Union, NAFTA and MERCOSUR*' (2007) 1 *Journal of Common Market Studies* 221.
[80] Duina, *The Social Construction of Free Trade* (n 80) 4.
[81] Ibid 5.

The European Union, NAFTA and MERCOSUR are taken as case studies for the comparison of these two areas of difference, because they are the three most important and best functioning RTAs in existence.[82] Duina observes and tries to explain why differences among the European Union, NAFTA and MERCOSUR occur. A first central question in Duina's book is: 'How have officials from the EU, MERCOSUR and NAFTA addressed the problem of "cognitive dissonance" that they inevitably created with the rapid imposition of markets onto their very diverse populations?'. Duina identifies a difference between NAFTA, on the one hand, and the European Union and MERCOSUR, on the other hand.[83] NAFTA officials have adopted a minimalist approach, relying explicitly on mutual recognition, standards set by other organisations, and a reactive conflict-resolution system. Officials from the European Union and MERCOSUR, in contrast, have standardised much of the world; they have developed rich cognitive guidebooks to reality.[84]

Duina has a constructivist explanation for this observed difference in standardisation. The majority of NAFTA officials come from the United States and Canada, which are countries with strong common law traditions. Only Mexico has a civil law tradition. If NAFTA were to impose an extended regional legal system on the United States and Canada, they would have to make a major transformation of their systems. The choice of the NAFTA officials for not implementing an extended regional legal system was widely supported by powerful businesses and other groups in the region.[85] In contrast to NAFTA, officials in the European Union and MERCOSUR have operated instead within rich civil law traditions. Rich national legal systems presented serious barriers to trade, which could be removed through the harmonisation of legal systems. The choice for a rich regional legal system was supported by a variety of regional groups in the European Union and MERCOSUR.

The second central question refers to the similarity of targets and the content of standardising notions and is answered by Duina by focusing on three subject areas within the realm of economics: the rights of women in the workplace, dairy products, and labour rights.[86] Concerning the rights of women in the workplace, EU officials have been quite active. Women made impressive gains in most EU member states in the 1960s and 1970s, which can explain why EU officials are working under pressure from powerful women's groups. In contrast to the European Union, in MERCOSUR and NAFTA the world of working women remains defined and regulated at the national level. In the case of MERCOSUR, this can be explained by the lack of women's groups in the Member States and by the underrepresentation of women at the regional level. In the case of NAFTA, women enjoyed a more favourable legal history in the United States, whereas women's groups proved largely uninterested in shaping NAFTA in Mexico.

The second subject area that Duina explores is the comparison of the treatment of dairy products in the three RTAs. MERCOSUR officials have heavily standardised the world of dairy products. An explanation for the route to standardisation of products and processes is the liberalisation of the agricultural sector in the Member States during the 1980s and

[82] Ibid 7.
[83] Ibid 88.
[84] Ibid.
[85] Ibid 99.
[86] Ibid 101.

1990s which prepared companies for participation in the international economy. In the case of the European Union and NAFTA, steps have been taken not to standardise many dairy products. In the European Union, this is because powerful dairy producers mobilised, with the help of governmental officials, to ensure that Brussels would grant them protection. In the case of NAFTA, dairy products were removed from the negotiations because Canada did not want to move towards open trade, unlike the United States and Mexico.

The third and last subject of Duina's study is the differences in labour rights in the three regional integration processes. Officials in all three areas endowed workers with impressive rights; yet, they have differed in their understanding of what those rights are. In both NAFTA and MERCOSUR, the rights to strike and form unions are recognised at the regional level. Principles were already in place in all the Member States, under pressure from the unions which made it easier to translate them into the regional level. In the case of MERCOSUR, this was particularly on the initiative of Argentina and, to a lesser extent, Brazil. Exceptions to labour rights in NAFTA concern the benefits for unemployed migrant workers, because the labour movement is largely protectionist for fear of massive migration from Mexico into the United States. On the other hand, migrant workers in the European Union enjoy more extensive rights than those in NAFTA and MERCOSUR, especially in the case of unemployment benefits. But officials in the European Union have not recognised the rights to strike and form unions because they were opposed by the British, who lacked national legislation on the matter. Duina concludes that the basic legal architecture of RTAs varies significantly, in ways that ensure continuity with existing realities in the member states.[87]

Another study adopting a social constructivist perspective is Min-hyung's.[88] The author compared the link between the changes in sector-specific policy and elite learning of member states of the European Union and MERCOSUR. In the European case, the deepening process of European integration facilitates the emergence of new actors as well as new goals in existing institutions. Min-hyung uses the French agricultural policy to demonstrate the policy change via domestic coalition change.[89] European member states remain strong, but their power has been increasingly circumscribed by the integration process. In contrast with the European integration process, there has not been any emergence of a 'new policy coalition' in Brazil associated with the deepening process of MERCOSUR integration.[90] Within MERCOSUR, Brazil's strong industrial policy is not limited by the constraints of the integration process.[91] Also, Brazil's highly protected automobile sector policy demonstrates that there is no shift in state policy preferences closely linked to South American integration. More generally, Min-hyung concludes that a high level of institutionalisation is necessary for elite learning to take place. In contrast to the European Union, in the case of MERCOSUR there is no elite learning because of the absence of independent supranational institutions.

[87] Ibid 100, 147.

[88] K Min-hyung, 'Regional Integration and the Changes in State Preferences: the EU and MERCOSUR Compared', paper presented at European Union Studies Association (EUSA) Biennial Conference, Montréal, 2007.

[89] Ibid 15.

[90] Ibid 17.

[91] Ibid 16.

In a different study, Borrás and Kluth concentrated on the question of how integration is addressed in times of crisis in the European Union and in MERCOSUR, specifically in the area of monetary cooperation.[92] They argued that the persistence of these institutions despite temporary financial detriments to some member states can be explained by the incorporation of regional ideals and norms by national elites. Even if regional monetary governance starts to lack reciprocity and issue-linkages, it is not being abandoned easily, if the regional framework is deeply embedded within the elites.[93]

IX Institutionalised Economic Integration

Treaty texts and other official documents of regional organisations and schemes signal their expressed ambitions. While it makes sense to compare these ambitions, it is also true that there might be a gap between expressed ambitions and implemented (regional) policies. Dorrucci *et al* tackled this issue and developed a method to assess the implementation of policies through a detailed system of scores, based on the Balassa framework.[94] Using monthly data on policy implementation for MERCOSUR and the European Union, and allowing for flexibility with respect to sequencing and parallel developments, they attached scores to these processes for the period 1957–2001 (on a scale of 0–100). Their overall conclusion is that the score for MERCOSUR in 2001 is comparable to the European score at the beginning of the 1960s. Although MERCOSUR scores highly as a free trade area, its overall score is reduced because of the lists of exclusions, reversibility of the commitments, and problems of compliance with common rules (because of the intergovernmental nature of MERCOSUR).[95] Dorrucci *et al* also shed light on the interaction between institutional developments and economic integration (see section on the conditions for monetary integration). They find a two-way causal interaction, sometimes the market taking the lead, sometimes the institutions taking the lead. The 'lesson' they draw for MERCOSUR is that, given the relatively low levels of institutionalised integration in MERCOSUR, there is a potential to stimulate 'real' economic integration through regionalisation policies.

A similar approach is followed by Hufbauer and Schott, later updated and expanded by Feng and Genna.[96] Their 'integration achievement scores' are largely equivalent to

[92] S Borrás and M Kluth, 'Integration in Times of Instability: Exchange Rate and Monetary co-operation in Mercosur and the EU' in F Laursen (ed), *Comparative Regional Integration: Theoretical Perspectives* (Aldershot, Ashgate, 2003).

[93] Ibid 223–24.

[94] E Dorrucci, S Firpo, M Fratzscher and FP Mongelli, *European Integration: What Lessons for Other Regions? The Case of Latin America*, ECB Working Paper 185 (2002); BA Balassa, *The Theory of Economic Integration* (Homewood, IL, Irwin, 1961). On the methodological aspects of regional integration indicators, see, eg P De Lombaerde, *Assessment and Measurement of Regional Integration* (London, Routledge, 2006) and P De Lombaerde, E Dorrucci, GM Genna and FP Mongelli, 'Quantitative Monitoring and Comparison of Regional Integration Processes' in A Kösler and M Zimmek (eds), *Elements of Regional Integration: a Multidimensional Approach* (Baden-Baden, Nomos, 2008).

[95] Dorrucci *et al*, *European Integration: What Lessons for Other Regions* (n 96) 10–12.

[96] GC Hufbauer and JJ Schott, *Western Hemisphere Economic Integration* (Washington, DC, Institute for International Economics, 1994); Feng and Genna, 'Regional Integration and Domestic Institutional Homogeneity' (n 43); Y Feng and GM Genna, 'Domestic Institutional Convergence and Regional Integration: Further Evidence' in ID Salavrakos (ed), *Aspects of Globalization, Regionalisation and Business* (Athens, Atiner, 2004);

Dorrucci *et al*'s institutional integration. Their conceptual framework is also based on the Balassa framework, but it is broken down into six aspects: (1) free trade in goods and services; (2) free movement of capital; (3) free movement of labour; (4) supranational institutions; (5) monetary coordination; and (6) fiscal coordination. Simpler five-level scores are used to assess each aspect. Feng and Genna conclude that, at the beginning of the twenty-first century, MERCOSUR shows levels of integration achievement that are lower than the European Union, CARICOM, and (surprisingly) CAN and NAFTA, (also surprisingly) comparable to ECOWAS (Economic Community of West African States), but higher than CACM/SICA and ASEAN.

Malamud established three conditions for the evolution of regional integration: demand by transnational actors, supply by regional leaders, and a subsequent institutionalisation to stabilise the process.[97] He applies this set of conditions to MERCOSUR and draws comparative conclusions with the European Union. The main difference detected is the degree of fulfilment of these conditions. In the European Union, both demand and supply was provided by transnational actors, national governments and the EU institutions, while in MERCOSUR, actors other than national political elites remained weak.[98] As for institutionalisation, the replication of European regional bodies has not proved successful, resulting in a standstill in progress, mainly due to a lack of implementation.[99] Malamud therefore suggested that, for now, MERCOSUR should concentrate on enabling the enforcement of regional rules rather than on participation issues.[100]

Phillips employed the concept of regional governance in order to analyse the evolution and modification of MERCOSUR in the 1990s.[101] She pointed towards the mutual dynamics between enterprise-led regionalisation and the regionalism project of political elites, and a consequent transformation of the domestic state models.[102] The focus on a regional mode of governance allows for comparisons with other regions such as ASEAN. Phillips suggested that the reshaping of MERCOSUR went away from the early open regionalism that was also present in ASEAN. Regional governance in both regions was mainly relying on informal structures rather than on institutions.[103] However, as opposed to ASEAN, the MERCOSUR project lacked a normative basis that would translate into a convergence of the political economies of the members.[104] While the Asian coherence was troubled by the financial crisis of the late 1990s, the emergence of such commonalities in South America has a priori been hindered by structural differences in commercial and investment necessities, mainly between Brazil and the other members. The dissimilar economic logic and sector composition in the three other members had hindered a convergence towards one common model of regional governance. However, Phillips

Y Feng and GM Genna, 'Measuring Regional Integration', paper presented at the Claremont Regional Integration Workshop with particular reference to Asia, Claremont, 2005.

[97] Malamud, 'Jefes de gobierno y procesos de integración regional' (n 24) 117.
[98] Ibid 127.
[99] Ibid 129.
[100] Ibid 131.
[101] N Philips, 'The Rise and Fall of Open Regionalism? Comparative Reflections on Regional Governance in the Southern Cone of Latin America' (2003) 2 *Third World Quarterly* 217.
[102] Ibid 224, 230.
[103] Ibid 219.
[104] Ibid 222.

detected signs of a transition towards such a model based on market-led regionalisation and a focus on rules and key areas of economic development.[105]

X Regional Policy-Making in Specific Policy Areas

This section reviews comparative analyses of regional policy-making in specific policy areas.

A Democracy and Human Rights

Grugel compares understandings of democracy in the European Union and in MERCOSUR.[106] The author comes to the conclusion that the two regions share a common conceptual understanding of what 'democracy' means and that MERCOSUR elites aspire to European-style democracies. But he also finds a different meaning attached to the concept of democracy in the regions. State actors in MERCOSUR seem less committed to democratic consolidation based on citizenship and social inclusion than the European Union assumes. Local civil society actors, in contrast, do identify with EU understandings of democracy.[107]

Matsushita makes a comparison between NAFTA and MERCOSUR with respect to the relationship between the type of integration and its attitude towards democracy.[108] In general, he concludes that the attitude of policy-makers towards democracy and the difference of institutionalisation between a customs union such as MERCOSUR and a free trade agreement like NAFTA can explain to some extent the difference in the degree of importance attached to democracy. The comparison also shows some similarities between NAFTA and MERCOSUR. In both cases, the presidential initiative for democracy was gradually replaced by the core technical criteria of the bureaucrats. But NAFTA and MERCOSUR understand democracy in a different way. NAFTA produced some democratic effects such as constraints against human rights violations and electoral fraud in Mexico. In the case of MERCOSUR, the purpose was to avoid a *coup d'état* among the Member States, but it did not address the problems of corruption and violation of human rights or freedom. Matsushita concludes that the comparative analysis shows limitations of democracy in the case of MERCOSUR.[109]

Suzuki compared two integrative systems, MERCOSUR and ASEAN, on this point.[110] As an integrative system he understands an 'international institution incorporating economic arrangements with human rights or democratic governance'. He concludes that MERCOSUR's governing elites have constructed a 'hard standards' integrative system with hard human rights standards that are strong enough to deter military coups. But they are

[105] Ibid 231.
[106] J Grugel, 'Democratization and Ideational Diffusion' (2007) 1 *Journal of Common Market Studies* 43.
[107] Ibid 62.
[108] H Matsushita, 'The First Integrated Wave of Regionalism and Democratization in the Americas: a Comparison of NAFTA and MERCOSUR' (2000) 11 *Japanese Journal of American Studies* 25.
[109] Ibid 45.
[110] M Suzuki, 'Regional Economic Systems under Democratic Crises: Comparative Institutional Analysis', paper prepared for the ISA 49th Annual Convention on Bridging Multiple Divides, San Francisco, 2008.

too weak to allow authoritarian power structures to perpetuate. In contrast to MERCOSUR, ASEAN governing elites constructed a 'soft standards' integrative system. This allows ASEAN to use authoritarian tactics to stabilise democratic politics.

B Labour Market Cooperation

Gitterman examines labour regulation in the European Union, NAFTA, MERCOSUR and ASEAN. He explores why nations cooperate on labour standards and accounts for variations in their nature and form.[111] In all the four regions, the conflicts between high and low labour standards nations, and the regional responses, follow a similar pattern.[112] But the regions responded differently to the potential effects of labour cost dumping. The European Union cooperated by harmonising regional employment and labour standards. NAFTA responded by providing oversight and enforcement of existing domestic standards. The MERCOSUR nations agreed to promote core labour principles according to national legislation and practice, as well as collective agreements and conventions. And MERCOSUR has taken further steps towards a 'social commitment', while ASEAN nations agreed only to share information and exchange best practices, largely on human capital issues.

Briceño compares MERCOSUR with NAFTA with respect to 'social regionalism', which is understood as the social demand of civil society for regionalism beyond free trade.[113] NAFTA created a fund to provide assistance to workers in sectors affected by free trade.[114] However, it did not create institutions of regional social rights. In the case of MERCOSUR, a fund was created to promote social cohesion in the region.[115] Besides this, MERCOSUR adopted other measures and regulations, such as the common regulations on pharmaceuticals, some reciprocal social security entitlements and joint health and safety inspections, and created the MERCOSUR Social Institute with the mandate to elaborate regional social policies.[116] However, as in the case of NAFTA, no institution was created to defend regional social rights.

C Cultural Industries Policy

Galperin tried to incorporate the institutional, historical and integration differences into his analysis and examined how these differences help us to understand the different policy outcome in each bloc.[117] The main argument of Galperin is that the NAFTA, the European Union and MERCOSUR represent three distinct ways to reconcile the tension between economics and culture intrinsic to cross-border trade in audio-visual products, and that their different policy outcomes reflect variations in three factors: industrial profile, domestic communication policies and cultural distance.

[111] DP Gitterman, 'European Integration and Labour Market Cooperation: a Comparative Regional Perspective' (2003) 2 *Journal of European Social Policy* 101.
[112] Ibid 115.
[113] Briceño Ruíz, 'The Strategic and Societal Interactions in the New Regionalism' (n 27) 2.
[114] Ibid 17.
[115] Ibid.
[116] Ibid 18.
[117] H Galperin, 'Cultural Industries Policy in Regional Trade Agreements: the Cases of NAFTA, the European Union and MERCOSUR' (1999) 21 *Media, Culture and Society* 628.

D Environmental Problems

Blum examines how NAFTA and MERCOSUR officials approach environmental problems. Blum came to the conclusion that MERCOSUR and NAFTA seek to establish recognised levels of environmental regulations. In MERCOSUR, the coordination of policies, including environmental and economic interests, is referred to as harmonisation. For example, the Special Conference on the Environment (REMA, Reunión Especializada de Medio Ambiente) was originally established to facilitate the harmonisation of environmental regulations across the Member States. In NAFTA, coordination of environmental regulations was a precondition to entry. The process of harmonisation occurred before the agreement was signed.

E Security

The volume edited by Khan represents one of the attempts to bring together a variety of case studies to shed light on the relationship between trade integration and security.[118] The concluding chapter by Brown *et al* addresses this issue in a comparative approach and gives institutional policy recommendations.[119] Their main finding is that trade is only one of many integration variables that contribute to peace and that the relationship between both is mutually enforcing.[120] MERCOSUR is one of the blocs with a noticeable link, as it has moved from providing stability towards fostering common economic interests and thereby reducing the occurrence and possibility of inter-state conflict.[121] However, the authors fail to explain the low level of institutionalisation in MERCOSUR, as their causal variables for developing countries (weak sovereignty, recent military conflicts and poverty) only partly apply to its Member States as opposed to other regions.[122] Although the authors attribute some importance to informal constraints such as a common political culture, they do not consider them sufficient for sustainable integration. They advocate formal and state-led regional governance backed up by institutions.[123] The efforts of MERCOSUR to set up democratic requirements for membership in order to encourage national reforms would be such a case. Moreover, it is argued that regional integration processes aiming for comprehensive trade liberalisation and world market orientation provide the best conditions for stability.[124] Accordingly, MERCOSUR should aim to include the sectors deemed sensitive. To make up for growing disparities, compensation mechanisms like the Fund for Structural Convergence (FOCEM) should be expanded.[125] Moreover, trade integration should be accompanied by cooperation in the area of migration and infrastructure in order to fulfil its potential for stability.[126]

[118] SR Khan (ed), *Regional Trade Integration and Conflict Resolution* (London, Routledge, 2009).

[119] O Brown, M Qobo and A Ruiz-Dana, 'Conclusions: the Role of Regional Trade Integration in Conflict Prevention' in SR Khan (ed), *Regional Trade Integration and Conflict Resolution* (London, Routledge, 2009).

[120] Ibid 234.

[121] Ibid 236.

[122] Ibid 238 *et seq.*

[123] Ibid 242.

[124] Ibid 244.

[125] Ibid 246.

[126] Ibid 247 *et seq.*

XI The 'Success' and Sustainability of Regional Integration

Mattli compared the European experience with experiences in other regions of the world, including MERCOSUR.[127] Mattli emphasises the importance of supply conditions. These are the conditions under which political leaders are willing and able to accommodate demands for functional integration. The first condition for willingness 'depends on the payoff of integration to political leaders'.[128] Political leaders who value political autonomy and political power are unlikely to seek deep levels of integration as long as their economies are successful. This also means that economic difficulties can be seen as a background condition of integration. In other words, regional groups have to seek important gains from integration.

A second supply condition for successful integration which Mattli mentions is the presence of an undisputed leader among the group of countries capable of serving as institutional focal point and willing to act as regional pay-master. This is because coordination problems are more easily solved in the presence of a regional leader.

Supply should match the demand conditions, as these relate to the potential market gains from integration with their mobilising power. Cases where appropriate demand and supply conditions are found are more likely to be successful and sustainable. Figure 9.1[129] combines the two types of conditions, represented by two variables, allowing Mattli to classify the different cases as successful, not successful or intermediate.

Figure 9.1 Outcomes of integration schemes

Potential Market gains from integration	(Uncontested) regional leadership YES	regional leadership NO
Relatively significant	*Highest success rate:* EU NAFTA EFTA (until 1973)	*Intermediate:* EFTA (after 1973) APEC MERCOSUR
Relatively insignificant	*Intermediate:* CACM (until 1969)	*Lowest success rate:* CACM (after 1969) ASEAN ECOWAS LAFTA Andrean Pact Caribbean Community Arab Common Market

The chances of a successful integration process are weakest where none of the conditions are satisfied. The most successful integration processes all satisfy the two conditions. The European Union and NAFTA are considered as successful because they satisfy the two

[127] Mattli, *The Logic of Regional Integration* (n 5).
[128] Ibid.
[129] Based on Mattli, *The Logic of Regional Integration* (n 5) 66.

conditions. With Germany as a regional leader in the European Union and the United States in the case of NAFTA, they both have a good chance of a successful integration. Regional groups in the 'intermediate' cells are more difficult to define. The European Free Trade Association (EFTA) was a successful integration, until the United Kingdom defected to the European Community in 1973. CACM started in this category but this came to an end because the United States had a negative influence as the regional leader, and because of the 'soccer war' between El Salvador and Honduras in 1969. Besides CACM, CAN is one of the weakest integration schemes.

From the 1960s, the (future) Member States of MERCOSUR changed the structure of their economies by means of industrialisation processes, which broadened the scope for mutually beneficial exchanges of goods at the regional level. Mattli situates MERCOSUR in the cell with no regional leader, although Brazil is the dominant economy within MERCOSUR. According to Mattli, this is because Brazil has been reluctant to use its economic and political position to assume active regional leadership. And it is for this reason that the future of MERCOSUR seemed ambiguous to him.[130]

A different approach to sustainability is found in Grieco.[131] He takes neo-functionalism as a theoretical framework and investigates linkages between increasing trade interdependence and regional institution building. The author finds clearer linkages in the European Union and NAFTA than in MERCOSUR, ASEAN and APEC.[132]

Shams used the case studies of three South–South regional integration processes, MERCOSUR, SADC and ECOWAS, to analyse the reasons for their success or lack thereof.[133] He assessed the claim put forward by various economists that argue for the superiority of North–South agreements. His findings suggested that structural factors such as disparities and divergence between the members' economies are not the main obstacles to successful economic integration. In the case of MERCOSUR, Brazil could serve as a driver for economic development while trade diversion has not occurred in a prevailing manner.[134] Instead, Shams identified insufficiently implemented and coordinated economic policies and reforms as the main impediments to dynamic integration.[135] Similar observations also apply to SADC and ECOWAS, leading the author to the conclusion that Southern regional integration processes can achieve similar economic achievements as North–South agreements provided corresponding and coherent economic policies are implemented in all member states.

XII Policy Lessons

Instead of comparisons, some authors contrast perceived successes or deficiencies in other regional integration processes with MERCOSUR so as to draw policy recommendations.

[130] Yet, Brazil has shown increasing willingness to adopt the role of a regional power under the presidencies of Cardoso and Lula. Although this does not include any surrendering of sovereignty, Brazil seems more willing to bear additional costs, especially since the Venezuelan ascendency as regional actor under Chávez.

[131] Grieco, 'Systemic Sources of Variation in Regional Institutionalisation in Western Europe, East Asia and the Americas' (n 40).

[132] Ibid 172–73.

[133] R Shams, 'Regional Integration in Developing Countries: Some Lessons Based on Case Studies', HWWA Discussion Papers 251 (2003).

[134] Ibid 5–6.

[135] Ibid 12–13.

Goldstein and Quenan did not undertake a comprehensive comparison but rather attempted to draw policy-oriented lessons from Latin American experiences for Sub-Saharan regionalism.[136] The authors adopted a favourable stance towards an open regionalism in the absence of feasible multilateral trade liberalisation. Their analysis concentrated on the MERCOSUR process and its economic successes and shortcomings, and emerged as a set of recommendations.[137] According to them, MERCOSUR could serve as a good example as regards its light-weight institutional structure and its initial focusing on facilitation of trade and investment. Issues that have not been addressed properly include overcoming regional disparities and micro-economic reforms, such as in the area of competition.

In a similar way, Sunkel[138] did not deal with MERCOSUR specifically but compared the effect of transnational integration in Asia and Latin America and argued for the emulation of certain industrialisation policies. Hira[139] took a similar stance in pointing out the successes of East Asian industrialisation policies that could be followed in Latin America.

XIII Conditions for Monetary Integration

Monetary integration is (still) not a declared policy objective of the MERCOSUR countries. Given the stark structural differences among the Member State economies and the different economic policy experiments (including the varying degrees of structuralism and neo-liberalism) that have been pursued in the past, this is not really surprising. However, the issue of macro-economic policy coordination is being discussed, and the idea of a common currency has been suggested on various occasions by political leaders and academics.

It has become standard practice to use optimal currency area theory as an analytical framework.[140] Comparative research in this area basically follows two modalities. Some studies compare actual integration schemes with (usually smaller) hypothetical country configurations and investigate which configurations are closer to an 'optimal currency area'. Other studies compare two or more actual integration schemes and evaluate their respective optimal currency area characteristics.

Following the first modality, the convenience of a monetary union in MERCOSUR has been analysed by Fernández Castro.[141] On the basis of the identification of common factors in the national product series in the different countries, the author supported a monetary union between Argentina and Uruguay, but excluding Brazil.[142]

[136] Goldstein and Quenan, 'Regionalism and Development in Latin America' (n 9).

[137] Ibid 63 *et seq.*

[138] Hettne, B, Inotai, A & Sunkel, O, (eds) *Comparing regionalisms: Implications for global development* (Basingstoke, Hampshire, Palgrave, 2001).

[139] Hira, A, *An East Asian model for Latin American success: The new path* (Aldershot, Ashgate, 2007).

[140] See RA Mundell, 'A Theory of Optimum Currency Areas' (1961) 51 *American Economic Review* 657. For an overview of the old and new literature on OCA, see, eg P De Lombaerde, 'Robert A. Mundell y la teoría de las areas monetarias óptimas' (2000) 31 *Cuadernos de Economía* 39.

[141] R Fernández Castro, 'Una evaluación de los costos de una unión monetaria en el Mercosur' (1998) 2 *Revista de economía.*

[142] Because of the accession of Venezuela to MERCOSUR (although still to be ratified), it is also relevant to look at similar studies that included Venezuela in the analysis. See, eg P De Lombaerde, G Carrillo and AM Reyes,

Following the second modality, Dorrucci *et al* used a set of seven variables suggested by the classical optimum currency area (OCA) theory and its more recent developments to compare the OCA characteristics of MERCOSUR and the Euro-zone.[143] The variables included in their analysis were: the synchronisation of the business cycle, convergence of inflation rates, exchange rate variability, trade openness and integration, financial market integration, convergence of interest rates, and income convergence. The Euro-zone, MERCOSUR, CAN, Chile and Mexico were included in the analysis, using data for the 1957–2001 period in the European case, and for 1980–2000 in the Latin American case. Their overall conclusion is that current levels of de facto economic integration in MERCOSUR are close to the corresponding levels for the Euro-zone in the 1960s and 1970s. This puts into perspective the discussion on a common currency in MERCOSUR and underlines also the political components in such decision-making processes.

Another comparative study by Kenen and Meade concentrates on the prospects of the emergence of new monetary unions in the near future.[144] Their expectations with regard to MERCOSUR remain low, as their findings suggest the absence of an optimum currency area. The authors also examine the potential of dollarisation for MERCOSUR. Although, such a step could resolve some economic challenges, the fact that only one-fifth of the external trade is conducted with North America, as well as the low degree of financial dollarisation and the current scepticism of many South American leaders towards the United States, make this option doubtful.[145] The comparative approach taken by Kenen and Meade assesses that other regional integration schemes are equally unlikely to form monetary unions, with the cautious exceptions of ASEAN and ECOWAS. The European currency remains a *sui generis* experience. The general absence of supranationalism, coordinated monetary policies and similar trade patterns in other world regions, including MERCOSUR, impede regional monetary integration on the European model.[146]

Levy-Yeyati and Sturzenegger examined the lessons of the European experience for MERCOSUR.[147] Aside from insufficient OCA conditions, the lack of an anchor country providing monetary and financial credibility, such as Germany within Europe, was identified as a major obstacle to a monetary union in MERCOSUR that would reduce volatile capital flows.[148] To achieve that goal, a currency union would have to include the United States, or the MERCOSUR Member Statess would at least need to embark on full

'Integración monetaria gradual en la CAN y teoría de las áreas monetarias óptimas' in P De Lombaerde (ed), *Integración asimétrica y convergencia económica en las Américas* (Bogotá, Universidad Nacional de Colombia/ Antropos, 2002) and P De Lombaerde, 'Optimum Currency Area Theory and Monetary Integration as a Gradual Process' in W Meeusen and J Villaverde (eds), *Convergence Issues in the European Union* (Cheltenham, Edward Elgar Publishing, 2002), in which it is demonstrated that Venezuela is the number one candidate to form an OCA with its neighbouring economy Colombia, based on factor mobility criteria and indicators based on intrar-egional intra-industry trade. However, if criteria are used that are based on the (similarities of the) structures of trade and production (inspired by PB Kenen, 'The Theory of Optimum Currency Areas' in RA Mundell and AK Swoboda (eds), *Monetary Problems of the International Economy* (Chicago, IL, University of Chicago Press, 1969)), or on the correlation between price shocks, Venezuela comes behind the other Andean countries.

[143] Dorrucci *et al*, *European Integration: What Lessons for Other Regions?* (n 96).

[144] PB Kenen and EE Meade, *Regional Monetary Integration* (Cambridge, Cambridge University Press, 2008).

[145] Ibid 142.

[146] Ibid 180–81.

[147] E Levy-Yeyati and F Sturzenegger, 'Is EMU a Blueprint for Mercosur?' (2000) 110 *Cuadernos de Economía* 63.

[148] Ibid 87.

dollarisation. However, the OCA preconditions for both scenarios are not likely to be more favourable than for a MERCOSUR currency union.[149]

XIV Conclusions

This chapter has presented an overview of comparative analyses of regional integration processes, or certain aspects thereof, in which MERCOSUR appears as one of the comparators. Recognising the potential added value of comparative analysis, while at the same time being aware of the methodological difficulties one is faced with, the following are a number of general conclusions that can be drawn from our meta-study, which allow us to identify a series of distinctive features of MERCOSUR, seen as a regional organisation and a broader process of socio-economic and political transformation at the same time.

(1) Generally speaking, genuine comparisons of MERCOSUR with other regionalisms mainly concentrate on the European Union, followed by regionalisms in the Western hemisphere and ASEAN. The rest of the world is almost absent from comparative approaches. However, edited volumes often try to cover most world regions in individual chapters but only adding a very thin layer of comparative analysis, if any.
(2) Three main factors for the emergence of regional integration processes can be distinguished: security considerations, economic concerns and the existence of willing and capable actors from the public and private sphere. In the case of MERCOSUR, political elites and economic opportunities have been especially conducive to the process.
(3) While the power asymmetries in MERCOSUR remain obvious and obstruct the emergence of supranational governance, the similarities of the political systems enable the reinforcement of regional commonalities.
(4) MERCOSUR shows one of the highest levels of regional cultural homogeneity in the world. However, whereas it is certainly true that this offers opportunities for the building of regional policies, it should be acknowledged that it is apparently not a *conditio sine qua non* for regional integration.
(5) The differences in the nature of regional governance in MERCOSUR seem to stem largely from the prevalent political culture and the cooperation between presidential regimes. As a consequence, the Secretariat remains relatively weak, while the parliaments are only partly included in the integration process. The dominance of presidentialism over technocracy can accelerate efforts in priority areas but impedes a comprehensive and sustainable integration.
(6) Overall, it seems that the identification of national economic and political elites with MERCOSUR plays a vital role in maintaining the institution as the main point of reference outside their nation. At the same time, the regional norm has played a reduced role for civil society actors. This phenomenon is articulated even more clearly in South America than in other regions due to a history of over 150 years of integration intentions and projects, many of which have failed, save for fortifying the

[149] Ibid 94.

ideal of regionalism with a strong endemic pathos prevailing in the elite discourse. More generally, the dominant composition and habits of the elites determine to a certain degree the priorities and conception of the regional project. This helps to explain some differences in MERCOSUR vis-à-vis other schemes and the reconfiguration within MERCOSUR itself in the course of elite changes.

(7) Generally, an assessment of the actual integration of the MERCOSUR region requires a focus that goes beyond the mere formal institutions. The dynamics of regionalisation driven by private actors has to be accounted for in an adequate way so as to grasp the realities of economic integration.

(8) By and large, comprehensive or dynamic indicators for success of regional integration remain scarce and largely driven by normative assumptions of what is seen as desirable by the author or the regional elites. Moreover, the danger of Euro-centrism is still prevalent and the necessity to go beyond trade figures is evident.

(9) When assessing the relative 'success' of regional integration initiatives, the different approaches reflect certain given definitions of success. While the European Union remains the uncontested but unattainable benchmark, the economic and political 'success' of MERCOSUR should probably be ranked at an intermediate position within the spectrum of regional integration initiatives.

(10) On the whole, the economic viability of regional monetary integration seems doubtful for most of the world, including MERCOSUR. However, political determination could improve the likelihood of such prospects. If financial crises lead elites to emphasise the necessity of closer monetary cooperation so as to reduce vulnerability, as has been observed in MERCOSUR in 2008 and 2009, arguments about complementarities and convergence become less important.

10

The Law of MERCOSUR and International Law: The Struggle for Independence

MARTHA LUCÍA OLIVAR JIMENEZ*

I Introduction

The integrationist experience in the Southern Cone arrives at its 90th anniversary amidst a dominant feeling of scepticism about its achievements and its future. In the words of one of the greatest specialists in Latin American integration, Professor Félix Peña, 'the dissatisfaction with the situation of MERCOSUR in the present time is evident. It is reflected in functionalist behaviours in scenarios which seem to neither contribute to nor solve existing problems, nor offer functional options for preserving its political and economic value'. According to Peña, there are three behaviours that require modification: an end to the current inertia in MERCOSUR's functioning caused by a 'discourse that is losing credibility among its recipients'; a reversal of the experience that is transforming the 'customs union' into a 'free trade zone'; and, finally, the prevention of the process of 'dilution', represented in the rise of parallel mechanisms which dilute MERCOSUR's effectiveness.[1]

It is recognised that the objectives proposed by the founding Treaties have not been achieved and that the process of completion of the common market is still far from attaining the desired goal. Moreover, each MERCOSUR Member State has, up until now, itself determined how the state should comply with the agreed rules, and/or obstruct the joint agreement.[2] Thus, an observation of intergovernmental organisation and operations, particularly during recent years, reveals how Member States' economic behaviour has

* PhD in European Community Law, Université Robert Schuman (Strasbourg). Adjunct Professor of Public International Law and Director of the Masters' Programme in International Relations of the Federal University of Rio Grande do Sul, Brazil. With thanks to Paloma Correa for the English version of this chapter. An expanded version in Spanish of this text has been published in 18 *Revista Electrónica de Estudios Internacionales* (2009), available at http://www.reei.org/reei18/doc/Articulo_OLIVAR_MarthaLucia.pdf.

[1] Felix Peña, 'El MERCOSUR en el nuevo escenario internacional' in *Diario El Cronista* (3 December 2008), available at www.felixpena.com.ar.

[2] This last issue was raised by Prof Peña, who considers there is still room to strengthen the process by working on three fronts simultaneously: the political and strategic negotiation among the Member States; the equalisation of economic advantages to generate the perception of mutual gains; and the creation of mechanisms to bring together national interests around a common vision. Peña, 'El MERCOSUR en el nuevo escenario internacional' (n 1).

changed and evolved over time. Most importantly, there has recently been a reaffirmation of the need to maintain and deepen the process of development of the subregion and its international strength.

One of the greatest obstacles to the perfection and evolution of the MERCOSUR process, as stressed by some authors, is the inability to provide judicial security that would allow for informed investment decisions, and the exercise of rights established by MERCOSUR's own provisions. This inability arises from the lack of effective rule enforcement and apparent inaction in the face of failures to comply with international obligations.

This situation is partly attributable to Member States' perception of the law of MERCOSUR, and an understanding of the nature of its rules as international public law, as well as the consequences for the judicial systems of Member States. Even though it is accepted that the process of integration and organisation must comply with the principles and rules of the international community, the bloc's originally adopted law and rules have allowed MERCOSUR to present particular characteristics when exercising competencies due to its basis and objectives.[3] The lack of recognition of the problems in this area represents a significant danger to the efficiency of the system and the improvement of the process.

Judicial analysis of the inefficiency of MERCOSUR's norms, and the measures that are being adopted to overcome these obstacles to integration, allows us to observe the rise of a tendency at all levels (doctrine, jurisprudence and institutions) to recognise MERCOSUR's autonomy in relation to public international law. This autonomy is defended (1) in relation to the judicial nature of MERCOSUR law, particularly derivative norms, considering their similarity to international provisions; and also (2) in relation to the hierarchy of MERCOSUR norms in relation to the judicial systems of Member States. We will limit the discussion to the principal judicial instruments, without an in-depth discussion of the institutional changes that have been imposed on MERCOSUR's structure during recent years, intended as means to overcome the above-mentioned problems.[4]

II The Judicial Nature of MERCOSUR Norms: Closeness to International Norms

In the international context, as the Treaty of Asunción is administered by intergovernmental bodies, and more recently has been administered as an intergovernmental organisation, the similarity between the law of MERCOSUR, particularly derivative law, and public international law is undeniable. This is particularly the case since the majority of normative rules must be internalised in the judicial systems of Member States. Since 2000, authorities in the bloc have adopted mechanisms for accelerating the process of incorporation, even considering the modification of these principles.

[3] For more information on this topic, see María Belén Olmos Gíupponi, Chapter 4.
[4] On institutional changes, see Adriana Dreyzin de Klor, Chapter 3.

A Need for Internalisation of Most Norms as a General Rule

The Treaty of Asunción, drafted in general terms on the basis of the principles of pragmatism and flexibility,[5] was silent on several important questions, including the judicial personality of MERCOSUR and the status of decisions of the MERCOSUR administrative bodies. Thus, in Chapter II on Organic Structure, after defining the two bodies with decision-making capacity, as well as their constitution and functioning,[6] article 16 went on to provide: 'During the transitional period, Council of the Common Market and Common Market Group decisions will be decided by consensus with the presence of all State Parties'. Nowhere in the Treaty is there any further reference to the scope of these provisions, nor is provision made as to how Member States are to be bound.

A considerable number of normative instruments were produced by the Council of the Common Market (CCM), as well as by the Common Market Group (CMG), during the transitional period. CCM Decisions concerned a multiplicity of questions; some provisions can be classified as merely administrative (creation of subordinate bodies, such as the ministerial meetings and the MERCOSUR Trade Commission (MTC), establishment of a timetable, and common proceedings and criteria, among others); some could be classified as rules aimed at implementing founding Treaty provisions (the regime of sanctions for forgery of certificates of origin, anti-dumping regulation, the regime of origin, the common external tariff, the common policy on customs on goods); others as rules implementing provisions in international treaties (the Brasília Protocol, Protocol on Cooperation and Jurisdictional Assistance on Civil, Commercial, Labour and Administrative matters, the Recife Agreement on the application of integrated control of boundaries between Member States, the Colonia Agreement on the reciprocal promotion and protection of investments,[7] the Buenos Aires Protocol concerning international jurisdiction for contracts). None of these Decisions determined how national systems[8] would incorporate these rules, leaving Member States plenty of freedom to select the mechanisms to achieve this objective. In Brazil, for example, some provisions were simply published in the Union's Official Diary, while others were incorporated by administrative acts.[9]

Entry into force for treaties adopted by CCM Decisions depended, according to the general system of international law, on the ratification by all or some parties, which implied a previous acceptance by national parliaments. According to the dualist practice, which is adopted in the region, the validity and national enforcement of treaties required an act of internalisation, which, in the case of Brazil, meant the adoption of a Promulgation Decree and its publication in the Union's Official Diary.[10]

[5] On the principles that served as inspiration for the Treaty of Asunción, ie flexibility, gradualism, balance and reciprocity, see José Ângelo Estrella Faria, *O Mercosul: Princípios, finalidade e alcance do Tratado de Assunção* (Brasília, Ministerio de Relacões exteriores, 1993).

[6] The two organisations follow an intergovernmental model, and they are composed of national employees from Member States.

[7] For more on this topic, see Diego Fraga Lerner, Chapter 16.

[8] On this particular issue, see generally Manuel Cienfuegos Mateo, 'La recepción y aplicación de los acuerdos internacionales del Mercosur' (2001) 3 *Revista Electrónica de Estudios Internacionales*, *available at* www.reei.org.

[9] For example, CCM Decision No 2/91 on the regime of sanctions on forgery and origin certificates was simply published in the Official Diary, whereas CMG Resolution No 131/94 concerning rules on the circulation of community vehicles in the territory of the common market was internalised by Decree No 1765/95 and by an Administrative Ruling of the Treasury Department (Portaria do Ministerio da Fazenda) No 16/95.

[10] Such practice has been recognised and accepted by the Supreme Federal Tribunal.

A diversity of incorporation methods may also be observed in relation to CMG Resolutions, which are much more numerous.[11] In the case of the most important provisions, their binding force was apparently accepted by Member States' practice.

The Ouro Preto Protocol, in force from December 1994 as an 'addition to the Asunción Treaty concerning MERCOSUR's institutional structure', outlined the bloc's institutional structure,[12] and institutionalised a practice in the transitional period of adopting declaratory rules on normative issues. Article 2 delegated limited decision-making powers to three bodies and reiterated MERCOSUR's intergovernmental nature. The MTC was created by CCM Decision No 9/94 as an addition to the CCM and CMG. The binding force of the acts adopted by these institutions was recognised by provisions in the Protocol, including article 9 (CCM Decisions), article 15 (CMG Resolutions), article 20 (MTC Directives), and article 42 (norms laid down by decision-making bodies). Article 41 recognised these provisions as judicial sources subordinate to the founding Treaties and the agreements entered into in the context of the Treaties, but no mechanism of legal control was instituted by the Protocol for securing this hierarchical order.

As regards the internal application of MERCOSUR norms, Chapter V (articles 38 and 40) and article 42 should be considered. Article 38 declared state commitments to adopt all necessary measures to safeguard compliance, with norms issued by decision-making bodies in their territories, as well as to inform the Administrative Secretariats of these measures. In the context of a process for regional integration, this implied obligation is fundamental to achieving proposed objectives, even though Treaty provisions leave no doubt concerning the extension of the state's commitment to MERCOSUR and the possibility, at least theoretically, for state responsibility in the case of failure to comply with international obligations.

The binding force of MERCOSUR norms generates for Member States a positive duty to incorporate provisions into their internal judicial systems and a negative duty to refrain from adopting acts that could obstruct the effectiveness of MERCOSUR norms.[13] The duty to incorporate derives from the intergovernmental nature of MERCOSUR decision-making bodies, which approximate the legal instruments to international norms. Article 38 of the Ouro Preto Protocol partially implements article 5 of the Treaty, which constituted the Andean Court of Justice, which provided that 'Member States have a duty to adopt necessary measures for complying with norms that form the Cartagena Agreement judicial system. *They are committed to the duty of refraining from adopting any measure that contravenes such norms, or that obstruct their application in any way*' (emphasis added). If this kind of provision is far from guaranteeing the efficacy of the bloc's secondary law, a similar paragraph could have inspired, in a jurisprudential or legal sense, the adoption of favourable harmonious solutions for the integration of Member States in MERCOSUR.

On the other hand, article 42 from the Protocol says: 'norms emanating from MERCOSUR bodies that are provided by article 2 of this Protocol shall have binding force and shall, when necessary, be incorporated by national judicial systems according to the

[11] The CMG adopted 12 Resolutions in 1991, 67 in 1992, 93 in 199, and 131 in 1994. Most of those were incorporated in Brazil through administrative acts and rulings, especially Portarias.

[12] Chapter II establishes the international legal personality of MERCOSUR, expressly recognising its capacity to conclude headquarter agreements and the capacity to act in the territory of each Member State.

[13] See Alejandro Daniel Perotti, 'El control de legalidad de las normas del MERCOSUR por el juez nacional' (2005) 3 *Derecho del Comercio Internacional, Temas y actualidades* (*DeCitas*, Buenos Aires) at 551–60.

legislative proceedings of each State'. The drafting of norms implied that some provisions adopted by subregional bodies would not require internalisation, without specifying which rules this would be. The definition of instruments that could be within this exception would only be declared by the CCM some years later. The first Decision concerning this issue would not be adopted until June 2000.

The publication in the Official Bulletin of the norms and acts determined by the CCM and CMG was to be carried out by the Secretariat, as provided in article 39. Unlike the EU system, where publication in the Union's Official Diary is strictly related to entry into force of normative provisions, publication in the MERCOSUR Bulletin means no more than the publicity of these provisions.[14] The message from the 'Pro-Tempore' Presidency was sufficiently clear: 'We wish to express our satisfaction with the publication of the first edition of the MERCOSUR Official Bulletin, whose edition was instituted by the Ouro Preto Protocol as a *way of spreading the norms adopted by MERCOSUR bodies*'.[15] Unfortunately, widespread knowledge of norms cannot contribute to judicial security if information concerning the validity of the norms is not easily obtained or, worse, if there is no effective information concerning this issue.

While completion of the common market demands harmony in the application of norms that eliminate internal barriers, article 40 provides for three phases in order to guarantee a simultaneous entry into force of MERCOSUR norms. The first phase requires the adoption by Member States of necessary measures for the incorporation of MERCOSUR acts in the national judicial system and their communication to the MERCOSUR Secretariat. As soon as this body has received this information from a state, it will then communicate the same information to each Member State. Finally, 30 days after this communication, the normative provisions will enter into force within the regional territory. During this period, the respective Official Diaries should contain the information regarding the entry into force of such provisions.

In 2001, Alejandro Pastori analysed the initial practice of states in relation to the incorporation of norms and called attention to its inefficiency. According to Pastori, states complied with incorporation requirements, including the publication and providing of information to the Administrative Secretariat, in a way such that each country incorporated without waiting for others, defeating the principal objective of the process: simultaneous entry into force within national territories.[16] This situation results in a 'premature incorporation'. Two doctrinal positions have arisen concerning the interpretation of article 40. First, supporting the above-mentioned practice, one position considers that national entry into force of MERCOSUR rules should only commence after the 30-day period after communication to the Secretariat of incorporation by all Member States (the norm would be suspended during this period of time). The second position is that each country should follow its internal proceedings, *apart from publication*, and should inform the Secretariat. States would be allowed to publish in their Official Diaries only when the Secretariat

[14] Articles 3 and 4 of the Treaty establishing the Andean Community of Nations (CAN), which creates the Andean Court of Justice, refer to the publication and entry into force of supranational norms.

[15] Secretaría Administrativa del MERCOSUR, *Boletín oficial del MERCOSUR* (Montevidéo, Barreiro y Ramos SA, June 1997) Year 1, No 1, 7. Emphasis added.

[16] Alejandro Pastori, 'Una fuente potencial de conflictos jurídicos: la mala praxis en materia de incorporación de la normativa MERCOSUR' (2001) 20 *Revista de la Universidad de la República de Uruguay* (June–December) 103.

communicated to them as to incorporation by all Member States. After 30 days, the simultaneous entry into force would be guaranteed.

Pastori also stresses how decisions of ad hoc arbitration courts, concerning article 40 had assimilated MERCOSUR norms into the law of MERCOSUR:

> If there is no effective entry into force in each country (even when the incorporation into internal law has been completed), the international entry into force cannot be verified. So, when it is said that the statute that approves the Treaty is a formal provision and is not substantive, we would be dealing with a kind of provision that entails a formality with no substantive content, because it is still waiting for its entry into force.[17]

We follow the opinion of the Uruguayan jurist in considering that premature incorporation contravenes the spirit and objective of the Treaty and its Protocol:

> It seems clear that article 40 does not imply the complete incorporation by State parties in different moments, because it actually tries to avoid it by requiring States to communicate to [the MERCOSUR Secretariat] when they have taken all internal measures for incorporation and are in a position to achieve the last phase: the publication of the norm. When the [MERCOSUR Secretariat] is informed that all Member States have achieved such a position, this body starts the 30-day period in which [Member States] must publish the norm in their Official Diaries. After this period, the norm would enter into force within all territories in a simultaneous way. The difference among the dates for publication of the national norm in respective Official Diaries and simultaneous entry into force is limited to this 30-day period . . . premature incorporation is a bad praxis and represents a failure to comply with Ouro Preto Protocol provisions.[18]

This is still the predominant practice among Member States.

The efficacy of the proceeding is entirely subordinated to state action, and might bring about (as already confirmed by arbitration awards) different situations as regards the internal publication of norms that are not being internationally enforced, but are awaiting internalisation by other states parties. The failure of one Member State to incorporate is sufficient to obstruct enforcement of the norm and avoid its use against the state.[19] The other difficult question to which article 40 does not provide a solution concerns the hierarchy of these norms and the occasional contradiction between present and future national provisions.

The seventh MERCOSUR ad hoc arbitration court has specifically addressed the problem of a lack of incorporation of bloc norms into internal law.[20] When analysing these decisions, Alejandro Perotti stressed the construction of the 'reasonable time limit' formula, based on international law principles, due to the lack of specific deadlines for fulfilling the obligation. The arbitration court stated the following:

[17] *Ibid.*

[18] Ibid.

[19] Alejandro Pastori refers to the third and fourth arbitral awards of April 2000 and May 2001, in which the court refused to apply MERCOSUR norms due to their lack of force despite the incorporation and application of such norms in one of the disputing states. See also Carlos Márcio B. Cozendey, 'Sistema de incorporação das normas MERCOSUL à orden jurídica interna' (2001), available at www.mercosul.gov.br/forum/default.asp; Cienfuegos Mateo, 'La recepción y aplicación de los acuerdos internacionales del Mercosur' (n 8).

[20] Award 2/02 on Obstacles to the Entry of Argentinian Phytosanitary Products into the Brazilian Market; Non-incorporation of CMG Resolutions Nos 48/96, 87/96, 149/96, 156/96 and 71/98 (which bar entry into force in MERCOSUR), issued on 19 April 2002.

> in cases where there is no time limit for fulfilling the obligation, incorporation established in articles 38 and 40 of the Protocol imposes on the interpreter the task of completing and delimiting the normative omissions, giving content to the uncertain judicial concept of a reasonable time limit.

According to Professor Perotti, when managing diverse factors in defining when a state has failed to comply with an obligation,[21] the arbitration court has made it extremely difficult to clarify the general notion: 'the obvious consequence, which is also regrettable, is that when the corresponding norm has not been internalised, the solution should pass through a proceeding of controversy solution'.[22] Instead of being a mechanism for facilitating the application of article 40, the reasonable deadline criteria might make this process even more complex.

It is possible to confirm that, during the transitional period and after the application of the Ouro Preto Protocol, Member States and MERCOSUR institutions understood the norms that were produced during the exercise of their competencies as true provisions of international public law, accepting the natural consequences flowing from this reality. The ineffectiveness of most of the provisions, and the inertia in the integration process, as pointed out by the specialised doctrine, leads institutions to adopt measures in order to solve problematic situations. These attempts have contributed to the perception of the judicial nature of MERCOSUR's normative system.

B Attempts to Improve and Facilitate National Entry into Force

Since 2000, through the attempts of Working Subgroup No 2 to answer 'Institutional Questions', considerable reforms have been made in the bloc's framework to improve the process of adopting decisions to guarantee efficacy within the territories of Member States. Parallel to these reforms, the CCM has adopted several Decisions aimed at regulating Treaty provisions.

CCM Decision No 23/00 on 'MERCOSUR: normative incorporation into State Party judicial systems' was the first of several specific provisions concerning this essential question for the consolidation of each phase of the process, particularly as regards the customs union. Three situations were regulated: (1) the situation concerning norms under article 40's general principle of the Ouro Preto Protocol; (2) the situation concerning rules that do not require internal measures for incorporation; and (3) the situation concerning international treaties adopted in the context of MERCOSUR.

(1) The general rule of incorporation has been reaffirmed in article 1 of CCM Decision No 23/00 in the same terms as in article 42 of the Ouro Preto Protocol. The duty to notify the Secretariat was left to the Common Market National Coordination Council in each state, which must always refer to MERCOSUR norms and to the text of the provisions for national incorporation. The other stages of article 40 Ouro Preto Protocol proceedings

[21] The main elements in the decision, analysed by Perotti, are: (i) whether other states abide by the incorporation; (ii) the importance of the subject matter and the complexity of the internal norms and procedures for implementation and execution; (iii) whether incorporation was done in an adequate, sufficient and complete manner (whether the incorporation was done effectively, ie whether each and every necessary internal requirement for the application of the law of MERCOSUR was followed); (iv) the difficulties states may face in the process of internalisation. Perotti, 'El control de legalidad de las normas del MERCOSUR por el juez nacional' (n 13) at 132.

[22] *Ibid.* 129, 130.

will be observed as soon as all states have made the notification. Under article 4 of CCM Decision No 23/00, the task of elaborating a framework of incorporation of MERCOSUR norms and updating it monthly to keep Member States aware of CMG ordinary sessions is left to the Secretariat. Article 7 refers to the situation in which a normative provision provides a time limit for its incorporation. In this case, such a provision is binding and incorporation must be done in a way that guarantees that proceedings for simultaneous entry into force be respected.

(2) Exceptions to the general rule requiring internal measures for incorporation include MERCOSUR norms that are related principally to organic questions of the bloc, and norms that are related to MERCOSUR external relations.[23] CCM Decision No 23/00 itself is an example of this kind of provision because it is mentioned in article 10.

(3) Article 6 of CCM Decision No 23/00 refers to the adoption of international treaties by Member States, subject to ratification and deposit, in which case, entry into force depends on each instrument according to public international law principles. If there is general agreement as regards the rules applicable to incorporation into internal law, the scope of such international obligations and their hierarchy within the internal context tend to be considered by MERCOSUR arbitration courts as differing in relation to international rules considering the objectives and principles that inspire regional integration.

The final provisions of CCM Decision No 23/00 are dedicated to norms previously approved.[24]

CCM Decision No 55/00 on 'Simultaneous entry into force of MERCOSUR norms' confirmed the Member State's duty to inform the MERCOSUR Secretariat about norms that had already been incorporated into their judicial systems by March 2001, in order to allow a full analysis of the current situation. Such analysis would be partially carried out by Member States and would serve as a basis for the Secretariat and Working Subgroup No 2's further study.

CCM Decision No 20/02 on 'Improving the incorporation system of MERCOSUR norms into State Party judicial systems' was adopted with important objectives: to improve the flexibility and predictability of the incorporation process; to ensure relevant processing of the entry into force of norms adopted by international bodies; to promote compliance by Member States; and, finally, to help to secure more uniformity and consistency in normative incorporation. This CCM instrument created new exceptions to the obligation to incorporate[25] and established a system of appointments within Member States to improve the technical and judicial convenience of adopting norms and to make

[23] CCM Decision No 23/00, art 5 covers two cases: (1) where the instrument refers to issues concerning the internal functioning of MERCOSUR and collectively agreed upon obligations to incorporate; (2) where the content of the norm is contemplated in the national legislation, in which case interested states should notify the Secretariat. This last clause was modified by CCM Decision No 20/02, art 10 for norms adopted after 30 June 2003.

[24] It establishes, eg the priority that issues of incorporation should receive at the meetings of the CMG. It also requires Member States to confirm and correct information given to the Secretariat, and properly identify the instruments that were not incorporated due to the existence of national legislation on the same subject matter.

[25] Three situations are covered: (1) when there is a national norm contemplating, in identical terms, the approved MERCOSUR norm, in which case states should notify the Secretariat within the deadline established for the incorporation of the norm by Ouro Preto Protocol,art 40; the Secretariat will be in charge of notifying other states (CCM Decision No 20/02, art art0, modifying CCM Decision No 23/00, art 5(b)); (2) when a state considers that, in light of its legal system, the application of the norm does not require a formal act of incorporation, in which case notification to the Secretariat is required and the norm is considered incorporated

internal incorporation easier. CCM Decision No 02/05, which was adopted on the basis of the Inter-institutional Agreement between the CCM and the Joint Parliamentary Commission (CPC, Comissâo Parlamentar Conjunta), anticipated a mechanism of exchanging information between the MERCOSUR Secretariat and the CPC in order to guarantee the operation of the internal appointment mechanism.

CCM Decision No 20/02 also regulated the *administrative* incorporation of MERCOSUR norms in order to accelerate the development of certain areas, even when such mechanisms were not the most profitable for the integration process in terms of judicial security related to norms adopted by the MERCOSUR institutions. Guidelines for the application of CCM Decision No 20/02 were elaborated by the Secretariat's Technical Section in 2003, following a request from the Forum of Consultation and Political Reform, aiming to publicise these provisions and accordingly guarantee compliance with the internal appointments procedure.

In June 2003, CCM Decision No 07/03 conferred on Working Subgroup No 2 the duty of analysing the direct applicability of all MERCOSUR norms that did not require legislative national treatment. This analysis gave rise to CCM Decision No 22/04 on 'Applicability and entry into force of norms enacted by MERCOSUR decision-making bodies' providing for the adoption, by each Member State, of a procedure for entry into force of norms that did not require internal legislative treatment, following the regulation laid down in the Decision's Annex. The procedure was conditional on previous internal appointments and on the analysis of judicial consistency stipulated in CCM Decision No 20/02. It was also conditional on the requirement of publication of norms in the respective Official Diaries within 40 days from the date of their entry into force, consisting of an act of incorporation under article 40 of the Ouro Preto Protocol. In the final part of the Annex to CCM Decision No 22/04, it was determined 'that MERCOSUR provisions, which follow such procedure, will have effect following entry into force in respect of national norms of similar or inferior hierarchy'. This is the logical outcome, but it is also surprising that the principle is embodied in a subregional provision. We would point out that the number of instruments enacted under these procedures is now considerable, however the Secretariat's information related to normative mechanisms that require internalisation, particularly by legislative means, still indicates a worrisome situation.

CCM Decision No 08/03, adopted at the same time as CCM Decision No 07/03, established general proceedings for overruling MERCOSUR norms. Three situations were regulated: (1) the approval of a MERCOSUR norm overruling a past norm that had not been incorporated was determined not to revive a state obligation to incorporate the past norm; the entry into force of a new provision overruled prior provisions; (2) until entry into force of the most recent norm, according to article 40 of the Ouro Preto Protocol, prior provisions would still be applicable; (3) in the case of adoption of MERCOSUR norms exclusively aimed at prior rules that had not been incorporated by some states, which were exceptions to the general rule, the overruling norm must be incorporated by states that had incorporated the previous norm. This last provision was aimed at situations described in article 12 of CCM Decision No 20/02.

into the national legal system for the purposes of Ouro Preto Protocol, art 40; (3) when, given its nature or its content, the norm does not require incorporation in all Member States, and in this case, the given MERCOSUR norm will explicitly mention the situation.

During the CCM's last meeting in December 2008, it adopted another Decision No 35/08. This Decision was related to the consequences of updating the MERCOSUR normative framework; it aimed to define the future of derivative norms that had not been incorporated by any states within five years of approval or within two years of the expiration of the implementation time limit.

Institutionally, it must be noted that article 4–12 of the Protocol Establishing the MERCOSUR Parliament, which concerns the elaboration of advisory opinions by this body regarding all MERCOSUR projects of norms subject to legislative incorporation, aims to facilitate incorporation. The article also determines that 'National Parliaments, upon internal proceedings, shall adopt all necessary measures to create a preferential proceeding for the consideration of MERCOSUR norms that had been adopted in accordance with the Parliament's advisory opinion'. The correct application of these rules would recognise the autonomy of MERCOSUR norms in relation to international law which have also been subject to approval conditions by Member States' national parliaments. On the other hand, the MERCOSUR Parliament is provided with legislative initiative (article 4–13). CCM Decision No 47/08 created a High Level Group (GANREL) to handle the institutional relationships between the bodies, with the task of recommending proceedings for interactions between these institutions.

Finally, the High Level Group for Institutional Reform (GANRI), which was created by Working Subgroup No 2, is now discussing a Protocol project concerning the direct applicability of MERCOSUR norms to municipal legal systems which, if adopted, could significantly change the future of subregional norms and the above-mentioned general principles.

The work developed by the MERCOSUR Secretariat has contributed to improving the transparency of decision-making and the activities of the executive and legislative bodies of the bloc. At the same time, the work of the MERCOSUR Secretariat has helped verify the status of MERCOSUR norms within Member States and, consequently, helped determine the situation of compliance with international obligations. Among the most important mechanisms for this task are the Annual Activities Reports, reports concerning the application of MERCOSUR law by national tribunals, and the MERCOSUR Official Bulletin.

The 2007 Activities Report states that the support for the process of elaboration and implementation of norms was given by the Secretariat's Sector of Norms, Documents and Publicity, which facilitated the adoption of 42 Decisions, 26 Resolutions and 21 Directives. This sector is responsible for elaborating a general list of norms that must be incorporated, and a list of current situations for the information of the Technical Incorporation of Norms Meeting, which was created in 2007 to help solve problems in this area.

The importance of these reports in assisting subregional normative application by national tribunals is undeniable. Published reports have recited the following objectives: to facilitate the task of the national judiciary in applying the bloc's judicial system by providing a source of accurate information; to aid academic scholarship with the provision of a primary source of analysis and studies; to make available to diplomatic and political authorities, particularly of the bloc's trading partners, data on the judicial validity of the MERCOSUR system. The Second Report concluded that, despite the fact that at the regional level 'communication among state party tribunals is still rare, particularly with respect to research and jurisprudence enacted concerning issues related to MERCOSUR

law, it is clear that this exchange has been improved'.[26] One of the most meaningful acts was the creation of a Permanent Supreme Courts Forum for MERCOSUR and Associated States (instituted by the Brasília Charter in November 2004), which has become a core forum for exchanging information and experiences, and which has also led to an improvement in the application of MERCOSUR law.

III The Hierarchy Of MERCOSUR Norms: Emergence Of Autonomous Principles

If the lack of incorporation poses a difficult problem for the progress of the integration of Member States, the solutions adopted by national authorities (particularly judges) in the occasional conflicts between regional norms and national provisions might represent another obstacle that must be overcome. The original balance established between MERCOSUR law, international public law and different legislative provisions enacted within Member States have undoubtedly contributed to the lack of application of the early MERCOSUR norms and to the inertia within the integration process. Fortunately, attempts to guarantee the primacy and applicability of MERCOSUR provisions continue to be made, even though many mechanisms remain to be determined. It should be emphasised that other integrationist processes have passed through similar experiences.

A The Problem of Balance with International Law and National Decisions

The First Report concerning the application of MERCOSUR norms by national tribunals drafted by the MERCOSUR Secretariat in 2004 states that:

> In the MERCOSUR model, the importance of internal judicial activity is always charged with an additional significance since, unlike other integration mechanisms, the absence of a Justice Tribunal transforms national tribunals into last instance forums, with the duty of defining the interpretation of MERCOSUR law . . . The occasional lack of application of MERCOSUR norms, even if it happens in an incomplete or a misunderstood way, substantially limits the success of legal rules that must regulate the process of integration, also contributing to the emergence of situations of judicial uncertainty.[27]

Every integrationist experience is challenged by this delicate question and solving it determines, in great measure, its evolution, as can be demonstrated by analysing the integrationist model in Europe and in the Andean region. There are no specific provisions on this issue in the MERCOSUR Treaties.

The positions adopted within the territories of the four Member States of the bloc follow constitutional provisions, or, in their absence, follow the jurisprudence of the

[26] Secretaria MERCOSUR, *2º Informe sobre la aplicación del Derecho del MERCOSUR por los Tribunales Nacionales (2004)* (Montevidéo, Konrad Adenauer Stiftun, May 2006).

[27] Secretaria del MERCOSUR, *Primer Informe sobre la aplicación del Derecho del MERCOSUR por los Tribunales Nacionales y sobre la aplicación del Derecho Nacional a través de los Mecanismos de Cooperación Jurisdiccional Internacional del MERCOSUR*, Estudio No 003/04 (Montevidéo, 15 July 2004), available at www.mercosur.org.uy.

various national systems. In this latter case, national authorities apply the same criteria used in relation to public international law. It is interesting to note how references to integration are present in all Constitutions,[28] as well as the recognition, traditional among South American states, of the supremacy of the Fundamental Charter above any other law. In order to safeguard these principles, mechanisms of legal constitutional control and international treaties were established.[29] As a result, the solution to the conflict between MERCOSUR norms and constitutional norms would in practice be similar irrespective of the country where it took place, as at the beginning of the European integration process.[30]

However, if the MERCOSUR provision in question was a Treaty provision related to fundamental rights, it it is interesting to question whether the result of a similar conflict in Argentina or in Brazil might in fact be different. Both Constitutions recognise the superiority in the constitutional hierarchy of treaties that have been approved by a special majority in Parliament.[31]

[28] Constitution of Uruguay, art 6: 'In the international treaties it ratifies, the Republic will propose a clause under which all disputes that may arise between the parties are to be settled by arbitration or other peaceful means. The Republic will pursue the social and economic integration of Latin American states in what it determines to be common defence of its products and raw materials. It will also move towards the integration of its public services'.

Constitution of Brazil (1988), art 4, special para: 'The Brazilian Federal Republic will pursue the economic, political, social, and cultural integration of the peoples of Latin America, envisaging the formation of a Latin American community of nations'.

Constitution of Paraguay (1992), art 145: 'The Republic of Paraguay, in equality to other States, acknowledges a supranational legal order which upholds the maintenance of human rights, peace, justice, cooperation, and development in the political, economic social and cultural realms. Such decisions may only be adopted by an absolute majority in each House of Congress'.

Constitution of Argentina (1994), art 75: 'It is within the competence of Congress: … 24. To approve integration treaties that delegate competences and jurisdiction to supranational organisations in conditions of reciprocity and equality and that respect the democratic order and human rights. The norms adopted as a consequence of the approval of such treaties have a superior hierarchy to national laws. The approval of such treaties with Latin American States requires the absolute majority of the totality of the members of each House. In the case of such treaties with other States, the National Congress, with the absolute majority of the members of each House present, will declare the convenience of approval of the treaty. It can only be approved with the vote of the absolute majority of the totality of the members of each House, after twenty-five days from the declaratory act. Denouncing treaties referred to in this subsection requires the previous approval of the absolute majority of the totality of the members of each House'.

[29] Constitution of Uruguay, art 239(1); Constitution of Brazil, art 102(III)(b); Constitution of Paraguay, art 259; and Constitution of Argentina, art 116. Protection of the Constitution is entrusted in Brazil to the Supreme Federal Tribunal, and in other states to their respective Supreme Courts. Brazilian law is more specific concerning the constitutional control of international norms: 'It is mainly the competence of the Supreme Federal Tribunal to guard the Constitution, and the competence to … III decide, by means of an extraordinary appeal, decisions in their sole or final stage of suit when the appealed decision: … (b) declares the unconstitutionality of a treaty or a federal law'.

[30] European doctrines on these matters are abundant and constantly evolving.

[31] Constitution of Argentina, art 75: 'It is within the competence of Congress: … 22. To approve treaties signed with other nations and with international organisations and treaties with the Holy See. General treaties and treaties with the Holy See have superior hierarchy to national laws. The American Declaration of Rights and Duties of Man; the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel and Degrading Treatment; the Convention on the Rights of the Child, in the conditions of their entry into force, have constitutional hierarchy, but do not negate any article of the first part of this Constitution and must be understood as complementary to rights and warranties recognised by it. They may only be denounced by the National Executive Power with previous approval of two-thirds of the totality of the members of each House. Other treaties and conventions on human rights, after being approved by Congress, require the vote of two-thirds of the totality of the members of each House to enjoy constitutional hierarchy'.

The difference between the two constitutional texts is that Argentina expressly allows this special treatment for prior treaties that have not complied with the procedure, thereby solving a problem that has also arisen in Brazil concerning the American Convention on Human Rights. The situation is likely to occur again, because in the regional context, important mechanisms have been adopted, such as the Ushuaia Covenant on the commitment to democracy in Bolivia and Chile in 1998, and the Protocol of Asunción concerning the duty to promote and protect MERCOSUR human rights in 2005.[32] In Declaration 23/2008 of the Sixth Meeting of MERCOSUR Supreme Courts, a working group was created responsible for drafting the MERCOSUR Charter of Fundamental Rights.

The divergence among Member States, which leads to adverse results for the consolidation of a common market, is leading to an occasional conflict between the norms adopted by the subregional decision-making bodies and national law or administrative acts. In Argentina and Paraguay, national authorities are bound to fulfil treaty obligations because of constitutional provisions. The most modern provisions within this field are stipulated in the Constitution of Argentina. Undoubtedly inspired by the European experience and preceded by Supreme Court decisions, article 75 recognises the difference between international public law (paragraph 22)[33] and regional integration law (paragraph 24), arising from the exercise of powers delegated to supranational organisations. The constitutional norms safeguard the primacy of provisions concerning the exercise of these powers in relation to federal laws; the jurisprudence of Argentinian tribunalssafeguards the application of the Constitution.

Article 137 of the Constitution of Paraguay also recognises the prevalence of international treaties over national provisions, without distinguishing origin or scope. Article 145, in which the existence of a supranational judicial order is accepted, obviously promotes integration, but there is a problem in the drafting of the second paragraph, where interpretation of the wording might occasionally make it difficult to understand its meaning. It is provided that, as supreme law, decisions made by supranational bodies with delegated authority may be introduced into Member State national legal systems without the intervention of state bodies, particularly without the need for further approval by parliament. This implies that the interpretation that might best be defended is that parliamentary approval will be requested only in relation to founding Treaties, or in relation to instruments aimed to complement or modify founding Treaties.

As regards the hierarchy of international norms in relation to national law, the Brazilian and Uruguayan Constitutions are similar. Neither includes specific norms concerning this issue, which has resulted in this question being resolved by the courts. While Brazilian High Courts have proclaimed that treaty and federal law have the same status, applying

Constitution of Brazil, art 5(3) (included in Constitutional Amendment No 45 of 2004): 'International treaties and conventions on human rights that are approved in each House of Congress, in two rounds, by three-fifths of their respective members, will be equivalent to constitutional amendments'.

[32] For details on this, see Lucas Lixinski, Chapter 20.

[33] As referred to in n 30, treaties and conventions receive 'infraconstitutional' and 'supralegal' hierarchy in Argentina. The Supreme Court has dealt with the issue since 1911, and since 1992 the Court has adopted a new and revolutionary view of constitutional modifications. In *Miguel A. Ekmekdjian v Gerardo Sofovich y otros*, the Court recognised the immediate applicability of an approved and ratified international convention, when affirming its primacy over federal laws in accordance with the Vienna Convention on the Law of Treaties. See 'La comprensión de la noción de derecho comunitario para una verdadera integración en el Cono Sur' in Maristela Basso (ed), *Mercosul: seus efeitos jurídicos, econômicos e políticos nos Estados-membros* (Porto Alegre, Livraria do Advogado Editora, 1997) 33–88.

the most recent provision or provisions with special effect, the apparent previous reluctance of Uruguayan tribunals has been replaced by the recognition of the primacy and efficacy of international norms.

The above-mentioned First Report concerning the application of MERCOSUR norms published in 2004 drew the following conclusions on the situation within the region:

> The judicial entry into force of MERCOSUR law has happened not only due to the initiative of tribunals, but also due to lawyers, who have included MERCOSUR provisions in their claims . . . On the other hand, the lack of uniformity that can be observed in some sectors of MERCOSUR (origin certificates, for example) reveals the fundamental need for a special jurisdiction concerning the interpretation of norms.

The Report expressed the hope that advisory opinions would become a tool for national judges, upon the intervention of superior tribunals.

B Attempts to Guarantee the Primacy of MERCOSUR Morms

As stated by Professor Manuel Cienfuegos,[34] in a process of integration it is fundamental to annul the consequences of a purely dualist approach to international law, because the law of the bloc can hardly coexist or be effective if it is subject to a regime of transformation into national law. Parallel to instruments and measures taken within MERCOSUR's institutions to guarantee the reception and application of subregional norms, considerable efforts have been made to acknowledge the autonomy of international norms, as well as their prevalence in the face of national provisions relating to the basis and specific principles of the integrationist experience.

In the light of the lack of established principles regulating the hierarchy of MERCOSUR norms in relation to national norms, the role of the Permanent Review Court created by the Olivos Protocol of 2002 is, without a doubt, crucial.

Outside the context and authority of judicial disputes, where it can act as a principal tribunal for the resolution of conflicts or as a forum to review an arbitration report adopted by an ad hoc arbitration court, the Permanent Review Court is able to issue advisory opinions requested by states parties acting together, or by bodies with decision-making authority, or by superior tribunals.

In its first revision appeal, the Court stressed the autonomy of integration law in relation to public international law:

> Despite the fact that the principles and provisions of international law are not included in the Olivos Protocol as one of the judicial references to be applied (article 34), they must be applied only in a subsidiary (or complementary) way and only when they are applicable to the case. International law can never be applied in a direct or primary way, because it corresponds to an Integration Law (which MERCOSUR already has) and to a desired Community Law (which MERCOSUR, however, does not have) due to the lack of supremacy. To sum up, Integration Law

[34] Cienfuegos Mateo, 'La recepción y aplicación de los acuerdos internacionales del Mercosur' (n 8).

> must and shall have enough autonomy from other fields of law. Denying this always contributes, in a negative way, to the development of MERCOSUR normative institutions.[35]

As regards advisory opinions, their lack of binding force is regrettable, because it affects the efficacy of the intended pre-judicial interpretation and deprives economic operators of guaranteed judicial security. The coordinator of the drafting of the first Permanent Review Court advisory opinion, Dr. Wilfrido Fernández de Brix, affirmed:

> In the first place it is characteristic of any tribunal to have imperative authority, but more than that, by operating a non-binding, non-obligatory system in relation to the national judges, the concept [of advisory opinion] is deprived of its value completely, and the nature and objective of what should be a good system of pre-judicial interpretation is lost. The principal objective of the opinion addressed to national judges in the context of an integration process, is to achieve the interpretation of a community norm in a uniform way for the entire integrated territory, an objective that is also enshrined in the fourth guideline of article 2 in CCM Decision 25/00.[36]

The power to request advisory opinions from the Permanent Review Court was conferred on Member State Supreme Courts by CCM Decisions Nos 37/03 (article 2) and 02/07 (articles 2 and 3), under a process requiring inferior courts and judges to request intervention, except in the case of delegation.

The first advisory opinion issued by the Permanent Review Court in 2007, in response to a request by a judge in Paraguay referred by the Supreme Court, represented an attempt by the Court to identify characteristics of MERCOSUR law justified by the nature of the integrationist process:

> The advisory opinions issued by national judicial bodies must be considered as preliminary advisory opinions, but not binding. It is left to the Permanent Review Court to interpret MERCOSUR Integration Law, allowing for the application of such an interpretation, as well as the interpretation and application of national law, by the authority of such advisory judicial bodies . . . The internalised MERCOSUR norms shall take precedence over States Parties' internal law . . . and such primacy results from the very nature of MERCOSUR Law.

Undoubtedly, the words of the coordinator responsible for the drafting of the opinion are inspiring for the defenders of a MERCOSUR integration law:

> It has been a constant mistake, both from a jurisprudential and doctrinal perspective, to stress the prevalence of a treaty over national law, in order to sustain the prevalence or not of MERCOSUR law over national law. Although it is a legally correct argument, it can never be the principal argument for supporting such conclusions. The principal argument must always be the following: integration law, due to its concept, nature, and scope, must always take precedence over national laws. If held to the contrary, the concept would lack the meaning, nature, and scope of a true process of integration, or, in the words of the European Court of Justice, it would challenge the judicial basis of MERCOSUR. It is irrelevant if the national norm is prior or subsequent.

As we can see, the Permanent Review Court has clearly stated the need, in the future, to confer binding force on advisory opinions in order to guarantee the interpretation,

[35] Arbitral Award 1/2005 on the appeal presented by the Oriental Republic of Uruguay against the arbitral award of the ad hoc arbitration court of 25 October 2005 in the case of Prohibición de importación de neumáticos remoldeados procedente de Uruguay, Permanent Review Court, Asunción, 20 December 2005, available at www.mercosur.org.uy.

[36] Advisory Opinion No 1/2007, issued by the Permanent Review Court on 1 April 2007, available at www.mercosur.org.uy

uniformity and correct application of MERCOSUR norms. Furthermore, the reaffirmation of the autonomy of integration law is notable.

Advisory opinions could be transformed into effective instruments to control the legality of secondary law, while safeguarding the hierarchy of primary law, thus ensuring satisfaction of Member States' obligations to the bloc. This was stressed by Professor Alejandro Perotti, with whom we strongly agree, when analysing Brazilian jurisprudence in relation to CMG Resolutions:

> The possibility of legal control of MERCOSUR derivative norms . . . by national judges who intervene in disputes where regulation arising from the MERCOSUR legal system is claimed, has been to a certain extent facilitated by an 'omission' that [the Olivos Protocol] must respect, and which has, within this context, followed the regime established previously by the Brasilia Protocol . . . In recent times, MERCOSUR law has begun to be regularly invoked in disputes carried on in states parties' national tribunals, generally being applied on the initiative of the state's own tribunals. For this reason, the possibility of arguments in which one of the plaintiffs claims incompatibility between original norms of law and the derivative provisions is, certainly, a hypothesis that cannot be dismissed.[37]

In the light of this situation, the right of national tribunals to refer cases to the Permanent Review Court would avoid a non-uniform application of MERCOSUR law within Member States' territories, because 'it could be thought of as a sort of invalidity declaration "in casu" (in the same way as is observed in Argentina in relation to legality control) by [the Permanent Review Court], or with an exception of illegality (process by a national judge) combined with [the Permanent Review Court] advisory opinion'.

In the first advisory opinion, the Court made several findings as regards this particular question. First, the Permanent Review Court has the authority to interpret MERCOSUR law and the national judge has the authority to apply the interpretation, and also to interpret both domestic and international law and apply them to the facts of the case. Secondly, the Permanent Review Court could refer to facts involved in the case, but could not issue a judgment on factual matters. Thirdly, the Permanent Review Court has authority to declare when derivative norms conflict with MERCOSUR original law:

> If held to the contrary, the [Permanent Review Court] would be bound to rule on the applicability or to apply a norm of derivative law even when it represented a contradiction to the Asunción Treaty or to the rest of the original law, which would be, in turn, a high level institutional nonsense . . . dismissing the [Court's] power to proceed accordingly would mean that national tribunals would then have the authority to declare the incompatibility mentioned before, leading to non-uniform enforcement of MERCOSUR law within states parties' territories, and it would also completely defeat the jurisdictional authority of a community tribunal.

We would further argue that the issuing of advisory opinions could represent a further resource for the development within the MERCOSUR system of actions against Member States for non-compliance:

[37] Perotti, 'El control de legalidad de las normas del MERCOSUR por el juez nacional' (n 13) at 551–60. The article refers to decisions by the Federal District Court of the Fourth Circuit that 'by declaring inapplicable Administrative Ruling No 16/95 (which … textually reproduces the dispositions of Resolution 131/94) due to its incompatibility with the Treaty of Asunción, accomplished, in these cases, legal control of the CMG Resolution. It also concluded that, by restricting the range of article 1 of the Treaty, it must be set aside due to the superior hierarchy of the Treaty'.

> It can be seen that national tribunals make use of the mechanism of advisory opinions in order to rule on acts, measures, or omissions by states parties, from the point of view of their suitability with MERCOSUR law, by demanding from the [Permanent Review Court] a ruling concerning the compatibility of a state's activity with the law of the bloc.[38]

This would allow a greater participation by civil society and by judges in controlling the development and evolution of the integration process, which aims to improve the welfare of individuals within the subregion.

In Declaration 23/2008 of the Sixth Meeting of MERCOSUR Supreme Courts, the creation of a MERCOSUR Supreme Court of Justice was suggested:

> it is of fundamental importance for the development of MERCOSUR, as well as for our successful integration, that there should be established a central MERCOSUR Supreme Court of Justice to solve conflicts and interpret community law, while preserving, however, the logical autonomy of states parties' judicial bodies . . . the only way to ensure our MERCOSUR inhabitants a better quality of life, is to improve the basis of judicial security, which must be uniform and not be subject to different interpretations from judicial bodies of each state party.

The fact that the Supreme Courts have affirmed this so clearly demonstrates the change in viewpoint that has occurred concerning national legal powers, very different from the prevailing ideas ten years earlier. The expression 'community law' itself used in relation to MERCOSUR norms is a sign of acknowledgment of the subregional legal system as being different from international public law.

IV Conclusion

The incorporation and implementation of MERCOSUR rules into national legal systems is still a complex area, even though many years have elapsed since the beginning of the integrationist experience. According to Professor Roberto Bouzas,[39] the greatest problem for MERCOSUR is that, rather than constituting a customs union, it is a precarious free trade area, resulting in instability of rules for access to markets and inertia in dealing with several restrictions on tariffs that negatively affect competition. In Bouzas' opinion, with which we agree, the ineffectiveness of the decision-making process and the implementation of norms appear to be hidden by a normative production process that gives a false impression of progress.[40] The words of the former Foreign Policy Minister of Uruguay,

[38] Here we agree, again, with Perotti, 'El control de legalidad de las normas del MERCOSUR por el juez nacional' (n 13).

[39] Roberto Bouzas, 'MERCOSUR: crisis económica o crisis de integración?' in Ministério de Relações Exteriores, Subsecretaria de Assuntos de Integração Econômica e de Comércio Exterior, *Grupo de Reflexão prospectiva do MERCOSUR* (Brasília, Instituto de Pesquisa de Relações Internacionais, 2002) 47–61.

[40] In the words of the renowned Professor: 'Transitorily the ineffectiveness of the decision-making and norm-implementation processes has been hidden by a "normative inflation" that gave it a certain appearance of progress, but that did not advance in the incorporation of new substantive decisions nor reduced the number of agreements pending implementation. In practice this "normative inflation" only added to the number of decisions without practical effects.' In the original: 'Transitoriamente la ineficacia del proceso decisorio y de implementación de normas se ocultó a través de una "inflación normativa" que daba una apariencia de progreso, pero que ni avanzaba en la incorporación de nuevas decisiones sustantivas ni reducía el acervo de acuerdos pendientes de implementación. En la práctica esta "inflación normativa" sólo acrecentó el acervo de decisiones sin efecto practico'. *Ibid* 52, 53.

Didier Opertti, reinforce this position: 'often we have the feeling of taking part in an automated game of decision-making where technical purposes take precedence, or where self-interest leads to a perceived risk in changing the process or divorcing it from political purposes'.[41]

On the other hand, if provisions are correctly incorporated but, in the case of conflict with national norms, the solutions adopted are different in the various Member States, the practice remains of attempting to overcome obstacles to integration by normative means, with the danger that this represents, for the process and for the operators, of giving a false perception of obtaining concrete results. It is interesting to note the emergence of a consensus within the subregion of the importance of admitting the particular nature of MERCOSUR law, independent of international public law, and of finding the proper solutions that the problems of application and conflict between legal systems demand.

The efforts being made to transform this situation of apparent inertia and stagnation in MERCOSUR are remarkable, but a review of the objectives and mechanisms is necessary in order to achieve effective results. Engaging the Member States' political interest will be essential if such efforts are to be successful, and the current situation is to undergo fundamental change. The words of Professor Felix Peña are eloquent:

> To construct MERCOSUR, above all, certainly means promoting trade and investments, joint productive transformation, space for competition, and trading around the world. But its strategic essence is of being a core of peace and political democratic stability within South America. It is an ambitious task which leaves no margin for circumstances which generate reciprocal distrust, and which must leave no member enough power to act for its own interests.[42]

[41] Didier Opertti Badán, 'Reflexiones sobre el MERCOSUR' in *Grupo de Reflexão prospectiva do MERCOSUR* (n 38) 13–25.

[42] Felix Peña, 'Hay que construir un MERCOSUR de socios no de rehenes', *El Cronista*, 4 August 2008, available at www.felixpena.com.ar.

II

Specific and Emerging Issues

11

Cooperation in Civil Judicial Matters

CARMEN TIBURCIO*

I Introduction

From the legal point of view, the world is divided into jurisdictions, which coincide, as a rule, with the geopolitical divisions in force. As the decisions and orders rendered by the judicial authority of each State are effective only within the territorial boundaries of this State, it is fundamental to establish effective means of cooperation with other States, particularly within an integrated space such as MERCOSUR.

Cooperation among States for the purposes of the administration of justice, besides allowing service and notification abroad and the recognition of foreign sentences, also aims for the exchange of information which is essential to the development of the proceedings.

For these purposes, in the civil sphere, two instruments have gained practical relevance: rogatory letters and recognition of foreign decisions.

In the absence of treaties, rogatory letters are the procedural means for carrying out service, notification and collection of evidence required by foreign authorities outside a certain jurisdiction. For example, if the domicile of the defendant is in another country, and he or she has to be served so that the proceedings may commence, or if an essential witness is domiciled in another country and there is the need for interrogation of such witness, the rogatory letter is the appropriate method through which to accomplish these purposes within MERCOSUR. It is also the appropriate form for collecting information about the contents of foreign law.

Judicial decisions are also only valid within the territorial boundaries of the country which issued them. Thus, if a defendant is ordered to pay a certain amount of money by the judiciary of country A, and the defendant is domiciled in country B, where all his assets are located, the decision issued by the judiciary of country A may be rendered ineffective if there are no appropriate means of cooperation between country A and B which allow for the execution of the judgment. Hence, the possibility of recognition of foreign judgments is of extreme importance. This cooperation is so necessary that the fathers of the US Constitution of 1787 foresaw that automatic recognition of decisions rendered by other states within the United States was fundamental to guarantee a more

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complete union among them.[1] This same idea was reproduced by the framers of the European Economic Community, in the Treaty of Rome, as under article 293 (ex article 220) EC, judgments rendered in one member State should be recognised in other States.[2] Later, this same rule was reproduced in the Brussels Convention[3] and also in the Lugano Convention,[4] as well as in EU Regulations 44/2001,[5] 1347/2000[6] and 2201/2003.[7] In the American arena, the idea of cooperation has also received great attention with the Inter-American Convention on Execution of Preventive Measures (1979), the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979), and the Inter-American Convention on Support Obligations (1989).[8] This same trend can also be observed within MERCOSUR, through some procedural conventions in force, particularly, the Las Leñas and Ouro Preto Protocols (Las Leñas Protocol on

[1] On the importance of cooperation in integrated spaces, see Andreas Lowenfeld, *International Litigation and the Quest for Reasonableness* (1996) 109; the US Constitution, article IV, s 1: 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State'.

[2] Article 293 (ex article 220) of the EC Treaty, signed in Rome on 25 March 1957: 'Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals; the abolition of double taxation within the Community; the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries; the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'.

[3] Brussels Convention of 24 September 1968 on the judicial competence and execution of decisions in civil and commercial matters, which was ratified initially by the six founding states of the EC and entered into force on 1 February 1973. This Convention has been modified by four Adherence Conventions, which are the consequence of the entry of new member states: the Convention of 9 October 1978, referring to the adherence of Denmark, Ireland and United Kingdom; the Convention of 25 October 1982, referring to the adherence of Greece; the Convention of 26 May 1989, signed in San Sebastian, referring to the adherence of Spain and Portugal; and the Convention of 29 November 1996, referring to the adherence of Austria, Finland and Sweden. (Information available at the European Union International Cooperation website at www.gddc.pt/cooperacao/materia-civil-comercial/uniao-europeia.html).

Until 1 July 2007, the Brussels Convention applied to all relations involving EU member states and Denmark. However an agreement was concluded between them extending the provisions of Regulation 44/2001 (which replaces the Brussels Convention) to Denmark.

[4] Lugano Convention of 16 September 1988 on judicial competence and execution of decisions in civil and commercial matters. The Lugano Convention was established with the objective of promoting the extension of principles already adopted by the Brussels Convention to the states parties of the European Free Trade Agreement (EFTA). This Convention has been ratified by the following countries: Netherlands, France, Luxembourg, United Kingdom, Portugal, Switzerland, Italy, Sweden, Norway, Finland, Ireland, Spain, Germany, Iceland, Austria, Denmark, Greece, Belgium and Poland (see www.gddc.pt/cooperacao/materia-civil-comercial/uniao-europeia.html). On 30 October 2007, in Lugano, the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was signed by the European Union, Denmark and the three EFTA states which are party to the old Lugano Convention (Switzerland, Norway and Iceland).

[5] This Regulation was in substitution for the Brussels Convention between the EU member states. From 1 July 2007, it also applies to Denmark.

[6] Council Regulation 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

[7] Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, revoking Regulation 1347/2000.

[8] On cooperation in general, see also the Inter-American Convention on Proof of and Information on Foreign Law (1979), the Inter-American Convention on the Taking of Evidence Abroad (1975), the Inter-American Convention on Letters Rogatory (1979), the Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad (1984) and the Additional Protocol to the Inter-American Convention on Letters Rogatory (1979).

Judicial Cooperation and Assistance in Civil, Commercial, Labour and Administrative Matters of 27 June 1992 and Ouro Preto Protocol on Precautionary Measures of 16 December 1994).

It is worth noting that in the sphere of MERCOSUR, direct assistance, as another means of international cooperation, has not yet gained acceptance. In respect of such procedure, the decision concerning the measure requested is taken by the local authority, and where the case needs to be decided by a judge, competence lies with the judge of the requested state.

II Systems of Cooperation within MERCOSUR

Within MERCOSUR, cooperation takes place through three different systems, based on (1) bilateral treaties; (2) multilateral treaties of other sponsoring agencies; and (3) specific MERCOSUR treaties. This chapter will focus exclusively on civil cooperation based on MERCOSUR treaties. It should be mentioned, however, that there are several bilateral treaties in the civil arena in force among the MERCOSUR Member States, as well as multilateral treaties sponsored by the CIDIPs[9] or the Hague Conference,[10] to mention just a few examples. Therefore, in practice, cooperation in civil matters among MERCOSUR Member States can encompass a very wide spectrum. However, this chapter will only deal with civil cooperation among Brazil, Argentina, Uruguay and Paraguay based on MERCOSUR treaties, ie under the Las Leñas and Ouro Preto Protocols.

[9] The Organization of American States (OAS) through its Secretariat for Legal Affairs plays a central role in the harmonisation and codification of private international law in the Western hemisphere. The principal components of this work are the Inter-American Specialized Conferences on Private International Law, which the OAS hosts approximately every four to six years. Known by the Spanish acronym CIDIP, these Conferences have produced 26 international instruments (including Conventions, Protocols, uniform documents and model laws), which shape the inter-American private international law framework.
The first of these Conferences, (CIDIP I), was held in Panama City, Panama in 1975. The most recent Conference, (CIDIP VI), was held at OAS headquarters in Washington, DC in 2002. (Information available at the OAS's website at www.oas.org/DIL/private_international_law.htm).

[10] Between 1893 and 1904, the Conference adopted seven international Conventions, which have all been subsequently replaced by more modern instruments. Between 1951 and 2008, the Conference adopted 38 international Conventions, the practical operation of many of which is regularly reviewed by Special Commissions. Even when they have not been ratified, the Conventions have an influence upon legal systems in both member and non-member states. They also form a source of inspiration for efforts to unify private international law at the regional level, eg within the OAS or the European Union. The most widely ratified Conventions deal with the abolition of legalisation (Apostille); service of process; taking of evidence abroad; access to justice; international child abduction; inter-country adoption; conflicts of laws relating to the form of testamentary dispositions; maintenance obligations; and recognition of divorces. The most recent Conventions are the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (2006), the Convention on Choice of Court Agreements (2005), the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance together with the Protocol on the Law Applicable to Maintenance Obligations (2007). (Information available at the Hague Convention on Private International Law's website at www.hcch.net/index_en.php?act=text.display&tid=26).

III Las Leñas and Ouro Preto Protocols: Admissibility of Executory Rogatory Letters

A Las Leñas Protocol

The Protocol deals with two kinds of rogatory letters. Under articles 5–17, the Protocol regulates those which contain requests for service, notification or collection of evidence (which will be referred to as 'first category rogatory letters'); articles 18–24 deal with rogatory letters which request the recognition and execution of foreign sentences and arbitral awards ('second category rogatory letters').

Within this context, article 5 of the Protocol limits the object of first category rogatory letters to service, notifications and the like, as well as to collection of evidence:

> Each State Party shall transmit, in the manner stipulated in article 2, letters rogatory on civil, commercial, labour or administrative matters to the judicial authorities of another State when they relate to:
>
> (a) execution of judicial measures, such as service of process, writs, summonses, notifications and similar proceedings;
> (b) receipt and production of evidence.

As regards this type of rogatory letter, article 8 establishes that only the public policy of the requested country will prevent the fulfilment of a request made through a rogatory letter:

> Letters rogatory shall be processed ex officio by the competent judicial authority of the requested State, and may be refused only if the letter rogatory is liable by its nature to violate the principles of public policy (*ordre public*) in the requested State.
> The execution of a letter rogatory shall not imply recognition of the international jurisdiction of the judicial authority by which it is executed.

Thus, rogatory letters requesting simple measures, such as notice, service or collection of evidence in general, as a rule should obtain the exequatur of the competent authorities of the requesting state, unless the nature of the measure is contrary to local public policy. That is to say that the merits of the action filed abroad are not to be examined, but solely the measure requested through the rogatory letter. Even if the action filed abroad is unknown to the forum or contrary to local public policy, the request should obtain the exequatur.[11]

In addition, the rogatory letter should be executed even if it is a situation of exclusive jurisdiction of the authorities of the requested state, as the Protocol provides that compliance with the request does not imply the recognition of the jurisdiction which rendered the decision. This means that if the request is related to service on the defendant,

[11] 'On the subject of passive rogatory commissions—as in the recognition of foreign sentences—the Brazilian legal system adopted the system of limited litigiousness [*contenciosidade limitada*], only admitting impugnation against the granting of exequatur, when based on specific points, like the lack of authenticity of documents, the non-observance of legal formalities or disrespect to public order, morality and national sovereignty. It is impossible, therefore, in the context of passive rogatory letters, to intend to discuss before the Court (the Federal Supreme Court, in this case), the grounds of the controversy which were raised abroad, unless if it involves a situation of offence to national sovereignty or disrespect to Brazilian public order. Precedents.' (STF, Ag Reg CR no 7870, DJ 4 March 1999).

this request should be granted the exequatur even in a situation where any subsequent judgment would not be recognised because it lies within the exclusive jurisdiction of the forum, such as cases involving real estate located in the requested state.

With regard to the recognition and execution of foreign decisions, pursuant to second category rogatory letters, the following requirements must be met under article 20 of the Protocol:

> The judicial decisions and arbitral judgments referred to in the preceding article shall have extraterritorial validity in the States Parties, provided that they satisfy the following conditions:
>
> (a) they fulfil the formal requirements for them to be considered as authentic in the State in which they are rendered;
> (b) they and the required annexes have been duly translated into the official language of the State in which their recognition and execution are being sought;
> (c) they emanate from a competent court of law or arbitral body in accordance with the norms of the requested State governing international jurisdiction;
> (d) the party against whom it is intended to execute the decision has been duly summoned and the exercise of his right of defence has been guaranteed;
> (e) the decision has force of *res judicata* and/or is enforceable in the State in which it was rendered;
> (f) they are not in clear violation of the principles of public policy (*ordre public*) in the State in which recognition and/or execution is sought.
>
> The conditions set out in subparagraphs (a), (c), (d), (e) and (f) must be certified in the affidavit of the judicial decision or arbitral judgment.

In brief, the Protocol clearly distinguishes rogatory letters with simple requests (first category) from those involving recognition and execution of foreign decisions (second category), and provides in respect of the first category one single barrier, local public policy, but in respect of the second category, six requirements for recognition.

It also admits the possibility of partial execution of the foreign judgment in the event that some aspect of it violates local public policy. Those aspects which are not contrary to fundamental principles of local public order will be granted execution.[12]

The Protocol also contains rules preventing recognition of foreign judgments in the event there is a pending action in the requested state between the same parties, based on the same facts and having the same object. First, if the pending action in the requested State was commenced before the action abroad which originated the foreign judgment, the latter will not be recognised. Secondly, if the action abroad was initiated before the action in the requested State but any decision rendered by the judicial authority of the requested state is incompatible with the foreign judgment the object of recognition, then again the foreign judgment will not be recognised.[13] Article 22 of the Protocol is based upon the principle of preference for national jurisdiction.

[12] 'Article 23: If a judgment or arbitral decision cannot be executed in its entirety, the competent judicial authority in the requested State may agree to its partial execution at the request of an interested party.'

[13] 'Article 22: Where a judicial decision or arbitral judgment is between the same parties, based on the same facts and having the same object as in the requested State, it shall be recognised and enforceable, provided that the decision is not incompatible with any other judgment rendered earlier or at the same time in such proceedings in the requested State. Likewise, it shall not be recognised or executed if proceedings had been initiated between the same parties, based on the same facts and having the same object, before any judicial authority in the requested State prior to the submission of the request to the judicial authority which had handed down the decision whose recognition is requested.'

In addition, the Protocol also sets out a rule establishing equality of procedural treatment between nationals and permanent residents of the forum with nationals and permanent residents of other States Parties.[14]

The Protocol also establishes that the internal law of the requested State shall govern the exequatur proceedings in the case of both first and second category rogatory letters.[15]

Thus, each State has the power to determine the competent authority for such proceedings. It should be noted that States Parties can adopt a system of exclusive competence, for example as in Brazil, where exequatur is presently within the sole jurisdiction of the Superior Tribunal of Justice (STJ), the highest level of the Brazilian judiciary for non-constitutional matters; or a system according to which first instance judges are competent to hear such proceedings. Accordingly, all procedural aspects related to the exequatur proceedings are to be regulated by the law of the requested state.

Furthermore, documents transmitted by the central authority will be deemed legal and valid independently of any further legalisation or authentication.[16]

Finally, the Protocol also deals with information on foreign law, where local conflict of laws rules lead to the applicability of the substantive law of any of the States Parties.[17]

(i) Brazilian Case Law

It has traditionally been held in Brazil, both among legal commentators and in case law, that measures of an executory nature should not be performed in Brazil through rogatory letters, as their sole object should be requests for service and collection of evidence. A well-known decision of the Brazilian Federal Supreme Court clarified this point:

[14] 'Article 3: Nationals and permanent residents of any of the States Parties shall have free access to the courts of the other States on the same basis as nationals and permanent residents of those States Parties for the defence of their rights and interests. The preceding paragraph shall apply to bodies corporate constituted, authorised or registered in accordance with the laws of any of the States Parties.'

'Article 4: No requirement of security or deposit in any amount may be imposed on the nationals or permanent residents of another State Party by reason of their status as nationals or permanent residents of that State Party. The preceding paragraph shall apply to bodies corporate constituted, authorised or registered in accordance with the laws of any of the States Parties.'

[15] 'Article 13: In executing a letter rogatory, the requested authority shall apply the proper restraints, as provided by its domestic law, in those cases and to the extent to which it is obliged to do so in order to execute a letter rogatory originating in its own State or requested by an interested party.'

'Article 24: Proceedings, including the competence of the respective judicial bodies, for the purposes of the recognition and execution of decisions or arbitral judgments, shall be governed by the laws of the requested State'.

[16] 'Article 25: Legal instruments drawn up by public officials of one State Party shall have the same probative force in the other States as corresponding instruments drawn up by their own public officials.'

'Article 26: Documents drawn up by the judicial or other authorities of one of the States Parties, as well as official documents and papers which certify the validity, date and authenticity of a signature or its conformity with an original, which are processed by the Central Authority, shall not require authentication, marginal notation or similar formalities when they must be produced in the territory of another State Party.'

[17] 'Article 28: The Central Authorities of the States Parties shall provide free of charge, as a form of legal cooperation, and provided it would not be incompatible with public policy (*ordre public*), information on matters of civil, commercial, labour and administrative law.'

'Article 29: The information referred to in the preceding article may also be brought before the courts of the other State on the basis of reports provided by the diplomatic or consular authorities of the State Party whose law is involved.'

'Article 30: A State providing information on the meaning and legal scope of its law shall not be held responsible for the opinion expressed nor shall it be obliged to enforce its law in accordance with the response provided. A State receiving such information shall not be obliged to enforce or ensure the enforcement of the foreign law in accordance with the response received.'

> Decision denying exequatur. Rogatory letter issued by the Judiciary of the Argentinean Republic to proceed in Brazil to the seizure of movable and immovable goods. Preventive measure set forth in article 1,295 of the Argentinean Civil Code under the legal term of 'embargo' [interpretive appeal] and in article 822 of the Brazilian Code of Civil Procedure, under the legal term of seizure. If such judicial measure depends on a final decision in Brazil, it is fundamental that this measure cannot be performed in our country before the proceedings of recognition of the foreign decision which granted it. Denial of the exequatur.[18]

The point was made more specifically later in the decision:

> The rogatory letter constitutes a judicial request according to which judicial interlocutory acts are executed such as services, notices, evaluations *et similia* when they do not depend on final sentences.

However, the Brazilian Federal Supreme Court, the competent authority for the granting of exequatur to rogatory letters from abroad before Constitutional Amendment 45/2004, decided that after the entry into force of the Las Leñas Protocol, Brazil would accept executory rogatory letters:

> [T]he case law of the Federal Supreme Court follows the understanding that, in Brazil, passive executory rogatory letters are not bound to be executed, except those based on international acts or conventions on inter-jurisdictional co-operation, such as the Las Leñas Protocol.[19]

Nevertheless, in a later decision, the Brazilian Supreme Court made it clear that, despite the controversial approval of the Protocol, the traditional procedure remained unaltered: recognition of such judgments was still necessary, though such a request could now be addressed to the Supreme Court by rogatory letter:

> The Las Leñas Protocol (Protocol on Judicial Cooperation and Assistance in Civil, Commercial, Labour and Administrative Matters) did not affect the requirement that any foreign decision—which includes the interlocutory decision granting preventive measures—in order to be effective in Brazil, should be submitted to the proceeding of recognition by the Federal Supreme Court, which prevents its incidental recognition, in Brazil, by the authority competent for its execution; the Protocol innovated, however, when determining that the execution (recognition) of a sentence originating from the State parties should be requested through rogatory letter, which implies the admission of the initiative of the competent judicial authority of the requesting State, and that the exequatur be granted independently of the defendant being served, without prejudice to the possibility of ulterior manifestation of the defendant, via an 'agravo' [interlocutory appeal] to the decision granting the exequatur or 'embargos' [interpretive appeal] to its compliance.[20]

This innovation brought about by the Protocol has raised many questions as to the requirements for recognition with regard to such second category rogatory letters: are they the same as those imposed for the recognition of foreign judgments, or are they the same as those required for the granting of exequatur to first category rogatory letters with simple requests? Traditionally, the examination of foreign judgments would consider several aspects, such as the international competence of the authority that pronounced the decision, its enforceability in the country where it was issued, due service on the

[18] STF, *RTJ* 25 August 1980, CR no 3237/AT, Justice Antônio Neder, *RTJ* 95/46.
[19] STF, *DJU* 11 September 1997, CR no. 7913, Justice Celso de Mello.
[20] STF, *DJU* 9 May 1997, AgRg CR 7613/AT, Justice Sepúlveda Pertence.

defendant, translation of the decision and whether it violated local public policy.[21] Conversely, rogatory letters which request acts such as service or collection of evidence would be verified with regard to two aspects only, that is, whether the request violated public policy[22] and whether it was a case involving the exclusive competence of the Brazilian judicial authority.[23] Thus, in the latter event, the examination made by the Supreme Court would be more superficial.

This controversy may be illustrated by a case involving a child who was residing in Buenos Aires with his mother and was abducted by his father and brought to Brazil. Justice Celso de Mello, then president of the Federal Supreme Court, granted a request sent by the Seventh Court of Minors of Buenos Aires via a rogatory letter asking for the recognition and execution of a judgment which requested search for and seizure of this minor.[24] On appeal, the president of the Supreme Court stated that the requirements for recognition of a rogatory letter requesting the recognition and execution of a foreign judgment were only those listed in article 226.2 of the Federal Supreme Court Internal Rules in force at the time, that is, those related to first category rogatory lettersy.[25]

However, in another case, Justice Celso de Mello made reference to articles 20 and 21 of the Las Leñas Protocol, which comprise the six requirements for recognition in Brazil of foreign judgments.[26]

(ii) Critical Analysis of the Protocol Text and Case Law

In some early cases, the Las Leñas Protocol was inconsistently applied by the Supreme Court with respect to the requirements for the recognition and execution of foreign judgments which were requested through rogatory letters. Since Brazil had traditionally had a process of recognition of foreign judgments rendered abroad, and rogatory letters for requests such as service, notification and collection of evidence, at first the Supreme Court held that the text of the Protocol only allowed the request for recognition of a foreign judgment to be addressed to the Federal Supreme Court by rogatory letter.

In fact, the Protocol established a different procedure for the recognition of foreign judgments, which necessitated the observation of the requirements for that purpose listed in article 20.

More recently, after Constitutional Amendment 45/2004 in June 2006, the Superior Tribunal of Justice applied the Las Leñas Protocol in a decision relating to a rogatory letter originating from Uruguay which received the exequatur from the president of the STJ. The first category rogatory letter requested the forwarding of wage slips for two people in order to provide evidence in an action for fraud and nullity in respect of a purchase and

[21] Requirements established in art 15 of the Introductory Law to the Brazilian Civil Code and, at the time, in art 217 of the Internal Rules of the Federal Supreme Court. Such requirements are also listed in the Las Leñas Protocol (art 20).

[22] See (then in force) Internal Rules of the Federal Supreme Court, art 226.2. It derives from the principle set out in Introductory Law to the Brazilian Civil Code, art 17 and it is also prescribed in Las Leñas Protocol, art 8.

[23] STF, *RTJ* 152/117, AgRg CR no 4982, Justice Octavio Gallotti. In the same sense, see *RTJ* 115/616 and *RTJ* 126/86.

[24] STF, *DJU* 20 November 1998, CR no 8240–1/AT, Justice Celso de Mello. See previous decision of the same case *DJU* 3 August 1998, Justice Celso de Mello, judgement of 26 June 1998, which quotes Las Leñas Protocol, arts 20 and 21.

[25] STF, *DJU* 20 November 1998, CR no 8240–1/AT, Justice Celso de Mello.

[26] STF, *DJU* 11 September 1997, CR no 7662–6/AT, Justice Celso de Mello.

sale of a property located at Uruguay.[27] Along the same lines, the STJ also granted the exequatur in cases involving requests for collection of evidence[28] and breach of tax confidentiality.[29] As regards second category rogatory letters, the STJ has granted exequaturs involving recognition of foreign judgments.[30]

B Ouro Preto Protocol

The Ouro Preto Protocol of 1994 on Precautionary Measures sets out the extra-territorial recognition of preventive measures aimed at avoiding irreparable harm that may occur to persons, property or obligations, and ensuring the effectiveness of pending or future judicial proceedings, in the following terms:

> Article 1. The purpose of this Protocol is to lay down rules applicable to the States Parties to the Treaty of Asunción governing the execution of precautionary measures intended to prevent irreparable damage in relation to persons, property or obligations to give, to do or not to do a specific thing.

In this context, the Protocol establishes the possibility of recognition of preventive measures granted by foreign judicial authorities:

> Article 4. The judicial authorities of the States Parties to the Treaty of Asunción shall execute the precautionary measures ordered by the judges or courts of the other States Parties competent in the international sphere and shall take the necessary steps in accordance with the law of the place in which the property or persons subject to the measures are located.

However, the exact scope of this Protocol was not made clear.

It is commonly accepted that preventive measures may be obtained (1) through a preliminary or provisional order, determined by an interlocutory decision, as a result only of the request by the plaintiff, without any response from the defendant; or (2) at the end of the proceedings, as a result of a final judgment and after both parties having presented their grounds for granting/rejecting the measure. Thus, it is controversial whether the Protocol intends the recognition of both situations, ensuring the extra-territorial force of both types of injunctions.

[27] STJ, *DJU* 26 June 2006, CR no 1110, Justice Barros Monteiro: '1. The 4th Court of First Instance of the District of Rivera, Uruguai, requests by this letter rogatory the forwarding of a certified copy of the wage statement of Ilson Moreira Velleda and Adelca Teixeira, concerning the years of 1992, 1993, 1994 and 1995. It also requires the collection of information from the Ministry of Social Security regarding Bernardina Teixeira. The request intends to support an action for fraud and nullity of a purchase and sale. The Federal Public Prosecutor's Office, in the person of the Sub-Prosecutor General of the Republic Edson Oliveira de Almeida, in opinion at pages 28/30, advised for the grant of the exequatur. 2. The request is based on the Protocol of Cooperation and Judicial Assistance on Civil, Commercial, Labour and Administrative Matters, within MERCOSUR, approved by the Legislative Decree no 55 of 19 May 1995 and enacted by the Decree no 2067 of 12 November 1996.The article 5, 'b' of such Protocol authorises the forwarding by the States Parties of letters rogatory aiming at the 'receiving or collection of evidence'. A similar case is found in the records, with such intention to obtain the wage statement as referred to above, as well as the information at the Ministry of Social Security, in order to inquire into the suspicion of fraud in the purchase and sale of a property located in Uruguay. … 3. In light of such facts, all the necessary prerequisites being met, I grant the exequatur. May the records be sent to the Court of the Federal District so all the applicable measures may be followed'.

[28] STJ, *DJU* 17 October 2007, CR no 2634/AR, Justice Barros Monteiro.

[29] STJ, *DJU* 13 May 2008, CR no 3137/AR, Justice Humberto Gomes de Barros.

[30] STJ, *DJU* 13 December 2006, CR no 1.709/AT, Justice Barros Monteiro and STJ, *DJU* 13 June 2007, CR no 2189/AT, Justice Barros Monteiro.

There are three possible interpretations of this Protocol. The first is that the Protocol deals with both situations, as the text does not establish any difference between them. Therefore, it is possible to conclude that both the injunction granted without adversarial proceedings, as well as a final decision after the defendant was afforded the opportunity to contest it, are comprised within its scope. The second possibility would be to interpret the Protocol as dealing only with interim injunctions sought by the plaintiff, because the preventive measure deriving from a final decision after the response of the defendant would be comprised within the scope of the Las Leñas Protocol. Finally, the third possible interpretation would restrict the scope of the Ouro Preto Protocol to the recognition of injunctions rendered as a result of adversarial proceedings, excluding interim measures obtained solely as a result of a request by the plaintiff. The text of the Protocol does not provide any clarification on this point.

It should be noted that the Ouro Preto Protocol does not reproduce the requirements necessary for the recognition and execution of foreign judgments laid down by the Las Leñas Protocol in article 20. This article, as mentioned above, lists circumstances which could prevent the recognition of a foreign judgment. The Ouro Preto Protocol appears to set up a single obstacle to the recognition of a foreign preventive measure, which is public policy under article 17.[31]

However, the text of the Protocol also includes some of the other requirements listed in the Las Leñas Protocol, namely: (a) authenticity (Las Leñas Protocol, article 20(a) and Ouro Preto Protocol, article 21.1); (b) translation (Las Leñas Protocol, article 20(b) and Ouro Preto Protocol, article 23); and (c) legalisation (Las Leñas Protocol, article 26 and Ouro Preto Protocol, articles 19.2, 19.3 and 19.4). It should be noted that the Ouro Preto Protocol does not reproduce the requirements listed by the Las Leñas Protocol as items (b) and (e) (which are the requirements that the defendant was served and that the decision has the status of *res judicata*), which makes sense because the preventive measure must have been granted only as a result of the request by the plaintiff and as a provisional measure.

There are, therefore, two possible solutions: (1) that the Ouro Preto Protocol applies to all types of preventive measures, either granted only on request of the plaintiff or after adversarial proceedings, and the Las Leñas Protocol applies to all other foreign judgments; or (2) the Ouro Preto Protocol applies only to preventive measures issued on request of the plaintiff, and those granted after the defendant has presented his response fall under the Las Leñas Protocol. Either way, it is advisable that whenever there is doubt as regards the legal basis for a request for recognition of a preventive measure, both Protocols are mentioned.

In addition, the Ouro Preto Protocol regulates the possibility of recognition of preventive measures rendered at any time in the proceedings abroad: before the filing of the main suit, during the main proceedings or afterwards, to guarantee compliance.[32]

It also provides that the appropriate means for requesting the recognition of a preventive measure issued abroad is the rogatory letter.[33]

[31] 'Article 17: The jurisdictional authority of the requested State may decline to execute a letter rogatory concerning precautionary measures that are manifestly contrary to its public policy (*ordre public*).'

[32] 'Article 3: Preparatory precautionary measures, precautionary measures incidental to the main proceedings and those which ensure the enforcement of a sentence shall be admissible.'

[33] 'Article 18: Requests for precautionary measures shall be formulated by means of letters of request or letters rogatory, the two terms being equivalent for the purposes of this Protocol.'

Accordingly, the Ouro Preto Protocol creates a new type of rogatory letter with executory force, concerning the recognition of a preventive measure granted by a foreign judicial authority.

In addition, it establishes the need to comply with the law of the place where the measure is to be executed (*lex diligentiae*)[34] under article 4. That is to say, that the admissibility of such preventive measures will be determined by the courts of the country that issued the measures,[35] while the execution of such measures and the procedures to be followed are to be established by the law of state executing such preventive measures.[36]

The Protocol provides that the execution of preventive measures by the requested state does not imply a commitment to recognise and/or enforce the final judgment that may be rendered by the foreign court in the main proceedings.[37]

Furthermore, the Protocol also mentions the possibility of precautionary measures in the proceedings for recognition of foreign judgments through rogatory letters. In order to guarantee the enforcement of the judgment rendered abroad, the court of the requested state may issue injunctions.[38]

The Protocol also includes (replicating a provision of the Inter-American Convention on Rogatory Letters, article 7) a controversial rule establishing the possibility that judges located in the border zones of the states parties may transmit the rogatory letters directly, that is, in the case of Brazil being the requested state, without submitting the exequatur to the STJ in Brazil.[39]

(i) Brazilian Case Law

In Brazil, there have been few decisions rendered by the Superior Courts concerning the Ouro Preto Protocol. The first case based on this Protocol related to a rogatory letter

[34] As regards compliance with *lex diligentiae*, see Jacob Dolinger and Carmen Tiburcio, 'The Forum Law Rule in International Litigation: *Lex Fori* or *Lex Diligentiae*? Unresolved Choice of Law Issues in the Transnational Rules of Civil Procedure' (1999) 33 *Texas International Law Journal* 425.

[35] 'Article 5: The grounds for a precautionary measure shall be decided in accordance with the laws and by the judges or courts of the requesting State.'

[36] 'Article 4: The judicial authorities of the States Parties to the Treaty of Asunción shall execute the precautionary measures ordered by the judges or courts of the other States Parties competent in the international sphere and shall take the necessary steps in accordance with the law of the place in which the property or persons subject to the measures are located.'

'Article 6: The execution of precautionary measures and their respective counter-measures or safeguards shall be ordered by the judges or courts of the requested State in accordance with its laws.'

'Article 7: The following shall also be governed by the laws and determined by the judges or courts of the requested State: (a) Any amendments that become necessary during the course of the proceedings for the proper implementation of the measures or, where appropriate, for their abridgement or replacement; (b) Sanctions resulting from malicious or unwarranted claims; and (c) Issues relating to ownership and other rights in rem.'

[37] 'Article 10: Execution of a precautionary measure by the requested judicial authority shall not entail any commitment to recognise or enforce the foreign judgment that may have been rendered in the main proceedings.'

[38] The Internal Rules of the Superior Tribunal of Justice, as currently in force in Brazil, expressly admit that possibility in art 4 para 3.

[39] Some legal commentators as well as court decisions have already considered that provision unconstitutional, as the rule establishing the competence of the Superior Tribunal of Justice to grant exequatur is established in art 105.I of the 1988 Brazilian Constitution. Contrary to this viewpoint, see Carmen Tiburcio, 'STJ—CR no 1.457/França—A polêmica da quebra de sigilo bancário no Brasil pela via rogatória' *RDE* no 4 (2006).

originating from Argentina, which did not receive the exequatur from the president of the Supreme Court as, at the time, this Protocol was not in force in Brazil.[40]

Another decision also involved a rogatory letter from Argentina requiring the recognition of a foreign judgment determining the seizure of rights and stocks located in Brazil, which received the exequatur of the Federal Supreme Court based on the Las Leñas Protocol. It should be noted that the case was related to preventive measures and that the Ouro Preto Protocol was already in force in the country, but the Court based the decision on the Las Leñas Protocol, reinforcing the understanding that preventive measures issued after adversarial proceedings are subject to it.[41]

In a decision based on the Ouro Preto Protocol, another rogatory letter from Argentina received the exequatur of the Federal Supreme Court but the decision did not mention whether the Argentinean judgment was rendered after adversarial proceedings or only at the request of the plaintiff:

> This is a rogatory letter deriving from the Argentinean Republic, aiming for authorization for the execution of the seizure over financial investments of any nature of a company having its seat in Brazil, in relation to bank entities with whom the company operates … The measure requested is based on Articles 3, 21 and others of the Protocol of Preventive Measures, signed in Ouro Preto in December 16, 1994 and approved by Decree No 2626 of June 15, 1998. Still, the letter possesses all the necessary requirements for its compliance, as it was sent through diplomatic channels … which confers authenticity. Therefore, we conclude for the rejection of the response and the granting of the exequatur …
>
> The legal opinion is correct and is therefore accepted. Consequently, the rejection is denied and the exequatur is granted.[42]

[40] STF, *DJU* 14 May 1998, CR 8.279/AT, Justice Celso de Mello; on appeal, judgment of 17 June 1998, *DJU* 10 August 2000. In Brazil, the process of drafting and incorporating international treaties into the domestic legal system follows the following procedure: (1) Negotiation between the parties and signature of the final text: it is incumbent exclusively upon the President of the Republic to maintain relations with foreign states (Federal Constitution, art 84.VII) and to conclude treaties, conventions and international acts, *ad referendum* of the National Congress (Federal Constitution, art 84.VIII). In his role of Commander and Chief of State, the President can appoint plenipotentiaries to conclude treaties on his behalf. (2) Approval by the National Congress (Federal Constitution, art 49.I): this step is initiated by a proposal of the President of the Republic. The National Congress decides by a majority of those present at the session (the House of Representatives and the Senate hold separate ballots). The Congress cannot amend or change the text of a treaty, being competent only to approve it or not. The approval of the Congress is made known to the public by the publication of a Legislative Decree issued by its President. (3) After approval by the National Congress, the adoption of international treaties can follow two different paths: (a) ratification: act of the Chief of the Executive in the external arena. This takes place only when Brazil has signed the original text of the treaty. In the event that it is bilateral, the ratification takes place through the exchange of notes; if multilateral, by the deposit of the instrument of ratification before the international organisation that has sponsored the drafting of the agreement. In the bilateral agreements, reservations cannot be made, as they would represent a new treaty; in multilateral agreements, unless there is an express rule in the text itself, the President of the Republic is allowed to make reservations, for which only the knowledge (not the acceptance) of the other parties is required; or (b) adhesion: this takes place when Brazil, without having signed a treaty wishes to be a party to it. The international effects of adhesion are equivalent to those resulting from ratification. (4) Enactment and publication: these acts aim at publicity in the domestic sphere. The Chief of the Executive enacts and determines the publication of a decree whereby the entire text of the agreement is made public, and this practice has existed since Imperial times, despite the fact that there is no express legal provision regarding treaties requiring these acts. Prior to the enactment, an international treaty is ineffective in the domestic arena, although, at the international level, the entry into force of a treaty takes place with the deposit of a certain number of the instruments of ratification prescribed in the treaty itself.

[41] STF, *DJU* 15 June 1999, CR no 7613/AT, Justice Celso de Mello.

[42] STF, *DJU* 26.06.00, CR n ° 9.194/AT, Justice Carlos Velloso.

Thus, following the enactment of Constitutional Amendment 45 of 2004, preventive measures based on the Ouro Preto Protocol should be submitted to the Superior Tribunal of Justice, and they are another example of executory rogatory letters, accepted within the scope of MERCOSUR.

In a more recent decision, the STJ denied the exequatur to a rogatory letter which was based on the Ouro Preto Protocol. The request sent by the Ninth National Court on Civil Matters of Buenos Aires, Republic of Argentina, requested a formal registration prohibiting any transaction relating to certain real property located in the Municipality of Porto Seguro, State of Bahia, to safeguard it for a future equitable distribution related to an ongoing divorce action. The court found that the order could not be granted since the competence to 'hear actions regarding real estate in Brazil' is solely within the jurisdiction of the Brazilian courts.

1. The 9th National Court on Civil Matters of Buenos Aires, Republic of Argentina, requests by this letter rogatory registration of the 'prohibition of any new act regarding the real property' located in the Municipality of Porto Seguro, State of Bahia, to safeguard it for a future equitable distribution related to the ongoing action of divorce in such place, according to the text of the letter at pages 7–9. This request is based on the Protocol of Preliminary Injunctions of MERCOSUR, enacted by the Decree no 2626 of June 15th, 1998. The Federal Public Prosecutor's Office advised for the denial of the order, given that 'this letter rogatory offends the principle of public policy, considering that Brazil has sole jurisdiction on the matter' (pgs 23/24).
2. The order cannot be granted, since, according to Article 89, I of the Code of Civil Procedure, the competence to 'hear actions regarding real estate in Brazil' is solely of the Brazilian Courts, discarding any other possibility. Moreover, the Law of Introduction to the Civil Code, article 12, paragraph 1, reads: 'The Brazilian Judiciary has sole jurisdiction over real estate located in Brazil'. …
3. In light of such facts, for offending the public order, I deny the exequatur (Article 6, Resolution no 9/2005 of this Court).[43]

Apart from this rare example of denial of exequatur, the Superior Tribunal of Justice has normally granted exequatur involving preventive measures issued abroad in respect of alimony[44] or seizure of assets,[45] among other situations.

C Applicability of the Ouro Preto Protocol in Argentina[46]

In Argentina, the National Chamber of Appeals in Commercial Matters (Cámara de Apelaciones en lo Comercial), chamber A, applied the Ouro Preto Protocol in a decision rendered in May 2003.

The case dealt with a rogatory letter originating from Paraguay, requesting the deposit of certain stocks. The court's decision was subjected to several appeals and the controversial point related to the applicable procedural law for these appeals. The court held that

[43] STJ, *DJU* 23 October 2007, CR no 2755/AR, Justice Barros Monteiro.

[44] STJ, *DJU* 10 October 2005, CR no 215/EX, Justice Edson Vidigal and STJ, *DJU* 20 September 2007, CR no 2430/AT, Justice Barros Monteiro.

[45] STJ, *DJU* 6 November 2006, CR no 870/AT, Justice Barros Monteiro; STJ, *DJU* 11 September 2007, CR no 2078/AR, Justice Barros Monteiro and STJ, *DJU* 8 June 20.06, CR no 1462/EX, Justice Barros Monteiro.

[46] *First Report on the Application of MERCOSUR Law by the National Courts* (2003).

the applicable law was the law of the forum, in accordance with article 6 of the Protocol. Therefore, Argentinean law should be applied to determine which appeals were to be admissible in the circumstances.

D Applicability of the Las Leñas and Ouro Preto Protocols in Uruguay[47]

In Uruguay, the Supreme Court of Justice has issued two specific sets of rules dealing with rogatory letters: Acordada No 7491[48], referring to rogatory letters from abroad; and Acordada No 7507,[49] which amended the former, dealing mainly with rogatory letters sent abroad.

Acordada No 7491 comprises provisions relating to rogatory letters from abroad received by the Supreme Court of Justice (articles 1–4), and common provisions relating to rogatory letters from abroad received via the Supreme Court of Justice and the central authority established in the Protocols (articles 5–7); Acordada No 7507 introduces provisions relating to rogatory letters addressed abroad (article 8).

IV Concluding Remarks

Cooperation in civil judicial matters within MERCOSUR is based on two international conventions, the Las Leñas and the Ouro Preto Protocols, and consists exclusively of rogatory letters, for the purposes of requesting service, notification and collection of evidence, and information required by foreign authorities, as well as recognition of foreign decisions. These two Protocols have been widely used and have facilitated cooperation among the Member States.

Recent instruments of cooperation, such as direct assistance, have not yet been formally incorporated into treaties within this sphere, although the Member States have individually adopted such procedures as a result of ratification of treaties outside the scope of MERCOSUR, such as the Hague Convention on the civil aspects of international child abduction. Therefore, there is also civil cooperation among states parties based on other international treaties.

[47] Ibid.

[48] Supreme Court of Justice, Acordada No 7491, which lays down the provisions on rogatory letters deriving from abroad received by the courts through the Supreme Court of Justice, September 2003 (DO 16 September 2003).

[49] Supreme Court of Justice, Acordada No 7507, which complements the provisions of Acordada No 7491 as regards rogatory letters received from abroad, concerning the treatment of rogatory letters through which the Uruguayan judicial authorities address themselves to foreign authorities, April 2004 (DO 16 April 2004).

12

MERCOSUR and Environmental Law

Water Management: a Case Study

ALESSANDRA CORREIA LIMA MACEDO FRANCA

I Introduction

The world order following what Hobsbawm[1] labelled the 'age of extremes' (1914–91) is still taking shape; however, the paradoxical characteristics of that era have definitely left their mark. While it is not necessary to recall all of factors that played a hand in shaping the history of the twentieth century, one proposition worthy of consideration is that present-day environmental challenges are mainly a product of a combination of catastrophes and economic development, the dimensions of which clearly surpassed the limits proposed by the Modern State Theory.

Along the way, the 'green' movement (focusing on solutions that are environmentally friendly and sustainable), born some time between the end of the twentieth century and the present, has, since its establishment, incorporated the notion of the indivisibility of nature and, in the normative sphere, the necessity of visualising a universal normative system, in order to protect the environment as a whole. Hence, systematic and structured environmental protection may constitute one of the attractive forces in international relations, resulting in the adoption, since 1970, of a growing number of international environmental protection measures. Relative to the changing paradigms of international relations over time, it is possible to observe the emergence of different attractive and repulsive forces.

The Declaration of the United Nations Conference on Human Environment (the Stockholm Conference) of 1972, and its proposed 26 environmental principles, represented the official beginning of a sustained movement initiated to construct a universal protective structure, founded on three pillars: normative,[2] institutional and financial.[3]

[1] E Hobsbawm, *Age of Extremes: the Short Twentieth Century 1914–1991* (London, Michael Joseph, 1994).

[2] With various Conventions elaborated since then, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), the Bonn Convention on Migratory Species (1979), the Vienna Convention for the Protection of the Ozone Layer (1985), the Montreal Protocol on Substances that Deplete the Ozone Layer (1987), the Basel Convention on the Transboundary Movement of Hazardous Wastes (1989), the Convention on Biological Diversity (1992), the Rotterdam Convention on Prior Informed Consent (1998), the Cartagena Protocol on Biosafety (2000), the Malmö Declaration (2000), the Millenium Declaration (2000), the Stockholm Convention on Persistent Organic Poluants (2001), and others.

[3] At one time (1974), both the United Nations Environment Program and the Environmental Fund were established within the United Nations system.

Inevitably, the United Nations assumed a leadership role in the movement towards universalising environmental protection.[4] In addition, early on, the International Law Commission had begun to address some of the environmental issues in its codification work.[5]

While the United Nations and its specialised agencies have played a key role in the process of shaping a normative structure for protecting the environment, we can observe initiatives contributing to the creation of international environmental law appearing from various sectors. For example, the natural environment has become a key component of customary international law, in international case law and in other instruments produced by other non-state actors, such as non-governmental organisations.

The growing normative inconsistency in the environmental context at the international level is a negative (repulsive) force. This inconsistency is a product of a series of trends which have contributed to the difficulty of establishing a stable international normative system, such as (1) the continuity of traditional norms and structures, in the face of normative reforms imposed by international organisations; (2) the erosion of state sovereignty, both internationally and internally; and (3) the growing influence of non-state actors in the formulation of international law.[6]

In consideration of the complex scenario described and its consequences for the efficacy of international environmental law, the very bipolar character of the issue suggests the need for a two-dimensional normative structure. While the transboundary effects of environmental actions are evident, one cannot ignore the local nature of many of the cause/effect variables involved. Given these conditions, without entering the polemical theoretical debate concerning the merits of regionalism versus universalism,[7] I propose that contemporary regional models of governance may offer the opportunity to achieve the best balance between localism and centralism in the environmental normative

[4] From 1970 on, the United Nations began to focus seriously on natural resources, as reported by Rainne: 'A concept of shared natural resources was rather widely discussed in the 1970s and the term was, for instance, included in several UN General Assembly resolutions'. Even so, 'the topic remained disputed and the discussions did not result in widely accepted legal solutions'. J Rainne, 'The Work of the International Law Commission on Shared Natural Resources: the Pursuit of Competence and Relevance' (2006) 75 *Nordic Journal of International Law* 322. In order to deal with environmental subjects the United Nations had to adapt itself to the new challenges; D Fitzpatrick recalls that 'when the United Nations Charter was drafted … the protection of the environment was not an issue of global concern'. Thus, the UN Charter does not expressly authorise the organisation to assume leadership in environmental matters. 'Despite the absence of a specific mandate, the very broad nature of the purposes of the UN, as expressed in Article 1 of the Charter, has allowed it to develop its environmental function within the context of its economic, social and humanitarian responsibilities'. D Fitzpatrick, 'The United Nations General Assembly and the Security Council' in J Werksman (ed), *Greening International Institutions* (London, Earthscan Publications, 1996) 1.

[5] In a review of the direct and indirect initiatives of the International Law Commission (ILC) relative to environmental issues, Hafner and Pearson conclude that the ILC has been dealing with environmental issues since 1950. G Hafner and H Pearson, 'Environmental Issues in the Work of the International Law Commission' (2000) 11 *Yearbook of International Environmental Law* 49.

[6] Asher Alkoby observes how non-governmental organisations, business corporations and other non-state entities have proceeded in the environmental field: 'they initiate international action to address environmental concerns; influence the negotiating process of treaties and other legal instruments, and help monitor state compliance with international norms'. A Alkoby, 'Non-state Actors and the Legitimacy of International Environmental Law' (2003) 3 *Non-state Actors and International Law* 26.

[7] This debate is addressed by Christoph Schreuer in an essay in which he considers the origin of regionalism within and outside the UN structures and he concludes that there is no 'antagonism between regionalism and universalism', and suggests that 'an optimum model involves universal, regional, possibly subregional, national and subnational elements of administration and governance'. C Schreuer, 'Regionalism v. Universalism' (1995) 6 *European Journal of International Law* 499.

structure. Philippe Sands has written in support of this position as follows: 'In application of the principle that different environmental standards could be applied to different geopolitical regions, the role of regional organizations is likely to increase significantly. They are frequently able to provide the flexibility needed to accommodate special regional concerns'.[8]

It is generally recognised that, up to the present, the European Union has constructed the best pattern of regional environmental governance in the world. Starting with the Treaty of Rome,[9] which contained only indirect references to the natural environment, the European Union has developed a high quality normative structure to protect natural resources. Sands highlighted the sequential development of this normative structure as follows:[10]

(1) adoption of the first Directive addressing environmental issues;
(2) implementation of Action Programmes on the environment;
(3) agreement of protection procedures;
(4) setting up of environmental research programmes;
(5) the expansion of the body of EC environmental rules;
(6) the introduction into the EC Treaty of the first provisions on environmental protection by the Single European Act 1986;
(7) addressing the 'environment' as an element in the fundamental objectives of the European Union in the Masstricht Treaty of 1992;
(8) the recognition of the principle of sustainable development as one of the goals of the European Union under the Treaty of Amsterdam of 1997; and
(9) the integration of environmental issues into other Community policies, as one means of promoting sustainable development.

The building blocks of the EU system of law form the basis for the efficacy of regional governance in the environmental field. These are: establishing principles and rules for setting standards; building an extensive corpus of normative processes for developing concepts and founding special regimes; and building an institutional framework of implementing procedures. In view of the successful European experience and accepting the premise that the regional alternative is arguably the best strategy to begin to build a world environmental protection system, I will assess the extent to which environmental requirements are contemplated in the MERCOSUR legal agenda.

I propose a 'systems' approach for the analysis of MERCOSUR laws and regulations relative to the environmental sphere, taking the general rules as my point of departure and moving on to the creation of special norms and institutions concerning management of the environment. The purpose will be to compare the MERCOSUR experience with that of the European Union in order to review the goals of MERCOSUR and draw some conclusions concerning the failures of the MERCOSUR integration process with respect to ecological concerns. The topic of water management will be used to illustrate how MERCOSUR has dealt with environmental issues.

[8] P Sands, *Principles of International Environmental Law* (Cambridge, Cambridge University Press, 2003) 102.

[9] The founding Treaty of the European Economic Community, signed in Rome on 25 March 1957.

[10] For a better understanding of the details of this historical development, see Sands, *Principles of International Environmental Law* (n 8) 740–49.

Prior to undertaking this comparative analysis of EU and MERCOSUR environmental protection law, I feel it is necessary to set out my frame of reference. In two essays, Barbara Pozzo and Vincenzo Vigoriti[11] established the essential first steps, or minimal requirements, for a comparative researcher to proceed on a firm footing. Following their advice, I will first operationally define my unit of analysis, which in this case is regional environmental protection law, with particular emphasis on water management. Secondly, I will define how I will make comparisons: the specific basis of my comparative analysis, with emphasis on how the normative experiences shaped the norms, institutions, enforceability and effectiveness of the systems. To fulfil the final requirement, I will also explain why I am comparing the systems.

The reasons for such a comparative analysis spring from the understanding that the concept of regional integration is a process that is universally applicable, albeit with some variations in characteristics, dynamics and processes of evolution, depending upon the geographical, social, economic and other characteristics unique to the group or parties involved. Thus, despite being distinguishable from the EU development model, the MERCOSUR formative process has the same objectives in common and brings into play the same practices as seen in Europe, making possible the use of the European model as a prototype.

II MERCOSUR and the Environment: A Brief History of Time

With the lack of well-documented texts relating to South American legal integration in the environmental field up to this point in time, this analysis will rely primary on normative sources.[12]

The Southern Common Market, MERCOSUR, was created only 17 years ago, with the adoption of the Treaty of Asunción of 1992, the very same year as the United Nations Conference on Environment and Development, also known as the Rio Summit or Earth Summit, was held. Since MERCOSUR's creation, environmental issues have been included among its objectives. Yet, despite the fact that MERCOSUR was created during a period of time when world attention was focused on environmental issues,[13] there is scant evidence to indicate that this body has addressed these issues. In the Preamble to the founding document, when referring to the principal objective of the bloc—the expansion of domestic markets through integration—the wording is such as to suggest that the

[11] B Pozzo, 'Primi passi di una comparatista' and V Vigoriti, 'Note minime sul diritto comparato' in V Bertorello (ed), *Io comparo, tu compari egli compara: che cosa, come, perché?* (Milano, Giuffrè Editore, 2003).

[12] See, for a normative reference, a survey edited by the MERCOSUR Secretariat, *Medio Ambiente en el MERCOSUR* (relevamiento no 001/06). However, we must note that, sometimes, even technical references are scarce, and only limited information is available to the public. I agree with Mialhe who denounces the lack of available information concerning environmental issues as regards MERCOSUR on the website (siam.mma.gov.br/) devoted to this objective. JL Mialhe, 'Direito Ambiental como expressão dos Direitos Humanos: a relevância do direito à informação no Mercosul' (2006) 5 *Verba Juris* 207.

[13] It is noteworthy that the 1988 Brazilian Constitution has an entire chapter devoted to environmental issues, reflecting considerable influence from the Stockholm Declaration of 1972.

objective must be achieved by making optimum use of available resources and preserving the environment. However, there is no reference to the environment in any of the specific articles of the document.

Garabello agrees that MERCOSUR's record of dealing with environmental issues is weak, starting with the low priority placed on this area in the Treaty of Asunción. Citing other integration models,[14] she suggests that one of the reasons for this lack of emphasis on environmental issues is that, in MERCOSUR developing countries, all attention was focused on commercial issues, as an avenue to swift and permanent economic growth.

A bilateral agreement signed between Brazil and Argentina in 1992 and formally approved by Uruguay, is considered the first special regulation concerning the environment among MERCOSUR Member Statess. Even so, this agreement was formulated under the auspices of the Latin American Integration Society (ALADI, Asociación Latinoamericana de Integración) and not as a formal MERCOSUR document. Also, the object of this agreement—cooperation in and exchange of goods used in environmental protection—is not clearly articulated and therefore has not yielded specific results.

The ground-breaking initiative on environmental protection undertaken by MERCOSUR countries can be traced back to February 1992, during preparations for the United Nations Conference on Environment and Development, to be held later that year.[15] On that occasion, the presidents of the partner countries signed the Declaration of Canela, in which they shared their concern at the crisis threatening the natural environment, their awareness of and commitment to shared responsibility and asymmetrical participation, and a framework for development and cooperation. However, despite its well-intentioned rhetoric, the document contains no power of enforcement, nor provisions establishing the institutional structure for putting its objectives into practice.

In response to some of the initial structural weaknesses, I should point out that concrete steps for internalising environmental issues on the part of MERCOSUR are carried out by the Council of the Common Market (CCM) and the Common Market Group (CMG), the superior and executive organs, respectively, of the MERCOSUR structure.[16] In CCM Decision No 1/92, formalised by the CCM in June 1992, a timetable of measures (the so-called Lãs Leñas Action Plan of 1994) was established which initiated action aimed at working towards the objectives and goals set out in the Treaty of Asunción. At this time, subgroups were formed and charged with several environmental initiatives.[17] The most relevant of these initiatives involved Working Group No 7, who were tasked with the carrying out of a programme to achieve the concurrence of national and provincial environmental legislation. Also in June 1992, the CMG, under its responsibility to execute the Decisions of the CCM, adopted CMG Resolution No 22/92, which created the Special Conference on the Environment (REMA, Reunión Especializada de Medio Ambiente del MERCOSUR). According to the terms of the Resolution, the primary task of REMA was to

[14] R Garabello, 'Una politica ambientale per il Mercosur? Luci ed ombre di uno sviluppo incerto' (2002) 22 *Communicazioni e studi* 669. As regards the European Union, she considers that 'already at the beginning of the 70s the then European Economic Community had begun to develop an environmental competence'.

[15] Though not a formal member of the regional bloc, Chile also participated in this effort. Chile has held associate member status since 1996.

[16] For more on the institutional structure, see Adriana Dreyzin de Klor, Chapter 3.

[17] See Subgroup 7, Technological and Industrial Policies (item 3); Subgroup 8, Agricultural Policy (item 7); and Subgroup 9, Energy Policy (item 6).

analyse legislation in force in MERCOSUR countries and to propose, via recommendations to the CMG, action plans in different spheres to enhance environmental protection and to work towards standardising roles and positions. A key point is that, in addition to REMA, Working Group No 7 created a Commission specialised in environmental issues (CMG Resolution No 5/93) to work in this sphere.

Following a series of delays, the MERCOSUR Las Leñas Action Plan was not implemented on schedule, evidencing the difficulties in achieving many of the objectives and targets set out in the Treaty of Asunción. In July 1993, the CCM published a general adjustment to the timetable proposed in the Las Leñas Plan (CCM Decision No 1/93).

Documented accomplishments of the work carried out by the Environmental Commission of Working Group No 7 are not available. The previously-mentioned survey edited by the MERCOSUR Secretariat states: 'the works of the mentioned commission included the elaboration of a comparative matrix of national legislations, a project of technical assistance for the environment and the elevation of recommendation no 20/93, which urged the CTT (Technical Cooperation Committee) to approve a Draft of Environmental Cooperation'.[18]

On the other hand, in reference to REMA, it is noteworthy that even though it was created in June 1992, its first meeting was held only in November 1993. Within one year (the group finished its activities in November 1994), the group had achieved some results. For example, REMA had completed some of the tasks set out by the CMG, which ordered REMA (CMG Resolution No 63/93) to elaborate a timetable to eliminate the non-tariff barriers related to the environment and, in accordance with its mandate, recommended the adoption of some guidelines for environmental policy (CMG Resolution No 10/94). Among the guidelines proposed, the first, aimed at ensuring the harmonisation of the terms of environmental legislation among the MERCOSUR Member States, seems to be the most significant in the legal area. The objective of harmonisation of legislation is important in its own right. However, in justifying this initiative it is clarified that to 'harmonise' does not suggest the need for 'one size fits all' legislation.

While the evidence suggests some noteworthy initiatives, a review of the overall landscape of MERCOSUR's progress to that point suggests that, up to 1994, environmental issues remained at the periphery of the MERCOSUR political and legal agenda. Even among the actions taken, such as CMG Resolution No 57/93, which adjusted some environmental items in energy policy guidelines, one has to keep in mind the programmatic character of such documents. What is still lacking is the inclusion of additional normative instruments to transform proposed goals into accomplishments.[19]

The adoption of the Ouro Preto Protocol in December 1994 established the definitive MERCOSUR institutional structure and confirmed the functions of the CMG. Article 14.V of the Protocol gave the CMG the authority to establish, modify or abolish organs such as working groups, and to call special meetings, for the purpose of achieving its objectives.

[18] MERCOSUR Secretariat, *Medio Ambiente en el MERCOSUR* (n 12) 6.

[19] There have also been significant advances in regulation concerning the transport of hazardous substances; in 1994, three CCM Decisions were incorporated into national legislation.

The first meeting of the Ministers and Secretariats of the Environment of MERCOSUR was held in Montevidéo in June 1995, during which time the Declaration of Taranco[20] was adopted. In the document, the participants analysed the achievements of REMA and, while recognising its positive performance, they were unified in their commitment to strengthen the institutional framework for dealing with environmental issues within MERCOSUR and called for the transformation of REMA into a working group. In addition, REMA conducted a survey of environment-related legislation enacted in partner countries, with the express purpose of promoting greater harmonisation. The Taranco Declaration supported the initiative to achieve greater cross-border concurrence of legislation, emphasising the importance of establishing agreed-upon priorities among the partners.

Subsequently, in August 1995, the CMG, at the same time that it was establishing its new internal structure (CMG Resolution No 20/95), created Working Group No 6, with the charge to deal specifically with environmental issues. The following December, the CMG set up the first seven major Protocols of the group.

III Working Group No 6 and the Framework Agreement on the Environment

CMG Resolution No 38/95, which established areas of emphasis for all the working groups, set goals for the Working Group No 6 in the following areas:

(1) Non-tariff barriers: analyse barriers related to the environment, with the purpose of either standardising or eliminating them.
(2) Competitiveness and the environment: study the environmental costs in the productive process, to ensure equal conditions of competitiveness among the MERCOSUR Member States, with other countries, as well as with other regional organisations.
(3) International norms (ISO 14000): analyse the probable impacts of the application of this type of norms, in order to guarantee equality in competitive position.
(4) Sectoral issues: promote inter-group integration.
(5) Drafting a legal environmental instrument for MERCOSUR: elaborate a normative instrument, taking into account national laws and regulations and specific environmental issues, for the purpose of enhancing the quality of the environment in the MERCOSUR Member States.
(6) System of environmental information: establish an environmental data system.
(7) MERCOSUR 'green label': develop a MERCOSUR environmental certification system.

In reviewing the set of stated Protocols, one is reminded of the previously-stated focus on legal harmonisation, which is an attempt to elaborate the strategic plan of MERCOSUR. The subsequent discussion will focus specifically on Protocol No 5: to elaborate a regional

[20] This document laid down a more programmatic framework, revising the MERCOSUR institutional structure relating to environmental protection and setting new objectives for the future.

instrument to be used as a reference point, against which national laws and regulations can be examined, with the objective of achieving greater cross-border harmony in the environmental field.

During the second session of Working Group No 6, in May 1996, a methodology and timetable of work was adopted to create the regional instrument. By June 1997, Working Group No 6 had drafted an instrument, entitle the Environmental Additional Protocol to the Treaty of Asunción; however, formal CCM approval of the final document only came some four years later, with the adoption of CCM Decision N 02/02, in June 2001. In the interim, Working Group No 6 had discarded the Additional Protocol draft document and adopted instead the Agreement of Florianópolis, which had been drafted in an extraordinary session of the working group in March 2001. Subsequent to its approval, the Agreement came to be known as the Framework Agreement on the Environment of MERCOSUR.[21] The purpose of the Agreement, as stated in article 4, is 'the sustainable development and protection of the environment through the coordination of the economic, social and environmental dimensions, thereby contributing to a higher environmental standard and quality of life for people'.

The Agreement stipulated that it would become effective 30 days after the ratification by all partners. Uruguay and Argentina were the final countries to ratify the Agreement, on 24 May 2004, and the Agreement entered into force in June 2004, exactly three years after its adoption by Working Group No 6. The key provisions can be found in articles 3 and 6. Article 3 contains a group of subprinciples by which the states parties will be guided in their efforts to achieve the objectives of the Agreement and to implement its provisions.[22] Article 6 sets forth specific actions to be carried out as part of undertaking the analysis of environmental problems in the subregion, with the participation of relevant national governmental agencies and civil society organisations.[23] Another relevant provision is

[21] An English version of the Agreement is available at http://untreaty.un.org/unts/144078_158780/7/1/14094.pdf.

[22] 'Article 3. In their efforts to achieve the objective of the present Agreement and to implement its provisions, the States Parties shall be guided by, inter alia, the following: (a) Promotion of the protection of the environment and the most effective use of available resources through coordination of sectoral policies, based on the principles of gradualism, flexibility and equilibrium; (b) Incorporation of an environmental component in sectoral policies and inclusion of environmental considerations in decisions taken within MERCOSUR, in order to enhance integration; (c) Promotion of sustainable development by means of reciprocal support between the environmental and economic sectors, avoiding the adoption of measures that might arbitrarily or unjustifiably restrict or distort the free movement of goods and services within MERCOSUR; (d) Giving priority to the causes and sources of environmental problems through a comprehensive approach; (e) Promotion of the effective participation of civil society in addressing environmental issues; and (f) Encouragement of the building in of environmental costs through the use of economic and regulatory management tools.'

[23] 'Article 6. The States Parties shall deepen the analysis of environmental problems in the subregion with the participation of the relevant national agencies and organisations of civil society. They shall carry out, inter alia, the following actions: (a) Increase exchanges of information on environmental laws, regulations, procedures, policies and practices, as well as their social, cultural, economic and health aspects, in particular, those which may affect trade or competitive positions within MERCOSUR; (b) Encourage national environmental policies and instruments with a view to optimising environmental management; (c) Seek to harmonise environmental legislation, taking into account the differing environmental, social and economic realities of the MERCOSUR countries; (d) Identify sources of financing for capacity-building in the States Parties, in order to contribute to the implementation of the present Agreement; (e) Help to promote environmentally sound and safe working conditions so as to make it possible to improve the quality of life, social welfare and job creation within a sustainable development framework; (f) Help to ensure that other MERCOSUR forums and agencies give appropriate and timely consideration to the relevant environmental aspects; (g) Promote the adoption of environmentally sound policies, production processes and services; (h) Encourage scientific research and the development of clean technologies; (i) Promote the use of economic instruments to support the execution of

contained in article 7, with respect to the continuity of the harmonisation work by the states, by providing thematic guidelines included in the Annex to the Agreement.[24]

The framework nature of the MERCOSUR Agreement is evident.[25] Within the regional context, this definition fits very well with the MERCOSUR environmental Agreement, not only in terms of its title, but especially in reference to the language of its rules and its overall structure.[26] Besides the Framework Agreement, other normative environmental initiatives were taken in the context of MERCOSUR, even before and during the long *vacatio legis* to the entering into force of that instrument. A very important one can be found in the context of an Interregional Framework Cooperation Agreement between the European Community and MERCOSUR, signed in Madrid in December 1995, which contains a specific article concerning cooperation on environmental protection issues. Another extra-bloc example is the Cooperation Agreement between MERCOSUR and Canada, which also deals with environmental topics.[27] Other timely initiatives were undertaken by other working groups with environmental interfaces, resulting in CCM Decisions and CMG Resolutions, enabling progress in areas such as transportation of dangerous goods, unlawful environmental degradation in regional security areas, and emission of polluting gases from automobiles. In May 1998, the theme of 'environmental emergencies' was introduced into the programme of work of Working Group No 6, signalling a new advance toward achieving environmental legal harmonisation.

Following through with the focus on legal harmonisation, and consequently on the Framework Agreement as an instrument produced with this objective in mind, it is important that I now turn my attention to the degree to which the Agreement has produced tangible results.

sustainable development and environmental protection policies; (j) Encourage the harmonisation of legal and institutional guidelines for the purpose of preventing, controlling and mitigating environmental impact on the States Parties, with particular reference to border areas; (k) Provide timely information on environmental disasters and emergencies that may affect the other States Parties and, where possible, technical and operational support; (l) Promote formal and informal environmental education and foster knowledge, patterns of conduct and integration of values aimed at producing the changes necessary to achieve sustainable development within MERCOSUR; (m) Consider cultural aspects, where appropriate, in the environmental decision-making process; and (n) Develop sectoral agreements on specific issues as needed for the achievement of the purpose of the present Agreement.'

[24] Thematic areas: 1 sustainable management of natural resources: (a) wild fauna and flora; (b) forests; (c) protected areas; (d) biological diversity; (e) biosecurity; (f) water resources; (g) fisheries and aquatic resources; (h) soil conservation; 2 quality of life and environmental planning: (a) basic sanitation and drinking water; (b) urban and industrial waste; (c) hazardous waste; (d) hazardous substances and products; (e) protection of the atmosphere/air quality; (f) land use planning; (g) urban transport; (h) renewable and/or alternative energy sources; 3 environmental policy instruments: (a) environmental legislation; (b) economic instruments; (c) environmental education, information and communication; (d) environmental monitoring instruments; (e) environmental impact studies; (f) environmental accounting; (g) environmentally conscious business management; (h) environmental technologies (research, processes and products); (i) information systems; (j) environmental emergencies; (k) valuation of environmental products and services; 4 environmentally sustainable productive activities: (a) ecotourism; (b) sustainable agriculture; (c) environmentally conscious business management; (d) sustainable forest management; (e) sustainable fishing.

[25] Referring to the Kyoto Protocol, see L Boisson de Chazournes, 'La gestion de l'intérêt commun à l'épreuve des enjeux économiques : le Protocole de Kyoto sur les changements climatiques' (1997) XLIII *Annuaire Français de Droit International* 702.

[26] As observed years before by Alexandre Kiss, the Framework Agreement approach is used increasingly frequently in international environmental law. A Kiss, 'Les traités-cadres: une technique juridique caractéristique du droit international de l'environnement' (1993) XXXIX *Annuaire Français de Droit International* 792.

[27] Both cited in MERCOSUR Secretariat, *Medio Ambiente en el MERCOSUR* (n12) 16–20.

Of the noteworthy efforts following the passage of the Agreement, the approval of CMG Resolution No 45/02 in June 2002 stands out as highly significant. A new set of guidelines for Working Group No 6 was established. In this latest document, instead of proposing to draft a document on environmental issues, the goal is to implement CCM Decision No 02/01, which is the Framework Agreement on Environment of MERCOSUR. In defining the objective as being that of implementing the Framework Agreement, the individual parties were directed to refer to the specific areas of concentration specified in the Annex and select those they considered most relevant, as a point of departure, to work towards integration. The choice of strategies for implementation would be at the discretion of the Member States.

One of the more significant achievements of Working Group No 6 was in response to deliberations concerning the recently introduced topic of 'environmental emergencies', with the elaboration of an Additional Protocol to the Framework Agreement on Environment of MERCOSUR. The legal instrument, proposed by Working Group No 6 in April 2003 and approved by the CMC in Decision No 14/04, seeks to regulate cooperation and assistance in response to environmental emergencies. However, five years have gone by and the ratification process has yet to be completed; therefore, this instrument has not yet been activated.

It is beyond the scope of this chapter to document all of the decisions and actions of Working Group No 6. The focus is limited to the contents of the Framework Agreement itself, detailing the terminology used and the character of its provisions, to examine the degree to which goals and objectives are achievable, to comment on the setting which marked the adoption of the document within the MERCOSUR integration process itself. It is timely also, *en passant*, to comment on the nature of some measures concerning environmental issues taken before and after the entry into force of the Agreement, while examining the efficacy of these specific provisions and the dynamics of their relationship to the Framework Agreement. As a final step, I propose to comment on the overall functional efficacy of the Framework Agreement. By addressing these points, I should be able to establish a better understanding of the paradoxes and paradigms of harmonisation of MERCOSUR environmental law.

IV A Critical Overview of the Framework Agreement

Before analysing the character and degree of efficacy of the Framework Agreement on Environment of MERCOSUR, it should be noted that, in the introductory section of the document, the MERCOSUR Member States reaffirmed the sustainable development precepts set out in Agenda 21, adopted in 1992. In addition, they reaffirmed, in article 1, their commitment to the principles set forth in the Rio Declaration on the Environment and Development of 1992 and went on to state in article 2 their commitment to examining the possibility of promoting the implementation of those principles which have not previously been addressed in international treaties. In consequence, the initiative to synchronise the regional document with the international norm seems to me a

noteworthy achievement of the Framework Agreement. The very fact of the transboundary character of nature itself calls for coordinated international and regional rules and guidelines.[28]

I will now return to the terms of the Agreement and the character of its provisions, keeping in mind its two overarching goals: (1) harmonising national laws and (2) seeking to promote the implementation of international principles.

First of all, the nature of the Agreement itself has been the object of considerable criticism and some degree of resignation. One area of contention has to do with the structure and process of public input and governance in MERCOSUR. Kathryn Hochstetler reviewed the process of adopting the environmental agreement, starting with the first document prepared by Working Group No 6, the Additional Protocol on the Environment (with 85 highly-specific articles, covering a wide variety of environmental issues) which was disregarded, and comparing it with the accepted Framework Agreement (with 10 articles), approved in June 2001. She summarised her analysis with the discouraging comment that the approved text 'only affirmed the 1992 Rio Declaration principles and made non-specific commitments for future analysis of regional environmental problems and environmental implementation'.[29]

Even given the somewhat unsatisfactory evaluation of progress to this point, in terms of the ideal of having in place a faultless environmental protection law, I prefer to adopt an optimistic view. Despite some internal weaknesses, the Agreement represents a significant (if somewhat belated) step forward in the process of developing a regional environmental law protection system. On the other hand, to assume an optimistic outlook is not to ignore the essential preconditions for keeping this initiative on course. It is imperative that the bloc adopt other instruments, in order to consolidate the MERCOSUR system of environmental protection. From this perspective and using the European system as a model, I will now consider the MERCOSUR instruments (both those already in place and others that will be required) that are necessary for effective and efficient performance in this area.

As has been mentioned, some normative environmental actions ensuring timely response were taken even before the adoption of the Agreement and CCM Decisions and CMG Resolutions, and this normative progress continued after the Agreement entered into force. I believe that evolving regulatory agreements can fill the voids left in the original Framework Agreement and are crucial to be adopted now and at the future. EU environmental law also is comprised of a complex set of Directives, Regulations and Decisions, plus a broad range of instruments and techniques, which complement the general principles and rules. But merely to exist is not sufficient—all the structures and procedures must be efficient and effective, and for this, they must satisfy a broad set of requirements. First of all, the structures and procedures must be in harmony with the terms and objectives of the Framework Agreement and must be articulated in a way to facilitate implementation of its provisions. Secondly, all of the normative structures have to be implementable, in that each area has to contain its own normative substructure.

[28] It is of note that the same type of provision is found in the Preamble to the Interregional Framework Cooperation Agreement between the European Community and MERCOSUR.

[29] K Hochstetler, 'The Multi-level Governance of the Environment in MERCOSUR 28/02–3/3', paper presented at the Annual Convention of the International Studies Association, Chicago, 2007 (see www.allacademic.com/meta/p178642_index.html).

Finally, there has to be mechanism of enforcement of the norms, with an institutional structure and an efficient procedure of conflict resolution.[30]

Taking into consideration the requirements set out above and within the context of article 7 of the Framework Agreement and the thematic guidelines in the Annex to the Agreement, we can conclude that the regulatory process of MERCOSUR is incomplete and not yet linked to the Framework Agreement. MERCOSUR has begun to regulate only some areas of its environmental law. What has evolved is a fragmented normative process, with bits and pieces referred to in the context of other working groups.[31] This kind of development inevitably leaves significant gaps to be remedied. Referring to the EU model, a high-level EU environmental law normative structure is manifest.[32] Legislation is organised by thematic fields[33] promoting the development of a much broader range of legislative instruments. Furthermore, within the European Union it is possible to find the use of new economic instruments and market-based techniques to facilitate implementation of the principles and rules set out in top-tier European treaties. I have chosen to concentrate on one of the thematic fields, in order to identify departures from the second requirement, 'the existence of a complete normative substructure for a specific field', thereby facilitating goal achievement.

V The Example of Water Regulation

Taking the case of safeguarding water resources, as one of the most important thematic areas on the environmental agenda to be developed by MERCOSUR, and comparing it with the EU example, we can observe that, within the European Union, the protective structure is well organised, utilising a model which transitions satisfactorily from the general to the specific.[34]

In the European case, in this specific area, we can find, besides general environmental regulation, a fairly complete and structured framework of regulation. Water issues already appeared in the implementation of the second Action Programme on the Environment (between 1977–1981) and, even before then, it was regulated by European Directives.[35]

[30] Soutullo and Gudynas, in assessing the effectiveness of the MERCOSUR network of protected areas in South America's respective eco-regions, reach virtually the same conclusion. In their words: 'a regional approach requires not only the identification of regional priorities, a unified strategy and coordinated actions, but also shared responsibility'. A Soutullo and E Gudynas, 'How Effective is the MERCOSUR Network of Protected Areas in Representing South America's Ecoregions?' (2006) 1 *Oryx* 115.

[31] See Garabello, 'Una politica ambientale per il Mercosur?' (n 14). The author gives various examples of environmental rules prepared by other working groups. The first concerns renewable energy sources (thematic zone 2(h) of the Framework Agreement) proposed by Working Group No 9 on energy policy. Two other examples relate to the protection of air quality (thematic zone 2(e)) and to transport (thematic zone 2(g0), both proposed by Working Group No 3 on technical norms. There is also an example of regulation concerning hazardous substances (thematic zone 2(d)) proposed by Working Group No 5 on terrestrial transport.

[32] The European Union home page covering EU activities on the environment provides a good snapshot of these activities: see http://europa.eu/pol/env/index_en.htm.

[33] General provisions, sustainable development, waste, noise, air pollution, water, nature and biodiversity, soil protection, civil protection, climate change.

[34] It is obvious that this protective structure was not built in a short period of time; it is the result of a long process which began with the European Water Charter in 1968.

[35] The group Observatoire Regional de l'Environnement Poitou-Charentes have made a limited review of the most important European Directives on the subject and we can see an in-depth and well-established normative

Nowadays, the European normative structure for water protection and management is more organised. It was unified by the EU Water Framework Directive, adopted in 2000.[36] This Directive replaced a range of Directives in the field of water policy, and operates as a central document related to other specific and localised norms (management plans and programmes of measures at a local level, and also a 'daughter Directive' on groundwater protection)[37] to make up a complete body of regulation.[38] The Framework Directive embodies the concept of integrated river basin management and sets some goals to be achieved sequentially within particular national and international basin legislation. At this point in time, the majority of the essential specific national legislation is already in place.[39]

Turning to MERCOSUR initiatives in the area of water protection, we find many deficiencies. In fact, even though there is a specific item on water resources listed among the thematic areas of the Framework Agreement, an instrument to implement and monitor water protection has yet to be developed. Both Working Group No 6 and the ad hoc group created to discuss the issue of water protection are still at an early stage of discussions and there are other ad hoc groups working in related areas,[40] which suggests the need for coordination of efforts and will likely make short-term progress more difficult to achieve. On the harmonisation aspect, Pes indicates that there are still significant differences between the laws and public policies of water management in each Member State.[41]

VI General Conclusion: A Question of Institutional Development

Returning to a general point of view, it is fair to conclude that ensuring a workable environmental protection framework, namely, the applicability of the existing norms, is something that MERCOSUR needs to learn from the EU experience. It is clear that MERCOSUR Member States have experienced difficulty in constructing normative instruments which stand the test of effectiveness. The MERCOSUR Additional Protocol to the Framework Agreement on the Environment is a case in point. Changing the point of view

regulation of water management. See in particular: Directive 75/440/EEC concerning superficial and fresh water quality (16 June 1975); Directive 76/160/EEC concerning bathing waters (8 December 1975); Directive 80/68/EEC concerning the protection of groundwater against the pollution caused by certain dangerous substances (17 December 1979).

[36] Directive 2000/60/EC.

[37] Directive 2006/118/EC.

[38] Still on this subject, we should not forget that outside the EU order but still involving the European countries there exists another framework instrument, the 1992 Helsinki Convention, adopted under the aegis of the United Nations Economic Commission for Europe (UNECE), with specific provisions concerning the prevention and control of pollution of transboundary watercourses and international lakes. This instrument confirms the high degree of European cooperation over this issue, and demonstrates that it is better to err on the side of excessive caution.

[39] Even though they cannot be free from criticism as there will always be some points that could be improved. See M Cavagnac and J-J Gouguet, 'La directive cadre sur l'eau au defi de l'internationalisation des effets externes' (2008) 3 *Revue Européenne de Droit de l'Environnement* 267.

[40] See, eg the ad hoc groups on the Guarani Aquifer and on Desertification.

[41] JHF Pes, *O Mercosul e as águas: A harmonização, via Mercosul, das normas de proteção às águas transfronteiriças do Brasil e Argentina* (Santa Maria, Urcamp and Ufsm, 2005).

to a different element does not change the opinion. The theme 'environmental emergencies' would suggest the need for urgency in crafting rules and guidelines for action, yet five years have passed since the acceptance of the Additional Protocol by CCM Decision No 14/04, and only two of the four MERCOSUR countries, Uruguay and Argentina, have ratified the instrument.

Considering the question of the creation of an enforcement apparatus, an institutional structure and an efficient conflict resolution mechanism, I conclude that this is perhaps the biggest MERCOSUR failure, not unique to the area of environmental issues.

Environmental governance in the European Union is the business of various institutions. As Sands mentions, the European Commission and the Council of Ministers both make it their business to be concerned with environmental issues.[42] He also stresses the role of the European Environmental Agency, an autonomous entity, acting mainly as a research and information distribution organ, specialising in environmental subjects. As mentioned in the introduction above, a key factor in the positive results within the European Union is the creation of mechanisms for normative enforcement. While some of the norms have no binding force, many of them, in fact, create rights and obligations, which translate into action. Moreover, the supranationality of the EU norms both encourages and promotes compliance and helps strengthen its institutions. Finally, the binding nature of the decisions of the European courts leaves no doubt concerning the efficacy of its normative system. In truth, the absence of effective normative enforcement and conflict resolution mechanisms within MERCOSUR will only serve to further erode the authority and efficacy of the institution.[43]

Moreover, while in Europe national legislations are in force and all states are involved in encouraging normative implementation and ensuring penalties for breaches of Directive provisions, MERCOSUR Member States are not prepared for this goal.

The fact that MERCOSUR has initiated actions to deal with environmental issues confirms that both the CCM and the CMG have been actively dealing with the problems. The institution of Working Group No 6 served to stimulate significant concrete advances in crafting MERCOSUR environmental law. In addition, since 2004, the environmental ministers of MERCOSUR countries have been more actively engaged in environmental issues. Thus, even though there are some observed weakness and gaps in the institutional framework, progress is being made. As regards the Meeting of Ministers, it is encouraging to see that some valuable documents have been produced, such as the elaboration of an Additional Protocol to the Framework Agreement on Water Resources Environmental Management.[44]

My opinion is that the MERCOSUR administrative units are prepared to provide the support necessary to deal with environmental issues. On the other hand, I feel that the normative and judicial institutions of MERCOSUR still show many weaknesses, which must be remedied for MERCOSUR to be an effective force in this area.

[42] Sands, *Principles of International Environmental Law* (n 8) 736–37.

[43] On this, see M Franca Filho, *O Silêncio Eloquente: a responsabilidade do Estado por omissões do legislador e a transposição de diretivas na Comunidade Européia e de diretrizes no MERCOSUL* (Coimbra, Coimbra editora, 2004).

[44] See the agreement elaborated at the Fourth Meeting of Ministers held in November 2005, available at http://MERCOSUR.medioambiente.gov.ar/archivos/web/MERCOSUR/File/4%20Proyecto%20de%20Dec%20Hidricos.pdf.

I have identified some judicial cases related to the environmental field that have been arbitrated in MERCOSUR courts. While it is not my aim to treat this in depth, I consider it worthy of note that in none of the cases did MERCOSUR's position on the environmental requirements prevail in the decisions.[45] In fact, in three of the cases, the environmental issues were treated only at the periphery of the issues. Only in the second case, *Uruguay v Argentina*, concerning the import of retreaded tyres, was the environment at the centre of the controversy. In this unique case, even though a pro-environmental decision was given at first instance,[46] only three months later the decision was overturned and the free trade principle prevailed over the environmental protection argument.

In contrast, the European Union has dealt with a significant number of cases involving environmental issues,[47] with a good success rate in protecting the environment. One of my purposes in comparing the success of the European Union and MERCOSUR is to encourage and to appeal to the MERCOSUR institutions to continue and intensify their work, to build a productive and efficient organ to deal with environmental concerns. I am confident that the optimistic view will prevail, in that there is sufficient evidence to confirm that MERCOSUR is slowly but surely moving in the right direction, to protect and preserve the environment. One must not forget that any comparative analysis must proceed with the understanding that each unit of analysis is unique[48] and a product of its own particular social, political, economic and cultural background. MERCOSUR environmental law has not only the European model from which it can draw ideas for developing its structures and functions. Other blocs and individual countries provide excellent examples of institutional structures and laws, rules and guidelines, with, most particularly, Brazilian environmental law being the best model of environmental protection within the individual MERCOSUR Member States.

[45] See *Retreaded Tyres, Uruguay v Brazil*, sixth MERCOSUR Ad Hoc Arbitration Court, January 2002; *Phytosanitary Products, Argentina v Brazil*, seventh Ad Hoc Arbitration Court, April 2002; *Retreaded Tyres, Uruguay v Brazil*, Decision No 1/2005 from the Permanent Review Court, December 2005; *Interruptions in Bridges, Uruguay v Argentina*, twelfth Ad Hoc Arbitration Court, June 2006. For a doctrinal approach, see also A Dreyzin De Klor, 'Comercio en el MERCOSUR y Desarrollo. Límites a propósito del laudo once y del primer laudo del Tribunal Permanente de Revisión' (2008) *Boletín Mexicano de Derecho Comparado* 175; and EB Gomes, 'Democracia, direitos humanos e proteção ao meio ambiente no contexto da integração regional' (2007) 27 *A and C Revista de Direito Administrativo e Constitucional*.

[46] *Retreaded Tyres, Uruguay v Argentina*, eleventh Ad Hoc Arbitration Court, October 2005.

[47] See eg the European case law of the two European courts in the 'environment and consumers' field, available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

[48] As pointed out by Nils Jansen: N Jansen, 'Comparative Law and Comparative Knowledge' in M Reinmann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (New York, Oxford University Press, 2008) 306.

13

Circulation of Workers in the Law of MERCOSUR

HUGO ROBERTO MANSUETI*

I Introduction

Unlike the typical freedom of movement limited to the internal territory of a state, the freedom of circulation referred to in this chapter concerns the right to migration and immigration at an international level.

Migration and immigration of individuals occur in the employment field, in the varied cases in which a foreigner is employed to perform tasks in the territory of a state of which such foreigner is not a national. In many cases, such individuals will be protected by a system of special legal conditions, for instance, people fulfilling tasks in diplomatic representation or in the consulates of their states, subject to specific regulations of international law; or those uprooted individuals who leave their countries due to political, ethnic or religious reasons, or environmental catastrophes, who are provided for by international law granting them the status of refugees.[1]

However, when such special cases of international protection do not apply and the individual leaves the territory in which he is a national voluntarily in order to take up employment in another territory, this situation constitutes 'labour migration'.

In 1999, the International Labour Organisation (ILO) estimated that the total number of migrant workers worldwide was around 90 million people (including workers and their families), who resided, whether legally or not, in a country in which they were not nationals. Studies carried out by the United Nations suggest the figure is 170 million people, including the irregular migrants who are more difficult to detect in official statistics and are economically and legally much more vulnerable.[2]

The main barrier to the full exercise of free circulation of individuals has been the regulation of migration and immigration flows in each state. It has always been considered that one of the attributes derived from the sovereignty of nation-states is the full power to decide on the admission of foreigners to their territory and the conditions and requirements established to enter and/or reside with limitations and prohibitions. The position that a state adopts as regards the right of migration (nationals or inhabitants leaving their territory) and immigration (foreigners entering) is known as 'migration policy'.

* The author would like to thank María Celina Peinado, lawyer, for the English version of this work.

[1] Mario E Ackerman, 'Los problemas laborales y de seguridad social que se plantean respecto de la migración de los trabajadores transfronterizos' (2000) B *DT* 1738.

[2] CLADE, *Informe Anual 2001*, ch IV, available at http://cladehlt.org/informe2001capIV.htm.

In recent years, a significant change in approach among the states of the international community has taken place as a consequence of so-called globalisation. This is illustrated, for example, in the recent increase in the number of Member States of the United Nations and of the World Trade Organization (WTO), which has recently expanded to include more powerful countries such as China, whose production possibilities are a source of concern for the economies of underdeveloped countries. 'Defensive' mechanisms adopted by states add to this process by the progressive creation of regional communities, aiming to produce the characteristics of integration accepted by the WTO by attempting to reduce differences and combine efforts in order to enter the world trading system on equal conditions.

All integration processes affect individuals' lives to some extent: this is the so-called 'social dimension'.

Broadly speaking, integration processes are developed through three main axes: (1) customs deregulation (reduction or elimination of duties); (2) acceptance of freedom of circulation of capital; and (3) the circulation of individuals.

(1) Customs deregulation brings about unfettered transnational competition; as a result, less competitive factories close down in favour of those factories that manage to market their products at lower prices. As a consequence, some workers lose their jobs.

(2) As far as the free circulation of capital is concerned, this generates the speculative settling of companies in locations where production at a lower cost is possible. This speculation takes place as either settlement or desettlement. When the economic situation makes production more expensive, such companies may close down, causing job losses. An example of this would be the '*maquila*' companies. This expression derives from the term '*maquillaje*', the Spanish word for 'make up', and refers to the hand-finishing of a product which requires non-qualified personnel or personnel with low levels of education to perform this task. The *maquiladoras* create unstable jobs in other countries at the cost of reducing employment in their own country. The head office provides the equipment and raw material and the host state provides the labour. Efrén Córdova points out that the agreement is always profitable for the company that establishes the *maquila*. The typical effect is to pay the lowest salaries without worrying about aspects such as safety and hygiene and environmental protection. Córdova adds that 105 of the 3,300 *maquiladoras* existing along the border between México and the United States generate US$5 billon annually, but almost 90 per cent of the workforce are poorly paid women.[3]

(3) The free circulation of individuals also generates social consequences, many of them arising from an asymmetric currency. Workers who migrate to another territory, often temporarily, earn lower incomes than nationals, but such salaries have significant value in their countries of origin due to currency differences. This situation also influences the employment market of the country which receives foreign labour, making its own workers less competitive and lowering their salary levels.

In the MERCOSUR context, article 1 of the Treaty of Asunción establishes in its first part that, 'This Common Market implies the free circulation of goods, services and productive factors among the countries'. The wording is very important. The main economic slant is obvious: the freedom of circulation of individuals—human beings—is not expressly stated, as was the case in the majority of the European integration

[3] Efrén Córdova, 'El dumping social en el marco de la globalización' (2000) XXVII *V and SS* 101.

documents, as José Acosta Estévez emphasises in his classic work.[4] It is necessary to construe the text of the article literally in order to consider individuals included in the formula, not as human beings but as 'productive factors'. However, as Paula C Sardegna writes,[5] migratory legality 'does not only make a rule to be fulfilled but also the fulfilment of the principles that contemporary societies have assumed as basic values'; undoubtedly, one of those principles is that the worker is neither goods nor just a productive factor.

In fact, the free circulation of labour regarded as productive factors and services becomes an inherent tool in the idea of a common market. This idea implies (as expressed in the Treaty itself) the elimination of any kind of restrictions on worker migration within the territory of the four MERCOSUR Member States; and essentially that workers who are nationals of any of these countries must receive the same treatment as the national labour force without discrimination of any kind. The only admissible exceptions to this general principle should be based on the performance of tasks related to security measures, morality, health and public hygiene.

This free circulation of individuals, as suppliers of services or production factors, essentially implies the acknowledgment and the implementation of three other freedoms: (a) circulation of wage-earning workers or the 'freedom to perform working tasks'; (b) rendering of services or the 'freedom to exercise professional services'; and (c) establishment or the 'freedom to engage in trading activities', for both individuals and legal entities.[6]

The exercise of the said freedoms will require, first, regulation of the activities of the Member States under which they reciprocally grant to the nationals of any other Member State a legal status different from that applied to other (non-member) foreign nationals. The European Union solved this issue by means of the Maastricht Treaty in 1992, creating 'Union Citizenship' complementary to the citizenship of the country of origin. In the case of MERCOSUR, any solution will require the fulfilment of the following conditions:

(a) free access for workers who reside in one of the Member States to offers of employment existing in any of the states;
(b) progressive elimination of obstacles to access to certain jobs for non-national workers and for nationals of the Member States;
(c) as regards exercise of a profession or trade, reciprocal acknowledgement of degrees or licences issued by a competent authority of any of the Member States;
(d) harmonisation and simplification of the procedures for communitarian migrants to obtain a residence permit;
(e) easing of residence conditions to make it easier for workers to remain in the country in the event of expiration of work contracts because of death, disability, dismissal or retirement;
(f) acknowledgement of contributions for social security made in the host country, to enable workers to retire in any of the other countries. This would require a special agreement.

[4] José Acosta Estévez, *Libre circulación de trabajadores, política social y derecho de establecimiento y libre prestación de servicios en la CEE* (Barcelona, Promociones y Publicaciones Universitarias, 1988).

[5] Paula Constanza Sardegna, *La trabajadora migrante en el Mercosur* (Buenos Aires, LexisNexis, 2001) 123.

[6] Miguel Colina Robledo, Juan Manuel Ramirez Martinez and Tomás Sala Franco, *Derecho Social Comunitario* (Valencia, Tirant lo Blanch Publishers, 1991) 71.

I will now make a concise reference to the similar process in the European Union, taking account of the lessons that can be learned from the EU integration experience. I will then analyse the progress achieved so far in the MERCOSUR Member States, where there are still many things to accomplish.

II Circulation of Workers in the European Union

The amendments introduced to the Treaty on European Union in Maastricht in 1992 created the status of 'Union Citizenship' in order to 'reinforce the protection of the rights and interests of the nationals of the Member States' (article B.1 of the Treaty). 'Union Citizenship' was granted by the Treaty to the nationals of all member states. It was established in article 7.A that the Community would adopt the measures in order to establish progressively an internal market that would imply 'a space with no internal borders, in which the free circulations of goods, individuals, services and capitals will be guaranteed pursuant to the herein Treaty'. In article 8, the right of the Union citizen to circulate and reside freely in the territory of the other member states was acknowledged, also providing the right to vote in the member state of residence. Later, in 1997, the Treaty of Amsterdam modified article 8 making clear that 'The citizenship of the union will complement and not replace national citizenship'.

The instruments of the Council of Europe are the most advanced as regards labour migration. Some of them deal with human rights in general, while others are specifically addressed to migrants and migrant workers. Among such instruments are the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the European Social Charter (1961) with its Additional Protocol (1988). They include provisions for individuals who reside and work in countries in which they are not nationals.

Nevertheless, these instruments (as all Council of Europe instruments) only refer to migrants who are citizens of the member states of the Council of Europe and their application is conditioned on reciprocity. It is also worth mentioning the European Convention on the Legal Status of Migrant Workers (1977) which applies to a national of a contracting party who has been authorised by another contracting party to reside in its territory in order to take up paid employment. This Convention regulates the main aspects of the legal status of migrant workers.

Among the other European instruments that deal with the different aspects of the life and employment of migrants, it is important to mention the European Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (1963), as well as the Convention on the Participation of Foreigners in Public Life at Local Level (1992).

The European Commission has also developed a significant number of regional rules, in order to regulate the intraregional migratory currents and the treatment of non-national workers. Although it has principally focused on the economic aspects of migration and the integration within the region, it has given increasing attention to social aspects. The most important European rules are the following:

(a) Regulation 1612/68[7] which deals mainly with equal treatment regarding employment access, work conditions, social and taxation advantages, union rights, professional background and education and principles for family reunion;
(b) Regulation. 1408/71[8] on social security systems for wage-earning workers, non-wage-earning workers and members of their families who migrate within the Community.

The instrument which provides most comprehensively for the treatment of non-nationals within the region is the Community Charter of Fundamental Social Rights of Workers of 1989, but this is not mandatory. It establishes the principles that govern the treatment of Community nationals with reference to employment.

As regards the relevant Council Directives, they include provisions on freedom of movement and residence, rights to remain in the territory of another member state after having finished working, provisions on the health and safety of migrant workers, education of their children, and the right to vote and to stand in elections of other member states. Although the scope of the rights granted by these norms is exclusively limited to internal circulation in the European Union, their importance and implementation will increase due to the Union's recent enlargement and potential incorporation of other candidate countries. Besides which, the body of rules governing the free circulation of people attains even greater importance since it is considered a model for other commercial areas in the rest of the world.

III MERCOSUR

The Treaty of Asunción involves significant legal consequences for the Member States whenever the fulfilment of objectives demands the harmonisation of internal rules. At the same time, during the harmonisation process, there will be a need for compromise between the international, regional and local or internal legal regulations, as well as between the different domestic legal regulations of the Member States.

A Main MERCOSUR Rules on the Circulation of Workers

MERCOSUR has achieved outstanding progress, and it is worth emphasising the Protocols in force on educational integration, with reciprocal acknowledgment of certificates, degrees and elementary school and secondary school non-technical degrees;[9] secondary school technical degrees;[10] recognition of university degrees in order to attend post-graduate studies in universities of the MERCOSUR Member States;[11] and also to teach at the post-graduate human resources level;[12] and at university levels as well.[13]

[7] [1968] OJ L/257, modified by Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 [2004] OJ L/158.
[8] [1971] OJ L/149, modified by Council Regulation 1606/98 of 29 June 1998 [1998] OJ L/209.
[9] Buenos Aires, 5 August 1994, ratified by Argentina by Statute 24676.
[10] Asunción, 5 August 1995, ratified by Argentina by Statute 24839.
[11] Fortaleza, Brazil, 16 December 1996, ratified by Argentina by Statute 24997.
[12] Fortaleza, Brazil, 16 December 1996, ratified by Argentina by Statute 25044.
[13] Asunción, 14 June 1999, ratified by Argentina by Statute 25521.

As regards Protocols on jurisdictional assistance, also noteworthy in its varied aspects is the cooperation and assistance on civil, business, labour and administrative matters;[14] preventive measures;[15] mutual legal assistance in criminal issues;[16] civil liability arising from road accidents;[17] and international jurisdiction regarding contracts.[18]

Concerning investments, the significant instruments are the Protocol of Colonia for the reciprocal promotion and protection of investments in MERCOSUR[19] and the Agreement on International Trade Arbitration of MERCOSUR;[20] and on cultural exchange, a Protocol on Cultural Integration of MERCOSUR has been approved.[21]

With reference to rules that have not achieved simultaneous enforcement, a Multilateral Agreement on Social Security of MERCOSUR and an Administrative Agreement have been approved for their application.[22] A system of reciprocal acknowledgment is implemented through these instruments between the Member States as regards the contributions made by national workers or foreigners that reside in their territories, enabling such benefits to be granted by the state in which the worker or beneficiary resides.

Important advances have also been made concerning cross-border workers. The following Decisions of the Council of the Common Market (CCM) (Nos 18/99, 19/99, 14/00 and 15/00)[23] approved under the MERCOSUR framework:

(a) Ministers Agreement No 17/99 on border neighbouring transit among the states partiesof MERCOSUR (CCM Decision No 18/99);
(b) Regulation of the border neighbouring transit system among the states parties of MERCOSUR (CCM Decision No 14/2000);
(c) Understanding on border neighbouring transit among the states arties of MERCOSUR, Bolivia and Chile (CCM Decision No 19/99);
(d) Regulation of the border neighbouring transit system among the states parties of MERCOSUR, the Republic of Bolivia and the Republic of Chile (CCM Decision No 15/2000).

Generally speaking, an identification and circulation system has been approved that facilitates the cross-border movement of residents of Member States with their domicile close to adjoining areas of two or more states. Residents will be able to obtain a Border Neighbouring Transit (Tránsito Vecinal Fronterizo) permit that will allow them to move across the international border, where their destination is the adjoining area of the neighbouring country, through an expedited procedure different from that in place for other migratory categories. The Border Neighbouring Transit permit is issued by the

[14] Valle de las Leñas, Mendoza, 27 June 1992, ratified by Argentina by Statute 24578, and complementary agreement, signed in Asunción, 19 June 1997, ratified by Argentina by Statute 25222.

[15] Ouro Preto, 16 December 1994, ratified by Argentina by Statute 24579.

[16] Potrero de los Funes, San Luis, 25 June 1996, ratified by Argentina by Statute 25095.

[17] Potreros de los Funes, San Luis, 25 June 1996, Asunción, 19 June 1997, ratified by Argentina by Statute 25407.

[18] Buenos Aires, 5 August 1994, ratified by Argentina by Statute 24669.

[19] Colonia, Uruguay, 17 January 1994, ratified by Argentina by Statute 24891.

[20] Buenos Aires, 23 July 1998, ratified by Argentina by Statute 25223.

[21] Fortaleza, Brazil, 16 December 1996, ratified by Argentina by Statute 24993.

[22] See both texts and commentary in *Derecho del Trabajo en el Mercosur*, 161/164 and 521/531. Argentina has recently approved these instruments by Statute 25655.

[23] In Argentina, these Decisions was incorporated into the internal migratory legal system by Provision No 12167/2002 of the National Department of Migrations, OB 7 November 2002.

relevant Member State or associate states of entry and the holder of the permit is entitled to stay in the neighbouring country for a maximum period of 72 hours.

It is important to note that this system was in fact already in force. Argentina, through article 50 of Statute No 22439 passed by Decree No 1023/94, had already provided for the entry of foreigners as a 'temporary resident' for the purposes of visiting or border transit; the procedure required the foreigner to present his identity document or any other identification issued by the competent authority of the border country, or any other identification issued or acknowledged by the National Department of Migrations. Currently, Statute No 25871 on Argentinean Migratory Policy' (which replaced Statute No 22439) includes 'Border Neighbouring Transit' in article 24(c) under the subcategory of 'temporary residents'.

With reference to migrant labour, significant progress was made in the Ministers Agreements Nos 13 and 14/2002 on Residence for Nationals of the Party States of MERCOSUR and Bolivia and Chile, signed on 8 November 2002 in Brasília.[24]

These two Agreements simplify the procedures for nationals of a Member State or associate state who intend to settle in the territory of another state, while they are currently residents of the first country, and wish to regularise their migratory status. When the migrant has not yet entered the state in which he/she intends to reside, the application form furnished at the consulate of this state of entry will suffice. Apart from the common documents used as proof of identity, the only additional requirements are (a) a certificate that testifies that the migrant does not have a criminal and/or judicial record and/or a police background clearance certificate; (b) proof of payment of relevant taxation; and (c) a certificate proving physical and psychological fitness, if required by the internal legislation of the state of entry. If the migrant is in fact currently residing in another Member State or associate state, the same application is required to be furnished to the relevant migration authority.

As regards the requirements for the legalisation of these documents, article 4.2 of the main Agreement (repeated in the Agreement with Bolivia and Chile) provides:

> [W]hen the application is entered in a consulate venue, certification of its authenticity will suffice, pursuant to the procedures established in the country of origin of the document. When the application is entered at the migratory services, said documents will only be dully certified by the consular officer from the applicant's country of origin authorised in the country of reception with no other requirements.

From this wording, it would appear that such documents would no longer require translation.

Under this procedure, the migrant is granted temporary residence for a two-year period. Article 5 of both Agreements allows such residence to become permanent, at the request of the migrant in the receiving country, within 90 days prior to the expiration of the temporary residence term. Requirements on the migrant are to prove effective residence during the temporary term, and to present evidence that the migrant has not been involved in any illegal and/or criminal activities and/or does not appear in police records, and that he/she has made a living through lawful means in order to live and support his/her family. Such migrants are entitled to enter, leave, circulate and remain

[24] Official Document 04/02.

freely in the territory of the receiving country, once either temporary or permanent residence has been granted (articlert 8.1 of both Agreements).

Articles 8.2 and 9 of both Agreements refer to the balancing of the rights of migrants granted residence (temporary or permanent) in the receiving country and those of nationals. This balancing is carried out pursuant to the rules that regulate the activities of nationals in the receiving country. The following rights are the most significant:

(1) the right to perform any activity, either self-employed or hired under contract (article 8.2);
(2) the right to enjoy the same civil, social, cultural and economic rights and freedoms as the nationals of the receiving country, in particular the right to work, and to perform any legal activity pursuant to law; to submit petitions to the authorities; to enter, remain, transit and leave the territory of the country; to become a member of an institution with legal purposes; and to worship in accordance with their faith (article 9.1). All such rights also apply to the migrant's family members (article 9.2);
(3) employment rights involving treatment not less favourable than that given to nationals in the receiving country as regards the application of employment legislation, in particular as regards payment, work conditions and social security matters (article 9.3);
(4) the right of the children of migrants to receive education on the same conditions as nationals of the receiving country; attendance at pre-school or public schools is not to be denied or limited due to the irregular residence status of their parents (article 9.6).

The recognition of these rights is a minimum threshold only; pursuant to article 11 of both Agreements, 'the herein Agreement will be applied without detriment to the rules or internal provisions of each Party State that may be more favourable for immigrants'.

The MERCOSUR Agreement will enter into force from the date of notice issued by the four Member States to Paraguay reporting that the necessary internal formalities have been fulfilled for this purpose (article 14). Similar provision is made in the Agreement signed between MERCOSUR and the associate states, with no specific or different provisions to enter into force in the territory of Bolivia or Chile.

All the above regulations represent important achievements of the respective governments arising from the cultural, educational and jurisdictional interchange required by the process of integration.

As stated by Nelson Jobim, Minister of the Federal Appeals Court, the true interests in the integration process are those of the people, and integration serves its purpose if the process becomes more accessible to individuals and helps them to find in these communitarian rules the solutions to their every-day problems.[25]

[25] Nélson Jobim, speech given at the first Encuentro de Escuelas de la Magistratura del Trabajo, Brazil, 27 August 2000.

B The Socio-Labour Declaration of MERCOSUR

The only instrument referring to social rights which has so far been signed in the MERCOSUR region is the Socio-Labour Declaration (Declaración sociolaboral del MERCOSUR) approved with the signature of the four presidents of the Member States on 10 December 1998 in Río de Janeiro.

Because of the juridical nature of the Declaration, it does not constitute a source of communitarian law of MERCOSUR pursuant to the Ouro Preto Protocol. Non-compliance cannot bring about the application of dispute settlement mechanisms.

Nevertheless, in this instrument the four most important representatives of the Member States of MERCOSUR bound themselves to acknowledge a number of rights in favour of their citizens, creating for this purpose a promotional, non-sanctioning body, the Regional Socio-Labour Commission (Comisión Sociolaboral Regional) (of a tripartite composition made up of the plenary of the National Commissions). Although this instrument has not been ratified by the legislative bodies of the Member States, the governments are encouraged to fulfil their obligations under it by a requirement to submit annual reports that are analysed by the Regional Socio-Labour Commission, which may make pertinent recommendations.

The juridical nature of the Declaration was the subject of two seminars organised by the National Association of Labour Law (Asociación Argentina de Derecho del Trabajo) in December 2001, and the Labour International Office (Oficina Internacional del Trabajo) and the Argentine Council for International Relations (*Consejo Argentino para las Relaciones Internacionales*) in August 2003. There are differing points of view as to whether the Declaration is binding type on Member States.[26] This is the position taken by Capón Filas[27] and Hugo Barretto Ghione,[28] among other authors,[29] while Américo Plá Rodríguez considers that the Declaration is a political instrument rather than a juridical one.[30] Julio Simón suggests that the Declaration should be published in the Argentine Official Bulletin,[31] based on a basic principle of Argentinean national law which states that regulations are binding only after their publication (Civil Code, section 2) and the text of the Declaration has not yet been published in the Argentine Official Bulletin. However, the text of the Declaration was in fact published in the MERCOSUR Official Bulletin.[32] Moreover, the Argentine Supreme Court (Corte Suprema de la Nación) has held that, after the constitutional amendment of 1994, treaties are automatically considered to be in force,

[26] Lucas A Malm Green, 'Eficacia jurídica de la Declaración Sociolaboral del MERCOSUR' (2002) B *DT* 1387.

[27] Rodolfo Capón Filas, 'Declaración Sociolaboral del Mercosur, Proyecto Regional para el Empleo Decente' (2002) 1 *Peronistas para el debate nacional*, *Centro de Estudios de la Patria Grande* (June) 51.

[28] Hugo Barretto Ghione, 'Consecuencias de la Declaración Sociolaboral del Mercosur en la interpretación de las normas laborales en los ordenamientos nacionales', (2002) 8(3) *Gaceta Laboral* 355.

[29] The author has always agreed with this position, as stated in 'La Declaración Sociolaboral del MERCOSUR. Su importancia jurídica y práctica' in *Eficacia jurídica de la Declaración Sociolaboral del Mercosur*, 1st edn (Montevidéo, Cinterfor OIT, 2002) 187 *et seq.* This argument is extensively developed in *Política social en el MERCOSUR: la Declaración Sociolaboral* (Buenos Aires/Madrid, Ciudad Argentina Publishing, 2004).

[30] Américo Plá Rodríguez, 'Las perspectivas de un derecho del trabajo comunitario' (2000) 66(4) *Revista do Tribunal Superior do Trabalho* (October/November) 63.

[31] Julio Simón, 'Eficacia jurídica de la Declaración Sociolaboral del MERCOSUR, con especial referencia a la Argentina' in *Eficacia jurídica de la Declaración Sociolaboral del Mercosur* (n 29) 31 *et seq.*

[32] Bulletin No 8 (January–March 1999) 252.

in compliance with Argentinean law, once they have come into force internationally.[33] In the *Aquino* case,[34] the Argentine Supreme Court cited and applied the Declaration on its own initiative, and recently did the same in the *Silva*[35] and *Aerolíneas* [36] cases. Such references encourage application of the Declaration, and several lower tier Argentinan courts have already done so.

The Declaration is therefore valid and enforceable juridically and not only politically. This arises clearly from the express terms used in the Declaration, which make explicit the binding will of the Member States 'to adopt' the labour principles and rights referred to therein. This has been further clarified by the subsequent actions of the governments, who have already constituted the Regional Socio-Labour Commission created by the Declaration and have agreed to conform to its *advisory* competence by submitting the reports required in the instrument.[37]

The Declaration consists of five parts as follows: the individual rights (sections 1–6 apply to the worker, section 7 to the employer); the collective rights (sections 8–12); social policy (13–19); and rules referring to application and follow-up by the tripartite Socio-Labour Commission (sections 20–25).

Pursuant to section 1 of the Declaration, concerning non-discrimination, the Member States guarantee in favour of workers 'the effective equality of rights, treatments and opportunities in employment and occupation, without any distinction or exclusion based on race, national origin …'.

Section 4 specifically addresses the issue of 'migrant and border workers' and provides:

1. Every migrant worker independently of his/her nationality has the right to receive help, information, protection and to have equal labour rights and conditions as the citizens of the country where he/she is performing his/her duties in compliance with the professional regulations in force in each country.
2. The Party States agree to implement measures with the objective of stipulating common regulations and procedures in relation to the circulation of workers in bordering areas and to carry out the necessary actions in order to improve employment opportunities as well as work and life conditions of said workers.

Thus, section 4 of the Declaration consists of two provisions which address the migrant worker and the border worker in very different ways. Although the Declaration does not define either of the categories, the distinguishing feature between the border worker and the classic migrant has to do with residing in one state and working in another. The migrant abandons his/her country of origin, with or without his/her family, to reside and

[33] *Horacio David Giroldi y otro s/ recurso de casación*, Fallos, Argentine Supreme Court, 7 April 1995, 318:514. See also Raúl Alberto Ramayo, 'Los tratados internacionales y la certidumbre de su vigencia' (1996) 183 *El Derecho* 1480.

[34] *Aquino Isacio v Cargo Servicios Industriales SA s/accidentes ley 9688*, Fallos, Argentine Supreme Court, 21 September 2004, 327:3753.

[35] *Silva, Facundo Jesús v Unilever de Argentina SA*, Fallos, Argentine Supreme Court,18 December 2007, 330:5435.

[36] *Aerolíneas Argentinas SA v Ministerio de Trabajo*, Argentine Supreme Court, 24 February 2009.

[37] The Inter-American Court of Human Rights, in its Advisory Opinion No 10/89 concerning the American Declaration of Human Rights, has stated that such Declarations of Rights, when their contents have been incorporated into the practice of states or into other instruments relating to the international order, have an enforceable character and are as binding as a treaty, which position is entirely applicable to the Social-Labour Declaration.

work in a different country. On the other hand, the border worker has a double national connection with his/her places of residence and of work.

In respect of the migrant worker, the first paragraph of section 4 of the Declaration provides for the full operation in his/her favour of the right to receive help, protection and information, and the right to equality of treatment with nationals of the state where he/she works. It is an 'open' disposition applying to every worker 'independently of his/her nationality' in favour of foreigners who come from countries that are not members of MERCOSUR, without consideration of whether or not there exists reciprocity in the treatment of workers from MERCOSUR performing duties in the territory of non-member states.

In respect of the second category, border workers, the rule is clearly programmatic. The provision must be interpreted as requiring states to establish regulations covering the circulation of workers in the bordering areas in order to improve their situation. Here, 'states commit themselves to adopt measures' to improve the situation of the border worker. The achievement of this objective requires more than mere statements; it requires positive action to direct national rules and practices towards the goal.

C Internal Regulations

The above regulations coexist with others that are part of the internal law of each Member State. In some cases they are compatible with regional regulations (inparticular with section 4.1 of the Declaration) but, in other cases, their incompatibility is evident.

(i) Argentina

The Argentinean legislation put into effect the national policy with regard to immigration that characterised the country in 1853–60, and it was included in the Constitution in those terms. In essence, immigration policy was targeted atEuropean immigration, although it was not exclusive. As a result, article 25 of the Constitution still reads in its first part 'The Federal Government will foster European immigration', but the Preamble clearly states the open character of the policy, as including: 'all the citizens of the World who wish to dwell on Argentine soil'. The recognition of the equality of civil rights of foreigners and nationals is not restricted to any particular country or continent

The Constitution contains a broad principle of equality before the law in article 16; and referring specifically to foreigners, article 20 states that 'Foreigners enjoy within the territory of the Nation all the civil rights of citizens', and this is followed by an enumeration of those rights, the most relevant for our purposes being 'they may exercise their industry, trade and profession'. The list of civil rights includes to 'work and perform any lawful industry'.[38]

[38] See art 14, enacted at the same time as art 20; and also art 14*bis*, as the social rights that were incorporated by the Constitutional Amendment of 1957 were an addition to the list of civil rights in art 14, and thus share the same status for the purposes of art 20, although their structure is different since they require positive action on the part of the government.

As regards the regulation of the individual's right to work, the Labour Contract Statute (Ley de contrato de Trabajo) follows the same open principles, with article 17 providing that 'there is prohibited any type of discrimination against workers on grounds of … nationality …'.

Nevertheless, as regards trade unions, article 18 of Statute No 23551 in its second paragraph prescribes that '75% of directive and representative positions are to be held by Argentinean citizens, and the bearer of the highest position as well as his/her statutory substitute must be an Argentinean citizen'.

In general terms, and according to Statute No 25871 on Argentinean Migration Policy, the labour status of a foreigner in the national territory who is not subject to a special system (foreign representation, crews, refugees, etc) will fall within one of the following five categories: permanent, temporary, transitory, precarious and illegal.

Permanent and temporary residents are able, while their permits are in force, to carry out any tasks as self-employed workers or with an employment relationship, being protected by the laws that prohibit discrimination based on national origin (National Constitution, article 20, Statute No 25871, article 51, Labour Contract Statute, articles 17 and 81 and Statute No 23592), with the limitations prescribed by article 18 of Statute No 23551 on Union Associations.

The transitory resident can carry out such activity only if he/she has been expressly authorised to do so (Statute No 25.871, article 52), being protected against discrimination and within the limitations of Statute No 23551. Any such permission lapses upon expiration of the term. Workers who enter the country to perform seasonal job duties are included in this category.

The precarious resident (Statute No 25871, article 20) holds a precarious permit or authorisation for a 180-day term, which can be renewed. The illegal resident will hold no permit whatsoever (Statute No 25871, article 53).

In all cases, employers will be held responsible for a continuing labour or contractual relationship with foreigners should their situation become illegal (Statute No 25871, articles 55–60). Likewise, the Labour Contract Act, articles 40 and 42, stipulate as a principle that the prohibitions related to the object of the labour contract are always aimed at the employer and do not affect the employee's right to collect a salary or to compensation derived from the termination of the contract due to such cause. Thus, the illegal situation of the foreign worker cannot be alleged by the employer to avoid the fulfilment of his/her obligations.

(ii) Brazil

Article 5 of the Brazilian Constitution provides that all persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property; and section XIII adds that they are free to perform any duty, job or profession in accordance with the professional qualifications prescribed by law.

As regards social rights, regulated by article 7, although there are provisions aimed at guaranteeing non-discrimination in the payment of salaries or in appointment to a job, based on gender, age, colour or civil status (section XXX) and appointment of disabled workers (section XXXI), no provision states that these rights are applied to the foreigner.

Scholars agree on interpreting the provisions of article 7 in accordance with the non-discrimination rule on the grounds of nationality arising from article 5 of the

Constitution. Statute No 9029 of 13 April 1995 is circumscribed by these guidelines, as it was enacted after the Constitutional Amendment of 1988 and provides that 'it is prohibited to adopt any discriminatory and limiting practice that may have an effect upon the employment access relationship or its continuity due to … reasons of origin'. Thus, in accordance with this interpretation, any provisions prescribing differences in labour terms and conditions on the grounds of nationality would implicitly be invalid if they stipulate a discriminatory treatment for the foreign worker residing in Brazil.[39]

Despite this, these regulations have not as yet been expressly declared invalid and, in the meantime, they are clearly incompatible with the requirements for effective equality of rights, treatment and opportunities making no distinction or exclusion because of national origin, which are guaranteed by the MERCOSUR Socio-Labour Declaration.

Moreover, these principles and section 4.1 of the Declaration are clearly incompatible with the provisions of Title III of the Consolidation of Labour Statutes and Special Regulations that Protect Labour, Chapter II, Nationalization of Employment (articles 352–371), which incorporates the so-called 'Two-thirds' Statute enacted in Brazil in the 1930s. Pursuant to the provisions of this Statute, in every workplace with two or more workers, two-thirds of the workers must be of Brazilian or Portuguese nationality (articles 353 and 354). Article 359 prohibits the hiring of foreigners who do not have an identity card issued by Brazilian authorities, which would require prior compliance with the residence conditions (article 366). Also, article 358 provides (jn full): 'In cases of lack or termination of employment, the dismissal of the foreign worker must precede that of the Brazilian who performs analogous functions'.

Finally, these provisions are also incompatible with ILO Convention No 122 regarding employment policies which has been ratified by Brazil, which expressly includes 'national origin' in article 1, section 2(c) listing grounds for exclusion that must be avoided in policies intended to foster employment.

(iii) Paraguay

The Constitution of Paraguay omits any specific reference to foreigners. Article 46 states the principle of equality for all people in the following terms:

> All residents of the Republic are equal as far as dignity and rights are concerned. No discrimination is permitted. The State will remove all obstacles and prevent those factors that support or promote discrimination. Guarantees aimed at preventing unfair inequalities will not be considered discriminatory but egalitarian factors.

This article has a broad application, covering 'all *residents*', and, as regards the prohibition of discrimination, the article makes no distinctions whatsoever, which may imply that foreigners could not be discriminated against because of their nationality.

Article 88 of the Constitution, included in Chapter VIII on social rights, complements provisions prohibiting discrimination on various grounds, including ethnic grounds, but does not refer to nationality.

[39] Mauricio Godinho Delgado, 'Proteções contra a discriminação na relação de emprego' in Márcio Tulio Viana and Luiz Otávio Linhares Renault (eds), *Discriminação* (San Pablo, LTR Publishers, 2000) 106; to the same effect, Valentín Carrión, *Comentários à Consolidação das leis do trabalho*, 18th edn (San Pablo, Revista dos Tribunais Publishers, 1994) 352 *et seq.*

Article 87 of the Constitution is clearly incompatible with section 4.11 of the MERCOSUR Socio-Labour Declaration, since it provides that the full employment policies that are to be encouraged by the state shall give preference to the national worker. Paraguay has also ratified ILO Convention No 122on employment policy; consequently, this article of its Constitution is openly incompatible with article 1, section 2(c) of the Convention. States parties are obliged to guarantee equal treatment and non-discrimination based on 'national origin', especially in employment policies, whereas the Paraguayan Constitution provides that the national worker shall be given preference.

In the Labour Code, when the grounds for exclusion included in the non-discrimination rule in article 9 are listed, nationality is not mentioned. Nevertheless, article 3 extends its provisions to 'all workers and employers of the Republic, being national or foreigners', so this provision allows for a compatible interpretation concerning discrimination; however, the incompatibility derived from giving preference to the national worker in full employment policies still remains.

The Labour Code has certain peculiarities that should be noted when it is compared with other internal regulations of Member States, because it addresses the issue of the hiring of Paraguayans to work abroad. Article 57 provides:

> Every contract made by Paraguayan workers to render services out of the country must be approved and recorded by the Labour Administrative Authority and reviewed by the Consul of the Nation where the worker is going to render services.
> In addition, this kind of contract must include the following essential clauses:
>
> (a) the employer must afford all the travelling and food expenses of the worker, his wife and children if that is the case, as well as those arising from the fulfilment of emigration laws;
> (b) the employer must show evidence of having enough funds, according to the judgement of the Labour Administrative Authority, to guarantee the payment of expenses arising from the repatriation of the worker and his family when travelling expenses of the family had been afforded by the employer; and
> (c) the worker must be twenty years old unless he is hired together with a relative who must be of age and must be related by blood within the fourth degree or by affinity within the second degree.

(iv) Uruguay

There are no express rules aimed at guaranteeing the equal treatment of national workers and foreign ones. Article 1 of the anti-discrimination Statute No 16045 seems to limit the scope of its provisions to 'the principle of equality of treatment and opportunities for both genders', ie between men and women, which means that the issue of national origin is not regulated.

Uruguay has ratified ILO Convention No 111, which does not include nationality as a ground of exclusion within the grounds that are mentioned in the non-discrimination rule. However, Uruguay has also ratified ILO Convention No 122, which expressly includes nationality for employment policy purposes in its article 1, section 2(c).

IV Conclusions

Integration processes develop through three main axes: (1) customs deregulation (reduction or elimination of duties); (2) acceptance of the freedom of movement of capital; and (3) the circulation of individuals. The third of these is by far the most important, since it refers to human beings, while the first refers to goods in general (tradable objects) and the second refers to machinery and equipment (physical capital) and money (financial capital).

The free circulation of workers and their families is a principle that has progressively been accepted in international community law, in its diverse geographical-cultural environments and political contexts, limiting the unrestricted power of states to impose conditions and requirements, prohibitions and discriminations, on the entry, exit and residence of workers and their families within their respective territorial jurisdictions.

Mercosureños may profit from the European Union's experience, with the necessary exceptions and adaptations appropriate to our case. European Union citizenship complements the citizenship of each of the EU member countries. In the context of the Council of Europe, countless juridical instruments have been approved, of a varied range, scope and content, such as the European Social Charter of Turin (1961), and, in particular, the European Convention concerning the juridical status of migrant workers (1977), which applies to nationals of a contracting party authorised by another party to reside in their territory to perform paid employment. This Convention regulates recruitment, health examinations, professional evaluations, travel costs, work and residence permits, family reunion, housing, work conditions, transfer of savings, social security, medical and social assistance, termination of labour contracts, dismissal and relocation, and arrangements for return to the country of origin.

Considering the situation in MERCOSUR, there have unquestionably been extraordinary improvements. There are now in place agreements concerning educational integration with reciprocal recognition of certificates, degrees and studies at different levels, and several Protocols of assistance on diverse aspects. Moreover, several instruments have been agreed that regulate the circulation of workers, including the MERCOSUR Socio-Labour Declaration, which we have already demonstrated is valid and enforceable from the juridical and not only from the political point of view.

Unfortunately, the integration process is not proceeding at the speed or in the way that many of us wish. Also, the internal regulations of the different Member States of MERCOSUR are not always compatible and consistent with international labour law, as laid down by sources such as the ILO and the United Nations; nor with regional law (such as the Organization of American States); and sometimes not even with subregional law (eg MERCOSUR and the Andean Community, although this is outside the scope of this chapter).

This may be the reason why academic opinion, in general, is not very encouraging regarding the existence of MERCOSUR labour law in the same way as a *communitarian* European labour law. This principally stems from a lack of understanding of the differences in development between the young MERCOSUR and the somewhat more mature European Union. Academic opinion is quick to suggest that no communitarian law exists if the conditions of supranationality and immediate application that exist in the European Union today (after more than 50 years of hard and difficult work, advancing

and retreating at a very slow pace, within a supranational jurisdictional framework) are not instantly put in place by means of an agreement or other similar document.

As an initial step, it will be necessary for the Member States to sign an agreement to complement the Treaty of Asunción, in which such a common integration political project must be clearly defined, which will establish more efficient procedures, and with a certain degree of supranationality, covering various issues and circumstances, to act as an original source of communitarian law. After that, it will be possible to build a future MERCOSUR social law.[40]

It has also been pointed out that the crucial issue for MERCOSUR is to review the concept of sovereignty and its possible flexibility. It is now time to encourage all the juridical authorities in the member countries to consider a reformulation of doctrine allowing for the validity and efficiency of supranational law.[41]

For the existence of a MERCOSUR communitarian law, the delegation or the transfer of competences to supranational entities, and the immediate and prevailing enforcement of the law approved by these entities in the territory of each Member State, has been considered as essential. This issue is not simple; just the opposite, it is rather controversial, because it implies not only significant political will, but also a certain degree of boldness to challenge the dogma of national sovereignty, which is considered by all the MERCOSUR Member States to involve the absolute power of the nation-state. This would inevitably have to be compromised to allow the transference or the delegation of national powers to supranational entities in order to achieve the perfect functioning of the common market, because only with such total integration at a supranational level would it be possible to guarantee the free circulation of goods, services and productive factors, which was the express aspiration of the Treaty of Asunción as the foundation of MERCOSUR.[42]

However, we share the view of Antonio Boggiano that these features are not in fact essential to a communitarian system. We also agree with Alejandro Perotti that MERCOSUR has at this stage a sufficient body of regulations to enable the courts of the Member States to assign to MERCOSUR law the above-mentioned characteristics of immediate application and preference over the regulations of Member States' internal framework. The enforcement of such rules by the courts will allow the Argentinean National Executive Power to demand compliance and reciprocity from the other Member States.

In this way, in practice with the enforcement of the law, a uniform regulatory system will be directly applied in the territories of the Member States to regulate the fundamental freedom of circulation of migrant workers, and a MERCOSUR labour law will thus take shape.

It is clear that MERCOSUR was established as an ambitious project, as demonstrated above by reference to the internal regulations of the Member States. It was intended that the common market should be completed by 31 December 1994, but its complex implementation following the Protocol of Ouro Preto of 17 December 1994 delayed its actual implementation until 2006. This delay arose from the complexity of the systems to

[40] Carlos Alberto Robinson, 'A livre circulação de trabalhadores: condição necessária ao processo de integração econômica' (2000) 1 *Revista de Derecho del Mercosur* 200.

[41] Júlio Redecker, 'Perspectivas de um direito comunitário do Mercosul' (2000) 4 *Revista de Derecho del Mercosur* 98.

[42] María Luiza Justo Nascimento, 'A importância da aplicabilidade direta das normas emanadas do Mercosul' (2000) 4 *Revista de Derecho del Mercosur* 127.

be applied, since various different governments have been in office in the Member States in the last few years. However, all of them have signified their desire to complete the MERCOSUR integration process to the extent that significant progress has been made, many such advancements being referred to above. The implementation of freedom of circulation will eventually help to give substance to the true meaning of integration, which is not only the unification of nations but also above all the integration of individuals.

The social dimension of the integration consists in the analysis of the effects of this process on individuals. This social dimension was not specifically referred to in the Treaty of Asunción, as its text does not acknowledge the right to free circulation of individuals, migrants and workers. The text of the relevant article had to be interpreted as including 'individuals' in those 'productive factors' whose free circulation is acknowledged in article 1 of the Treaty. However, this initial defect was later remedied by the implementation of a systemic structure for MERCOSUR, with the establishment of several advisory bodies in which private individuals take part. Those are the individuals whom the integration process is intended to benefit, whose wellbeing is desired. Similarly, the Socio-Labour Declaration, the key instrument of MERCOSUR social rights, resulted from a consensus of the sectors involved in production and labour represented in the Labour Subgroup No 10 that originated it. The eventual passage of the Declaration followed the usual stop-start pattern of MERCOSUR processes by which improvements are made. There are times when agreement on issues such as the common external tariff, supranationality and the direct effect of rules seems about to be reached, but then negotiations stall. However, progress, albeit slow and stilted, is steadily being made.

The Socio-Labour Declaration and its provisions towards the acknowledgement of effective equal labour treatment in MERCOSUR continues to follow this stop-start pattern. The Declaration was created as a provisional instrument that would be used as a base for future communitarian rules; its revision was planned after the first two years. It was reaffirmed by the Buenos Aires Charter on Social Commitment of 30 June 2000, and it was established as the only Declaration of Social Rights in the region. We seem to be attempting to move forward on a 'square wheel' which cannot turn easily and requires some kind of impulsion to keep it turning.

Systemic theories of law have conceived the idea of transforming behaviour which together with values originate normative consequences. In a way, they share with Von Ihering the point of view of the law as something that requires struggle, behaviour and transformation. Two elements are considered, the means and the objective—the means is the struggle and the objective is justice. All this seems to be of strict application in social law, which in fact is a clear consequence of the conflict.

The subject matter of that transforming behaviour which is necessary to make the 'square wheel' turn many times arises from the creativity of jurists: the academic doctrine with its ideas, lawyers with their arguments and also judges with their transforming and progressive decisions. As if law were also turning on square wheels.

The Socio-Labour Declaration of MERCOSUR seems to be one of these square wheels, which is waiting for some kind of motion. Making it turn will contribute to the Treaty of Asunción's objective of economic development with social justice, as it will avoid situations of social dumping through the deregulatory practices that some governments may wish to adopt. The Declaration, as a body of minimum regional laws, will bind the

governments to promote measures to foster employment, but also employment protection, which in promoting human dignity helps the fulfilment of man's spiritual destiny, the ultimate purpose to be achieved in the integration process.

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International Taxation in MERCOSUR

JAMILE BERGAMASCHINE MATA DIZ*

I Introduction

The Treaty of Asunción, signed in March 1991, which established MERCOSUR (the Common Market of the South), contained provisions concerning tax harmonisation in the Member States, including tax coordination, in order to avoid distortions that could modify the market conditions and competition in marketed products.

At a more specific level, the economic interdependence of the integration process has significant implications for three important aspects of taxation:

(a) a significant increase in the mobility of factors, particularly capital, which becomes very sensitive to differences in fiscal treatment and affects the tax base;
(b) a greater difficulty in assessing and collecting taxes in the case of activities performed outside the state jurisdiction, especially in the case of intangibles;
(c) an increase in the complexity of the tax administration process, which requires new instruments and a greater level of information for tax collection, calling for wider cooperation among jurisdictions.[1]

Although article 1 of the Treaty of Asunción (AT) regulates the coordination of macroeconomic policies, there is no special mention of taxation. To complete the common market it is necessary to adopt a level of taxation compatibility within the Member States. On the one hand, this includes finding ways to ensure compatible processes of taxation within the Member States. On the other hand, it means that Member States have to accept supranational regulation.

Currently, MERCOSUR is a customs union with a common external tariff[2] which applies to most products, with the exception of certain specified products as to which the domestic tariff prevails in each individual state. Products in the free trade zone may have

* The personal opinions contained in this work are the exclusive responsibility of the author and do not reflect institutional positions of the MERCOSUR Secretariat.

[1] L Villela and A Barreix, *Taxation in MERCOSUR and Coordination Possibilities* (Washington, DC, IDB, 2003) 20.

[2] The common external tariff (CET) has 11 tariff levels varying from 0 to 20 per cent and applies to 85 per cent of the list of items. The remaining tariff items, including capital goods, telecommunications, and computer equipment (1,100 items), will continue to be subject to national tariff rates until the end of the transition period when the tariffs will converge linearly and automatically. Capital goods will have a maximum CET of 14 per cent effective from the year 2001 (2006 for Paraguay and Uruguay); computer equipment and telecommunications goods will have a maximum CET of 16 per cent from 2006. Besides these special cases, a list of exceptions to the CET was established for up to 300 tariff items per country (399 for Paraguay), effective through the end of the year 2000 (2005 for Paraguay).

the more favourable tax treatment established under MERCOSUR, which applies to the goods produced in the normal customs zones of each Member State, or, in the case of certain specified products, may receive the normal customs treatment prevailing in each country. Therefore, MERCOSUR is not a 'complete' customs union; this is the main reason why it cannot be said that there is a common market in the region.

The main aims of this chapter are to provide a brief analysis of the measures being applied by MERCOSUR Member States to coordinate their taxation policies, and to present a study of tax legislation in each MERCOSUR Member State, with special focus on indirect taxation, taking into account its impact on the trade in goods and services.

II Intra-Bloc Regulation

Up to now, tax harmonisation in MERCOSUR has focused on the elimination of discriminatory treatment which affects the free access to the common market. The remaining aspects of fiscal policy, such as those related to policies concerning public expenditure, indebtedness, regulation and public companies, still remain within the domestic sphere and are regulated by each Member State individually.

Initially, the main objective was to regulate the intra-bloc trade in goods and related services. Accordingly, taxation was considered as an accessory to that purpose and the agreements focused on eliminating taxes as an obstacle to the trade in goods. Such agreements were in line with the principle of non-discrimination between national products and imported goods, basically through the application of indirect taxes; specific agreements were foreseen for general taxes on sales. For instance, the single agreement on tax incentives and free zones, intended to limit industrial free zones, provided that sales coming from such zones and directed to the bloc would be treated as imports from third countries. Meanwhile, free trade areas where services delivered and other activities are duty free were admitted (and indeed increased). Consequently, this measure has significant tax repercussions in other Member States, especially on income tax.

Undoubtedly, the challenge of tax harmonisation in a regional economic bloc needs a reasonable balance between national sovereignty and coordination amongst the different Member States. It implies, therefore, evaluation of the available options for the compatibility of the national tax systems and non-discrimination measures in the perspective of free circulation of people, goods and capital, without overlooking the preservation of a certain degree of autonomy of the Members States. The coordination of macro-economic policies, an objective set out in article 1 AT, strengthens the necessity to improve the tax mechanisms applied in each of the Members States. However, this is not an easy task and it requires the states to sacrifice their current tax revenue in favour of an objective still in progress. With regard to the construction of scenarios for the process of harmonisation of tax policies in MERCOSUR, two controversial aspects need to be highlighted. The first concerns the removal of fiscal barriers, meaning not only customs duties, but also the border controls currently in place. The second principally concerns indirect taxes, since value added tax (VAT, *Impuesto al Valor Agregado*, as applied in Argentina, Paraguay and Uruguay) and ICMS (tax on the circulation of products and services of transport and communications, *Imposto sobre a Circulação de Mercadorias e Serviços*, the Brazilian equivalent of the VAT) represent significant tax revenue for each state.

Thus, for the time being, regulation as under European Community law has not been implemented, since the Ouro Preto Protocol (1994) did not approve a supranational structure on the model of the European Union. The efficient functioning of a common market implies the adoption, on the part of the community authorities, of decisions that the national constitutions attribute to the national bodies in the current system in effect pursuant to the Treaty of Asunción. It will be necessary to delegate legislative, executive and judicial competences to a communitarian institution, for example a Court of Justice, and also to reformulate the constitutions of the Member States so as to harmonise the requirements of their internal laws to the peculiarities of the common market. Such harmonisation can be defined as the adoption, at a communitarian level, of rules intended to ensure the functioning of the common market and which norms must be transposed into national laws. This would require the existence of two levels of legislation: communitarian, which is imposed on the Member States, and national, which creates rights and imposes obligations within specific countries, as is the case with the European Union.

Those who are unhappy with the outcomes of the integration only evaluate the effect of the removal of customs barriers, arguing that it will have an impact on the most vulnerable products. However, any system which privileges certain products will inevitably face difficulties in the long run. A compromise could be to adopt a model which combines the elimination of customs barriers and the adoption of temporary and specific measures to grant protection to certain vulnerable goods.

Before analysing the tax issues in detail, it is convenient to make some general reflections. First, so far in MERCOSUR there has only been legislative harmonisation; if an institution with supranational competence were to be established, it would be able to elaborate norms to be applied by the Member States. Any such body would have to be established by a treaty or agreement signed by the Member States. If a treaty created a supranational jurisprudence, the harmonisation would be accomplished by means of the instruments adopted for this supranational institutional structure. In contrast to the European system, the Treaty of Asunción does not imply the acceptance or application of a communitarian law (at least initially during the period of transition, that is, the principle of supranationality did not apply up to 31 December 1994). Up to the present, all the efforts made have not yet accomplished a complete common market.

From the scope of the provisions of a treaty or agreement with effects on taxes, various types of harmonisation can be differentiated, such as: (i) fiscal harmonisation limited to the functioning of a customs union; (ii) fiscal harmonisation aimed at the complete elimination of trade barriers; and (iii) a programme of harmonisation focused on the system of fiscal organisation, which places concrete limits on definitive aspects of the functioning of the various national tax systems as far as the establishment and good functioning of the common market requires them. This latter is a form of vertical harmonisation that only seeks modifications in those sectors that effectively represent a necessary condition for the creation of a common market, in particular states' macroeconomic policies. Observing the process of establishment of MERCOSUR, one notes that the Treaty of Asunción emphasises the formation of a common market, not limited only to a tax harmonisation to establish a customs union. The tax harmonisation in the Treaty can be considered as a basic component of regional integration for two reasons: first, harmonisation is one of the principles and the objectives of the Treaty; secondly, and according to these objectives, there is an explicit mention in the Treaty of Asunción of the harmonisation of taxation (in particular of the national tax systems).

Relevant principles can be extracted from the juridical process adopted for MERCOSUR and also from the economic system established by the Treaty of Asunción, which can be considered as neoliberal taking into account the internal structure and the provisions regarding external exchanges. The most important principles of particular relevance to tax harmonisation are (i) a market economy inspired by the postulates of economic liberalism; and (ii) equality of treatment and non-discrimination. It can be assumed that the interaction between these principles will be decisive for the continuation of the tax harmonisation process initiated by the adoption of the external common tariff, considering in particular the existing limitations of a technical character, to which must be added other issues of a political nature which will definitively determine the rhythm and the intensity of the tax harmonisation process.

Harmonisation as a whole is a continuous and controlled process of self-adaptation of the structures, which itself relies on the characteristics and objectives of the integration process. Therefore, adjustments of the fiscal structures decisively influence the economic structures, and vice versa; as regards the tax system, as an economic element, economic growth must be accompanied by adjustments correlative to the evolution of the other structures of the communitarian system. This implies that each level of economic growth must theoretically correspond to a definitive fiscal structure. Consequently, tax harmonisation will be incomplete without consequent harmonisation of the economic structures. Meanwhile, the processes are interdependent. The requirement for such a continuous process is evident and is made explicit in projects which seek the formation of a customs union, since it is virtually impossible for such an arrangement to remain at the stage of a customs union. As a result, the suppression of customs barriers heralds the appearance of other obstacles to the completion of a commercial and political union, previously ignored because action was restricted to the level of tariff protection.

The customs union stage implies the removal of certain barriers to trade, but it does not imply a complete tax harmonisation; on the contrary, the dynamic of the system leads to a phase of stagnation, during which the need for harmonising laws comes to be seen as essential. Harmonisation will result in the unification of economic structures and this last stage will demand the institution of a central power. Harmonisation can be conceived of in various ways, either as a method to regulate the coexistence of different national laws, or as a declaration of intent to unify national tax and financial structures. The advance of the harmonisation process will require a parallel evolution of economic integration. If such a result is not achieved, the effect of harmonisation of the basic system or of the structures of specific taxes may be neutralised by the manipulation of outcomes or through administrative practice regarding the management and the application of taxes.

Peaceful coexistence of national systems is required in the course of the integration process. Harmonisation policy on tax implies narrow limits, allowing the Member States some autonomy in economic, financial and taxation policy. Protected by these fiscal boundaries, the Member States are free to adopt diverse 'manipulations' related to the imposition of taxes. From a technical perspective, there is a need for the removal of the distinct levels of performance within the scope of harmonisation adopted by the Treaty of Asunción, the express objective of which is stated to be to create a common market, with one of the main instruments to achieve this being macro-economic policy.

However, the Treaty of Asunción does not lay down all the steps in the integration process in a homogeneous way, establishing a necessary timetable for the phases of the free trade zone and customs union. At all stages, the method of performance is reduced to the

simple expectation of cooperation on the part of the Member States. As an expression of sovereignty and national autonomy, such cooperation to some extent depends on states' national interests and the security of their economic structures, leading states to find in the maintenance of their autonomy one of the most effective protectionist policies (in relation to exchanges of trade). This explains how the centrifugal trends of national interests constitute the main difficulty for the adequacy of harmonisation policies (in particular, fiscal harmonisation). It also highlights another troublesome factor which also makes effective tax harmonization difficult—national politics.

Harmonisation accordingly affects the sovereignty (in its traditional meaning) of states, because a state's taxation system not only constitutes an essential source of public resources, but is also the modern instrument of economic and social policy. Such policy limitations restrict the scope of harmonisation of the fiscal and tax systems to the extent to which states will accept the adoption of a common tax policy which interferes with their important and traditional prerogatives in respect of a fundamental pillar of governmental fiscal policy, ie taxation. It seems clear that tax harmonisation through the imposition of either of the chosen criteria (destination or origin) can only be achieved in those sectors in which the diversity of the current tax regimes results in economic distortions. At a minimum, harmonisation must be applied to all the indirect taxes that result in significant levels of distortion in the formation of the common market.

The first aspect to be analysed is the national tax systems. These are not only created by the national legislator, but to some extent their structures essentially depend on the environment in which they are applied and to which they must be adapted. Failure by the various MERCOSUR Member States to establish a minimum level of uniformity regarding such factors would render harmonisation of the tax system practically impossible. The public budget of each Member State could constitute a problem, because of the divergences in the volumes of particular goods produced in each of the Member States. States will be concerned that an equal imposition of taxes within the common market will result in trading deficits between the countries (an excess of imports of particular goods in one country and a deficiency of imports in another, generating an insoluble situation).

The problem is even more complex if it is analysed from a dynamic point of view. Since at present the financial requirements of a state induce it to introduce modifications in its tax system, an attempt to achieve harmonisation would result in distortions in the common tax system, unless states adopt the same modifications made by each other. Each Member State would set its tax policies according to its perceived political requirements to avoid 'excessive' taxation, creating distortions and disequilibria in the public budget, a situation which could easily arise in MERCOSUR. To prevent such disequilibria, the only option would be to raise a part of the national finances at a communitarian level, by adopting a financial system of a federal type, allowing compensation for the differences in public incomes. Some scholars argue that a financial system of the federal type is a necessary condition for the achievement of harmonisation. Tax harmonisation not only implies economic harmonisation, but also that common tax policies should be adopted by the Member States, since incompatibilities in national laws exist in each of the Member States.

Harmonisation is a condition for the common market to operate in a balanced way, including the elimination of tax differences requiring different border controls, and the elimination of differences in macro-economic policies which could prejudice the development and future success of MERCOSUR. As mentioned above, the most complex

harmonisation issue in taxation terms to address is that of indirect taxes and their incidence on the exchange of goods, because of their repercussions on the consumer.

III Tax Systems in MERCOSUR Member States

The tax systems in operation in each of the MERCOSUR Member States possess distinctive elements, with each of them presenting a different form of political and territorial organisation and different juridical structures and constitutional laws.

(1) In Argentina, the national state was created from the association, through the adoption of the national Constitution, of a group of originally sovereign provinces. The Constitution provides in article 121 that the provinces retain all powers which are not delegated by the Constitution to the central government, which were specifically reserved by special agreement at the time of the provinces' incorporation. The national Constitution also establishes that the provinces are responsible for the city-level system. Therefore, in the organisation of the state, the central government has the power to legislate on customs matters, receiving the income that arises as a result of taxes on the import and export of goods. Also, indirect taxes can be imposed by the central government in a concurrent competence with the provinces, and direct taxes can also be imposed in certain circumstances. These taxes are 'concurrent', which means that a part of the revenue collected is distributed by the central government to the provincial governments based on percentages defined in a relevant law. As mentioned above, the provinces retain all non-delegated competences, being able, therefore, to impose direct and indirect taxes. The common taxes in the provinces represent an important part of their income, and in addition they apply a sales tax and a real estate tax. The Federal District (City of Buenos Aires) has a similar tax system. The fiscal rules applied to the municipalities are determined in the Constitution of the province to which they belong. In some provinces, the municipalities have a broad competence, while in others their powers are limited to the collection of local rates for the services that they provide.

(2) In Brazil, the Federal Constitution (1988) adopted a tripartite system of competence when determining the powers of each level of the state (the Union, federated member states and cities) to impose taxes. Articles 145, 153, 154, 155 and 156 of the Federal Constitution establish which taxes the Union, federated member states, the Federal District and the cities can impose. Each of them can only legislate in the sphere of express competence recognised in the relevant articles, and are not permitted to commit any 'incursions' into the fields of competence of any other body. The general tax competence not only confers the power to create and control taxes, but also to legislate on tax issues. Thus, the Federal Constitution determines which taxes 'belong' to each of the levels of the state.

It is important to underline that the limitations on the general tax competence are associated with the attribution of competences to each level of the state. Thus, together with the attribution of powers, the Federal Constitution also expresses a series of specific restrictions on the tax competences, for example, specific rules which are to apply to religious and educational organisations and to the distribution of public income between

the Union and the federated states and cities (eg, 50 per cent of the revenue from the tax on rural property, which is within the competence of the central government, belongs to the cities).

(3) Paraguay has adopted a unitary structure, in which the central government is competent to impose taxes, without an allocation of competences to the provinces or cities. The substantive taxes are regulated in the national Constitution, which also grants exclusive competence on taxes to the legislature, only delegating the determining of the division of revenue to the internal organisations, which must not exceed the maximum values established by the relevant regulations.

(4) Uruguay is a unitary state, and the departmental governments are not permitted to 'break' the unity of the state, creating a different model from that adopted by regional governments under a federal state (in which the regions have more autonomy). As regards the departmental governments, it should be noted that: (i) they are not founding communities, and the Uruguayan state was not created by an agreement between the departmental governments, unlike the regional states in a federal model which are associated by agreements (general or specific); (ii) the departmental governments are not permitted to adopt their own Constitutions, and do not have power to intervene in reforms of the national Constitution.

At a practical level, there is some allocation of competences from the central government to departmental or municipal bodies. Moreover, bodies which have such competences are not in a hierarchy under the central government but are regulated by certain controls established in the Constitution (articles 300 to 303) which apply throughout the national territory. Thus, the determination as to which powers are allocated to the national government and which to the departmental governments is established according to specified criteria and not as a result of a hierarchy, since the departmental bodies are decentralised. In summary, the Uruguayan Constitution distributes the competences between the organisations of the central state and the departmental governments according to specified criteria partly established in the ordinary laws and partly determined by the Constitution.

In an integration process whose main objective is to constitute a common market, indirect taxation becomes of special relevance, as being directly applicable to the production and consumption of goods. In this context, it is helpful to look in detail at the specific taxes adopted in the MERCOSUR Member States which possess characteristics of indirect incidence. It is evident that indirect taxation will play an important role in the achievement of the common market, as it affects the mobility of the production factors, in particular the essential four freedoms: circulation of goods, people, services and capital. Accordingly, in the next section we will devote special attention to the main indirect taxes imposed by the MERCOSUR Member States. As stated by Barreix and Villela:

> [D]espite the logics of the sequence of coordination efforts, which moreover coincide with the international experience, the problems of indirect taxing adjustment (VAT, ICMS, turnover tax and excise taxes) can reveal very important political difficulties, given the problems of fiscal federalism of the main partners. Therefore, it will take a long time to complete the process.[3]

[3] Villela and Barreix, *Taxation in MERCOSUR and Coordination Possibilities* (n 1).

A Argentina

Argentina introduced VAT on 29 December 1973 under Law 20.631, having as its main characteristics the incidence of the tax when any sale or importation of products occurs, or on the rendering of services, except in the case of certain exempted products and activities, such as books, brochures and insurance operations, among others. The relevant moment when the tax obligation arises (having relevance for the receipt of income and the place of the activity) will be determined by the destination of the merchandise or payment for the service. As regards the imposition of the VAT, it must be noted that the relevant value will be the full price of the product or service, so that, if the product is imported, the tax on importation will be added to the value of the merchandise or the service, before the imposition of the VAT.

The rate of tax varies in accordance with the necessity of the product or service, being applied selectively to different categories of merchandise. The basic rate is 21 per cent, whereas, for example, a rate of 27 per cent is applied to the provision of electricity, and also of gas.

Finally, Argentina imposes specific consumption taxes on the consumption of products with specific characteristics to which the state attributes significance, such as tobacco, alcoholic beverages and electronic devices; there is also a tax on fuels, which follows the same rules as for VAT, except that the rates of tax determined for each category of fuel are specifically fixed by law.

At the provincial level, a general sales tax is applied on the sale of goods and services with a 5.5 per cent tax rate. This is a cumulative tax, which accumulates through each of the stages of the production process, with the result that the effective rate of the tax is far higher than the original tax rate. At the city level, a similar tax on the sale of goods and services is commonly applied, although at a lower rate of tax. It is also common for this type of tax to be applied even by municipalities with more limited fiscal capacities in respect of services provided.

B Brazil

In Brazil, the more important indirect taxes are the ICMS, a tax on the circulation of goods and services; the IPI, a tax on manufactured products; and the ISS, a service occupation tax. Each of these is allocated to an area of distinct competence. It should be noted that in Brazil, the taxation system is weighted towards the imposition of taxes on products. There is not only taxation on all the stages of the production process, but also in particular on the consumed product, either merchandise or service.

Furthermore, Brazil has a rigid constitutional system of allocation of competences to the various federal levels. With regard to indirect taxes, the following division applies:

(i) Federal Level

The Federal Constitution confers on the Union the competence to impose tax on manufactured products (IPI). The constitutional basis of the tax is found in article 153.4 of the Federal Constitution, which establishes that competence lies with the central government (the Union), and the tax is regulated by Federal Laws Nos 4502/64 and 7798/98. The main characteristics of the IPI are that it is a selective tax having indirect

incidence on the production and direct incidence on the consumption of the product. It has an extra fiscal function in taxing products considered superfluous or a luxury, such as perfumes, cigarettes and alcoholic beverages.

(a) Taxable events

The tax arises upon the issuance of customs clearance to a foreign supplier, when goods leave the establishment of an importer or manufacturer, on their being bought on the market, and on the abandonment of goods. A product is considered to be 'manufactured' if it has been submitted to any operation that modifies its nature for the purpose of consumption.

Article 3 of Federal Law No 4544/02 provides that 'a manufactured product is the resultant of any operation defined in this Regulation as manufacture, whether incomplete, partial or intermediate'. Article 4 characterises 'manufacture' as 'any operation that modifies the nature, the functioning, the finishing, the presentation or the purpose of the product, to perfect it for consumption'.

The Regulation goes on to present a list of activities considered to be 'manufacture' and others that cannot be so considered.

(b) Taxable value

The taxable value is represented by the exit value of the good; or in the absence of the value, the market price of the good on the wholesale market. In the case of imported products, it is any increased price beyond that of exchange goods and importation tax.

(c) Principle of non-cumulation

As Calmon explains: 'monthly, as in the ICMS, the taxpayer adds up the value of the tax included in the price of the inputs and products that it has acquired subject to tax (credit account) and, in the same way, it adds up the value of the tax added on the cost of the products sold (debit account). If the balance is in debit, the taxpayer will have IPI to pay. If the balance is in credit, this is transferred to the following month, when it can be used to the taxpayer's advantage . . . It is intended that each agent only pays or would have to pay the tax on the value it has added to the product, therefore the value that was collected in previous operations is credited to decrease the amount of the tax'.[4]

Verification is made through the various incomings and outgoings of the product during a precise period of time, taking into account that the value to be quantified will be fixed in the future.

(d) Tax rate

The tax rate varies on a selective basis according to the necessity of the product. It is determined by an Act of the executive government (Federal Constitution, article 153.1).[5]

[4] S Calmon Navarro, *Curso de Direito Tributário Brasileito* (2005) 456.

[5] Ibid. '[T]o pay tax value, the taxpayers decrease of the debit to the credits of the appropriate IPI in the period, in recurrence of the acquisition of the inputs and acquired products, and once again it proves the instability of general rule of the tributes only reduce the quantitative aspect of the normative consequences'.

(e) Taxpayer

The tax is levied on the importer, on anyone determined by the law to be a manufacturer, on the trader of products etc.

(f) Principle of priority and legality

This tax, as well as import and export taxes, represents an exception to the principle of priority, since the Federal Constitution itself established it (article 150.2). Under the principle of legality, it is an exception which grants power to the executive, within the conditions and the limits established in law, to modify the rate of tax, in order to adjust it to the objectives of exchange policy and foreign trade.

(ii) Federative Member State Level

The Federal Constitution determines in article 155.2 the competence of the federative member states to establish the ICMS, a tax on operations related to the circulation of merchandise and the rendering of services of inter-state and inter-municipal transport and communication.

Detailed regulation depends on the adoption of laws by the federative member states, which must meet the criteria laid down by Federal Law No 87/96. The main characteristics of the ICMS are that it is a tax on consumption imposed on operations related to the circulation of merchandise, the rendering of inter-state and inter-municipal transport services and the rendering of communications services.

(a) Principle of non-cumulation

This is a constitutional principle that requires the possibility for taxpayers to obtain credit for the tax paid on previous operations, in order to reduce the tax burden on the end-product.

Non-cumulation is a technique which is, in principle, intended to avoid double taxation problems. It compensates in the current operation for the tax paid in previous ones. A taxpayer who proves the existence of bill of sale from a previous phase evidencing that ICMS was processed, independently of whether or not it has in practice been paid, has the right to claim the credit. This method, in each incidence, discounts the ICMS due because it was demanded in the previous operation. In accurately computing a product's or service's incomings and outgoings in the relevant tax periods, the taxpayer is able to add up all the units of debit and set them against all units of credit.

Accordingly, since agents involved in the circulation of goods and services pay ICMS in the exercise of their activities (on the acquisition of goods and services for use or consumption), and buyers and users of services, in the quality of taxpayers *de jure*, situated at any point of the circulation chain without any distinction, are authorised to obtain credit and reduce the tax on their operations, everything is therefore considered operational cost. The same mechanism applies to both the European VAT and Latin American tax laws.

The most significant problem is related to the absence of a complementary law applying the principle of non-cumulation, such as established in Federal Constitution, article 155.2(11)(c), which makes the distinction between 'physical credit' and financial credit.[6]

(b) Taxable events

Federal Law No 87/96, article 2 mentions some events upon the happening of which tax will be payable:

(1) a change in the title to property; this is an indispensable requirement without which tax will not be payable;
(2) when a product or service is offered for sale or put at the disposal of the consumer, either final or not; whether or not a product is of a mercantile nature is determined by the intended destination of the good;
(3) a product's merely leaving an establishment does not imply it is in circulation, this will only be the case where title to the property has changed, not only from an economic but also from a legal point of view;
(4) rendering of inter-municipal and inter-state transport services, with the tax arising where the services are established;
(5) the rendering of services of communication; these are only taxed if they are rendered under obligation, irrespective of the nature of the services;
6) a mere supply of goods does not involve circulation; a further operation, for example sale of merchandise to the final consumer or commercial lender, etc, is required.

(c) Territorial aspects

In the case of the ICMS, whether or not tax will be payable depends in specific situations on the time and location of the activities (in virtue of exemptions determined by the regulations). Federal Law No 87/96, article 12 establishes the territorial and material aspects of the ICMS, although some of the provisions set out in the article are considered unconstitutional by scholars (eg the mere transference of merchandise between establishments of one same owner being considered a taxable event, as provided in article 12.1).

The territorial question will be determined case by case, depending on the determination of what constitutes establishment, merchandise, rendering of services, etc, in line with Federal Law No 87/96, article 11. In the case of imports, the imposition of the tax will always be within the competence of the federative member state where the import establishment is located, rather than of the place where the customs clearance was carried out.

(d) Taxable value

The taxable value for the purposes of ICMS is the cost of the circulation of the merchandise or the price of the service rendered. The cost of freight paid to another establishment of the same company or to an interdependent company is included in the

[6] Financial credit is the same as contractual credit, being what is determined in bills of sale. Financial credit includes credit on the acquisition of merchandise that is to become a permanent asset in the establishment, but which is not part of the product in manufacture (see Federal Law No 87/96, art 2.1). Exceptions to the principle of non-cumulation are found in Federal Constitution, art 155.2(2).

taxable value, if it exceeds the normal cost of transport services (as to the definition of 'interdependent company', see Federal Law No 87/96, article 17).

(e) Tax rate

Each federative member state sets its own tax rate, following the general principles laid down in the Federal Constitution, for example, the principle of selectivity (article 155.2(3)). As scholars point out, commenting on article 155, this variation in tax rate represents the constitutional abandonment of the idea of the ICMS as a neutral tax. In contrast to foreign models, this Brazilian system has led to the tax becoming the target of fiscal and extra-fiscal manipulation as the federative member states seek to use it as a 'forceful weapon' in a regional fiscal war.

The Federal Constitution, article 155.4 sets out the various methods of determining the tax rate:

(1) a Resolution of the Senate, on the initiative of the President of the Republic or of one-third of the senators, approved by an absolute majority of the legislators, is required to establish the tax rate for inter-state operations and exports;
(2) the Senate also has the power to establish the tax rate for internal operations (minimum and maximum), when necessary for solving a specific conflict affecting the interests of the federative member states;
(3) the internal tax rate, except in the case of agreement between the federative member states, cannot be lower than the inter-state rates;
(4) when the operation involves the delivery of merchandise for final consumption in another federative member state, the inter-state tax rate will be applied and the recipient will be the taxpayer. In this situation, the Federal Constitution determines that the tax arising from application of the internal and inter-state taxes will be paid to the federative member state to which the merchandise has been delivered. In general, the tax rate is 13 per cent on export activities, and a maximum of 12 per cent and a minimum of 7 per cent on inter-state operations (in respect of the North, Northeast, Middle-west and Espirito Santo). The tax rate on internal operations varies between 18 per cent, 7 per cent and 5 per cent (depending on the product).

(f) Taxpayer

Tax is payable by any person, juridical or natural, who habitually or in a volume characteristic of commercial intention, carries out operations involving the circulation of goods or the rendering of inter-state and inter-municipal transport and communication services, including where the operation or rendering of the service are initiated externally (Federal Law No 87/96, article 4).

This implies that importers should also pay the tax. Currently, the doctrine and the jurisprudence are unanimous in considering that the principle of equality among taxpayers should be applied to those carrying out such operations.[7] As Gomes Aranha points out, the provisions of Federal Constitution, article 155.2(9) determine that the entry of imported merchandise is taxable, irrespective of where the capital assets or establishments are located. The proper construction of this article indicates that the importer must be an

[7] See Abridgement 661 of the Supreme Court.

'enterprise' importing 'goods'. Thus, the use of the expression 'natural person' in relation to the taxpayer, as under Federal Law No 87/96, cannot refer to any natural person, only to one who has an establishment involved in commercial activities.[8]

The question of who is chargeable to the tax was determined in Case No 196,472–3 of 1 October 1999. Federal Law No 87/96, article 5 was held to establish the taxpayer's responsibility, while article 6.10 made provision for tax substitution. Following the adoption of Federal Law No 03/93, tax substitution has been firmly established, an issue that has generated innumerable controversies amongst scholars. This chapter agrees with Calmon when he states that 'the act of receiving for the states of values for a reason or purpose ICMS, ie, not corresponding taxable incomes to the actual values practiced by the taxpayers, characterizes confiscatory means and tries immediate restitution, in the name of Constitution'.[9]

(g) Immunities and exemptions

Federal Constitution, article 155.10, defines situations of non-incidence of the tax. Most scholars consider these to be instances of immunity.

(iii) Municipal Level

As for the federal tax system and federated member states tax system, the constitutional norm regulating the ISS (service occupation tax)is Federal Constitution, article 156.3. The legal regulation is provided by municipal law, which must meet the criteria laid down in Federal Law No 406/68 and Federal Law No 116/03, among others.

The main characteristic of the tax is that is applied on the value of the services rendered, depending on the location and the character of the service provider (whether in a permanent or temporary occupation).

(a) Taxable events

Tax is payable on the continuous rendering of services included in the annex to Federal Law No 116/03, even where such services do not constitute the main activity of the service provider. The incidence of the tax does not depend on the description applied to the service by the taxpayer, but on the nature of the service itself.

Scholars have queried whether the list in the annex is exhaustive or merely provides illustrative examples. Calmon states that the tax applies to the rendering of services of any nature carried out by independent professionals or companies, therefore excluding services rendered under an employment relationship and services rendered under statutory requirement. Some scholars maintain (although it is by no means certain that the jurisprudence adopts the same interpretation) that all services are taxable, with the exception of those mentioned above, which fall, under the constitutional provisions, within the federative members states' competence to be taxed under ICMS.[10]

To solve the conflicts which have arisen in the application of the IPI, ICMS and ISS, it would have been preferable for the list to have been clarified as follows:

[8] LR Gomes Aranha, *Curso de Direito Tributário* (Belo Horizonte, Del Rey, 2002).
[9] Calmon Navarro, *Curso de Direito Tributário Brasileito* (n 4) 553.
[10] Ibid.

(1) those services currently listed which do not involve the supply of merchandise are subject to ISS;
(2) those listed services which involve the supply of merchandise attracting the incidence of ICMS are subject to ISS on the services and ICMS on the supply of merchandise;
(3) services not mentioned in the list, but which involve the supply of merchandise are subject to ICMS.

In can be concluded that the absence of complementary federal regulation is hindering the definitive solution of the problem of defining the possible services to be taxed under the ISS. To prevent these conflicts, the National Parliament should consider the adoption of a law: (a) defining non-taxable services rendered under an obligation; (b) making provision for cases of mixed operations, where it is necessary to separate goods and services, as for example in the case of vehicle servicing involving the sale of parts (subject to ICMS) and the rendering of services (subject to ISS); (c) still maintaining, however, a non-exhaustive list, leaving it possible at municipal level to determine specific events which should result in the incidence of tax; thus (d) providing a general list of taxable services, but as illustrative examples only.[11]

(b) Taxable value

The taxable value is the value of the services rendered.

(c) Tax rates

The tax rates vary according to the respective municipal laws, and in accordance with the nature of the service. In general, the rate is between 5 per cent (maximum) and 2 per cent (minimum).

(d) Taxpayer

Tax is charged on the provider of the service. There is a danger that interpretation of this requirement may become confused following the legislature's partial repeal of certain articles of Federal Law No 406/68. The legislature's actions have resulted in regulation in this area now requiring a combination of article 9 of Federal Law No 406/68 with articles of Federal Law No 116/03 (governing professional service providers).

(e) Territorial aspects

The main issue of contention as regards ISS relates to the location of the service. The problem arises because Federal Law No 116/03 makes a distinction with respect to the payment of ISS to the local municipality, with payment in some cases determined by the location of the establishment (criterion rationae personae), but in other cases mentioned in the annex, payment is determined by the place where the service is rendered (criterion rationae loci). The Superior Court decided, contrary to an amendment to the law limiting the latter rationale to cases of civil construction, that ISS must be collected in all cases at the place of the rendering of the service.

[11] Ibid 591.

C Paraguay

Adopting a similar juridical structure to that of the Uruguayan Constitution (see below), Paraguay has established constitutional principles to protect the rights of taxpayers. The most significant of these principles are the principles of legality, the prohibition of confiscation, and the prohibition of double taxation between states.[12] In this context, the Paraguayan Constitution confers on the legislature a general competence to regulate taxation, with no fixed requirements as to the distribution of public income, nor any established hierarchy of tax competences.

Paraguay is a unitary state, which is not comprised of federative or provincial entities (the provinces have some competences but these are limited by the Constitution). Accordingly, the imposition and collection of taxes on consumption are a competence of the Union.

Paraguayan VAT is thus a tax within the competence of the central power, adopted under Law No 125 of 9 January 1992. Detailed regulation was made by Decree No 13.424 of 5 May 1992. The rules regarding VAT in the Paraguayan Republic were amended by Law No 2.421 in 2004.

Paraguayan VAT appears to follow the same model as the Argentinean system, as the tax obligation arises on all operations, including the sales of goods and the rendering of services, on gifts of goods and supply of goods under obligation, as well as on imports. Certain activities specified by law do not attract a charge to tax, such as sales of farming products and real property, among others.

As regards the incidence of VAT, the location is determined by the destination of the merchandise or where the service was rendered. The taxable value is the price of the product or of the service rendered. Exceptions to VAT on 'less valuable' goods are found in article 91 of Law No 2.421, which establishes a tax rate of up to 10 per cent on the value of the service or goods.[13]

D Uruguay

Having analysed the characteristics of the national tax systems in the Constitutions and other national laws of Argentina, Brazil and Paraguay, we now turn to the principles and norms included in the Constitution of the Republic of Uruguay, which generally follow the same systemic logic as the other Member States.

Norms on taxation in the Uruguayan legal system are provided by the Constitution. There are no established limitations on the local and provincial governments under the Constitution, which makes no express distribution of tax competences. This follows from the form of state determined by the Constitution of Uruguay, which, like Paraguay, adopts the form of a unitary state not having the characteristics of a federative state.

The Uruguayan system contains only a tenuous form of allocation of competences, since the public administration has general competence in most aspects of the tax system (particularly in the case of VAT and other indirect taxes). General principles are embodied

[12] Constitution of Paraguay, arts 179, 180 and 181.
[13] Law No 2421/04, art 91.

in the Uruguayan Constitution, such as tax immunity conferred on religious institutions, the principle of legality, and of extra-fiscal organisation.

As regards indirect taxes, VAT was first instituted in Uruguay by Law No 14.100 of 29 December 1972, and has been modified by gradual changes through Decrees and Laws over the years.[14] The Tax Code lays down guidelines for the regulation of Uruguayan VAT; the central power is competent to impose the tax, and all those who carry out operations defined in the law are liable as taxpayers.

The tax obligation arises when a taxpayer completes an operation involving the circulation of goods or the rendering of services, as well as the importation of merchandise. Certain cases specified by law constitute exceptions to the tax, such as operations involving the importing industrial goods, ships of the Merchant Navy, among others. The taxable value is established in accordance with the full value of the rendering of the service or circulation of the product. The tax rate varies between 14 per cent and 23 per cent, in accordance with the utility and necessity of the product or service, as determined by the Uruguayan government.

The tax obligation arises when the product is supplied or service is rendered, and the location is defined as the place where the product is sold or the place of establishment of the service.

Finally, Uruguay has also established specific internal taxes, which are imposed on only one phase of commercial activities, and are characterised by distinct tax rates depending on the nature of the goods, such as alcoholic beverages, fuels and cigarettes.

The tax rates are applied on the real value of the product, or on an estimated value determined by the executive, based on the current sale price to the consumer. Such estimated values are determined on a periodic basis as 'basic prices'. The General Tax Bureau calculates the basic prices every two months, based on the variation in prices of taxed goods.

The executive has further power to establish the taxable value to be applied to specific exported or imported goods if the taxable value determined by using *ad valorem* criteria would otherwise be lower.

The tax rates applied vary from 80 per cent in the case of spirituous drinks (except fine liquors, special wines, champagne and vermouth or beer which attract a rate of 20.2 and 23.5 per cent respectively) to 5.26 per cent for fuels used by national aviation or transport (with exemptions in the case of state institutions).

[14] Modified by Laws Nos 16.811 of 21 February 1997 and 16.829 of 19 May 1997, 395/997 of 23 October 1997, 16.906 of 1 July 1998, 16.986 of 22 July 1998, 17.042 of 25 November 1998, 17.113 of 9 June 1999, 17.123 of 21 June 1999, 17.158 and 17.292 of 25 January 2001, 17.311 of 5 April 2001, 17.286 of 22 December 2000, 17.296 of 21 February 2001, 17.311 of 05 April 2001, 17.453 of 28 February 2002, 17.503 of 30 May 2002 and 18.083 of 18 January 2007.

IV Analysis of the Principal Differences in the National Taxes of MERCOSUR Member States

This brief analysis of the tax system of each MERCOSUR Member State, with special emphasis on VAT, has highlighted that the principal differences are those relating to the structure of each of the national taxes.

The specific peculiarities are connected to the different regulation adopted by the VAT and ICMS laws, in particular with respect to products and to consumers. ICMS combines imposition by origin and by destination criteria, while VAT essentially utilises the criteria of origin. The treatment of taxable value also differs, as VAT falls on the full value of the transaction, while with ICMS total tax paid is part of the taxable value, which may create distortions between the effective and the nominal rate of tax.

As Fernandes points out, looking at the incidence of general taxation as it affects consumers, there is a significant difference in that Paraguayan and Uruguayan VAT includes intangible goods, which is not the case with Argentinean VAT and Brazilian taxes. Moreover, trading operations (purchases and sales) are treated differently for the purpose of income taxation in the four countries.[15]

There are further important differences in the laws relating to foreign commerce. The taxable values attributed to imports differ from country for country.

Thus, Argentina, for example applies VAT to the value of an imported good with the addition of importation taxes, including business taxes (excluding VAT). Paraguay stipulates as taxable value the customs value of the good, including all the taxes incidental to the operation, but excluding VAT. For Uruguay, the initial value is CIF (cost, insurance and freight), including taxes. Finally, the ICMS as imposed in Brazil applies to the price of the operation, including the tax figure in the global sum, and also including IPI and many other internal taxes.

In relation to exports, Argentina and Paraguay provide for exemptions, Uruguay establishes cases of non-incidence and Brazil has constitutional articles providing for non-incidence (in some cases in terms of immunity) for manufactured products (except for those not wholly elaborated).

Moreover, our analysis has raised questions about the tax incentives adopted by each country. Brazil and Argentina have incentives mechanisms which may have significant impact on the achievement of a common market, since such mechanisms can generate a difficult environment for the coordination of macro-economic policies. In this context, the deepening of the integration process could be affected without adequate measures to deal with the unique incentives applied by the different MERCOSUR Member States.

Finally, the inadequacy of regional coordination of customs policies may result in important distortions in the common market; for example, Argentina's and Brazil's Duty Free Zones (Tierra del Fuego and Manaus) will allow products to enter the markets of both countries without paying the common external tariff until 2013.[16]

[15] EC Fenandes, *Sistema Tributário do MERCOSUL* (São Paulo, RT, 1997) 85.

[16] A Barreix and L Villela, *Tributación en el Mercosur y la Necesidad de Coordinación* (Washington, DC, IDB, 2004).

V Conclusions

The coordination of macro-economic policies requires the governments of the Member States to take a series of steps towards achieving a common market. First, it depends on the establishment of an institutional system with competence to adopt, execute and control communitarian laws which must be observed by the states. Secondly, it requires the adoption of norms resulting in a common juridical system with similar principles and elements.

The allocation of investments also plays an important role in relation to the characterisation of distortions in an integrated region. Effective differences in competition policies as regards the tax burden on the profits of investments will have an impact on decisions about the location of the investment. Thus, internal taxation represents a determinative factor in the destination of investments attracted by the common market.

Although MERCOSUR has achieved the status of a customs union, it is essential to adopt a mechanism that allows for a gradual and continued advancement in (at least) the approximation of tax legislation. In relation to taxation on consumption, the harmonisation must go forward on the basis of the prevalence of the principle of taxation in the destination country by means of the common incidence in all states of tax on the added value, ie VAT.

The evolution of MERCOSUR is progressing at a speed determined by the aims that Member State governments most wish to further. However, it is essential that Member States adopt and push forward a programme to create an effective common market and complete the customs union phase. If the political project to transform MERCOSUR into a de facto economic union is to become reality, the adoption of a negotiated calendar for harmonising taxation in the region should now be regarded as a priority. Under present conditions, tax asymmetries within the bloc represent a substantial obstacle to persuading private business to cooperate with political leaders to restore public confidence in the integration process.

15

The Protection of Foreign Direct Investment in MERCOSUR

DIEGO FRAGA LERNER

I Introduction

Since the 1990s, developing countries have consistently relied on foreign direct investment (FDI) to promote their development.[1] According to the United Nations Conference on Trade and Development (UNCTAD), FDI inflows are the largest component of net resource flows to developing countries worldwide, increasing to nearly US$250 billion in 2005.[2]

Latin American countries have also followed this trend, and are indeed responsible for a significant share of the world's FDI dedicated to developing countries. According to official data from the Economic Commission for Latin America and the Caribbean (ECLAC), Latin America and the Caribbean were able almost to triple their inflows from an annual average of US$27.5 billion between 1992–1996 to US$71.3 billion in 2005 and US$72.4 billion in 2006. In this sense, Brazil and Argentina, the largest economies in the MERCOSUR area, were among the most important recipients of FDI in Latin America in 2006, Brazil being responsible for US$18.8 billion and Argentina for US$4.8 billion.[3]

[1] For the purposes of this article, I have adopted the following definition of FDI: 'Direct investment is the category of international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another economy. (The resident entity is the direct investor and the enterprise is the direct investment enterprise.) The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise. Direct investment comprises not only the initial transaction establishing the relationship between the investor and the enterprise but also all subsequent transactions between them and among affiliated enterprises, both incorporated and unincorporated'. International Monetary Fund, *Balance of Payments Manual*, 5th edn (Washington, DC, IMF, 2007) 86. Also 'OECD recommends that a direct investment enterprise be defined as an incorporated or unincorporated enterprise in which a foreign investor owns 10 per cent or more of the ordinary shares or voting power of an incorporated enterprise or the equivalent of an unincorporated enterprise. The numerical guideline of ownership of 10 per cent of ordinary shares or voting stock determines the existence of a direct investment relationship. An effective voice in the management, as evidenced by an ownership of at least 10 per cent, implies that the direct investor is able to influence or participate in the management of an enterprise; it does not require absolute control by the foreign investor'. OECD, *Benchmark Definition of Foreign Direct Investment*, 3rd edn (New York, OECD, 1999) 8. For more information on the distinctions between FDI and portfolio investment, please refer to M Sornarajah, *The International Law on Foreign Investment*, 2nd edn (Cambridge, Cambridge University Press, 2004) 7.

[2] UNCTAD, *World Investment Report 2006* (New York, United Nations Publications, 2006) 4.

[3] ECLAC, *Foreign Investment in Latin America and the Caribbean* (Santiago, United Nations Publications, 2007) 13.

Interestingly enough, the world has also seen a different phenomenon occurring since the 1990s, as developing countries are increasingly becoming home countries for FDI flows and their companies join the group of the world's major transnational corporations (TNCs).[4] While developing countries amounted to 15 per cent (US$117 billion) of world outflows in 2005,[5] FDI outflows from Latin America and the Caribbean rose to US$40.62 billion in 2006.[6]

Even though this impressive increase of FDI outflows from the region may be attributable to a small number of large transactions involving some of the most important Latin American TNCs, one fact appears to be undisputable: MERCOSUR countries have been key players in this Latin American movement, as Brazil accounted for an impressive US$28 billion in 2006, and Argentina and Venezuela were responsible for approximately US$4 billion all together.

These striking figures demonstrate that MERCOSUR countries should be interested both in the establishment of a comprehensive regional legal framework in order to attract and regulate FDI within the bloc, and also in the adoption of a regional policy towards the promotion of outward investments in other regions of the world. Nevertheless, MERCOSUR initiatives to establish protocols on the protection and promotion of FDI have been to little avail so far, mainly because each country defends a somewhat different position on the subject.

Based on this scenario, this chapter is designed to introduce the reader to the past efforts of MERCOSUR countries to design a regional policy towards FDI and, perhaps more importantly, to present some possible explanations for the bloc's failure to achieve such goal. The chapter is structured as follows: (i) an overview of the historical approach of Latin American countries towards FDI, which have traditionally led the developing countries' challenge to the standpoint of the developed world (ie that aliens must be treated in accordance with an international minimum standard, which could be higher than the standard accorded by a host state to its own nationals); (ii) a discussion of the surge of the new economic world order at the end of the 1980s, which resulted in Latin American countries adopting a more liberal approach to their economies and, consequently, changed their perspective regarding the promotion of both inward and outward FDI and led them to take different stances in order to seek to promote such FDI flows; (iii) an analysis of the Colonia Protocol, an instrument which, when ratified by all MERCOSUR countries, will deal with the promotion and protection of investments among MERCOSUR countries, and of the Buenos Aires Protocol which, when ratified by all MERCOSUR Member States, will deal with investments originated outside of the bloc; (iv) finally, an assessment of the most important reasons why MERCOSUR countries have so far refrained from adopting regional instruments to regulate FDI.

[4] For an overview of Latin American corporations' expansion throughout the globe, see ECLAC, *Foreign Investment in Latin America and the Caribbean* (Santiago, United Nations Publication, 2006) 63–81.

[5] UNCTAD, *World Investment Report 2006* (New York, United Nations Publication, 2006) 5.

[6] ECLAC, *Foreign Investment in Latin America and the Caribbean* (Santiago, United Nations Publications, 2007) 46.

II Latin America's Historical Approach to FDI

Since the beginning of the twentieth century, when a first attempt to consolidate certain legal principles and rules on FDI was launched by the developed world (particularly the United States and Western Europe), Latin America took a strong stance in the debate regarding the level of protection to be awarded to foreign nationals in their territory.

At the time, developed countries, especially the United States, had become increasingly worried about the significant sums of money their citizens had invested in the developing world, particularly in Latin America. Elihu Root, then US Secretary of State, wrote thus in 1910 about the potential effects of the outward investments made by his country in the developing world: 'The great accumulation of capital in the money centres of the world, far in excess of the opportunities for home investment, has led to a great increase of international investment extending over the entire surface of the earth, and these investments have naturally been followed by citizens from the investing countries prosecuting and caring for the enterprises in the other countries where their investments are made'.[7]

The greatest concern of the United States was that an alien investor could not be limited to the remedies available in local law, and therefore host countries should provide treatment in accordance with international standards to foreign investors. At the time, however, there was no clear definition on the substance of such international principles, which were commonly grounded on an alleged 'established standard of civilization'.[8]

Latin American states, opposing the idea of international standards designed to protect foreign investors, and also dissatisfied with measures taken by capital exporting countries which they deemed to be an illegal use of force,[9] relied on the writings of the famous Argentinean jurist, Carlos Calvo, to support their position. According to Calvo, foreigners were not entitled to any additional rights or privileges while operating outside of their countries; in his view, any disputes relating to the protection of foreign investors should be settled in accordance with the laws of the host country and by its municipal courts.

[7] Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 *American Journal of International Law* 518.

[8] Elihu Root presented the following view about the standard of civilization: 'Each country is bound to give to nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization. There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form part of the international law of the world. A country is entitled to measure the standard of justice due an alien by the justice it accords its own citizens only when its system of law and administration conforms to this general standard. If any country's system of law and administration does not conform to that standard of justice, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens'. Root, 'The Basis of Protection to Citizens Residing Abroad' (n 7) 518–19.

[9] At the time, many Latin American countries had their ports closely monitored and eventually closed by European countries because of disputes related to the protection of European investments in the region. See Rubén Eduardo Tempone, *Protección de Inversiones Extranjeras* (Buenos Aires, Ciudad Argentina, 2003) 20–21.

Furthermore, Calvo strongly denied the existence of an international minimum standard, especially because of the lack of the necessary state practice and *opinio juris* to constitute an international custom.[10]

In sum, the so-called 'Calvo doctrine' contended that the sovereignty of states encompasses: (a) the principle of equality between foreigners and nationals; (b) the power of the host state to apply its own laws and to exercise its jurisdiction over foreigners and their properties; (c) the principle of non-intervention of the home state in controversies related to the treatment of its nationals and their property inside the host state's territory; (d) the absence of any obligation on the part of the host state to pay compensation to a foreign investor in cases of *force majeure* (eg civil disturbances and wars).[11]

In 1903, the conflict between the views of the developed world and those of Latin American countries hit its peak. In that year, the British, German and Italian governments decided to blockade Venezuelan ports following the seizure of property from some of their nationals in that country without payment of any economic compensation. While Venezuelan authorities contended that there was no reason to take military measures to solve a problem that did not directly concern two sovereign countries, the United States defended the European military approach. The then US President, Theodore Roosevelt, took the view that whenever a country in the American continent defaulted in payment to a foreign creditor, it was up to the United States to intervene so as to facilitate the payment of such debt.[12] Later on, in 1907, this conflict also impeded attempts by the international community to achieve a consensus in the Second Hague Peace Conference, which dealt, inter alia, with the limitation of force by sovereign states in the collection of contract debts. While there was an agreement that usually states should refrain from taking military measures and should resort to peaceful settlement tools, the use of force was still considered lawful in situations when the host state either refused to submit a dispute to arbitration or decided not to comply with an arbitration award.

Therefore, even though the vast majority of developing countries have adopted a favourable stance towards FDI in recent decades (as discussed below), it is impossible to deny the importance of the Calvo doctrine for all Latin American countries' position on this matter. Not even the fact that the Calvo doctrine is not considered as a rule of customary international law[13] undermines its importance; as mentioned by former International Court of Justice Judge, Stephen Schwebel, the Calvo doctrine was one of the most important factors that kept alive a 'fundamental doctrinal division' on the issue of

[10] For more information on the Calvo doctrine, see eg Eduardo Jimenez de Aréchaga, 'La protección del inversor en el Derecho Internacional' in *Temas de Derecho Internacional: Homenaje a Frida M. Pfirter de Armas Barea* (Buenos Aires, La Fundación, 1989) 53–54.

[11] Esteban M Ymaz Videla, *Protección de Inversiones Extranjeras: tratados bilaterales: sus efectos en las contrataciones administrativas* (Buenos Aires, La Ley, 1999) 12.

[12] For more information on the blockade of Venezuelan ports in 1903, see eg Celso D de Albuquerque Mello, *Curso de Direito Internacional Público*, 12th edn (Río de Janeiro, Renovar, 2000) 486.

[13] Most international scholars believe that the Calvo doctrine played only a regional role and did not have any impact outside Latin America. Furthermore, some argue that Calvo's proposition lacks substance and was not even lawful, since it undermined the exercise of home countries' sovereignty. See, eg Nguyen Quoc Dihn, Patrick Daillier and Alain Pellet, *Direito Internacional Público*, 2nd edn (Lisbon, Fundação Calouste Gulbenkian, 2003) 831. Also arguing that the Calvo doctrine is not a rule of international law, see Brigitte Stern, *O contencioso dos investimentos internacionais* (Barueri, Manole, 2003) 31. On the other hand, Ian Brownlie had already stressed that many international tribunals have broadly accepted the Calvo doctrine. Ian Brownlie, *Principles of Public International Law*, 5th edn (Oxford, Oxford University Press, 1998) 549.

foreign investment,[14] a division that was even recognised by the US Supreme Court in its 1964 decision in *Banco Nacional de Cuba v Sabatino*.[15]

As a response to the Calvo doctrine, capital-exporting countries usually insisted that any taking of foreign-owned property should be accompanied by the payment of 'prompt, adequate and effective compensation', as set out in 1937 by then US Secretary of State, Cordell Hull, and which famously became known as the 'Hull formula'.[16] Even though some scholars maintained that the Hull formula was recognised from its inception as a customary rule of international law,[17] most academics accept that the explicit opposition from Latin American and also Eastern European countries at the time prevented recognition of the Hull formula as a customary rule.[18]

In the 1950s and 1960s, the different views expressed by developed and developing countries were taken to a new forum: the United Nations. In an attempt to guarantee a formal recognition of their position, developing countries devised the strategy of promoting the passing of General Assembly resolutions reinforcing the sovereignty of each state

[14] Stephen Schwebel summarises the conflict over the treatment of FDI in the following manner: 'For some two hundred years, the international community was divided over what law governed the treatment of foreign investment and over the content of that law. In large and loose terms, capital-exporting countries maintained that international law, which indisputably related to the treatment of aliens, related to the treatment and taking of their property as well. The standard of that treatment could not lawfully fall below the minimum standard of international law. If the property of a foreigner was expropriated by a state, the expropriation was lawful only if it was for a public purpose, not discriminatory, and accompanied by the payment of prompt, adequate, and effective compensation. Capital-importing countries tended to have another perspective. The foreign investor was governed by the law of the host state and the remedies afforded by that law alone; he was entitled to no more than national treatment, the treatment accorded by the host state to the investments of its own nationals'. Stephen Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 *American Society of International Law Proceedings* 27.

[15] The US Supreme Court's decision reads in part: 'There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens . . . The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system'. *Banco Nacional de Cuba v Sabatino*, 376 US 398, 428–30 (1964).

[16] Cordell Hull used the expression 'prompt, adequate and effective compensation' for the first time in a letter sent to the Mexican Minister of Foreign Affairs in 1937, as an attempt to clarify the American understanding on the then current international law standard of compensation for the expropriation of private property. Hull's letter read in part as follows: 'The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore'. See Green Hackworth, *Digest of International Law* (Washington, DC, Government Printing Office, 1942) 658–59.

[17] See Andrew Guzman, 'Why LDCS Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 644. It is also important to note that a customary international law rule requires a general and consistent practice of states (state practice) followed by them from a sense of legal obligation (*opinio juris*). For a in-depth analysis of customary law rules, see Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Oxford University Press, 2003) 18–22.

[18] While analysing the principle of 'prompt, adequate and effective compensation', Elihu Lauterpacht made the following interesting comment: 'I have mentioned that it was the view expressed in 1937 by the United States. It was recalled by Britain in 1951. I have mentioned, too, the strong criticism of the standard by, in particular, the Eastern European States. They argued, in the context of extensive post-war socialization, that if the standard of prompt, adequate and effective compensation were to be insisted upon, this would involve a far-reaching limitation upon the sovereignty of States. It was, they argued, inherent in the sovereignty of States that they should be able to regulate and control—to the point of nationalization—the use and ownership of property within their territories'. Elihu Lauterpacht, 'International Law and Private Foreign Investment' (1997) 4 *Indiana Journal of Global Legal Studies* 263.

over its internal affairs, especially the regulation of FDI. From 1952 onwards, therefore, developing countries supported the adoption of resolutions recognising the sovereignty of a state over its natural resources, and the consequential unlimited state power to expropriate private property for reasons of public utility, and also the resort to the host state's municipal courts to resolve any disputes a foreign investor might have.[19]

As a consequence of this strong position taken by developing countries (and especially Latin American states) against the creation of international law standards aiming at the protection of foreign investors, the international law community was unable to elaborate a comprehensive body of FDI law. However, and mostly due to economic reasons, this situation was about to change dramatically in the 1980s.

III The 1980s, the BIT Wave and the Different Approach Towards FDI of MERCOSUR Countries

At the end of the 1980s, developing countries started to rely heavily on FDI in order to finance their economic development. In order to get access to capital, however, these countries had to accept not only the prevalence of the market economy principles promulgated by the most economically powerful states, but also the necessity of agreeing to the terms imposed by foreign investors willing to make such investments, who were committed to the settling of international rules to protect FDI.[20] As a result, in the 1980s many developing countries had already signed at least one bilateral investment treaty (BIT) with a developed country, for these instruments began to be seen as tools to attract foreign investment. BITs provided (and continue to provide) foreign investors with many rights and privileges that are not available under the municipal law of the host state, such as guarantees of 'full protection and security' and 'fair and equitable treatment' to all investments made under its provisions, assurance of 'prompt, adequate and effective compensation' in case of expropriation or nationalisation (as required by the Hull formula), and also resort to international arbitration in case of any dispute against the host state, usually under the auspices of the World Bank's International Center for the Settlement of Investment Disputes (ICSID).[21]

[19] UN General Assembly Resolution No 1803, para 4, provides that 'Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases, the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law'. Also, UNGA Resolution No 3281 states in relevant part that 'To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means'.

[20] For more information on the reasons that led investors from developed countries to push developing countries into signing BITs, see, eg Gennady Pilch, 'The Development and Expansion of Bilateral Investment Treaties' (1992) 86 *American Society of International Law Proceedings* 534.

[21] There is a vast literature dealing with the substantive and procedural provisions that are most commonly found in BITs. The following authors provide in-depth analysis of such provisions: Giorgio Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 *Recueil des Cours* 251; M Sornarajah,

Because of their essential features, BITs were also seen as legal instruments that could play a decisive role in the investment decisions of a foreign company, especially because of the fierce competition between developing countries to attract foreign investment, and also as key to integrating these countries into a global economy. By the end of the 1980s, 194 BITs had been signed, the vast majority of them between a developed and a developing country.[22] During the 1990s, the number of BITs grew exponentially, reaching a total of 1,857 instruments.[23]

Latin American countries followed the worldwide BIT trend with enthusiasm, especially at the beginning of the 1990s. As Nigel Blackaby emphasises, the adoption of free market economies in the region led national governments to search vigorously for investments, and the establishment of an effective legal framework was seen as a vital tool to achieve such goal.[24]

In the MERCOSUR region, Argentina was the country that took the most enthusiastic stance towards the signing of international instruments regulating the entry of FDI within its borders. Especially in the 1990s, the country demonstrated a willingness to accept international arbitration as a method of dispute resolution between the state and foreign investors. The country signed more than 40 BITs with other sovereign nations, in an attempt to increase the volume of inward FDI within its territory,[25] and also ratified the ICSID Convention in 1994.

However, economic and political instability (particularly in the 2001–2003 period) have placed the country in an uneasy position with respect to its obligations under BITs. At the present time, there are more than 40 cases involving the Argentinean government in ICSID arbitrations,[26] and there is considerable debate in the country regarding its capacity to comply with all the compensatory awards that may be awarded by ICSID tribunals against Argentina in the next few years.[27]

Of all the MERCOSUR countries, Paraguay was the first one to ratify the ICSID Convention, back in 1983, and has signed around 20 BITs to date.[28] Even though its situation cannot be compared to Argentina's, Paraguay has also had to address claims from

The International Law on Foreign Investment, 2nd edn (Cambridge, Cambridge University Press, 2004); K Scott Gudgeon, 'United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards' (1986) 4 *International Tax and Business Lawyer* 105; Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Amsterdam, Kluwer Academic Publishers, 1995).

[22] UNCTAD, *Bilateral Investment Treaties, 1959–1999*, available at www.unctad.org.

[23] Ibid.

[24] Nigel Blackaby points out that 'throughout the region, States have acknowledged the necessity to evolve in what respects the protection given to investors as a means to attract investment. Now that democratic governments have been established as the rule in the continent, there are many countries which, since the early 1990s, have adopted a market economy model that presupposed the privatization of several sectors and the free access of foreign investment. In order to attract this investment, the region needs to offer a legal framework that is safe and stable. A strict application of the Calbo doctrine would simply make that potential investors went to other markets'. Nigel Blackaby, 'América Latina y el arbitraje: se malinterpretó a Carlos Calvo?' (2005) 4 *Revista de Arbitragem e Mediação* 119.

[25] For a list of many of the BITs signed by Argentina, see UNCTAD online database of BITs, available at www.unctadxi.org/templates/DocSearch____779.aspx.

[26] According to the ICSID website, there are 18 concluded cases and 28 pending cases against Argentina. For more information on these cases, see http://icsid.worldbank.org.

[27] See, eg Mercedes Ales, Leonardo Granato and Carlos Nahuel Oddone, 'Argentina Facing International Claims over Foreign Investments' 14 (2008) *Law and Business Review of the Americas* 481.

[28] For a list of many of the BITs signed by Paraguay, see UNCTAD online database of BITs, available at www.unctadxi.org/templates/DocSearch____779.aspx.

foreign investors before ICSID panels.[29] Uruguay has signed more than 20 BITs[30] (including one with the United States[31]) and has been a party to the ICSID Convention since 2000.

From the above, it can be concluded that Argentina's, Uruguay's and Paraguay's policies on FDI in the 1990s were fairly consistent with the signature of the MERCOSUR Protocols in 1994. However, this cannot be said about the Brazilian posture towards the international regulation of FDI.

Undoubtedly, Brazil was heavily influenced by free market ideas at the beginning of the 1990s and took strong measures to attract FDI, particularly through privatisation of large state-owned companies. Also, the promotion of inward FDI is still an important characteristic of the Brazilian economy, which is by far the largest FDI destination in South America. Despite that, Brazil has never relied in BITs to attract FDI and decided not to sign the ICSID Convention.[32]

This does not mean, however, that the signing of BITs was never considered by Brazilian authorities. Between 1994 and 1998, then Presidents Itamar Franco and Fernando Henrique Cardoso supported the signing of 14 BITs,[33] all of them with the clear intention of providing another incentive to foreign investors with an interest in investing in the country (ie an assurance that any claims would be considered by an international tribunal and in accordance with treaty provisions negotiated by their own countries). However, these BITs were never ratified by the Brazilian Congress, which contended that (a) a state submitting to arbitration against a private company constituted a violation of the state's sovereignty; and (b) BITs gave a substantive preferential treatment to foreign investors, which would constitute a violation of Brazilian national laws.[34]

Not surprisingly, the same considerations were presented by the Brazilian Congress as reasons for not ratifying both the Colonia and Buenos Aires Protocols. Nevertheless, it is important to analyse in depth the text of both instruments and the economic rationale that led to their signing, for these documents still represent the most important attempt by MERCOSUR to regulate FDI within the region.

[29] According to the ICSID website, there are one concluded case and two pending cases against Paraguay. For more information on these cases, see http://icsid.worldbank.org.

[30] For a list of many of the BITs signed by Uruguay, see UNCTAD online database of BITs, available at www.unctadxi.org/templates/DocSearch____779.aspx.

[31] For a brief overview of the 2005 Uruguay-United States BIT, see Mark Kantor, 'Follow-up: an Analysis of the U.S.-Uruguay Bilateral Investment Treaty, the New Model's First Application' (2005) 23 *Alternatives to the High Cost of Litigation* 47.

[32] The Brazilian opposition to the text of the ICSID Convention was expressed by its delegate in the following terms: 'Mr Ribeiro (Brazil) considered that the proposed Centre possessed certain characteristics that set it apart from the principles that had traditionally inspired international arbitration, a legal institution designed for the peaceful solution of disputes between nations. Moreover, the draft Convention raised constitutional problems, since it implied a certain curtailment of the scope of national legal processes. Brazilian constitutional law guaranteed the judicial power a monopoly of the administration of justice (see Art 141, paragraph 4, of the Brazilian Constitution) and therefore it would be inadmissible to create within the territory of the nation a body entrusted with decisions in the field of law. Were such activities to be delegated to an international organization, the violation of this constitutional precept would be even more flagrant'. For more information, see Jean Kalicki and Suzana Medeiros, 'Investment Arbitration in Brazil: Revisiting Brazil's Traditional Reluctance towards ICSID, BITs, and Investor-State Arbitration' 14 *Revista de Arbitragem e Mediação* 68.

[33] For a list of some of the BITs signed by Brazil, see UNCTAD online database of BITs, available at www.unctadxi.org/templates/DocSearch____779.aspx.

[34] Kalicki and Medeiros, 'Investment Arbitration in Brazil' (n 32) 72.

IV The MERCOSUR Protocols

At the beginning of the 1990s, and especially because of the strong 'BIT wave', MERCOSUR countries tried to design a comprehensive regional scheme for the promotion and protection of FDI within the region. In 1992, a working group received a mandate to prepare drafts of two different Protocols on the issue of foreign direct investment: while one of them would regulate the acceptance of FDI within MERCOSUR, the admission of FDI into MERCOSUR from third countries would be treated in a different document. After two years of discussions on the drafts, the presidents of Brazil, Argentina, Paraguay and Uruguay signed in 1994 the Colonia Protocol for the Mutual Protection and Promotion of Investments in MERCOSUR (Protocolo de Colonia para la Proteccion y Promocion Reciproca de Inversiones en el MERCOSUR),[35] signed in Colonia (Colonia Protocol), which regulated FDI within the region, and also the Protocol on the Protection and Promotion of Investments Coming from States Not Parties to MERCOSUR (Protocolo sobre Proteccion y Promocion de Inversiones Provenientes de Estados No Partes del MERCOSUR), signed in Buenos Aires (Buenos Aires Protocol).[36]

Despite these efforts, neither Protocol was ratified by the legislative bodies of the four countries and, therefore, they are still to come into force. While the Colonia Protocol was only ratified by Argentina, Brazil was the only country not to ratify the Buenos Aires Protocol.[37]

Even though neither document came into force, analysis of them is important because (i) they represent the most important attempt by MERCOSUR countries to reach a common understanding on the regulation of FDI; and (ii) they demonstrate the common understanding of MERCOSUR countries, at least during the 1990s, that the creation of a regional legal framework to protect FDI was of utmost importance to increase FDI flows into the region.[38]

A Colonia Protocol

The Colonia Protocol contains many of the rules commonly found in BITs. In article 1, the Protocol provides a broad definition of the term 'investment', which would encompass any kind of asset directly or indirectly maintained by the foreign investor in accordance with the laws of the host country. Furthermore, this same article also provides a non-exclusive list of assets that should be considered to be within the meaning of the term 'investment'

[35] Protocolo de Colonia para la Proteccion y Promocion Reciproca de Inversiones en el MERCOSUR, available at www.mercosur.int.

[36] Protocolo sobre Proteccion y Promocion de Inversiones Provenientes de Estados No Partes del MERCOSUR, available at www.mercosur.int.

[37] The Colonia Protocol was ratified by Argentina through Decree 24891/95. The Buenos Aires Protocol was ratified by Argentina (Decree 24554/96), Paraguay (Decree 593/95) and Uruguay (Decree 17531/2003). For more information on the ratification of both Protocols, see Guillermo Argerich, 'Protocolo de inversiones extranjeras del MERCOSUR, instrumentos útiles para el siglo XXI?' in Adriana Dreyzin de Klor, Diego P Fernández Arroyo and Luiz Otávio Pimentel (eds), *Investimentos Estrangeiros* (Florianópolis, Fundação Boiteux, 2005) 208.

[38] For further comments on the reasons that led the MERCOSUR countries to sign both the Colonia and Buenos Aires Protocols, see Márcia Teshima, *Investimentos no Mercosul & sua proteção* (Curitiba, Juruá Editora, 2003) 157; Argerich, 'Protocolo de inversiones extranjeras del MERCOSUR, instrumentos útiles para el siglo XXI?' (n 37) 208.

for the purposes of the Colonia Protocol. Most importantly, it provides for the protection of (i) movable and immovable property and any other property rights; (ii) shares and stocks of companies; (iii) claims to money or to any performance under contract having a financial value; (iv) copyrights, know-how and industrial property rights such as patents, trademarks, industrial designs and trade names; (v) rights conferred by law or under contract, including licence to search for, cultivate, extract or exploit natural resources.

Article 1 of the Protocol provides for open admission of investments from Member States and also gives a very broad definition of the term 'investor'. While most BITs usually define an investor as a natural person who is a citizen of the home country in accordance with its municipal law, the Colonia Protocol provides that any permanent resident of the home country would also be considered to fall under the definition for the purposes of the agreement. As regards juridical persons, the Colonia Protocol applies two criteria simultaneously: to be considered as an investor, a company must (1) be constituted in accordance with the laws of one of the contracting parties, and (2) maintain its headquarters in that country. The Protocol also determines that a company constituted in the territory of the host country could be considered as an investor, provided that it is controlled either directly or indirectly by a citizen of another contracting party.[39]

[39] The official version of art 1 reads as follows: '1. El término "inversión" designa todo tipo de activo invertido directa o indirectamente por inversores de una de las Partes Contratantes en el territorio de otra Parte Contratante, deacuerdo con las leyes y reglamentación de esta última. Incluye en particular, aunque no exclusivamente: a) la propiedad de bienes muebles e inmuebles, así como los demás derechos reales tales como hipotecas, cauciones y derechos de prenda; b) acciones, cuotas societarias y cualquier otro tipo de participación en sociedades; c) títulos de crédito y derechos a prestaciones que tengan un valor económico; los préstamos estarán incluídos solamente cuando estén directamente vinculados a una inversión específica; d) derechos de propiedad intelectual o inmaterial, incluyendo derechos de autor y de propiedad industrial, tales como patentes, diseños industriales, marcas, nombres comerciales, procedimientos técnicos, know-how y valor llave; e) concesiones económicas de derecho público conferidas conforme a la ley, incluyendo las concesiones para la búsqueda, cultivo,extracción o explotación de recursos naturales.

2. El término "inversor" designa: a) toda persona física que sea nacional de una de las Partes Contratantes o resida en forma permanente o se domicilie en el territorio de ésta, de conformidad con su legislación. Las disposiciones de este Protocolo no se aplicarán a las inversiones realizadas por personas físicas que sean nacionales de una de las Partes Contratantes en el territorio de otra Parte Contratante, si tales personas, a la fecha de la inversión, residieren en forma permanente o se domiciliaren en esta última Parte Contratante, a menos que se pruebe que los recursos referidos a estas inversionesprovienen del exterior; b) toda persona jurídica constituída de conformidad con las leyes y reglamentaciones de una Parte Contratante y que tenga su sede enel territorio de dicha Parte Contratante; c) las personas jurídicas constituídas en el territorio donde se realiza la inversión, efectivamente controladas, directa o indirectamente, por personas físicas o jurídicas definidas en a) y b).

3. El término "ganancias" designa todas las sumas producidas por una inversión, tales como utilidades, rentas, dividendos, intereses, regalías y otros ingresos corrientes.

4. El término "territorio" designa el territorio nacional de cada Parte Contratante, incluyendo aquellas zonas marítimas adyacentes al límite exterior del mar territorial nacional, sobre el cual la Parte Contratante involucrada pueda, de conformidad con el derechointernacional, ejercer derechos soberanos o jurisdicción'.

Free translation: '1. The term "investment" shall mean, in conformity with the laws and regulations of the Contracting Party in whose territory the investment is made, every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party. It includes in particular, though not exclusively: (a) movable and immovable property as well as any other property rights such as mortgages, liens, pledges; (b) shares, stocks, or other rights or interests in such companies; (c) claims to any performance having an economic value; loans only being included when they are directly related to a specific investment; (d) intellectual property rights, including copyrights, trademarks, patents, industrial designs, technical processes, know-how, trade secrets, trade names and goodwill; (e) business concessions with economic value conferred by law, including concessions to search for, extract, cultivate or exploit natural resources.

2. The term "investor" shall mean with respect to either Contracting Party: (a) natural persons having the nationality of that Contracting Party or permanently residing in its territory, in accordance with its laws. The provisions of this Protocol will not be applicable to investments made by natural persons having the nationality

The Colonia Protocol also adopts a traditional approach as regards the standards of treatment to be applied to FDI. In article 3, the Protocol provides for 'fair and equitable treatment' for all investments from the contracting parties. The Protocol further contains a most-Favoured-nation (MFN) clause, which would be applicable except for any taxation privileges conferred on nationals from a particular country through an international treaty.[40] Finally, each contracting party also promised not to make either the establishment or the operation of a foreign company conditional on performance requirements (eg a commitment to export a predetermined percentage of a foreign company's production).

MERCOSUR countries also took a liberal approach to the issue of expropriation or nationalisation. According to article 3 of the Colonia Protocol, investments must not be expropriated or nationalised, either directly, or indirectly through measures tantamount to expropriation or nationalisation, except for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and upon payment of prompt, adequate and effective compensation, which should be paid without delay and be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken.[41] There is no doubt, therefore, that the MERCOSUR countries were

of one of the Contracting Parties if such persons, at the time of the investment, have a permanent residence in the territory of the other Contracting Party, unless it is demonstrated that the resources involved in the investment come from abroad; (b) any legal person constituted in accordance with the laws of a Contracting Party and having its seat in the territory of that Contracting Party; (c) any legal person constituted in the territory where the investment is being made, provided it is effectively controlled, either directly or indirectly, by natural or legal persons as defined in (a) and (b).

3. The term "returns" shall mean amounts yielded by an investment, such as profits, interests, capital gains, shares, dividends.

4. The term "territory" shall mean the territory of each Contracting Party, as well as those maritime areas, including the sea-bed and sub-soil adjacent to the outer limit of the territorial sea of either of the above territories, over which the Contracting Party concerned may, in accordance with international law, exercise sovereign rights or jurisdiction'.

[40] Furthermore, it is important to note that each contracting party presented a list of sectors of the economy to which MFN treatment was not applicable. It can be argued, therefore, that the MFN clause would not have such a great impact on the standard of treatment of foreign nationals, for each party could protect its most significant economic activities. For more information on this issue, see Argerich, 'Protocolo de inversiones extranjeras del MERCOSUR, instrumentos útiles para el siglo XXI?' (n 37) 213.

[41] The official version of art 3 reads as follows: '1. Ninguna de las Partes Contratantes tomará medidas de nacionalización o expropiación ni ninguna otra medida que tenga el mismo efecto, contra inversiones que se encuentren en su territorio y que pertenezcan a inversores de otra Parte Contratante, a menos que dichas medidas sean tomadas por razones de utilidad pública, sobre una base no discriminatoria y bajo eldebido proceso legal. Las medidas serán acompa¤adas de disposiciones para el pago de unacompensación previa, adecuada y efectiva. El monto de dicha compensación corresponderá al valor real que la inversión expropiada tenía inmediatamente antes del momento en que la decisión de nacionalizar o expropiar haya sido anunciada legalmente o hecha pública por la autoridad competente y generaráintereses o se actualizará su valor hasta la fecha de su pago.

2. Los inversores de una Parte Contratante, que sufrieran pérdidas en sus inversiones en el territorio de otra Parte Contratante debido a guerra u otro conflicto armado, estado de emergencia nacional, revuelta, insurrección o motín, recibirán, en lo que se refiere a restitución, indemnización, compensación u otro resarcimiento, un tratamiento no menos favorable que el acordado asus propios inversores o a los inversores de un tercer Estado'. Free translation: '1. None of the Contracting Parties shall take measures of nationalization or expropriation or any other measure with the same effect, against investments in their territories and that belong to investors of another Contracting Party, unless such measures are taken for reasons of public utility, on a non-discriminatory basis and under due legal process. The measures shall be accompanied of provisions for the payment of prior, adequate and effective compensation. The amount of such compensation shall correspond to the real value the expropriated investment had immediately prior to the moment the decision to nationalize or expropriate has been legally announced or made public by the competent authority and shall generate interests or be updated until the date of its payment.

willing to accept the Hull formula as the governing principle for any compensation deemed necessary under the Colonia Protocol.

The agreement also provides foreign investors with many venues to settle their disputes with the host countries. Initially, the Protocol provides that any controversy between the investor and the host state arising under any provision of said the instrument should be settled, whenever possible, by amicable negotiation. If the parties were unable to reach an agreement within six months, the investor would have the unilateral prerogative to choose one of the following options: (i) submit the controversy to the host state's judiciary and accept its decision as binding; or (ii) submit the controversy to international arbitration, under the auspices of ICSID or to an ad hoc tribunal. Therefore, it is clear that the rationale of the Colonia Protocol is to provide the investor with a neutral forum to present its allegations against the host state and, consequently, to bring MERCOSUR countries into international arbitration against private individuals.

Finally, the Colonia Protocol specifically provided, in article 11, that it would only come into effect 30 days after its ratification by all four contracting parties; after which, the treaty would remain in effect until 12 months after any of the contracting parties formally notified the other states of its decision to terminate the agreement.[42]

B Buenos Aires Protocol

The Buenos Aires Protocol is similar in content to the Colonia Protocol and provides investors from third states with the same basic rights and privileges when investing in any of the contracting parties. To this effect, the Buenos Aires Protocol adopts the same definitions of the terms 'investment' and 'investor' in its article 2 and also provides investors with fair and equitable treatment. Investors are also entitled to the benefits of an MFN clause, except for any taxation privileges conferred on nationals from a particular country through an international treaty, and also any privileges originating from the contracting parties' participation in a common market or free market zone.

Arguably, the most important distinction between the Protocols lies in the issue of expropriation and nationalisation and the unwillingness of MERCOSUR countries to recognise the Hull formula as the principle governing any compensation that should be paid to an investor of a third state. Addressing the issue of compensation, the Buenos Aires Protocol merely mandates contracting parties to pay a 'fair, adequate and reasonable'

2. Investors of one Contracting Party who suffer losses in their investments in the territory of another Contracting Party due to war or another armed conflict, state of national emergency, insurrection, riots or mutiny, shall receive, in what concerns restitution, damages, compensation or another form of reparation, a treatment not less favorable than that given to the State's own investors or the investors of a third State'.

[42] The original version of art 11 provides, in relevant part: '1. El presente Protocolo entrará en vigor 30 días después de la fecha de depósito del cuarto instrumento de ratificación. Su validez será de diez años, luego permanecerá en vigor indefinidamente hasta la expiración de un plazo de doce meses, a partir de la fecha en que alguna de las Partes Contratantes notifique por escrito a lasotras Partes Contratantes su decisión de darlo por terminado'. Free translation: '1. This Protocol will enter into force 30 days after the deposit of the fourth instrument of ratification. It will be valid for ten years and will then stay valid for another period of twelve months, starting from the date when one Contracting Party notifies the other Contracting Parties of its decision to terminate the agreement'.

compensation in case of expropriation,[43] a distinction that has led many MERCOSUR scholars to argue that this clause could not be interpreted as requiring the contracting parties to comply with the specific requirements of the Hull formula.[44]

The Buenos Aires Protocol also contains a different provision on the matter of dispute settlement. Even though it also allows the investor to refer a claim either to the host country's judiciary or international arbitration, the Protocol does not make any specific mention of ICSID arbitration; it only permits the investor to choose between ad hoc arbitration and any international arbitration institution.

Finally, the Buenos Aires Protocol is subject to the same requirements for entering into force: it would only come into effect 30 days after its ratification by all four contracting parties, when it would remain in force until 12 months after any of the contracting parties formally notified the other states of its decision to terminate the agreement.

V Concluding Remarks

This analysis of the Protocols demonstrates that both instruments were based on an understanding that MERCOSUR countries had to provide a beneficial legal framework to foreign investors if they wanted to keep attracting FDI to the region. MERCOSUR countries, therefore, were only concerned with inward investment, for their most basic need at the beginning of the 1990s was to raise enough capital to finance their economic development.

Today, however, this understanding seems to overlook two important issues: (i) the importance of the outward investments of some of the MERCOSUR countries, particularly Brazil, Argentina and newcomer Venezuela, which together invested abroad US$32 billion in 2006; (ii) the decline in core neo-liberal ideals in Latin America, where many

[43] The original version of the Buenos Aires Protocol's provision on expropriation and nationalisation reads as follows: '1. Ninguno de los Estados Partes tomarán medidas de nacionalización o expropiación ni ninguna otra medida que tenga el mismo efecto contra inversiones que se encuentren en su territorio que pertenezcan a inversores de Terceros Estados, a menos que dichas medidas sean tomadas por razones de utilidad pública o de interés social, sobre una base no discriminatoria y bajo el debido proceso legal. Las medidas serán acompañadas de disposiciones para el pago de una compensación justa, adecuada y pronta u oportuna. El monto de dicha compensación corresponderá al valor de la inversión expropiada.

2. Los inversores de un Tercer Estado, que sufrieran pérdidas en sus inversiones en el territorio del Estado Parte, debido a guerra u otro conflicto armado, estado de emergencia nacional, revuelta, insurrección o motín, recibirán, en lo que se refiere a restitución, indemnización, compensación u otro resarcimiento, un tratamiento no menos favorable que el acordado a sus propios inversores o a los inversores de otros estados'.

Free translation: '1. None of the Contracting States shall take nationalization or expropriation measures or any other measure that has the same effect, against investments in their territories and that belong to investors of Third States, unless such measures be taken for reasons of public utility or social interest, on a non-discriminatory basis and under due legal process. The measures shall be accompanied of provisions for the payment of fair, adequate and prompt or opportune compensation. The amount of such compensation shall correspond to the value of the expropriated investment.

3. The investors of a Third State who suffer losses in their investments on the territory of the State Party, due to war or another armed conflict, state of national emergency, riot, uprising, insurrection or mutiny, shall receive, in what concerns restitution, damages, compensation or another form of reparation, a treatment no less favorable than the one given to their own investors or to investors from other States'.

[44] For comments on this specific concern, see, eg Eugênia CG de Jesus Zerbini, *O regime internacional dos investimentos: sistemas regional, multilateral, setorial e bilateral* (São Paulo, Universidade de São Paulo, 2003) 13–15.

governments are currently re-evaluating the benefits of FDI for their economies. As a consequence, there is no doubt that the Protocols, especially the Buenos Aires Protocol, seem now to be outdated, as it would mainly provide protection for investors from developed countries, where MERCOSUR companies do not have important investments.

Even though there are no current discussions within the MERCOSUR bloc on the issue of FDI, it is not difficult to predict that, in the future, MERCOSUR countries will be most willing to guarantee a beneficial treatment to investors from places where MERCOSUR companies have strong investment opportunities (therefore providing a more balanced relationship between the contracting states, since all countries involved would have corresponding inward and outward flows).

On the other hand, it is also important to recall that Argentina is constantly being condemned by ICSID panels to pay damages to foreign investors, and that support for BITs and international arbitration in the country has declined in recent years. Moreover, many foreign investors are presenting claims before ICSID against Venezuela, and it is not clear whether this country would support a regional scheme for the protection of FDI at the moment.[45] Finally, there is no evidence that Brazil will change its position against international treaties regulating FDI in the near future, despite the phenomenal upsurge of outward FDI from the country recently (outward FDI that is dangerously subject to nothing more than the national laws and the jurisdiction of each host state where it is located).

For these reasons, it seems that a regional regime to promote and protect FDI in MERCOSUR is still a valid goal that is yet to be achieved. It is crucial to bear in mind, however, that the MERCOSUR countries' understanding about the content of this regional scheme is divergent and has mutated in the last decade, a pattern that is likely to remain in the years to come.

[45] According to the ICSID website, there are five concluded cases and seven pending cases against Argentina. For more information on these cases, see http://icsid.worldbank.org.

16

Competition Rules in MERCOSUR: the Fortaleza Protocol

LÚCIO TOMÉ FÉTEIRA*

I Introduction

The aim of the present chapter is to present an overview of the competition rules of MERCOSUR. These rules are contained in the Fortaleza Protocol,[1] approved almost six years after the signature of the foundational act of MERCOSUR, the Treaty of Asunción.[2] The present status of the Protocol is as follows: only Brazil and Paraguay have deposited their respective instruments of ratification of the Protocol, which would apparently mean that the latter had come into effect between these two states parties (article 33). However, this point is subject to debate (see below). In any case, the lack of direct effect and/or the necessary implementing measures has prevented the application of the Protocol.

The chapter is divided into four parts. The first part introduces the topic by addressing some preliminary issues of a more general nature on the relevance of competition rules for the building of a common market. The second part will review and analyse briefly the provisions of the Protocol, with a particular emphasis on those dealing with substantive issues. The third part will focus on the comparative analysis of the substantive provisions of the Protocol, taking as reference points both European competition law (ECL) and the most relevant national competition laws of the MERCOSUR Member States, in particular those of Argentina and Brazil. Finally, the fourth part will conclude with some critical and prospective remarks.

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[1] Fortaleza Protocol for the Defence of Competition in MERCOSUR, signed in Fortaleza, Brazil, on 17 December 1996 and approved by Council of the Common Market (CCM) Decision No 18/96. All references to legislation pertaining to MERCOSUR will refer to the translation published in MH Ferrari (ed), *The Mercosur Codes* (London, British Institute of International and Comparative Law, 2000). All articles referred to without indication of source belong to the Protocol.

[2] Treaty establishing a common market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay, signed in Asunción, Paraguay, on 26 March 1991. The Bolivarian Republic of Venezuela has signed a membership agreement on 4 July 2006 but full membership depends on the unanimity of the states parties (Treaty of Asunción, art 20) and ratifications by Brazil and Paraguay are currently pending. Bolivia, Chile, Colombia, Ecuador and Peru have associate member status.

Parallels between the integration project of MERCOSUR and the European Union and, more specifically, between competition provisions of the Fortaleza Protocol and ECL are unavoidable at different levels and for different reasons. At a more general level, the European Union was taken as an integration model for the crafting of MERCOSUR, notwithstanding the acknowledgement that idiosyncrasies on both sides of the ocean rendered impossible, if not undesirable, any attempt to simply transpose the European integration model.[3] As regards competition law specifically, the fact that the Protocol has yet to come into force does not deprive the comparison of its usefulness, but rather confers on it a prospective flavour that rests mainly on two points. The first concerns the fact that the Treaty of Asunción aims, as its very title indicates and article 1 thereof reasserts, at building a common market, an objective also embedded in the EC Treaty. Secondly, the effort of building a common market is inextricably linked to the adoption of several common policies, and among these competition policy occupies a very prominent role,[4] to the point that we can ask whether it does not play a more fundamental part, as a fundamental freedom.[5] Article 1 of the Treaty of Asunción states:

> The Common Market shall involve: … [t]he coordination of macro-economic and sectoral policies between the States Parties in foreign trade, agriculture, industry, fiscal and monetary matters, in foreign exchange and capital, services, customs, transport and communications and in any other matter that may be agreed upon in order to ensure adequate conditions of competition between the State Parties.

However, the commonalities between the European Union and MERCOSUR should not obscure fundamental differences, in particular those concerning the institutional structure and the nature of the law produced by the respective organs. From this perspective, the European Union's supranational structure is clearly distinguishable from MERCOSUR's intergovernmental approach.[6] By the same token, primacy and direct effect are features not shared by the legislation produced by MERCOSUR,[7] a fact that compromises any attempt to consider MERCOSUR law as anything close to EU law.[8] These differences also explain the difficulties felt in the implementation of common competition rules, the most obvious being the fact that the Fortaleza Protocol has not come into force almost 14 years after its approval.

The absence from the Protocol of any express reference to competition rules is noticeable,[9] though the allusion to 'coordination of macro-economic and sectoral policies' envisaging the establishment of 'adequate conditions of competition' has been regarded as

[3] See generally RM Ramos, 'A União Europeia e o MERCOSUR. Perspectivas Institucionais' in RM Ramos, *Das Comunidades à União Europeia* (Coimbra, Coimbra Editora, 1999) 361; and ACP Pereira, 'Diferentes Aspectos dos Sistemas de Integração da União Européia e do MERCOSUR: uma Abordagem Sintética e Comparativa' in ACP Pereira and K Ambos (eds), *MERCOSUR e União Européia: Perspectivas da integração Regional* (Río de Janeiro, Editora Lumen Juris, 2006) 193.

[4] See, eg C Salomão Filho, 'Des MERCOSUR als Marktregelung' in J Basedow and J Samtleben (eds), *Wirtschaftsrecht des MERCOSUR – Horizont 2000* (Baden-Baden, Nomos, 2001) 37.

[5] See especially A Jaeger, Jnr, *Liberdade de Concorrência na União Européia e no MERCOSUR* (São Paulo, Editora LTR, 2006).

[6] See especially U Wehner, *Der Mercosur* (Baden-Baden, Nomos, 1999) 127–30.

[7] Ibid 111 *et seq.*

[8] Ibid 118–19.

[9] See, eg P Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (Baden-Baden, Nomos, 2003) 260.

encompassing the establishment of common competition rules.[10] More specifically, article 4(2) of the Treaty of Asunción refers to the need for the Member States to 'coordinate their respective domestic policies with a view to drafting common rules for trade competition'. Although this provision refers to the need to ensure equitable terms of trade in the commercial relations with third countries, the reference to trade competition has nevertheless been regarded as having provided the legal foundations for the approval of the Protocol.[11]

Within the wider context of economic integration,[12] the building of a common market is considered an intermediate step between the accomplishment of an internal market and the setting of a free trade area. Unlike a free trade area, the common market requires not only the elimination of reciprocal custom duties, quantitative restrictions and measures of equivalent effect,[13] but also the extension of free movement of goods to services, workers and capital. Furthermore, and similarly to a customs union, it requires the adoption of a common external tariff. However, when compared to a more advanced stage of economic integration—the internal market—the common market does not include the adoption of common policies in the context of the economic sectors under integration.[14] In its present state, MERCOSUR would be better characterised as both an incomplete free trading area and an imperfect customs union.[15]

The effort of building a common market, which provides an example of negative integration,[16] involves the elimination of all hindrances to the free movement of goods, services and factors of production, ie capital (free movement of investment) and labour (free movement of workers).[17] A mere top-down approach from the states involved in the integration process aimed at dismantling trade barriers, namely custom duties and quantitative restrictions to trade, would be insufficient to establish a common market. One of underlying reasons for this is that market agents have the ability to replace state-imposed barriers by privately-enacted barriers.[18] The classic example of the latter are cartels, an agreement between undertakings whose effects are very similar to protectionist

[10] See also ACP Pereira, *Direito Institucional e Material do MERCOSUR* (Río de Janeiro, Editora Lumen Juris, 2005) 157; and RU Gimenes, 'Regime de concorrência das empresas binacionais no MERCOSUR' in PB Casella (ed), *MERCOSUR: Integração Regional e Globalização* (Río de Janeiro/São Paulo, Renovar, 2000) 420.

[11] See especially Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 261–62, including further bibliographical references.

[12] See generally P Behrens, 'Integrationstheorie' (1981) 45 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 8; and MCL Porto, *Teoria da Integração e Políticas comunitárias* (Coimbra, Almedina, 2001). See especially Pereira, *Direito Institucional e Material do MERCOSUR* (n 10) 130.

[13] See, eg Ferrari, *The Mercosur Codes* (n 1) 13.

[14] See generally Behrens, 'Integrationstheorie' (n 12) 30–35; and see especially Pereira, *Direito Institucional e Material do MERCOSUR* (n 10) 130. However, the common market also includes a partial harmonisation of economic policy as the result of the prohibition of barriers to trade; in the case of MERCOSUR, art 1 of the Treaty of Asunción refers to 'the adoption of a common trade policy in relation to third States or groups of States'.

[15] See especially Salomão Filho, 'Des MERCOSUR als Marktregelung' (n 4) 33. For the more recent efforts of Uruguay in this field, see its list of priorities as the holder of the *pro tempore* Presidency of MERCOSUR for the period July–December 2009, available at the MERCOSUR website, www.mercosur.int.

[16] See also, though reluctant about the choice of words, Behrens, 'Integrationstheorie' (n 12) 26.

[17] See especially Pereira, *Direito Institucional e Material do MERCOSUR* (n 10) 144. Also on this point, the parallel with the European Union is unavoidable; see generally D Wyatt and A Dashwood, *European Union Law*, 5th edn (London, Sweet & Maxwell, 2006) 571.

[18] See especially Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 236–43.

measures adopted by states: increase of prices, restriction of production and output, barriers to entry, exclusion of competitors, etc.[19]

At this point it seems useful to draw a parallel with the European experience and make a connection between the three concepts: economic integration, common market and competition.[20] Article 2 of the EC Treaty refers to the task of 'establishing a common market' and article 3 further states that:

> For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: … a system ensuring that competition in the internal market is not distorted.[21]

In the context of MERCOSUR, article 1 of the Treaty of Asunción links the establishment of a competition policy with the creation of a common market in a similar, though less explicit way. Both cases illustrate the need to ensure that the dismantling of state-imposed barriers is not replaced by privately-agreed barriers that endanger the achievement of a common market. In the European Union, this issue arose in the early days of the European Economic Community,[22] although it was only with the Single European Act (1987) that the interdependence between the competition system and the internal market was clearly spelled out in the EC Treaty (article 3(1)(g)).

However, if the connection between economic integration, under the form of a common market, and competition rules is so clear,[23] we may wonder why such rules were not included in the Treaty of Asunción in the first place. Furthermore, we can also question if the fact that the Member States chose to include such rules in a Protocol, instead of in the Treaty, is in itself significant.

As regards the first point, the explanation seems to be twofold: on the one hand, competition is a sensitive political issue, one that is not likely to easily gather consensus, in particular in the context of MERCOSUR, where competition law at the national level shows very strong asymmetries in terms of development and effectiveness. On the other hand, the Treaty itself has been regarded since its inception as a framework (*Rahmenvertrag*) and transitory treaty (*Übergangscharakter des Vertrags*),[24] aimed at setting the foundations for the creation of a common market but requiring further implementation.

As to the choice of the term 'Protocol', it seems that too much weight should not be attached to the word. In the field of international public law the word is often synonymous

[19] See generally C Bellamy and G Child, *European Community Law of Competition*, 6th edn (Oxford, Oxford University Press, 2008) 305.

[20] See especially E-J Mestmäcker and H Schweitzer, *Europäisches Wettbewerbsrecht*, 2nd edn (München, CH Beck, 2004) 43.

[21] As a result of the changes introduced by the Treaty of Lisbon, the reference to 'a system ensuring that competition is not distorted' was moved from art 3 EC to the Protocol on the Internal Market and Competition. However, since the Treaty of Lisbon has yet to come into force and the practical implications of the change are themselves subject to debate, I shall leave the issue outside the scope of the present chapter.

[22] See especially E-J Mestmäcker, 'Offene Märkte im System unverfälschten Wettbewerbs' in H Coing, H Kronstein and E-J Mestmäcker (eds), *Wirtschaftsordnung und Rechtsordnung. Festschrift für Franz Böhm zum 70. Geburtstag* (Karlsruhe, CF Müller, 1965) 348.

[23] See, eg J Basedow, 'MERCOSUR als Integrationsmodell' in Basedow and Samtleben, *Wirtschaftsrecht des MERCOSUR* (n 4) 22.

[24] See especially F Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (Berlin, Duncker & Humblot, 2008) 37.

with treaty[25] and usually designates a legal text intended to complement the contents of a treaty and enjoying the same binding force.[26] In the specific context of MERCOSUR, the texts approved by the Member States following the Treaty of Asunción were called Protocols, a designation that should by no means be seen as undermining their equivalence to the Treaty,[27] nor the significance of the text itself.[28] Furthermore, article 33 of the Fortaleza Protocol clearly describes the Protocol as 'an integral part of the Treaty of Asunción', a point further developed in article 36 which provides that '[a]ccession by any State to the Treaty of Asunción shall imply *ipso jure* accession to this Protocol'. Accordingly, the Fortaleza Protocol can be regarded, alongside the Treaty of Asunción, as part of MERCOSUR's primary law (see article 41 of the Ouro Preto Protocol), though it should be added that the distinction between primary and secondary law in the context of MERCOSUR is not exempt from doubts.[29]

As mentioned above, the Fortaleza Protocol has yet to become binding law for all the states parties. At this point, only Brazil and Paraguay have ratified the Protocol, and it seems likely that the combination of Argentina's and Uruguay's continuing reluctance[30] and the ongoing international economic crisis will not allow the status quo to change in the near future. As suggested in the introduction, it could be argued that in accordance with article 33 of the Protocol, the latter should have come into force in Brazil and Paraguay. However, the Protocol was approved as an annex to Council of the Common Market (CCM) Decision No 18/96. This poses a problem, because article 40 of the Ouro Preto Protocol is intended to ensure, in the absence of direct effect, the simultaneous entry into force of the decisions adopted by MERCOSUR authorities (including CCM Decisions; see Ouro Preto Protocol, article 2), which take effect when all states parties have taken the necessary steps to incorporate such Decisions into their legal systems and have informed the MERCOSUR Administrative Secretariat. This has not been the case with Decision No 18/96, and the matter was addressed in 2001 in a judgment of the ad hoc arbitration court, which concluded by rejecting of the possibility of separating the validity of the Protocol from that of the Decision. The ad hoc arbitration court justified its views by asserting that '[p]artial validity would create an intolerable situation of legal uncertainty' and that 'distinguishing the validity of different provisions of a single norm is always a delicate and perilous enterprise, all the more when absent precise guidelines and a univocal criterion to undertake it'.[31] The point, however, remains to be

[25] See generally AMS Martins, 'O Direito da Concorrência no MERCOSUR após o Protocolo de Fortaleza' in PB Casella (ed), *MERCOSUR: Integração Regional e Globalização* (Río de Janeiro/São Paulo, Renovar, 2000) 570–71.

[26] See especially P Dailliger and A Pellet, *Droit International Publique*, 7th edn (Paris, LGDJ, 2002) 133–34.

[27] On the specific nature of the Protocol and its characterisation as a legislating treaty (*Gesetzgebungsvertrag*), see especially J Samtleben, 'Der MERCOSUR als Rechtssystem' in Basedow and Samtleben, *Wirtschaftsrecht des MERCOSUR* (n 4) 64–66. See generally Dailliger and Pellet, *Droit International Publique* (n 26) 121.

[28] The Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR, Ouro Preto Protocol, deals with fundamental questions concerning the institutional structure of MERCOSUR.

[29] See also Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 65–66. On the question of hierarchy of sources of law, compare Samtleben, 'Der MERCOSUR als Rechtssystem' (n 27) 58–59.

[30] See especially Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 270.

[31] Paragraphs 122–25 of the Decision of the ad hoc arbitration court of MERCOSUR on the complaint presented by the Federative Republic of Brazil against the Republic of Argentina on the application of anti-dumping measures against the export of whole-chickens originating from Brazil, Resolution 574/2000 of the Ministry of Economy of the Republic of Argentina. Available (in the Portuguese and Spanish versions) at www.mercosur.int. Author's translation.

settled in the academic literature,[32] although those who argue that the Protocol has yet to enter into force seem to have the stronger arguments, absent the existence of direct effect. Be that as it may, even if not yet in force, the Fortaleza Protocol is not devoid of legal effect, as it obliges the states parties to make progress in the transposition of the Protocol into their legal systems.

Two other developments are worth mentioning before shifting our focus to the analysis of the Protocol's provisions. The first concerns the Regulation of the Protocol, approved in March 2003 by MERCOSUR Trade Commission (MTC) Decision No 1/03. The Regulation deals mainly with internal rules concerning the functioning of the Commission for Defence of Competition (CDC)[33] and procedural questions on the application of the Protocol. The second development concerns the approval by the MTC of Decision No 4/04 containing an understanding on the cooperation between national competition authorities for the application of national competition laws, a development that could help to circumvent some of the disadvantages of the present stalemate regarding the Protocol.

II Overview of the Protocol: Substantial and Procedural Rules

The Protocol is divided into 10 chapters, containing a total of 37 articles. In its Preamble, the Protocol alludes to the connection between competition rules and the common market, regional economic growth, free market access and distribution of the economic benefits resulting therefrom. The Protocol covers the following topics: object and scope of application (articles 1–3); behaviours and practices which restrict competition (articles 4–6); harmonisation of legislation (article 7); institutional structures in the field of competition (articles 8–9); procedural matters (articles 10–26); sanctions (articles 27–29); cooperation between regulatory authorities (article 30); dispute resolution (article 31); and final and transitional provisions (articles 32–37).

As regards its scope of application, the Protocol covers 'acts … the object of which is to produce, or which in fact produce, effects on competition within MERCOSUR and which affect trade between States Parties' (*rationae loci*) carried out by 'natural or juridical persons, of public or of private law, or other entities' (*rationae personae*). The latter comprises undertakings exercising a state monopoly, as long as 'the regular exercise of its legal responsibilities is not prevented by the rules of [the] Protocol'. *A contrario* one can infer (and article 3 clearly supports this inference) that an act of a purely internal nature, ie carried out in the territory of a state party, by entities domiciled therein and with its effects confined to the same state party, remain within the exclusive competence of that state.

[32] Compare JM von Bernuth, *Lauterkeitsrecht, Kartellrecht und Verbraucherschutz in den Ländern des MERCOSUR* (Baden-Baden, Nomos, 2001) 198; Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 269–70; and Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 359–60.

[33] The CDC is an intergovernmental organ composed of national competition authorities and charged with applying the Protocol in collaboration with the MTC (art 8).

The description of the behaviours and practices deemed to restrict competition is divided between a general provision (articles 4, 5) and a list of examples (article 6). The general provision potentially encompasses a very broad range of cases. Article 4 provides that:

> [a]cts, whether individual or concerted, whatever their form, whose object or effect is to limit, restrict, falsify or distort competition or market access or which constitute an abuse of a dominant position in the relevant market of services or goods within MERCOSUR and which affect trade between States Parties shall, irrespective of fault, be violations of the rules of this Protocol.

Article 5 restricts the scope of the general clause by adding that:

> [s]imple success in the market resulting from natural process based on the greater efficiency of an economic agent in relation to its competitors shall not amount to an offence against competition.

The practices included in article 6 are not considered to be automatically anti-competitive, but only 'in so far as they come within the meaning or Article 4'. The list of examples is a lengthy one and comprises both concerted and individual practices (both horizontal and vertical),[34] as well as the abuse of dominance.

The absence of any reference to merger control or to state aids from the core substantive provisions of the Protocol is a noteworthy omission, although both are mentioned in articles 7 and 32 respectively. Article 7 refers to the obligation of the states parties (yet to be fulfilled) to 'adopt common norms for the control of acts and contracts, of any kind, which may limit or in any other way prejudice free competition or result in the domination of the relevant regional market of goods and services, including those resulting in economic concentration'. This provision arises from the lack of direct effect of the competition provisions of the Protocol, meaning that are not automatically enforceable following the conclusion of the Protocol, 'except to the extent that the national legal system considers certain international obligations to be self-executing'.[35] As will be seen below, article 7 severely undermines the effectiveness of the competition provisions, leaving the states parties to rely entirely on their own national provisions, where such provisions exist.

As regards state aids, a reference is included in the chapter dealing with final and transitional provisions, where article 32 states that '[w]ithin a two year period as from the entry into force of this Protocol and for the purpose of incorporation therein, the States Parties agree to elaborate common norms and mechanisms regulating State aids'.

In terms of the institutional framework, the implementation of the Protocol relies on two organs: the MTC and the CDC. The first is an organ with decisional capacity (Ouro Preto Protocol, article 2), composed of members from the MERCOSUR Member States (Ouro Preto Protocol, article 17) and empowered to issue binding directives as well as non-binding proposals (Ouro Preto Protocol, article 20). Its role in the field of competition is related to the competences it enjoys under article 19 of the Ouro Preto Protocol in the context of intra-MERCOSUR trade.

[34] Horizontal agreements are those between undertakings at the same level of the production/distribution chain, whilst vertical agreements are those between undertakings acting at different levels of the production/distribution chain (see, eg Bellamy and Child, *European Community Law of Competition* (n 19) 303–4).

[35] Ferrari, *The Mercosur Codes* (n 1) 48. On direct effect in general, see, eg Wyatt and Dashwood, *European Union Law* (n 17) 127.

The CDC is a creation of the Fortaleza Protocol, designed as an intergovernmental organ 'integrated with the national organs of the application of [the] Protocol in each State Party' (article 8) and charged with the crafting of the procedural rules needed for the implementation of the Protocol (article 9).

The complexity of the procedural rules (articles 10–21) set by the Protocol reflect, on the one hand, the intergovernmental nature of the CDC and, on the other hand, the political sensitivity of the matters at stake.[36] In general terms, the procedure for the application of competition rules involves the two levels, national and intergovernmental, and a total of up to five organs. From these five, three of them necessarily intervene in the procedure: (i) the national organs charged with the application of competition law (national competition authority or NCA); (ii) the CDC; and (iii) the MTC. In case these organs are unable to reach a consensus on the application of the Protocol, two other bodies may intervene in the procedure: (iv) the CMG; and (v) the ad hoc arbitration court. I will first describe the procedure involving only the NCA, the CDC and the MTC, before moving on to the possibilities for the intervention of the CMG and the constitution of an ad hoc arbitration court.

The initiative to start the proceedings, whether *ex officio* or on the basis of a complaint of a party with a legitimate interest, lies with the NCA (article 10).[37] However, once set in motion, the proceedings must then be sent to the CDC, together with a preliminary technical assessment (article 10), which will determine either to launch an investigation procedure or (subject to confirmation (*ad referendum*) by the MTC), to file the proceedings (article 11). Furthermore, '[i]n case of urgency or which threatens irreparable damage to competition' (article 13), the CDC (subject to confirmation (*ad referendum*) by the MTC) may require the application of preventive measures, and impose penalties for non-compliance.

Should the investigation proceed, it is to be undertaken by the NCA where the defendant is domiciled (article 15), under the guidelines set by the CDC (article 14); during the investigation, all other NCAs are under a duty to cooperate with the NCA conducting the investigation 'by supplying information, documents and other means considered necessary for the proper performance of the investigative proceeding' (article 16).[38] The NCA is obliged to publish periodical reports of its activities (article 15) and the CDC is obliged to keep the MTC informed of the status of the proceedings concerning the cases under investigation (article 12).

Once the investigation is completed, the NCA must submit a final report to the CDC (article 18), which will serve as a basis for the latter (subject to confirmation (*ad referendum*) by the MTC) to delineate the illicit practices and adequate sanctions (article 19). It then rests with the MTC, taking into consideration the report and conclusions of the CDC, to adopt a Directive determining 'the sanctions to be applied to the party at fault or the measures adequate to the case' (article 20). The implementation of both the

[36] See also Ferrari, *The Mercosur Codes* (n 1) 19–20.

[37] Though of minor present interest, it should be noted that art 34 excluded the application of the Protocol to anti-competitive practices 'where an examination has been initiated by the competent authority of a State Party before its entry into force as provided for in Article 33'.

[38] Article 30 foresees a wider cooperation duty, involving the implementation of 'mechanisms of cooperation and consultation at the technical level' between the regulatory authorities, aiming at improving the 'national systems and common instruments for the defence of competition' through the cooperation between national authorities and regulatory authorities. See also MTC Decision No 4/04, referred to above.

preventive measures (and respective penalties) and the sanctions is to be undertaken at the national level, by the NCA (articles 13 and 20).

Differences between the MERCOSUR organs may arise at several points in the proceedings and the Protocol deals with two of them: differences concerning the application of the proceedings required under the Protocol and differences concerning the sanctions to be applied (and implicitly, the definition of the impugned practices). The first are to be solved by the MTC at the request of the CDC (article 17); the second, however, require a brief explanation.

Since the definition of the impugned practices and the establishment of the appropriate sanctions (or other measures fitting the case) requires unanimity (article 19, which applies the general rule set out in Ouro Preto Protocol, article 37), consensus might be difficult to reach. In such an event, the CDC must report the situation to the MTC, forwarding its conclusions and evidencing the existing differences of opinion. The MTC should settle the matter through the unanimous adoption of a Directive or, if that is not possible, 'forward the different alternatives proposed to the Common Market Group' (article 20). If a unanimous Resolution of the CMG is not agreed, 'the interested State Party may have direct recourse to the proceedings provided for under Chapter IV of the Protocol of Brasilia for the Settlement of Disputes'[39] (article 21), which would bring about the setting up of an ad hoc arbitration court.

Still on procedural matters, articles 22–26 include the possibility that the proceedings may be brought to an end when a so-called settlement by cessation is reached, by which the infringing party undertakes certain obligations without implying 'an admission in respect of matters of fact or a recognition of the illegality of the behaviour in question' (article 22). Such a settlement by cessation may occur at any stage of the proceedings and depends on the authorisation of the CDC (subject to confirmation (*ad referendum*) by the MTC) (article 22), though it is to be implemented by the NCA of the state party in whose territory the defendant is domiciled (article 26). Necessary elements of a settlement by cessation are (i) an obligation to cease the practice at issue within an established timeframe; (ii) a determination of the amount of the daily fine applicable in case of non-compliance; and (iii) an obligation to submit periodic reports to the NCA on any modification concerning the offending company's corporate structure, control, activities and location (article 23). Once authorised, the settlement by cessation can be subject to modifications on the grounds that 'it proved to be excessively onerous on the defendant and that it prejudices third parties or the public, and that the new situation does not amount to an infringement of competition' (article 25). As to the proceedings, they remain suspended while the terms of the settlement by cessation are observed and, if there is compliance throughout the whole period, will be filed at the expiry of the time-period (article 24).

Once an anti-competitive practice is found, the CDC (subject to confirmation (*ad referendum*) by the MTC) will order the cessation of the practice within a specified timeframe, with daily penalties applicable in case of violation of the cessation order

[39] The Brasília Protocol for the Settlement of Disputes was signed on 17 December 1991 pursuant to art 3 and section II of the Treaty of Asunción. Its aim is to implement a permanent system for the settlement of disputes during the '[t]ransition period, which shall be between the entry into force of this Treaty up to 31 December 1994' (Treaty of Asunción, art 3). It should be noted that art 31 of the Fortaleza Protocol refers generally to the Brasília Protocol and to the General Procedure for Complaints before the MTC set out in the Annex to the Ouro Preto Protocol regarding 'disputes related to the application, interpretation or non-fulfilment of the provisions set out in [the] Protocol'.

(article 27). Furthermore, the Protocol prescribes a list of sanctions, which can be applied either cumulatively or alternatively, taking into consideration 'the seriousness of the facts and the degree of harm caused to competition within MERCOSUR' (article 29). These sanctions comprise (i) penalty fines and (ii) prohibitions on participating in government purchases or entering into transactions with public financial institutions in any of the states parties for a given period (article 28). The CDC (subject to confirmation (*ad referendum*) by the MTC) may further recommend 'the competent authorities of States Parties to avoid granting the party at fault any kind of incentives or payment facilities in relation to its tax obligations' (article 28). In all cases, the implementation of the cessation order together with the imposition of penalties and the sanctions provided for in article 28 are to be 'carried out by the regulatory authority of the State Party in whose territory the party at fault is domiciled' (articles 27, 28).

Regarding cooperation, article 30 imposes on the states parties the obligation to adopt 'through their respective national authorities, mechanisms of cooperation and consultation at the technical level'.

In matters involving dispute resolution, article 31 provides that, in disputes arising from the application, interpretation and non-fulfilment of the provisions of the Protocol, '[t]he provisions of the Protocol of Brazilia and of the General procedure for Complaints before the MERCOSUR Trade Commission set out in the Annex to the Protocol of Ouro Preto shall be applicable'.

Finally, the Protocol includes in its last chapter the final and transitional provisions. Among these, the following are particularly noteworthy: article 32 (obligation of the states parties to elaborate common norms and mechanisms on state aid); article 34 (the exemption from the provisions of the Protocol of investigations started before the entry into force of the Protocol); and article 36 (the accession of a state to the Treaty of Asunción implies *ipso jure* accession to the Fortaleza Protocol).

III MERCOSUR, European Competition Law and National Competition Law

Of the four current MERCOSUR Member States,[40] all except Paraguay[41] have now enacted competition laws.[42] However, the situations in the remaining three Member States are not identical: while in the case of Uruguay, the competition provisions are relatively recent,[43]

[40] As mentioned above, Venezuela is still awaiting full membership.

[41] Paraguay is the only state party that did not possess a unified competition law, only some scattered provisions concerning competition; see generally Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 194–95. However, there is a new Bill currently pending before the Parliament which might become the first unified competition law of the country. See *Boletín Latinoamericano de Competencia*, 24 May 2008, 41 (available at http://ec.europa.eu/comm/competition/publications/blc/index.html) and the more recent developments on the website of the Ministry of Trade and Industry of Paraguay (www.mic.gov.py).

[42] For a broader account of the history of competition policies in Latin America, see generally J Peña, 'Competition Policies in Latin America, post-Washington Consensus' in P Marsden (ed), *Handbook of Research in Trans-Atlantic Antitrust* (Cheltenham, Edward Elgar, 2006) 732.

[43] Uruguay enacted a new competition law in 2007: Law 18159 of 30 July 2007. See generally CM Blanco, *Manual básico de derecho de la competencia* (Montevidéo, Fundación Cultura Universitaria, 2007).

competition law in Argentina and Brazil dates back to the 1920s and 1930s.[44] In their original versions, Argentina's and Brazil's competition laws closely followed the US antitrust model as embodied in the Sherman Act (1890), including the latter's provisions dealing with criminal sanctions. After a lengthy evolution, both Argentina and Brazil have now enacted competition laws that are much closer to ECL than to US antitrust:[45] this is the case of both Law 8884 of 11 June 1994 in Brazil (referred to below as BCL) and of Law 25156 of 25 August 1999 in Argentina (ACL), representing the two most significant competition jurisdictions within MERCOSUR.

If we consider that the drafting of the competition provisions of the Fortaleza Protocol closely followed the ACL and BCL, it should not come as a surprise that the drafting of the Protocol itself is much closer to ECL than to the Sherman Act. Nor should it be surprising that the case law of the European Court of Justice plays a non-negligible role in the interpretation and application of national competition laws in Argentina and Brazil.[46]

Taking all these elements into consideration, along with the fact that the Fortaleza Protocol has yet to enter into force, a detailed analysis on its own of the Protocol's provisions risks being a somewhat abstract and not particularly useful exercise. In order to bring this chapter closer to reality and, at the same time, to circumvent the limitations arising from the present non-application of the Protocol, it seems preferable to address its provisions from the perspective of the similarities and differences vis-à-vis, on the one hand, ACL and BCL and, on the other hand, ECL. I shall focus my analysis on articles 1–3, dealing with the object and scope of application of the Protocol, and on articles 4 and 5, addressing the behaviours and practices deemed to restrict competition.

A Object and Scope of Application of the Fortaleza Protocol

Following article 1, which provides that the Protocol has as its object the protection of competition, the issues of the personal (*rationae personae*) and territorial (*rationae loci*) scope of application of the Protocol are addressed in articles 2 and 3.

Unlike ECL, the Protocol has not adopted a broad reference to undertakings as the addressees of competition law, having instead preferred a more descriptive approach, one that expressly mentions 'natural or juridical persons, of public or of private law', adding to it a somewhat obscure reference to 'other entities'. Furthermore, the Protocol expressly provides that, within certain limits, state monopolies are equally subject to its provisions. However, differences of substance vis-à-vis the EC Treaty are more apparent than real.

In the context of ECL, the concept of undertaking is both a fundamental and unified concept,[47] one that summarises the market agent to whom competition provisions are primarily addressed. We find references to undertakings in all major fields of ECL: cartels

[44] Respectively, Ley 11210 of 24 August 1923 (Argentina) and Decreto-Lei 839 of 18 November 1938 (Brazil). See especially Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 54–57 and 119–21.

[45] See, eg Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 352–53.

[46] Ibid 353–54.

[47] See especially Mestmäcker and Schweitzer, *Europäisches Wettbewerbsrecht* (n 20) 221–24; see generally Bellamy and Child, *European Community Law of Competition* (n 19) 93.

(article 81 EC), abuse of a dominant position (article 82 EC), merger control (Regulation 139/2004) and state aid (article 88 EC). Furthermore, the concept of undertaking is equally present in the application of the previous provisions to public undertakings (article 86(1) EC). However, in order to be a useful concept, it has been given a broad and uniform interpretation by the European Commission and the courts,[48] engaging in a functional approach that goes beyond technical and legal differences between member states. For this reason, the concept of undertaking in ECL encompasses 'any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed' as well as of its profit-making nature.[49]

Though not expressly referring to undertakings, article 2 of the Protocol took an equally broad approach to the addressees of competition law, one that also established as its cornerstone the engagement of the latter in an economic activity.[50] This is the result of an integrated reading of articles 2 (referring to the effect on 'trade between States Parties'), 4 (which also includes a reference to the market-oriented effect of the anti-competitive behaviour) and 5 (referring to the 'economic agent'). This emphasis on the engagement in an economic activity coincides with the practice of the competition authorities in Argentina and Brazil in a number of cases.[51]

Alongside 'natural or juridical persons', the Protocol also includes a reference to 'other entities', an expression without parallel in ACL or BCL. The expression is apparently intended to capture those entities that might escape the scope of the provision or fall in between the categories of natural and legal persons; examples are entities devoid or deprived of legal personality for whatever reason[52] but nonetheless active in the market, and those whose legal nature is controversial, neither clearly private nor public.[53]

Although not referring specifically to 'public undertakings', as the EC Treaty does in article 86, the Protocol does mention, in article 2, 'undertakings exercising a State monopoly'. In the context of ECL, the expression 'state monopolies' involves at least two provisions of the EC Treaty: article 86(1), which extends the application of competition rules to public undertakings and undertakings charged with special and exclusive powers; and article 31, which concerns the EU member states' obligation to adapt state monopolies of a commercial matter to the rules of the internal market. However, it does not seem that the purpose of article 2 of the Protocol is to identify a specific addressee of the competition provisions (although the expression 'undertaking' is expressly used in this context, unlike the rather vague reference to 'persons' in the previous sentence of article 2),[54] but rather to exclude in generous terms such undertakings from the application of

[48] References to the substantial case law of the European Court of Justice involving the concept of 'undertaking' can be found in Bellamy and Child, *European Community Law of Competition* (n 19) 93.

[49] Ibid.

[50] See especially Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 363.

[51] For detailed references to the cases decided by the national competition authorities in both countries (in Argentina, the Comisión Nacional de Defensa de la Competencia, CNDC and in Brazil, the Conselho Administrativo de Defesa Econômica, CADE), see especially Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 364.

[52] Article 15 BCL refers specifically to de facto or de jure existing entities, even if temporarily, with or without legal personality ('constituídas de fato ou de direito, ainda que temporariamente, *com ou sem personalidade jurídica*' (emphasis added)).

[53] See also Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 367.

[54] Compare Fuders, ibid 371 and 375–76, who argues that the reference to 'undertaking exercising a state monopoly' is to be interpreted restrictively, in the context of the relevant market where the undertaking enjoys the monopoly position.

the competition provisions. On the one hand, neither the nature of the undertaking nor the nature of the state monopoly are specified, which leads us to conclude that both commercial and revenue-producing monopolies (articles 31 and 86(2) EC) exercised by a public or private undertaking are included in this provision. On the other hand, the same provision allows for a considerable leeway of the state parties, since the inclusion of the undertakings exercising a state monopoly within the scope of the Protocol goes only as far as 'the regular exercise of its legal responsibilities is not prevented by the rules in [the] Protocol'. By contrast, a similar provision in the EC Treaty, article 86(2), refers to '[u]ndertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly' and is more cautious in excluding them from the application of competition rules: only 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.[55]

For obvious reasons, the full extent of the exception included in article 2 is difficult to judge at this point. Nevertheless, a worrying point concerns the fact that, at least according to the drafting of the provision, the state party does not have to justify the creation or concession of a monopoly nor the provisions that govern the latter. Furthermore, the possibility that the application of the provisions of the Protocol to an undertaking charged with a state monopoly may indeed prevent the 'regular exercise of its legal responsibilities', is fairly high thus restraining significantly the scope of the provision. These points could be counterbalanced should article 2 be interpreted restrictively, but it remains to be seen if that will be the case.[56] In any event, it seems clear that state action taking the form of economic activity in the market was included in the scope of application of the Protocol,[57] even when the latter involves indirect manifestations of sovereignty, such as monopolies created through state concession or state-sponsored dominant undertakings.[58] Furthermore, it seems reasonable to conclude that a literal interpretation of article 2 of the Protocol would strip it of much of its usefulness, allowing virtually any legal provisions enacted by the states parties to exclude undertakings exercising a state monopoly from the scope of the Protocol.

The scope of application of the Protocol is subject to restrictions not only as regards its addressees, but also regarding two economic sectors: the sugar and automobile sectors. These sectors are excluded from the scope of application of the Treaty of Asunción[59] and, since the Fortaleza Protocol is part of the Treaty (article 33), the exception seems to extend to the latter.[60]

The question of the territorial scope of application of the Protocol gives rise to two separate though intertwined questions, the first concerning the application of the Protocol itself and the second pertaining to the interplay between the Protocol and the states

[55] On the interpretation and application of art 86(2) EC by the European Court of Justice, see Mestmäcker and Schweitzer, *Europäisches Wettbewerbsrecht* (n 20) 868.

[56] Compare Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 373–77. But see DM Ramos, *Das Wettbewerbsschutz-Protokoll des MERCOSUR* (Frankfurt am Main, Peter Lang, 2000) 170–71.

[57] See generally von Bernuth, *Lauterkeitsrecht, Kartellrecht und Verbraucherschutz in den Ländern des MERCOSUR* (n 32) 200, referring to the exclusion of the state-action doctrine in the context of the Protocol.

[58] See also Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 364.

[59] Ibid 228–29.

[60] Ibid 368; but see Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 273.

parties' own competition law. Since both questions have already been addressed in ECL, it seems that some useful references can be taken from the European experience.

As regards its territorial scope of application, the Protocol refers to a double and cumulative criterion: for the Protocol to apply, the act *sub judice* has to produce 'effects on competition within MERCOSUR' as well as to 'affect trade between the States Parties' (article 2). Furthermore, article 10 of the Regulation approved by MTC Decision No 1/03 adds that the effect on trade between states parties and the effect on the relevant markets[61] has to be considered at the same time. Also, on this point, the drafting of the Protocol is remarkably close to the wording of the EC Treaty, which alludes to the effect on trade between EU member states (articles 81, 82) and to the preventive, distortive and restrictive repercussions on competition within the common market (article 81). Similarly to ECL,[62] the Protocol seems to have followed the path of the 'effects doctrine' as the criterion to determine the application of competition rules: as long as the anti-competitive act produces effects within MERCOSUR, it is irrelevant for the application of the Protocol where it has taken place. However, in order for the Protocol to be applicable, there must also be an effect on trade between the states parties. As in the context of ECL,[63] it seems that a double role can be assigned to this inter-state trade clause: it defines (i) the competence of the CDC and the MTC and (ii) the applicable substantive law. The point is complemented by article 3 of the Protocol, which states that, in matters producing purely internal effects, it falls within the exclusive competence of the state party to 'regulate acts carried out in its respective territory by natural or juridical persons, of public or private law, or other entities domiciled therein'.

When comparing the drafting of article 2 of the Protocol with articles 81 and 82 of the EC Treaty, it is noticeable that the former does not include any reference to anti-competitive acts that are capable of affecting trade (potential effects on trade), dealing solely with those acts 'which [de facto] affect trade between the States Parties'. The Protocol's narrower approach to competition law seems to carry two implications: on the one hand, and unlike ECL, there seems to be little need to contemplate a *de minimis* rule on the impact on trade,[64] ie a requirement that the effect on trade has to be above a certain threshold of significance (appreciable effect) in order to be relevant. The reason, so it seems, is that the application of the Protocol, unlike the EC Treaty, is only triggered by an effective effect on inter-state trade. Secondly, and perhaps more importantly, the effectiveness of competition rules seem to demand a broad interpretation of the concept of effect on trade[65] along the lines of the approach taken in ECL. This means that trade should not merely encompass the commercial activity associated with the exchange of goods and

[61] The provision in question refers specifically to the relevant markets of products and services within MERCOSUR, which is defined by art 10 as comprising 'the ensemble of goods and services produced or commercialised in the territory of one or more States Parties of MERCOSUR'.

[62] Though initially reluctant to adopt the effects doctrine due to its potential implications in terms of public international law, the present stance of European case law comes very close to the latter. See Joined Cases C-89, C-104, C-114, C-116, C-117 and C-125–129/85 *Åhlström v Commission* ('Woodpulp I') [1988] ECR I-5193 and Case T-102/96 *Gencor v Commission* [1999] ECR II-753. See generally Bellamy and Child, *European Community Law of Competition* (n 19) 61.

[63] See especially Mestmäcker and Schweitzer, *Europäisches Wettbewerbsrecht* (n 20) 126–27.

[64] See also Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 384–87. But see von Bernuth, *Lauterkeitsrecht, Kartellrecht und Verbraucherschutz in den Ländern des MERCOSUR* (n 32) 202–3.

[65] Compare Commission's Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81.

services in the market, but rather the economic activity as a whole.[66] Likewise, the effect on trade between states parties should not be construed as the mere restriction thereof, but should rather encompass any alteration of the pattern of trade that would exist absent the anti-competitive act,[67] irrespective of its positive (increase) or negative (decrease) impact.

As mentioned above, addressing the territorial application of the Protocol involves a second point: the interplay between the national legal systems of the states parties and the rules of the Protocol. The underlying question is to what extent, if any, can national competition laws apply in cases falling within the scope of application of the Protocol. The latter addresses the problem partially in article 3, but it merely deals with those cases involving purely internal effects. If we take into consideration the fact that economic fluxes tend to affect several jurisdictions, together with the circumstance that both the Protocol (article 2) and the two most significant jurisdictions within MERCOSUR have adopted the effects doctrine,[68] we soon realise that the cases addressed by article 3 of the Protocol will surely be a minority. The unanswered question relates to cases having an effect on competition within MERCOSUR and involving the application of both the Protocol and the competition laws of the states parties.

Similar questions pertaining to the interplay between national and Community law also afflicted ECL for many years[69] but the combination of two developments helped virtually to eradicate the problem. The first was the seminal *Walt Wilhelm* judgment,[70] which clearly stated that the principle of primacy of European law extended to competition law. As a consequence, the divergences resulting from the application of national competition law to a case falling within the scope of application of ECL could only be maintained so far as it did not compromise de facto the primacy of ECL. The second development was much more recent and relates to the introduction of a convergence rule in article 3 of Regulation 1/2003.[71] According to this rule, in cases affecting trade between EU member states, national authorities may apply national competition law alongside ECL, but are prevented from reaching diverging results from those that would flow from the sole application of ECL.[72]

In the absence of a principle of primacy, the question of the interplay between the Fortaleza Protocol and national provisions has to be dealt with internally by each legal system. The fundamental question in this respect concerns the hierarchical status of

[66] See generally Bellamy and Child, *European Community Law of Competition* (n 19) 72–73.

[67] See Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235; the criterion was often repeated in ensuing cases; for further references to case law see Bellamy and Child, *European Community Law of Competition* (n 19).

[68] See especially Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 68–70 and 134.

[69] See generally R Ellger, 'Das Verhältnis der Wettbewerbsregeln des EG-V zu den Gesetzen gegen Wettbewerbsbeschränkungen in den Mitgliedstaaten der Europäischen Gemeinschaft' in J Basedow, U Drobnig, R Ellger *et al* (eds), *Aufbruch nach Europa: 75 Jahre Max-Planck-Institut für Privatrecht* (Tübingen, Mohr Siebeck, 2001), 265.

[70] Case 18/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1. But it was in Case 6/64 *Costa v ENEL* [1964] ECR 585 that the principle of the primacy of European law was first stated.

[71] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[72] Regulation 1/2003, art 3(1) and (2). There is, however, one exception to this rule concerning 'stricter national law which prohibits or sanctions unilateral behaviour adopted by undertakings'; see below. See especially the commentary of E Rehbinder in U Immenga and E-J Mestmäcker (eds), *Wettbewerbsrecht Band 1 EG/Teil 2* (München, CH Beck, 2007) 914.

treaties and international agreements vis-à-vis internal norms of infra-constitutional value,[73] a question that receives similar answers in three of the MERCOSUR Member States. While in the case of Argentina and Paraguay, it is the Constitution itself that expressly allows for international law to prevail over internal law, in the case of Brazil, it is the BCL that expressly provides for international treaties to prevail over internal competition provisions in case of conflict between the two.[74] Finally, in the case of Uruguay, the situation is unclear, given the absence of a unified competition law, as well as of a constitutional provision dealing with the matter. In the light of the above-mentioned internal provisions, it seems clear that the Protocol prevails over ordinary internal law in the case of Argentina, Brazil and Paraguay, but such an outcome is less clear in the case of Uruguay.[75]

Ultimately, even in the absence of an explicit hierarchy between the treaty and the Protocol provisions vis-à-vis the Member States' internal legal systems, others factors bear weight in the prevention of conflicts between MERCOSUR and national provisions.[76] The similarity between the provisions of the Protocol, on the one hand, and the provisions of both the Argentinean and Brazilian competition laws,[77] on the other, renders a conflict between the two unlikely. Furthermore, the intergovernmental structure which characterises MERCOSUR and, in particular, the requirement of consensus in decision-making (Ouro Preto Protocol, article 37 and Fortaleza Protocol, articles 19–21) together with the mechanisms for dispute resolution in the context of competition law (Brazilia Protocol, chapter IV) further helps the smooth interplay between the two levels of legislation. In any event, in the absence of the principle of primacy of MERCOSUR law, the matter has to be settled by the interplay between the legal orders of the Member States.

B Behaviours and Practices which Restrict Competition

The Fortaleza Protocol defines the anti-competitive practices that fall within its scope of application through the combination of a general provision (articles 4 and 5) with a list of examples (article 6). Substantively, the Protocol deals with two kinds of anti-competitive practices in the same provision:[78] individual and concerted practices which 'limit, restrict, falsify or distort' (article 4) competition; and the abuse of a dominant position. Neither

[73] As regards the hierarchical position of MERCOSUR norms vis-à-vis constitutional norms, all Member States give primacy to the former in detriment to the latter. See especially Samtleben, 'Der MERCOSUR als Rechtssystem' (n 27) 78–79.

[74] Article 2 BCL refers to the application of the Brazilian competition law to practices undertaken in the whole or in part of the Brazilian territory, or to those producing or that may produce effects therein, without prejudice to conventions and treaties signed by Brazil ('sem prejuízo de convenções e tratados de que seja signatário o Brasil').

[75] The interplay between MERCOSUR and internal law in Argentina, Brazil and Paraguay resembles the situation in Europe after the *Walt Wilhelm* judgment (n 70), while the situation in Uruguay is more akin to the European one prior to the same judgment. See especially Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 393–94. As to the evolution of the same problem in Europe, see generally Ellger, 'Das Verhältnis der Wettbewerbsregeln des EG-V zu den Gesetzen gegen Wettbewerbsbeschränkungen in den Mitgliedstaaten der Europäischen Gemeinsch' (n 69) 272.

[76] See especially Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 392–94.

[77] The similarities in the drafting of ACL and BCL should not be construed as implying that their interpretation and application are also similar, as this often is not the case.

[78] On the advantages of this approach, see generally Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 520–22.

merger control (or the control of 'economic concentration', to use the expression used in the Protocol) nor the prohibition of state aid are directly addressed by any of the Protocol's provisions. As mentioned above, the only references to these issues are to be found in articles 7 and 32, which impose on the states parties the duty to elaborate common norms dealing with these matters.[79]

The drafting of articles 4–6 bears strong resemblances, both in terms of structure and of content, to articles 1 and 2 ACL and to articles 20 and 21 BCL.[80] Both national competition laws have likewise adopted a general clause prohibiting anti-competitive practices complemented by a list of examples of the latter. In turn, we can also detect the affiliation of the latter to ECL, since article 81 EC refers to concerted practices, which prevent, restrict or distort competition, and article 82 EC deals with the prohibition of abuse of a dominant position, both provisions combining a general clause with a list of examples. There are, nevertheless, several differences vis-à-vis the respective Protocol provisions; these can be divided into those of a general nature and those pertaining to each of the anti-competitive practices. I shall begin by addressing the former, leaving the specific differences to be analysed alongside the various paragraphs of article 6.

The first general difference concerns individual practices falling below the threshold of dominance. Such practices were included in articles 4 and 6 but remain outside the competition provisions of the EC Treaty and are relegated instead to the national laws of EU member states. Article 82 EC deals with the abuse of dominance, including both single and collective dominance, but there is no mention of individual anti-competitive practices falling below the dominance threshold. In the same vein, article 81 EC deals solely with concerted practices, leaving individual practices outside its scope. Not addressed by ECL, these matters were left to the national competition laws of the EU member states, giving rise to numerous and complex questions pertaining to the interplay of the two levels of legislation.[81] As mentioned above, article 3 of Regulation 1/2003 now deals expressly with the matter and imposes a rule of convergence between national and European competition law, whenever the latter applies. The only remaining exception was included in article 3(2),[82] which states that 'Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings'.

In MERCOSUR, article 4 includes individual and concerted acts alike, which means that individual acts falling below the threshold of dominance are addressed both at the state parties' level (article 1 ACL and article 20 BCL) and at the MERCOSUR level. Such acts, although not involving market dominance, presuppose nevertheless some degree of

[79] In both provisions the adoption rules on merger control and state aids are subject to a two-year term, which in both cases (expressly in art 32 and implicitly in art 7 *pari ratione*) commences from the entry into force of the Protocol. On the problems surrounding the coming into effect of the Protocol, see above.

[80] See especially Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 395. For the full text of both Competition Acts in their original versions and with a German translation, see Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 332 and 348.

[81] See generally Ellger, 'Das Verhältnis der Wettbewerbsregeln des EG-V zu den Gesetzen gegen Wettbewerbsbeschränkungen in den Mitgliedstaaten der Europäischen Gemeinsch' (n 69).

[82] See especially the commentary by Rehbinder in Immenga and Mestmäcker, *Wettbewerbsrecht Band 1 EG/Teil 2* (n 72) 922.

market power, as the practice of national competition authorities has shown[83] and as the examples included in the list in article 6 equally imply.

The second general distinguishing feature, which is to a certain extent a consequence of the latter, concerns the somewhat fluid dividing line between competition law and unfair competition in the context of ACL and BCL and in the drafting of the Protocol. This point will be addressed in the analysis of the contents of article 6, but at this point it should be noted that, within the examples included in article 6, we find practices that are usually dealt with under unfair competition or that fall within the grey area between the latter and competition law. Such is the case, for example, of article 6(XV) and (XII) respectively. These points seem to be linked, as it appears that the inclusion in the Protocol of individual practices below the threshold of dominance reflects a reaction against the insufficiencies of national unfair competition law.[84]

A point that deserves to be emphasised is the reference to the inter-state clause in the context of article 4. Whilst in the EC Treaty, both articles 81 and 82 refer to the mere possibility of the anti-competitive practice affecting trade between EU member states, the Protocol has instead opted for a de facto effect. This may explain why the states parties did not feel the need to include a *de minimis* rule in the Protocol concerning *the effect on trade*, a much needed filtering mechanism in the case of ECL. A different but connected *de minimis* rule concerns the *anti-competitive effect*, equally a prerequisite under ECL but not under the Protocol. However, if we take into account the legal solutions adopted at the level of national competition laws, namely in Argentina and Brazil, we realise that in both cases the relevance of the anti-competitive behaviour depends on a minimum threshold of market power. If this approach were to be transposed to the level of the Protocol, this would probably lead to a solution equivalent to the adoption of a *de minimis* rule concerning anti-competitive effects.[85]

Underlying the application of article 4 is the concept of relevant market,[86] comprising the product market and the geographical market.[87] There is no reference to the relevant market as such but, as it is the case in ECL, the concept is of the utmost practical importance when determining the market in which the anti-competitive practice takes place. Whenever an individual or collective practise is at stake, the definition of the relevant market allows us to evaluate the anticompetitive impact on competition, whilst in cases involving an abuse of a dominant position, it also allows us to assess the existence of dominance. Most probably, the definition of the relevant market is one of the points that will necessitate the regulatory intervention of the CDC under article 9, in a similar vein to what has happened in ECL with the Commission's guidelines on the relevant market.

[83] See the national cases decided by the CNDC and by the CADE, referred by Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 398.

[84] See especially T Schreiber, *Das argentinische Gesetz 25.156 zum Schutz des Wettbewerbs* (Frankfurt am Main, Peter Lang, 2003) 157; and von Bernuth, *Lauterkeitsrecht, Kartellrecht und Verbraucherschutz in den Ländern des MERCOSUR* (n 32) 53, maxime 74 and 90–91.

[85] See especially Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 397–98 and 431–32. Compare Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (*de minimis*) [2001] OJ C368/13.

[86] See generally Mestmäcker and Schweitzer, *Europäisches Wettbewerbsrecht* (n 20) 396.

[87] Occasionally it might also be necessary to define the temporal dimension of 'market', comprising the period over which a market operates (see, eg Bellamy and Child, *European Community Law of Competition* (n 19) 293).

(i) Individual and Concerted Practices

According to the first part of article 4:

> [a]cts, whether individual or concerted, whatever their form, whose object or effect is to limit, restrict, falsify or distort competition or market access … and which affect trade between States Parties, shall, irrespective of fault, be violations of the rules of this Protocol.

The provision intends to encompass both individual and collective conduct, horizontal and vertical restraints,[88] as long as they have an anti-competitive effect. However, it is clear that in the case of collective practices, the wording of article 4 refers only to concerted practices, while article 81 of the EC Treaty includes, alongside the latter, agreements between undertakings and decisions by associations of undertakings.[89] In favour of a broader interpretation of the concept of 'concerted practices' in the Protocol, aligned with that of ECL, there is not only the *a fortiori* argument (*a maiore ad minus*) but also the fact that, under ACL and BCL,[90] practice has shown that all forms of collective conduct are included under the respective provisions. Among the various forms of collective restraints of competition, the concept of 'concerted practice'[91] is arguably the subtlest, coming close to the concept of parallel behaviour in the context of oligopolistic markets[92] (which, unlike the latter, does not infringe competition rules). The concept was designed to catch collusive behaviours that might elude both the concept of agreement and that of a decision by an association of undertakings. In fact, the distinction between agreement and concerted practice is much more one of degree than one of nature[93] and there is even a partial overlap between the different forms of collective conduct.[94] The European Court of Justice has consistently defined concerted practice in the following terms:

> [A] form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.[95]

The praxis under ACL and BCL is not far from this approach, equally aiming to capture any form of anti-competitive cooperation between market agents, irrespective of form (written or verbal), intrinsic binding force (ranging from contracts to 'gentlemen's agreements') or the existence or lack of intention, provided that such cooperative behaviour goes beyond a mere parallel behaviour and has as its object or purpose the coordination of market conducts.[96] It should be added, however, that both national competition laws traditionally pay greater attention to horizontal anti-competitive practices, rightly considered to be more damaging to competition, than to vertical restraints.[97]

[88] See above.

[89] Article 81(1) EC reads: 'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.

[90] See especially Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 396 and 409.

[91] On the topic, see generally Bellamy and Child, *European Community Law of Competition* (n 19) 119.

[92] See generally Mestmäcker and Schweitzer, *Europäisches Wettbewerbsrecht* (n 20) 251–54 and 406–8.

[93] See Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125.

[94] See also Bellamy and Child, *European Community Law of Competition* (n 19) 107.

[95] See Case 48/69 *ICI v Commission* [1972] ECR 619, para 64.

[96] See especially Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 409–13.

[97] See especially Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 81 and 145.

While it is plausible that such national practices will be reflected in the application of the Protocol, it remains to be seen to what degree this will happen.

As mentioned above, one of the most striking differences vis-à-vis ECL is to be found in the inclusion of individual practices below the threshold of dominance in the Protocol.[98] In the context of ECL, individual practices below the threshold of dominance are not addressed at the level of ECL, but rather left to be regulated by the EU member states, usually in the context of specific competition provisions[99] or in the context of unfair competition law.[100] Furthermore, matters involving individual practices not involving dominance are frequently found at the confluence of unfair competition and competition law.[101] This also holds true for the Protocol, as can be concluded from a review of the examples included in article 6, a provision directly inspired by article 2 ACL and article 21 BCL. As stated above, among the examples we find practices typically addressed by competition law (article 6(IV)), together with practices often regulated under unfair competition law (article 6(XIV) and (XV)), and practices that can be addressed by one or the other depending on the existence of dominance (article 6(VII) and (XII)).

As regards the restrictions on competition deriving from individual and collective conduct, article 4 refers generally to practices which 'limit, restrict, falsify or distort competition or market access', while article 6 provides a list of examples of what those restraints may be. Though broader and more descriptive in its approach, article 4 is in practice equivalent to the wording of articles 81 and 82 EC, and follows very closely that of the ACL and BCL.[102] The reason behind this particular choice of words was, it appears, the intention of encompassing every possible form of anti-competitive action,[103] coupled with a specific reference to market access, which clearly reflects its relevance for a project of economic integration such as MERCOSUR.[104]

There are two groups of cases that are captured by the provision: on the one hand, the restriction of competition (limit, restrict); and on the other hand, the artificial modification of the competitive conditions in the market (falsify, distort).[105]

As regards the anti-competitive effect, it can result either from the object of the individual or collective conduct, or from its effects. In the first case, as happens with direct restrictions of competition, the practice is in itself anti-competitive, whilst in the second

[98] See especially Schreiber, *Das argentinische Gesetz 25.156 zum Schutz des Wettbewerbs* (n 84) 156–57 and von Bernuth, *Lauterkeitsrecht, Kartellrecht und Verbraucherschutz in den Ländern des MERCOSUR* (n 32) 53.

[99] For example, section 20(2) of the German competition law (Gesetz gegen Wettbewerbsbeschränkungen), which deals with the abuse of economic dependency and can be applied to unilateral conduct below the threshold of dominance. See generally commentary by E Markert in U Immenga and E-J Mestmäcker (eds), *Wettbewerbsrecht – Band 2. GWB*, 4th edn (München, CH Beck, 2007) 544.

[100] For example, section 4(10) of the German unfair competition law (Unlautererwettbewerbs Gesetz), which deals with the obstruction of competitors (*Mitbewerberbehinderung*); the case of sale below cost, which may be covered by section 20(4) of the German competition law, may also fall within this provision. See generally FL Ekey, D Klippel, J Kotthoff *et al*, *Wettbewerbsrecht*, 2nd edn (Heidelberg, CF Müller, 2005) 278.

[101] See especially, H Ullrich, *Anti-Unfair Competition Law and Anti-Trust Law: a Continental Conundrum?*, EUI Working Papers, Law No 2005/01 (2005).

[102] See generally Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 422.

[103] See generally Ramos, 'A União Europeia e o MERCOSUR. Perspectivas Institucionais' (n 3) 69; and Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 282.

[104] See also Ramos, 'A União Europeia e o MERCOSUR. Perspectivas Institucionais' (n 3) 71–72; and Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 425.

[105] See also Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 424.

the negative impact on competition results from the existence of a causality nexus between the practice and the anti-competitive effects.[106]

Among the many examples listed in article 6, we can distinguish between the so-called direct restrictions of competition and other restrictions of competition. Direct restrictions encompass anti-competitive behaviours whose object is per se restrictive of competition[107] and are therefore deemed to be intrinsically harmful to competition without the need for a detailed market analysis. Examples of direct restrictions taken from article 6 are price-fixing agreements (article 6(I)), output reducing agreements (III) and agreements to divide markets (IV). However, other examples taken from ECL could also fit the general provision of article 4: agreements allocating customers, imposing a duty to deal exclusively through agreed market channels, or banning exports, or likewise restricting the buyer's freedom to deal, are generally considered to be direct restrictions of competition.[108]

Notwithstanding the fact that a specific practice might fall into one of the examples listed in the 17 paragraphs of article 6, a general assessment under article 4 is nevertheless required in order to reach the conclusion that a particular behaviour is anti-competitive. The reason lies in the circumstance that the behaviours described in article 6 are deemed to be restrictive of competition 'in so far as they come within the meaning of Article 4'. Conversely, a behaviour can be considered anti-competitive for the simple reason that it fulfils the prerequisites of article 4, although not matching any of the examples listed in article 6.

A point that clearly sets the Protocol apart from the solutions adopted in ECL is the absence of any provision equivalent to article 81(3) EC.[109] Unlike ECL, and notwithstanding its article 7, the Protocol does not include the possibility of exempting anti-competitive practices that meet an economic balancing test such as the one set out in article 81(3) EC. Though such a possibility exists under the national competition laws, it should be stressed that the paths chosen in Argentina and Brazil were not identical. Under article 1 ACL,[110] the prohibition of anti-competitive practices depends on the existence of a negative impact on the general interest ('de modo que pueda resultar perjuicio para el interés económico general'), an undetermined concept that recalls the rule of reason of US antitrust and has since the 1990s been interpreted in order to bring ACL closer to economic efficiency.[111] By contrast, article 54 BCL[112] has adopted a solution very similar to article 81(3) EC, allowing anti-competitive practices that meet the criteria included therein and which are very similar to those included in article 81(3) EC. The most relevant

[106] See generally Mestmäcker and Schweitzer, *Europäisches Wettbewerbsrecht* (n 20) 283–86.

[107] See generally Bellamy and Child, *European Community Law of Competition* (n 19) 163–64. The case law on agreements with a restrictive object per se goes back to the seminal *Consten and Grundig* judgment (Case 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299) and there have been frequent cases since then.

[108] Bellamy and Child, *European Community Law of Competition* (n 19).

[109] Article 81(3) EC states: 'The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings; any decision or category of decisions by associations of undertakings; any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.

[110] See especially Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 497–504.

[111] Ibid 500–1.

[112] See generally Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 491–97.

difference vis-à-vis ECL relates to the fact that article 54 BCL has proved to be more generous than its European counterpart, in allowing the CADE (*Conselho Administrativo de Defesa Econômica*, or Administrative Council of Economic Defense) to authorise an anti-competitive practice if the latter (i) meets three out of the four conditions set by the same provision ('desde que atendidas pelo menos três das condições previstas nos incisos do parágrafo anterior'); (ii) is required by preponderant reasons relating to the national economy and the common good ('quando necessários por motivo preponderante da economia nacional e do bem comum'); and (iii) as long as it does not entail a loss for the final consumer or user ('e desde que não impliquem prejuízo ao consumidor ou usuário final').[113]

The divergences between the ACL and BCL might very well account for the absence of any exemption mechanism in the Protocol, but the situation will be bound to change if the latter comes into force, as not only will the positive effects of competition restraints have to be weighed, but also because the absence of escape valves (such as exemptions and a *de minimis* rule) will risk overburdening the MERCOSUR system of competition rules.

(ii) Abuse of a Dominant Position

Article 4 also refers to the abuse of dominance in the following terms:

> Acts, whether individual or concerted, whatever their form … which constitute an abuse of a dominant position in the relevant market of goods or services within MERCOSUR and which affect trade between States Parties, shall, irrespective of fault, be violations of the rules of this Protocol.

As regards abuse of dominance, the similarities between the Protocol and ECL are evident, as the general clause of article 4 and the non-exhaustive list of examples in article 6 reflect the structure of article 82 EC.[114]

In ECL, dominance is not considered to be in itself anti-competitive, but it is rather its abuse that infringes competition rules.[115] Furthermore, the assessment of dominance takes as a reference point not the market as a whole, but rather a certain sphere of influence therein, encapsulated in the concept of 'relevant market'. In MERCOSUR, the first assertion derives from the combined interpretation of the reference to abuse in article 4 with the caveat introduced by article 5[116] that '[s]imple success in the market resulting from natural process based on the greater efficiency of an economic agent in relation to its competitors shall not amount to an offence against competition'. The second assertion finds its roots in the explicit reference included in article 4 to a 'relevant market for goods or services'.

In the context of ECL, the 'relevant market' is a mere tool to identify and define the boundaries of competition between firms, by identifying the competitive constraints of a

[113] On the question of the existence of a rule of reason in the context of BCL, see especially Bischoff-Everding, *Wettbewerbsrecht im MERCOSUR* (n 9) 73–74.

[114] See generally Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 508.

[115] The point has been repeatedly stressed in the case law of the European Court of Justice; see, eg Case 322/81 *Michelin v Commission* [1983] ECR 3461.

[116] This provision was strongly influenced by art 20 s 1 BCL.

firm.[117] The purpose of the exercise is to evaluate to what extent factors such as demand substitution, supply substitution and, in some cases, potential competition[118] effectively condition the undertaking's behaviour on the market. The definition of the relevant market presupposes two fundamental axes: the *product market*, which comprises 'those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'; and the *geographic market*, which comprises 'the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area'.[119] Article 11 of the Regulation approved by MTC Decision No 1/03 also reflects this approach, stating that the assessment of a dominant position depends, among other factors, on market share, demand substitutability, legal barriers to access to the market, and the degree of influence of the dominant undertaking on prices and demand/supply (combined with supply substitutability and potential competitors).

The ability of the dominant firm to behave independently from the other market players, as a typical feature of dominance, is a common trait underlined not only by ECL, but also by ACL and BCL. However, the two national competition laws have followed different paths as regards the definition of a 'dominant position'. While article 4 ACL merely links the dominant position to cases involving a monopolist, a monopsonist or a firm exerting a significant influence on the market,[120] article 20 BCL takes a double approach: its section 2 links the existence of a dominant position with the control of a substantial part of the relevant market ('parcela substancial de mercado relevante') and its section 3 presumes (*juris tantum*) the existence of a dominant position when the firm or firms control(s) 20 per cent of the relevant market.

(iii) Examples in Article 6 of the Protocol

Article 6 contains a long list of examples of anti-competitive practices, which includes the following:

(I) to fix, impose or enact, directly or indirectly, in agreement with competitors or in isolation, in any form, prices and conditions of purchase or sale in respect of goods, or the performance of services or production;
(II) to obtain or influence the adoption of commercial uniform or concerted behaviour between competitors;

[117] See Commission's Notice on the definition of the relevant market, para 2. This approach is also reflected in art 5 ACL, though the factors referred to therein are not exhaustive; see generally Schreiber, *Das argentinische Gesetz 25.156 zum Schutz des Wettbewerbs* (n 84) 185.

[118] Commission's Notice on the definition of the relevant market, para 13 *et seq.*

[119] Ibid paras 7–8.

[120] 'Relevant influence' is a summary of the provisions, as art 4 ACL provides that a firm also enjoys a dominant position when, without being the only buyer or supplier of a given product, 'it is not exposed to substantial competition or is able, as result of the degree to which it is vertically or horizontally integrated, to determine the economic viability of a competitor or market agent, to the detriment of the latter' ('o, cuando sin ser la única, no está expuesta a una competencia substancial o, cuando por el grado de integración vertical u horizontal está en condiciones de determinar la viabilidad económica de un competidor o participante en el mercado, en perjuicio de éstos').

(III) to regulate markets in goods or services, by entering into agreements to limit or control research and technological development, the production of goods or the performance of services, or to hamper investment intended for the production or distribution of goods or services;
(IV) to divide markets in services or in finished or semi-finished goods, or the sources of supply of raw materials or intermediate goods;
(V) to limit or impede the access of new undertakings to the market;
(VI) to concert prices or advantages that may affect competition in public bids;
(VII) to adopt dissimilar conditions in equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(VIII) to make the sale of a product subject to the acquisition of another or to the utilisation of a service, or to make the performance of a service subject to the utilisation of another or to the acquisition of a product;
(IX) to impede the access of competitors to sources of inputs, raw materials, equipment or technology, as well as of distribution channels;
(X) to demand or to grant exclusivity in relation to the dissemination of publicity in the mass media of communication;
(XI) to makes purchases or sales subject to the condition of non-use or acquisition, sale or supply of goods or services produced, processed, distributed or marketed by a third person;
(XII) to sell, for reasons unjustifiable in commercial practice, merchandise at prices below cost;
(XIII) to refuse unreasonably the sale of goods or the performance of services;
(XIV) to break off or reduce large scale production without justifiable reason;
(XV) to destroy, to render useless or to monopolise raw materials, or intermediate or finished goods, as well as to destroy or to render useless or to impede the use of equipment for their production, distribution or transportation;
(XVI) to abandon, or to cause the abandonment of, or to destroy crops or plantations without good reason;
(XVII) to manipulate markets in order to impose prices.

The limitations of space in the present chapter only allow for a brief overview of the contents of article 6, taking as a reference point the equivalent provisions in ECL.[121] It will become clear from the comparison that, though substantively close to ECL, article 6 of Protocol reflects a more descriptive and far-reaching approach, in line with article 2 ACL and article 21 BCL. The five examples contained in the EC Treaty (four of them common to concerted practices and abuse of dominance and the fifth exclusive of the former), are scattered throughout the catalogue included in article 6 of the Protocol. In some cases the correspondence is clear, but in others we find ourselves outside the scope of ECL, or of competition law as it is usually understood, for that matter. A (tentative) correspondence between the provisions of ECL and the rules of the Protocol could be as follows:[122]

[121] For further in-depth analysis on ECL see Mestmäcker and Schweitzer, *Europäisches Wettbewerbsrecht* (n 20) and Bellamy and Child, *European Community Law of Competition* (n 19).

[122] Compare ER de Ladmann, 'MERCOSUR' in J Basedow (ed), *Limits and Control of Competition with a View to International Harmonization* (The Hague, Kluwer Law International, 2002) 273–94.

(a) articles 81(1)(a) and 82(a) EC, dealing with concerted practices and abuses of dominance involving directly or indirectly fixing/imposing (unfair) purchase or selling prices or any other (unfair) trading condition, would find correspondence in article 6(I), (VI) and (XVII);
(b) articles 81(1)(b) and 82(b) EC refer both to concerted practices and abuses of dominance consisting in the limitation or control of production, markets, technical development or investments, a matter that is reflected in article 6(III), (XIII) and (XIV);
(c) article 81(1)(c) EC addresses concerted practices involving the sharing of markets or sources of supply and finds correspondence in article 6(IV);
(d) articles 81(1)(d) and 82(c) EC refer to concerted practices and abuse of dominance whereby dissimilar conditions are applied to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. This issue is dealt with under article 6(VII) and (XII);
(e) articles 81(1)(e) and 82(d) EC deal with concerted practices and abuse of dominance whereby the conclusion of contracts is subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. In the Protocol, we can find equivalent provisions in article 6(VIII) and (XI).[123]

As regards the provisions of article 6 not mentioned above, it is hard to imagine how items (X), (XV) and (XVI) could fall within the general clauses of articles 81 and 82 EC.[124] Conversely, article 6(II) could fit into any of the above-mentioned provisions of the EC Treaty.

IV Conclusion

The analysis undertaken in this chapter aimed at providing an overview of the competition provisions of MERCOSUR drawing, wherever possible, parallels with both ACL and BCL, as well as with ECL. The approach was necessarily prospective, since the Fortaleza Protocol has yet to enter into force, and suffers from the inherent uncertainty of things to come. Taking into consideration that the Protocol was agreed in 1994, and the effects of the most recent international economic crisis, which favour protectionism rather than free trade, the possibility that the Protocol will come into force in the near future looks dim at best.

This chapter will conclude with the review of some of the points that may prove problematic once—or when—the Protocol comes into force. These are of a general nature, relating to MERCOSUR as it was conceived and has developed so far, and of a specific nature, regarding the legal solutions adopted in the Protocol.[125]

[123] Compare Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 541–43 and 546; the author stresses the convergences between art 6(X) and (XI), on the one hand, and art 82(a), (b) and (c) EC, on the other.
[124] But see Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 540, who sees a correspondence between art 6(XIV) and (XVI) and art 82(b) EC.
[125] Compare Salomão Filho, 'Des MERCOSUR als Marktregelung' (n 4) 43–44.

On a general level, I would emphasise two points. The first concerns the absence of supremacy and direct effect from the provisions governing MERCOSUR, a point that will tend to impact negatively on the interaction between the national and the intergovernmental levels of competition law. It should suffice to recall the situation pre-Regulation 1/2003 in Europe, and consider the multiple problems deriving from the interplay between national and European competition laws. The second potentially problematic general point relates to the disparities concerning the state of development and effectiveness of each of the state parties' competition provisions, a point further aggravated by the above-mentioned absence of supremacy and direct effect.

On a specific level, I would regard as problematic the following points. First, the absence from the Protocol of state aid control is extremely worrying, both from the perspective of free trade[126] and in terms of the effectiveness of competition law. Both aspects converge in the fact that, without state aid control, the achievement of a common market will be considerably slowed down, if not adjourned *sine die*. Secondly, it remains to be seen to what extent the generosity of the Protocol on issues such as the concept of undertaking, the absence of a *de minimis* rule and the far-reaching examples listed in article 6, will turn into practical problems once the Protocol is implemented. Thirdly, on the procedural level, the path chosen by the Protocol is excessively complex, lengthy, prone to political interference and eventually ineffective (a particularly good example being the mechanisms for the implementation of sanctions).

On a final note, caution concerning excessive approximations to ECL is advisable. It is beyond dispute that the latter has exerted a significant influence, both in the drafting of and in the wording of the Fortaleza Protocol, but it must always be borne in mind that the economic, legal and historical contexts are quite dissimilar. Despite the fact that the Protocol has so far not proven to be an effective tool for implementing competition policy, this should not detract from the importance of competition law for the integration project of MERCOSUR.[127] What it might signify is that, whereas in some points the Treaty of Asunción might have been too timid, in others, the Fortaleza Protocol might have proven to be too bold, and that regulatory competition combined with comity[128] might in fact prove to be a more viable option at this stage than an over-arching solution such as the Protocol.

[126] On the connection between anti-dumping measures and state aids, see generally Fuders, *Die Wirtschaftsverfassung des MERCOSUR* (n 24) 568–71.

[127] See especially Jaeger, Jnr, *Liberdade de Concorrência na União Européia e no MERCOSUR* (n 5) 535.

[128] See MTC Decision No 4/04 on the cooperation between competition authorities to implement national competition laws, above.

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The Protection of Intellectual Property in MERCOSUR

FÉLIX VACAS FERNÁNDEZ

I Introduction

In general terms and according to RX Basaldua, 'by intellectual property right we understand a right in the works emanating from intellectual activity in very different areas such as the literary, artistic, scientific or industrial fields'.[1] While the international protection of these rights can be traced back to the nineteenth century (2008 was the 125th anniversary of the first international treaty on the subject, the Paris Convention for the Protection of Industrial Property of 1883, followed three years later by the Berne Convention on the Protection of Literary and Artistic Works of 1886), their importance has increased exponentially since the 1990s with the deepening of the irreversible processes of globalisation and liberalisation of international trade.

As discussed below, intellectual property and trade are inextricably linked; therefore, the protection of intellectual property rights cannot be achieved effectively without trade regulations to that end. Moreover, such protection can no longer be put in place only at the level of each state, but must also include the international level, universally and also within existing regional economic integration processes. As we shall see, MERCOSUR, as an international organisation whose aim is to create a 'common market',[2] is no exception to the objective necessity nowadays to regulate intellectual property rights beyond the borders of the individual Member States. Before analysing the agreements that have been adopted within the framework of MERCOSUR in relation to intellectual property rights, we should address a number of considerations concerning this issue and the importance of its international regulation, particularly in the context of integration processes.

With regard to the concept of intellectual property rights, article 2 of the Stockholm Convention provides that:

> 'intellectual property' shall include the rights relating to:
>
> – literary, artistic and scientific works;
> – performances of performing artists, phonograms, and broadcasts;
> – inventions in all fields of human endeavour;
> – scientific discoveries;

[1] RX Basaldúa, *La Organización Mundial del Comercio y la regulación del comercio internacional* (Buenos Aires, LexisNexis, 2007) 489.

[2] Treaty of Asunción, art 1.

– industrial designs;
– trademarks, service marks, and commercial names and designations;
– protection against unfair competition;

and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.[3]

On the other hand, Chapter II of the Agreement on Trade-Related Aspects of Intellectual Property Rights[4] (TRIPS) regulates the following rights: (1) copyright and related rights; (2) trademarks; (3) geographical indications; (4) industrial designs; (5) patents; (6) lay-out designs (topographies) of integrated circuits; (7) protection of undisclosed information; (8) control of anti-competitive practices in contractual licences.

Whichever definition is accepted, these are the rights which are generally regarded as making up the field of intellectual property, each of which is in turn shaped by more specific rights that form its content. Since these rights began to be protected through international treaties in the last third of the nineteenth century, the system of international protection of intellectual property rights has steadily improved. Through this process, a system of treaties with universal application has been put in place, beginning with the above-mentioned Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886, which were followed by the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, adopted in Rome on 26 October 1961, the Treaty on Intellectual Property Protection of Integrated Circuits, adopted at Washington on 26 May 1989, and, most significantly, the Convention establishing the World Intellectual Property Organization (WIPO) adopted at Stockholm on 14 July 1967.

The WIPO was responsible for managing those treaties whose main objective was to protect intellectual property at a universal level. However, despite this, as noted by S Lester and B Mercurio, 'intellectual property was largely unregulated and only minimally protected internationally through the WIPO administered agreements'.[5] Accordingly, during the 1980s some of the most developed states, led by the United States, began to focus on the profound relationship that intellectual property has with trade, and thus to argue for the need to include the issue within the framework of regulation established under the General Agreement on Tariffs and Trade (GATT). The result was the adoption of the TRIPS Agreement on 15 April 1994, as part of the Marrakech Treaty that established the World Trade Organization (WTO).

In the first paragraph of its Preamble, the TRIPS Agreement recognises the profound relationship between intellectual property and trade, its protection and promotion, at the international level, noting that states parties: 'Desir(e) to reduce distortions in and impediments to international trade, and tak(e) into account the need to promote effective and adequate protection of intellectual property rights and ensure that measures and

[3] Convention establishing the World Intellectual Property Organization, signed at Stockholm on 14 July 1967 and as amended on 28 September 1979, art 2.

[4] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is Annex 1C of the Marrakesh Agreement establishing the World Trade Organization, signed in Marrakesh, Morocco, on 15 April 1994.

[5] S Lester and B Mercurio, *World Trade Law: Text, Materials and Commentary* (Oxford and Portland, Hart Publishing, 2008) 706.

procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.' The Agreement recites the states parties' wish 'to establish a mutually supportive relationship between WTO and the World Intellectual Property Organization' and in article 2 provides as follows: 'Nothing in Parts I to IV of this Agreement shall derogate from obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in respect of Integrated Circuits'.

Thus, the new international legal-political context created by the TRIPS Agreement provides only minimum standards, in relation both to the content of the protection of intellectual property rights and the instruments of implementation of its provisions, that states parties may exceed to ensure higher levels of protection of such rights, or transpose into their domestic legal systems according to their own procedures and practices. As Lester and Mercurio explain: 'Members are required to comply with the entirety of the TRIPS Agreement but it is important to note that the Agreement only sets a minimum standard, which allows Members to provide more extensive intellectual property protection if they desire. Additionally, Members are free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice'.[6]

Article 1.1 TRIPS provides:

> Members shall give effect to the provisions of this Agreement. Members may provide in their legislation, although not required to do so, more extensive protection than required by this Agreement, provided that such protection does not violate its provisions. Members shall be free to determine the appropriate method to apply the provisions of this Agreement within their own legal system and practice.

On this basis, higher standards offering greater protection for intellectual property rights can be developed not just by individual member states, but by states acting together in the framework of the regional integration processes in which they are involved, in relation both to the content of rights and to the procedural protection mechanisms. This is on the understanding that the most-favoured-nation clause in article 4 TRIPS[7] does not contain any exception for free trade areas (as provided by article XXIV GATT), so that any higher thresholds for the protection of intellectual property rights superior to the standards laid down in the TRIPS Agreement will become applicable to all nations, not only to the states parties to the integration process.

Since, as we have seen, rules relating to intellectual property affect both intellectual property rights and international trade, developing from the provisions of the TRIPS Agreement a deeper and more effective regulation that seeks to harmonise, and indeed to establish, common standards in the field, will not only promote the effective protection of intellectual property rights, but at the same time will serve to remove barriers to trade and thus help to meet the requirements for the creation of a genuine common market (or at least a free trade area, depending on the will and ambition of the members of the integration process in question).

[6] Ibid 709.

[7] TRIPS Agreement, art 4 provides: 'With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members'.

Clearly, regulation providing for more than the minimum standards of protection, whether at the level of the individual state or of the relevant integration process,, must respect the principles and minimum standards contained in the TRIPS Agreement relating to trade. But, as we have already seen, greater protection of intellectual property rights and a greater degree of trade liberalisation are not just possible or desirable, but necessary for the establishment and effective implementation of a genuine single market, ie one free of internal trade barriers, including those related to intellectual property.

Under Article 1 of the Treaty of Asunción, which established MERCOSUR, Member States undertake to harmonise their legislation in relevant areas to ensure the strengthening of their integration process. This integration process aims at the establishment of 'a common market', which is defined as:

- The free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and *non-tariff restrictions on the movement of goods and any other equivalent measure*;
- The establishment of a common external tariff and the *adoption of a common commercial policy* in relation to third States or groups of states and the coordination of positions in regional economic forums and international trade;
- *Coordination of* macroeconomic and *specific policies between the parties*: *foreign trade*, agricultural, *industrial*, fiscal, monetary, exchange rate and capital, services, customs, transport and communications, and others that agree, in order to ensure an adequate competition among States Parties.[8]

The coordination of policies and the adoption of a common commercial policy and free movement of goods, services and factors of production in many cases certainly require the harmonisation of the domestic legislation of the Member States. This would seem to be true for intellectual property rights, even though they may be categorised as 'private rights',[9] since their relationship to trade is particularly significant and their regulation could involve unilateral constraints or barriers to trade; as MERCOSUR is an integration process aimed at creating a common market, it must necessarily involve (as the Treaty of Asunción establishes) 'the elimination of customs duties and tariffs restricting the movement of goods and any other equivalent measure'.

As Martínez Medrano and Soucasse point out: 'In each of the States Parties of MERCOSUR, there are property rights, trademarks, patents, industrial designs, in which, under national laws, the principle of territoriality rules. That is, while there will be a single market, from the standpoint of Industrial Property Rights, national territories remain. Industrial property rights may then become an obstacle or a barrier to trade and free movement of goods and services within the common market'.[10] To avoid this, it will therefore be necessary to undertake a major effort of coordination and harmonisation of the rules governing such rights, starting with the minimum standards laid down in the TRIPS Agreement, to which all MERCOSUR Member States are parties.

In a large measure, the development of the efforts of the MERCOSUR Member States towards harmonisation have focused on adapting their national legislation to the requirements of the multilateral international treaties to which they are parties, in particular the

[8] Emphasis added.

[9] TRIPS Agreement, Preamble.

[10] G Martínez Medrano and G Soucasse, 'Armonización de la propiedad industrial en el MERCOSUR', 1, available at www.derecho-comercial.com.

TRIPS Agreement, and on establishing common minimum standards of protection for intellectual property. However, there has been some progress within MERCOSUR (if somewhat timid and insufficient) towards meeting the objectives set out in the Treaty of Asunción, in the following specific areas:

(1) Protocol on the harmonisation of intellectual property rights in MERCOSUR, relating to trademarks, indications of source and appellations of origin, Asunción, 5 August 1995, CCM Decision No 08/95;
(2) Protocol on the harmonisation of standards in the field of industrial designs, Río de Janeiro, 10 December 1998, CCM Decision No 16/98;
(3) CCM Decision No 2/01 on drug policy in MERCOSUR, Bolivia and Chile, Montevidéo, 27 November 2001.

In the following sections, we will analyse the law of MERCOSUR concerning intellectual property rights, as set out in the above-mentioned instruments.

II Protocol on the Harmonisation of Intellectual Property Rights in MERCOSUR, Relating to Trademarks, Geographical Indications and Appellations of Origin

In the light of the ongoing delays in the Uruguay Round negotiations, including those on intellectual property, MERCOSUR took the initiative in 1992 to create the Commission on Intellectual Property,[11] which in 1994 adopted an Agreement on Harmonisation of Intellectual Property in MERCOSUR, which was approved by the Council of the Common Market (CCM) on 5 August 1995 as the Protocol on the harmonisation of intellectual property rights in MERCOSUR, relating to trademarks, geographical indications of source and appellations of origin. The Protocol was ratified by Paraguay on 15 November 1996 and by Uruguay on 14 December 1998, having entered into force for both states on 6 August 2000.

However, it is noteworthy that, 15 years after its adoption, neither Argentina nor Brazil have ratified the Protocol, which is thus not in force for those states. Despite this, since the Protocol largely reflects the minimum standards laid down in the TRIPS Agreement, many of its provisions are reflected in the domestic legislation of the four MERCOSUR Member States. In what follows we analyse the provisions of the Protocol, distinguishing, on the one hand, the regulations on trademarks and, on the other, those on geographical indications and designations of origin, first referring to the general rules common to both fields.

A Common Provisions: General and Final

According to the Preamble, the MERCOSUR Member States adopted this Protocol with the aim to 'reduce distortions and impediments to trade and movement of goods and

[11] Recommendation 7/94.

services in the territory of States Parties to the Treaty of Asunción' and to 'promote effective and adequate protection of intellectual property rights regarding trademarks, indications of source and appellations of origin and ensure that the exercise of such rights does not in itself constitute a barrier to legitimate trade'.[12]

In seeking to achieve these goals, the drafters of the Protocol were aware that they could not begin from a blank sheet but, as we have already seen, had to recognise the validity of the multilateral international treaties in this field to which MERCOSUR Member States were parties. Thus, article 2 of the Protocol provides that '[t]he States Parties undertake to observe the rules and principles of the Paris Convention for the Protection of Industrial Property (Stockholm Act 1967) and the Agreement on Trade—Intellectual Property Rights (1994)' and stresses that the provisions of the Protocol are not to affect the obligations resulting therefrom. The Protocol therefore attempts to move beyond the minimum standards set at the multilateral level, in order to meet the objectives set out in the Treaty of Asunción.

Consistent with this, article 1 of the Protocol uses the same technique to establish minimum standards that each state party can exceed in order to 'give broader protection, provided it is not incompatible with the norms and principles of Treaties mentioned in this Protocol'. Any such broader protection, as a result of the inclusion of a national treatment clause, will be extended to nationals of other states parties:

> Each State Party shall accord to the nationals of other States Parties treatment no less favourable than that accorded to its own nationals with regard to the protection and exercise of intellectual property rights regarding trademarks, indications of source and appellations of origin.[13]

The final article within the General Provisions, article 4, regulates the 'waiver of legalisation' 'of signatures and documents on procedures relating to intellectual property rights on matters of trade marks, geographical indications and denominations of origin' and also the use of 'legalised translations in procedures relating to intellectual property relating to trade marks, geographical indications of source and denominations of origin, where the original documents were in Spanish or Portuguese'.

As regards the final provisions of the Protocol, significant obligations are contained in articles 22 and 23 to implement 'effective measures to curb production in trading pirated or counterfeit products' and to cooperate in 'reviewing and resolving difficulties in the movement of goods and services in MERCOSUR, as a result of issues relating to intellectual property'. A general duty of cooperation is established in article 24, in the form of a programme to develop in the near future harmonised regulation of the different intellectual property fields; however, as we shall see below, this has not yet been fully implemented.

Finally, article 25 provides that disputes which may arise from the application, interpretation or breach of the provisions of the Protocol 'shall be settled by direct diplomatic negotiations', referring to 'the procedures under the dispute settlement system in force in MERCOSUR' in the event that such negotiations are not successful.

[12] Protocol on the harmonisation of intellectual property rights in MERCOSUR, relating to trademarks, indications of source and appellations of origin, Asunción, 5 August 1995, CCM Decision No 08/95.

[13] Ibid art 3.

B Regulatory Frameworks

With regard to the specific regulations contained in the Protocol relating to trade marks, articles 5 to 18, separate provision is made, on the one hand, as to the delimitation of the subject matter of regulation (ie the trademark itself), and, on the other, as to regulation of matters relating to its registration.

As regards the delimitation of the subject matter of regulation, the Protocol approaches the issue from the objective definition of brand; article 5.1 provides that a trademark is 'a mark for registration for any sign that is capable of distinguishing in the trade products or services'. Article 5.2 adds that 'any State Party may require, as a condition of registration, that the sign must be visually perceptible'. However, there are clear differences in the domestic regulation of the MERCOSUR Member States on this issue, as Brazil expressly requires visual perceptibility in article 122 of its Code of Industrial Property,[14] while the Argentinean Trademark Act of 1980[15] does not. In fact, in March 1999 a request was granted by the National Institute of Industrial Property of Argentina for the first registration of a trademark which was not visible.

Article 5.3 of the Protocol extends protection to both service marks and collective and certification marks, while article 5.4 declares that 'the nature of the product or service to which the mark has to be applied will not, in any case, preclude the registration of the mark'. In this regard, Martínez Medrano and Soucasse point out that 'if the sale of the product is prohibited or is contrary to morality, the mark must still be granted even if it could not be used afterwards. There is a difference between a trade mark contrary to morality and products contrary to it. This is the second course. Otherwise the Trademark Office would become an agency for approval of products or services'.[16]

After defining trademarks that may be registered in generic terms, as discussed above, the Protocol then offers an indicative list in article 6 (by no means intended to be comprehensive), which includes: 'fancy words, names, pseudonyms, commercial slogans, letters, figures, monograms, shapes, portraits, labels, badges, prints, borders, lines and stripes, color combinations and arrangements'. The article makes reference to 'the form of products, containers or packaging, or the means or places of sale of products or services'. As regards three-dimensional trademarks (or brand packaging), all the MERCOSUR Member States (except Argentina)[17] permit registration of such a mark, provided it is not in a form that is required for technical reasons due to the nature of the product. Finally, article 6.2 provides that brands can consist 'of national or foreign geographical indications, provided it is not a geographical indication or denomination of origin' as defined in the Protocol.

As regards regulation of registration of trademarks, article 7 of the Protocol requires only a 'legitimate interest' of a 'natural or legal person in public law or private law' as grounds for application for registration of a mark. On this basis, we can say that the system of trademark regulation in the Protocol is attributive, since ownership of a trademark is acquired with its registration, which can be requested by the person, physical or legal, who has a legitimate interest in it. However, article 8, which regulates the priority

[14] Law 9279 of 14 May 1996.
[15] Law 22,362 of 26 December 1980.
[16] Martínez Medrano and Soucasse, 'Armonización de la propiedad industrial en el MERCOSUR' (n 10) 1.
[17] Argentinean Trademark Act, art 2.C.

to register the mark, allows the possible recognition of so-called marks of fact, that is, unregistered trademarks utilised in practice. This introduces (even if by way of exception) an element of the declarative system, according to which the registration of a trademark does not confer ownership of it, as property in the mark exists prior to registration by its mere use, but only serves to publicly declare the mark's existence. Article 8 provides as follows:

> Priority in obtaining the registration of a mark will be accorded to the claimant who first requested it, unless that right is claimed by a third party who has used the mark publicly, peacefully and in good faith, in any State Party, during a period of at least six months, provided that the third party challenges the claimant when making his request to register the mark.

This rule is based on the similar provisions of article 129 of the Code of Trademarks in Brazil, which is also implicitly included in the laws of Uruguay and Paraguay, and is applied jurisprudentially in Argentina.

The next article in the Protocol (which is arranged to correspond to a timeline of the registration process), sets out the trademarks that cannot be registered. The first four paragraphs of article 9 prohibit the registration of:

- Descriptive signs or signs generically used to designate the goods or services or types of products or services that the brand distinguishes, or which are an indication of origin or appellation of origin.
- Deceptive signs, contrary to morality or public order, offensive to persons alive or dead or to creeds; signs consisting of national symbols of any country; signs which might falsely suggest association with persons alive or dead, or with national symbols of any country or violating its value or respectability.
- Brands that demonstrably affect the rights of third parties and any trademark filed in bad faith which is found to affect the rights of others will be declared invalid.
- Signs that imitate or reproduce, in whole or in part, a mark which the applicant must have known to belong to an owner established or domiciled in any of the States Parties and which is likely to cause confusion or association.

However, in an apparent systematic error in the Protocol, the last two paragraphs of article 9 deal with the regulation of well-known or high reputation trademarks. A 'well-known mark' would be a trademark well known in the specific sector of products that the mark distinguishes, whereas a 'high reputation mark' refers to a trademark which would be recognised by all consumers. While article 9.5 and 9.6 are silent on whether or not such marks must be registered to ensure their protection, article 16.3 of TRIPS must be understood to apply, under which registration is certainly required.

Article 10 establishes the time limits for registration and its renewal, establishing a term of 10 years, extendable for further successive 10-year periods; but, if the time period is extended, there cannot be any change in the trademark nor any extension of the list of products or services covered by the registration.

Once the trademark has been registered, following the system described above, article 11 of the Protocol sets out the rights conferred by registration of the mark as follows:

> The registration of a trademark confers on its proprietor the exclusive right to use, and to prevent any third party from performing without their consent, among others, the following acts: use in trade of a sign identical or similar to the mark for any goods or services when such a use could create confusion or a likelihood of association with the registrant, or an unfair trade or economic

damage due to a dilution of the distinctive force or commercial value of the mark, or an unfair advantage of the prestige of the mark or its owner.

The grant of such rights is not unlimited. Article 12 limits the rights by recognising to third parties the use 'among others, of the following indications: (a) his name or address, or that of his business, (b) indications or information on availability, use, application or compatibility of his products or services, in particular with regard to spare parts or accessories', provided only 'that such use is made in good faith and is unable to cause confusion about the source of business products or services'.

An important issue which inevitably arises in the regulation of trademarks is the question of exhaustion: the first marketing of the product involves the exhaustion of trademark rights, as otherwise the holder of such rights could prevent subsequent resale by having full control over the marketing chain of the product. Article 13 of the Protocol regulates this issue, stating that 'the registration of a mark may not prevent the free movement of the marked products introduced into legitimate trade by the owner or with his authorisation'; although it does not specify whether the exhaustion is to be applied in MERCOSUR as a whole, or whether it is to be applied at the national or international level, thus leaving Member States a free choice. Brazil and Uruguay have opted for national exhaustion, while Argentina and Paraguay have opted for international exhaustion.

Article 14 of the Protocol deals with the issue of invalidity of registration of the mark, if 'it was registered in contravention of the prohibitions set forth in articles 8 and 9'. Articles 16 and 15 refer to the use and cancellation for lack of use of the trademark, respectively. Article 16 provides that 'the burden of proof of the use of the mark lies with the trademark owner', and further that 'the use of the mark in any State Party is sufficient to avoid the cancellation of registration requested in any of them'. By contrast, the first paragraph of article 15 allows 'the competent national authority . . . to cancel the registration of a mark if it had not been used in any of the States Parties during the five years preceding the date when the cancellation request was presented'.

C Regulation of Geographical Indications and Designations of Origin

Articles 19 and 20 of the Protocol regulate geographical indications and designations of origin. These terms are defined as follows: 'a geographical indication [is] the geographical name of the country, city, region or locality in its territory, which is known as a centre of extraction, production or manufacturing of certain products or provision of a concrete service'; and an 'appellation of origin [is] the geographical name of a country, city, region or locality in its territory, which designates products or services whose qualities or characteristics are due exclusively or essentially to the geographical environment, including natural and human factors'.

Under the Protocol, and in accordance with the above definitions, states parties undertake to protect each other's respective geographical indications and designations of origin. Furthermore, article 20 prohibits the registration as trademarks both of geographical indications of source and appellations of origin.

III Protocol on the Harmonisation of Standards in the Field of Industrial Designs

The general duty of cooperation in the harmonisation of intellectual property rights within MERCOSUR set out in article 24 of the Protocol relating to trademarks, indications of source and appellations of origin prompted continuing efforts to conclude additional agreements in other matters relating to industrial property. These came to fruition with the adoption by the CCM on 10 December 1998 in Río de Janeiro of the Protocol on the harmonisation of standards in the field of industrial designs.

As in the case of the 1995 Protocol, this second Protocol was adopted with the intention to 'reduce distortions and impediments to trade and movement of goods and services in the territory of States Parties to the Treaty of Asunción', and to 'promote effective and adequate protection of intellectual property rights in respect of industrial designs and ensure that the exercise of such rights does not represent in itself a barrier to legitimate trade'.[18] However, more than 10 years after its adoption, none of the MERCOSUR Member States have ratified it.

The approach adopted in this Protocol follows the line marked out by the 1995 Protocol, both in respect of its objectives and in relation to the common (both general and final) rules. Thus, article 1 provides *minimum standards* that states parties should ensure, but leaves them free to 'give broader protection, provided it is not incompatible with the rules and principles of the treaties referred to in this Protocol'. Similarly, article 2 proclaims the validity of international obligations contained in the Paris Convention for the Protection of Industrial Property (Stockholm Act 1967) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), which the parties undertake to observe. Article 3 contains the national treatment clause, and article 4 the norms related to waivers of legalisation and translation of 'documents in proceedings relating to intellectual property in the area of Industrial Designs'.

As regards the final provisions of the Protocol, in addition to the traditional requirements regarding the deposit of the Treaty, its entry into force (which as we have seen has not yet happened), and adherence to its terms, these provisions adopt the same approach as the 1995 Protocol with regard to dispute settlement (article 22) and add a commitment to make 'efforts towards reaching a consensus within a period of two years on additional protocols to harmonise procedures and flexibility of applications for deposit of demands on Industrial Designs'—a commitment which also has not yet been met.

In relation to the definition of 'industrial design', article 5 provides that 'Industrial designs capable of protection are original creations consisting of a plastic form or giving a special appearance to an industrial product conferring on it an ornamental character'. Article 9.2 excludes from the protection afforded by this Protocol 'designs that constitute a purely artistic item or which are not suitable for industrial manufacturing'. As Martínez Medrano and Soucasse point out: 'This addition is confusing because it incorporates elements of a theory which is inconsistent with the definition adopted by the Protocol, and does so in the chapter of the exclusions. We understand that it must simply refer to

[18] Preamble to the Protocol on the harmonisation of standards on industrial designs, CCM Decision No 16/98 of 10 December 1998.

the condition of the enforceability or industrial application, but this reference is made in Article 8 paragraph 2 as a requirement to confer protection'.[19]

In fact, article 8 of the Protocol establishes two requirements for the protection of industrial designs: originality and industrial application. The second element is self-explanatory; 'originality' is defined as 'differing significantly from the known industrial designs', and this is further clarified as follows:

> 1.1. Designs will not be considered original if they have been publicly used or made accessible to the public in MERCOSUR or any other country, by any means, before the date of the application or the priority validly claimed.
>
> 1.2 Designs will not be considered original for the purposes of protection if they are industrial designs that have been the subject of a previous application in the country of filing, provided the request is still accessible to the public.
>
> 1.3 Designs will not be considered already known if they were released within the six months preceding the date of filing of the application or the priority, under the following conditions:
>
> (a) that such disclosure resulted directly or indirectly from acts done by the author or his successor or from a breach of contract or other unlawful act committed against any of them;
> (b) that such disclosure resulted from the erroneous or improper publication of requests by the Office of Industrial Property.

Article 14 provides that the registration of industrial designs 'will extend for a minimum of 10 years from the application'. Without imposing a compulsory obligation on states parties, it commits them to try to establish in their domestic law a renewal term of at least five years. Article 16 states the grounds for terminating the registration of an industrial design,[20] and article 17 regulates actions for revocation of registration.

The rights arising from registration of industrial designs are contained in article 11 and are the following: 'to prevent third parties, without consent, from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design when such acts are undertaken for commercial purposes'. Under article 12, these rights do not extend to acts done 'in private and non-commercial use, provided they do not significantly impair the economic interest of the owner; or done exclusively for purposes of experimentation, teaching or research'. Finally, article 13 regulates exhaustion of the right:

> Protection of an Industrial Design by one of the States Parties shall not prevent the free movement of articles bearing or incorporating the same design after they have been introduced into the legitimate trade in any of the States Parties of MERCOSUR, by the holder or with his consent.

[19] Martínez Medrano and Soucasse, 'Armonización de la propiedad industrial en el MERCOSUR' (n 10) 18.

[20] The grounds are: '(1) Expiration of the term of registration. (2) Where the laws of the States Parties provide for the payment of fees for the maintenance of law, failure to pay them. (3) Waiver of the owner, without prejudice to the rights of others. (4) Where the laws of the State Party so provide, failure to maintain a representative in the country of domicile or establishment, in the case of non-resident holder'.

IV Patents and Drugs: Drug Policy in MERCOSUR, Bolivia and Chile

In relation to patents, although there is no systematic policy development in general within MERCOSUR, the Member States have taken a common political decision, which has had obvious legal effects in MERCOSUR and its associated countries, Bolivia and Chile, with respect to a specific issue—drugs—which directly affects the issue of patents. In the framework of the Twelfth Meeting held in Montevidéo on 27 November 2001, the attendees approved an agreement entitled the 'drug policy of MERCOSUR, Bolivia and Chile', which was endorsed by the CCM on 18 February 2002.

The general purpose of the policy is:

> to seek to improve state action, particularly with regard to four themes identified as key objectives for the countries of the region in the area of medicines:
>
> (a) expanding people's access to drugs, considering the needs of different social groups;
> (b) ensuring the quality, safety and efficacy of the drugs circulating in the region;
> (c) promoting a culture of rational use of medicines;
> (d) creating an environment of research and development in the sector that supports better integration of the countries in the domain of the technology sector.[21]

As noted by C Farías Zárate: 'The document in Annex IV is a tool through which the construction of a common medication policy for MERCOSUR, Bolivia and Chile, is shaped, considering health as a basic pillar for the building of any social and political order to secure the quality of life of the people who compose it'.[22] Indeed, the policy expresses, in general, that 'in the formation of the common market among States Parties and Associates, the convergence of policies on issues of mutual interest that have significant impact on living conditions and the welfare of the regional population has especial relevance'.[23] The policy goes on to set out various reasons to justify the adoption of the proposed measures, including the following two:

> First, it must be emphasized that the drugs are critical to the health policy of all states in the region as key inputs for the health of populations. Medicine is the main therapeutic tool and has an important current role in the quest for equal opportunity through social policies. Most of the population of the region has no access to medicines when they need them. It is estimated that of the total population of the countries involved, at least 80 million people experience great difficulty in gaining access to needed medicines.
>
> Secondly, it is considered that countries in the current state of development pass through a demographic and epidemiological transition which increases the prevalence of chronic degenerative diseases, alongside the resurgence of certain diseases such as tuberculosis, dengue and cholera. These diseases, along with others that have a high potential of infection, such as acquired immunodeficiency syndrome, require a continued use of drugs, often for the rest of patients' lives. In some cases, the drugs involve a significant aggregation of high technology, resulting in

[21] CCM Decision No 2/01 on drug policy in MERCOSUR, Bolivia and Chile, Montevidéo, 27 November 2001, Pt 1.

[22] C Farías Zárate, 'Mercosur–WTO: The Application of Intellectual Property Rights—The Case of Medicinal Products', 21 June 2007, 7, available at http://notasinternacionales.blogspot.com/2007/06/ltima-actualizacin.html.

[23] CCM Decision No 2/01 on drug policy in MERCOSUR, Bolivia and Chile, Montevidéo, para 3.

> very large costs to patients and government programmes. The phenomenon of microbial resistance also contributes to the need for new and more expensive medicines.[24]

Accordingly, among other means, it was agreed in the policy that a possibility would be to 'rela(x) the patent requirements in cases of high relevance to health'.[25] This was seen as a method to expand throughout MERCOSUR and the associated states the programme earlier launched by Brazil in the fight against AIDS, which despite a confrontation with the United States within the WTO, was finally accepted in the so-called Doha Declaration of 14 November 2001 in the framework of the Fourth WTO Ministerial Conference, just 13 days before the policy was approved by the MERCOSUR Member States, Bolivia and Chile. As noted by Farías Zárate: '[w]e must consider that the provisions of Annex IV to the agreements on TRIPS and Health of the Doha Declaration are not incompatible with it. We can frame the propositions of the Annex well within the parameters proposed in Doha on the hierarchy between the power of a State to protect the health of its people and the intellectual property rights of pharmaceutical patents'.[26]

V Concluding Remarks

We have seen how the development of harmonised regulation of intellectual property rights within MERCOSUR is still far from being a reality. The great majority of the fields relevant to intellectual property rights have not yet been the subject of regulatory treatment within MERCOSUR. This is the case even though article 24 of the 1995 Protocol expressed a commitment to an ongoing programme of cooperation: 'The States Parties undertake to make efforts to conclude, as soon as possible, additional agreements on patents, utility models, industrial designs, copyrights and related fields, and other matters relating to intellectual property'.

As we have seen, this programme has been advanced only in the field of industrial designs (at least theoretically). Paradoxically perhaps, an important agreement on drugs policy has been reached and implemented, which falls squarely within the field of intellectual property rights on patents, but it was concluded by way of exception, utilising the provisions of article 8.2 TRIPS, a multilateral treaty.

Even in the case of the two Protocols adopted by MERCOSUR on harmonisation in matters relating to intellectual property, neither has been ratified by all Member States; the 1995 Protocol is still awaiting a significant grant of consent by Brazil and Argentina, and the consent of all Member States is still awaited for the Protocol on industrial designs. Thus, the desired furthering of the protection of intellectual property rights and the objective of harmonisation of different national laws in this area has not yet been achieved. As indicated by A Uzcátegui and F Kinoshita: 'At present, the alignment proposed by the Protocol is carried out in the States Parties of MERCOSUR and not as a direct consequence of the above Protocol,[27] but by the fact that States Parties of

[24] Ibid.
[25] Ibid.
[26] Farías Zárate, 'Mercosur–WTO: The Application of Intellectual Property Rights' (n 22) 8.
[27] This reflection can be extended to the Protocol on the harmonisation of standards on industrial designs.

MERCOSUR today have their domestic legislation harmonized with the minimum standards required by international conventions on the matter'.[28]

Thus, given the absence of real regulation by MERCOSUR in the field of intellectual property, the Member States have had to harmonise their domestic legislation on the basis of the common minimum standards laid down by multilateral international agreements, particularly the provisions of the TRIPS Agreement. But, as CM Correa reminds us, 'the [TRIPS] Agreement's provisions only state what the minimum rights should be, but not the precise contents of such rights. The Agreement does not in any manner constitute a uniform law. In many areas, various options are open'.[29] Therefore, and as noted at the outset, it would be much more desirable, and indeed almost essential in any regional integration process which has the objective to create a genuine common market, to move beyond what is established by multilateral trade regulation and international protection of intellectual property rights. The delay in reaching this target, set out 13 years ago, probably demonstrates better than anything else the difficulties which the process of integration of the Southern Common Market currently faces.

[28] A Uzcátegui and F Kinoshita, 'Propiedad intelectual en el marco del Acuerdo del Acuerdo MERCOSUR-Unión Europea de 1995: apuntes teóricos para las negociaciones intercontinentales (1999–2002)' (2002) 45 *Revista Secuencia* 229 at 233.

[29] CM Correa, *Intellectual Property Rights, the WTO and Developing Countries* (London, Zed Books, 2000) 103.

18

Consumer Protection Policy in MERCOSUR

CLAUDIA LIMA MARQUES*

I Introduction

In the last decade, consumer protection policy has become more important in regional international organisations[1] and especially in regional integration projects in the Americas, such as MERCOSUR,[2] the Central American Integration System (SICA), the Andean Community (CAN), the Caribbean Community (CARICOM) and to some extent also in the North American Free Trade Association (NAFTA).[3]

This chapter will focus on the development of consumer protection policy in MERCOSUR. As pointed out by Thierry Bourgoignie, consumer law has an inherently 'international character' (*vocation international*).[4] I will divide my observations into two parts: the first will review the evolution of consumer policy in MERCOSUR and the second will make an evaluation of the impact of this policy.

* The author wants to thank Lucas Lixinski for his help with the English version and kind invitation. This chapter is based on the results of the author's 2008 research, published in Canada (Claudia Lima Marques, 'Consumer Protection Policy in Mercosur: an Evaluation' in Thierry Bourgoignie (ed), *L'intégration économique régionale et la protection du consommateur* (Cowansville, Yvon Blais, 2009) 355–400).

[1] As regards the Organization of American States (OAS), see Diego Fernandez Arroyo, and José A Moreno Rodriguez, *Protección de los Consumidores en America-Trabajos de la CIDIP VII (OEA)* (Asunción, Le Ley/CEDEP, 2007) *1et seq*; Claudia Lima Marques, 'Consumer Protection in Private International Law Rules: the Need for an Interamerican Convention on the Law Applicable to Some Consumer Contracts and Consumer Transactions (CIDIP)' in Thierry Bourgoignie (ed), *Regards croisés sur les enjeux contemporains du droit de la consommation* (Cowansville, Yvon Blais, 2006) 145–90. Comparing with the European Union, Andrea Marighetto, 'A proteção dos consumidores no direito internacional privado: estudo comparativo sobre os atuais debates relativos à recente aprovação pela UE do Regulamento (CE) 593 de 2008 sobre a lei aplicável às obrigações contratuais (civis e de consumo) e às propostas da CIDIP VII sobre a proteção interamericana dos consumidores' (2008) 68 *Revista de Direito do Consumidor* (São Paulo) 117.

[2] See Alicia M Perugini, 'Aspectos juridoco-economicos de la jurisdiccion internacional en el ambito del consumidor' in Miguel Angel Ciuro Caldani, (ed), *Del Mercosur* (Buenos Aires, Ciudad Argentina, 1998) 317–28.

[3] See the reports on these integrations projects by Ana Elizabeth Villalta (SICA), Erika Trinajeros (CAN), Philipp McClauren (CARICOM) and James Nehf (NAFTA), in Thierry Bourgoignie (ed), *L'intégration économique régionale et la protection du consommateur* (Cowansville, Yvon Blais, 2009) *171et seq.*

[4] Thierry Bourgoignie, *Eléments pour une théorie du droit de la consommation* (Bruxelles, Story, 1988) 215.

II Characteristics of the Five Stages or 'Eras' of Consumer Protection in MERCOSUR

MERCOSUR has evolved a *sui generis* consumer policy in its first 17 years of existence.[5] The following outlines this slow evolution of consumer policy in MERCOSUR,[6] and delineates the characteristics of what I have called the five different stages or 'eras' of consumer protection in MERCOSUR.

A First Stage (1985–1991): the Consumer as Forgotten Actor

In MERCOSUR's founding Treaty, the 1991 Treaty of Asunción (and also the complementary 1994 Ouro Preto Protocol) there is no explicit reference to the term 'consumer'.[7] In the Preamble to the Treaty of Asunción there is a mention of the goal of improving the 'quality of life of the peoples of the region' and article 1 allows for 'legislative harmonisation' to achieve this objective.[8] The foundations of common consumer protection initiatives arise only from this vague provision and the general goal and Treaty authorisation for legislative harmonisation in civil, commercial and consumer matters.[9]

There was also no mention of consumer protection in the first instrument of economic integration between Argentina and Brazil (Ata de Buenos Aires) in 1985 and this resulted in consumer policy not being considered a priority. It can also be argued that the decision to create only a minimal intergovernmental structure, with all matters decided by consensus of the four Member States, has not assisted in the development of a consumer policy. Neither of the two initial MERCOSUR institutions, the Council of the Common Market (CCM, Consejo Mercado Común) or the Common Market Group (CMG,, Grupo Mercado Común) had a committee or a subgroup on consumer protection. It therefore fell to CMG Subgroup No 10 on macro-economic issues to take the initiative to study consumer issues. I have always argued, since MERCOSUR's inception, that the above-mentioned preambular references could be used as the basis to develop a common consumer policy and a better consumer protection for people in the MERCOSUR Member States.[10] In 1991, only Brazil had a special consumer law. This initial 'legislative asymmetry' has continued to mark the development of MERCOSUR.

[5] See also Roberto Neto Grassi, 'La politique de protection du consommateur dans le système d'intégration régionale du Mercosur' in Bourgoignie (ed), *L'intégration économique régionale et la protection du consommateur* (n 3) 351.

[6] See also Roberto AC Pfeiffer, 'Consumer Defense in Mercosur: a Balance and Recent Challenges' in Bourgoignie (ed), *L'intégration économique régionale et la protection du consommateur* (n 3) 401 *et seq.*

[7] As regards the Treaty of Asunción (1991) and the Ouro Preto Protocol, see Nádia Araújo, Frederico Magalhães Marques and Márcio Reis, *Código do Mercosul: Tratados e Legislação* (Río de Janeiro, Renovar, 1998) 17 and Roberto Dromi, Miguel A Ekmekdjian and Julio C Rivera, *Derecho Comunitario-Sistemas de Integración-Regimen del Mercosur* (Buenos Aires, Ciudad Argentina, 1995) 25.

[8] See Newton de Lucca, *Direito do Consumidor: Aspectos práticos* (São Paulo, RT, 1995) 136. See also Karina Richter, *Consumidor & MERCOSUL* (Juruá, Curitiba, 2006) 73.

[9] See Carlos Alberto Ghersi, 'Razones y fundamentos para la integración regional' in Carlos Alberto Ghersi (ed), *Mercosur: Perspectivas desde el derecho privado* (Buenos Aires, Editorial Universidad, 1993) 30.

[10] Claudia Lima Marques, 'O Código Brasileiro de Defesa do Consumidor e o Mercosul' in Claudia Lima Marques (ed), *A Proteção do Consumidor no Brasil e no MERCOSUL* (Porto Alegre, Editora Livraria dos Advogados, 1994) 98.

Indeed, at the time of the creation of MERCOSUR, Jean-Michel Arrighi spoke of the 'forgotten consumer' (*el consumidor, protagonista olvidado*),[11] because the constitutional Treaty of Asunción made no mention of consumers or consumer interests in the new common market.[12] The United Nations Guidelines on consumer protection of 1985 had a very weak impact upon the founding fathers of MERCOSUR[13] and at that time only the Brazilian Constitution of 1988 addressed consumers' rights (XXXII CF/1988, article 5). The provisional institutional shape of MERCOSUR also failed to deal with consumer interests.[14]

B Age of Hope (1991–1994)

The Treaty of Asunción was signed as a provisional treaty to be complemented in 1994. So I will call this stage of development, from 1991 to 1994, an era of hope.

In 1992, the Ministers of Justice of the four founding Member States began the drafting of Conventions in a new informal body, the Meeting of Ministers of Justice (Reunión de Ministros de Justicia). In 1992, they achieved the ratification of the first and most important treaty on cooperation, the Las Leñas Protocol, which can also be used by the consumer to facilitate access to justice, by ending discriminatory treatment of foreign litigants, and ensuring legal assistance free of charge for consumers domiciled in another Member State.[15] This treaty also assists in the provision of information about, and recognition of, foreign judgments in MERCOSUR. In 1994, the Meeting approved a treaty on the jurisdiction for commercial contracts (Buenos Aires Protocol),[16] leaving consumer contracts to be addressed later in a special treaty, the Santa Maria Protocol (signed only in 1996).[17]

As regards substantive matters, the weak consumer protection initiatives during the period 1991 to 1994 in MERCOSUR were conducted by the CMG, an intergovernmental executive institution in MERCOSUR, formed by the Ministries of Economics, Justice and Foreign Affairs of the Member States. There is also the Economic and Social Forum (Forum Econômico e Social), a consultative body of MERCOSUR. All other MERCOSUR bodies are governmental bodies and decide by consensus.

Within CMG Subgroup No 10 on macro-economic and general policy coordination (Sub-Grupo 10 de Coordenação de Políticas Macroeconômicas), a study group was

[11] Jean Michel Arrighi, 'La Proteccion de los Consumidores y el Mercosul' (1992) 2 *Revista Direito do Consumidor* (São Paulo) 126: 'el consumidor, protagonista olvidado'.

[12] *cf* Liliana Locatelli, *Proteção ao consumidor e comércio internacional* (Curitiba, Juruá, 2003) 150. In 1994, I argued that the Preamble to the Treaty of Asunción led to the conclusion that the consumer should be protected (see Lima Marques, 'O Código Brasileiro de Defesa do Consumidor e o Mercosul' (n 10) 98 *et seq*).

[13] See Juan Ignacio Inchausti, 'Protección de los derechos del consumidor en la Unión Europea y en el Mercosur' in Roberto Dromi (ed), *Mercosur y empresas* (Buenos Aires, Ciudad Argentina, 2002) 164.

[14] See Werter R Faria, 'A institucionalização do Mercosul' in Luiz Otávio Pimentel (ed), *MERCOSUL no Cenário Internacional: Direito e Sociedade* (Juruá, Curitiba, 1998) vol 2, 381–87 and Locatelli, *Proteção ao consumidor e comércio internacional* (n 12) 123 *et seq*.

[15] See Eduardo Tellechea Bergman, *La dimensión judicial del caso privado internacional en el ámbito regional* (Montevidéo, Fundación de Cultura Universitaria, 2002) 113.

[16] See ibid 127–28.

[17] Adriana Dreyzin De Klor and Teresita Saracho Cornet, *Trámites judiciales internacionales* (Zavalia, Buenos Aires, 2004) 215.

created to deal with consumer matters (Comissão de Estudos de Direito do Consumidor).[18] This study group began its work by producing the Pautas Básicas y comunes de defensa de los consumidores, a set of basic and general guidelines on consumer protection in the region. This end-result of the study group's activities seemed to consider consumer protection laws as barriers to free trade, and was strongly criticised by scholars in Brazil, Uruguay and Argentina.[19]

In 1993, Argentina enacted its consumer law. In 1993 and 1994, officials of the four Members States agreed on a future common legislation on consumer protection, the so-called Pautas básicas de protección del consumidor or Common Guidelines.

A number of CMG Resolutions were passed that indirectly protect consumers, on topics such as metrology, health and safety of products and services (CMG Resolutions Nos 31/92, 19/93, 31/93, 46/93, 82/93, 83/93, 91/93, 55/94, 56/94 and 64/94).[20]

So we can say that, following Jean Michel Arrighi's[21] protest, in which he called the consumer 'the forgotten actor', MERCOSUR's institutions began to develop consumer policies through three different routes, with initiatives on substantive consumer law, especially in matters of contracts and torts; initiatives on private international law, especially on jurisdiction and international procedural rules;[22] and initiatives about metrology, standards of safety and consumer information on products and services in the region.[23]

C A Strange Golden Age (1994–1997), or All that Glitters is Not Gold

From 1994 to 1997, the new Ouro Preto Protocol consolidated consumer protection as one of MERCOSUR's policies and transferred the task to the new institutions, the CCM and its special consumer committee CT No 7 (Comité Técnico 7, Defensa del Consumidor) and established as an institution of MERCOSUR the very active Reunión de Ministros de Justicia del Mercosur.

Hopes were high that MERCOSUR would become an important legislator in the region. In 1997, before the financial crises in Brazil and Argentina, MERCOSUR experienced considerable economic success and it was considered the third most important economic bloc in the world.[24] In 1994, the Argentinean Constitution was modified to include a list of consumer rights in article 42, in an effort to overcome the idea that consumer protection laws were non-tariff barriers to trade in MERCOSUR. But the first instrument enacted, in 1994, was a private international law rule indicating that the law applicable to consumer

[18] Claudia Lima Marques, 'El Código brasileño de defensa del consumidor y el Mercosur' in Carlos Alberto Ghersi (ed), *Mercosur: Perspectivas desde el derecho privado, Parte II* (Buenos Aires, Universidad, 1996) 199. But see Perugini, 'Aspectos jurídico-económicos de la jurisdicción internacional en el ámbito del consumidor' (n 2) 320, on the so-called 'Asuntos Laborales, Empleo y Seguridad Social'.

[19] Ghersi, *Mercosul: Perspectivas desde el derecho privado, Parte II* (n 19).

[20] See details in Pfeiffer, 'Consumer Defense in Mercosur: a Balance and Recent Challenges' (n 6) 401 *et seq.*

[21] *cf* Arrighi, 'La Proteccion de los Consumidores y el Mercosul' (n 11) 126.

[22] As many as seven MERCOSUR Conventions on international private law have been ratified, see Adriana Dreyzin De Klor, *El Mercosur generador de una nueva fuente de derecho international privado* (Buenos Aires, Zavalia, 1997) 261 and Diego Fernandez Arroyo, *Derecho Internacional Privado Interamericano: Evolución y Perspectivas* (Buenos Aires, Rubinzal-Culzoni, 2000) 72.

[23] Florisbal Del'olmo, 'Direito do consumidor e direito internacional privado' (2008) 68 *Revista de Direito do Consumidor* (São Paulo) 107.

[24] *cf* Augusto Jaeger, Jnr, *Liberdade de concorrência na União Européia e no Mercosul* (São Paulo, LTR, 2006) 560.

transactions is that of the market where the transaction takes place and prohibiting any discrimination until a common legislation is agreed. CMG Resolution No 126/94 remains in effect today, and is the only specific MERCOSUR regulation on consumer law that is in force.

I call this a 'golden age' of consumer policy in MERCOSUR, because it was the most active era of legislative harmonisation, despite the fact that common rules did not achieve a consensus for acceptance. The most significant development was the alteration in, the structure of MERCOSUR in 1994 and the establishment of a new body, the CCM, with the objective of preparing MERCOSUR to become a common market.[25] The above-mentioned CCM consumer committee, CT No 7, is today the core body dealing with consumer protection and policy, and it has now incorporated the former study group on consumer protection.[26]

As sated above, in December 1994, the CMG enacted what remains the only provision on consumer protection in the region, CMG Resolution No 126/94.[27] In its first preambular clause, Resolution No 126/94 imposes an international level of consumer protection.[28] Article 2 prohibits any discrimination against foreign goods and services[29] and provides for the application of consumer law of the country of destination of the goods and services until MERCOSUR has its own harmonised consumer legislation.

CT No 7, in its first Directriz or resolution, MERCOSUR-CCM-CT No 7, Dir No 1/95, directed the creation of the Reglamento Común para la Defensa del consumidor del MERCOSUR, on the basis of the work of the former study group.[30]

In 1996, five Resolutions of this Reglamento (regulation) were approved at the CCM Meeting of that year.[31] All such legal texts, however, must await the approval of a 'complete harmonisation' in order to enter into force. The first, CMG Resolution No 123/96, contains definitions of 'consumer', 'provider' and 'consumer transaction'; the second, CMG Resolution No 124/96, provides an open list of consumer rights; the third, CMG Resolution No 125/96, contains provisions on the quality of products and services and the duty to inform; and two others, CMG Resolutions Nos 126/96 and 127/96 (later Nos 42/98 and 21/04), make provision about advertising and contractual warranty. None of these Resolutions are in force today, for lack of internalisation by the Member States. However, it is noteworthy that Uruguay and Paraguay used the five chapters of the Proyecto (referred to below) to assist in the drafting of their national laws.[32]

[25] See José Artur Denot Medeiros, 'Mercosul: Quadro Normativo e Institucional Pós-Ouro Preto' in (1995) 16 *Boletim de Integração Latino-Americana* 1. See also Werter Faria, *Órgãos de Integração e Instituições Parlamentares Internacionais* (Brasília, Comissão Parlamentar conjunta do Mercosul-Seção Brasileira, 1994) 11.

[26] See Leonir Batisti, *Direito do Consumidor para o Mercosul* (Curitiba, Juruá, 1998) 416–17. CCM Decision No 9/94, 14 *Boletim de Integração Latino-Americana* 325.

[27] CMG Resolution No 126/94, 15 *Boletim de Integração Latino-Americana* 133.

[28] See ibid.

[29] Ibid.

[30] CCM Decision No 1/95, (1995) 16 *Boletim de Integração Latino-Americana* 106, 107.

[31] See CMG Resolutions Nos 123/96, 124/96, 125/96, 126/96, 127/96, 23/24 *Revista Direito do Consumidor* 512.

[32] *cf* Dora Szafir, *El consumidor en el Derecho comunitario: Proyecto de protocolo de Defensa del Consumidor del Mercosur* (Montevidéo, FCU, 1998) 213.

The experience of this new institution as a legislative power in the region was therefore, unfortunately, very negative, and its draft of a maximal harmonisation or quasi-unification of consumer protection in the four Member States, the Proyecto de Reglamento Común para la Defensa del Consumidor, was rejected in 1997, because it would lower the levels of consumer protection in Brazil and Argentina. To give a practical example, Dora Szafir points out that the principle set out in article 2 of the 1996 Draft, that the interpretation of the law should be in favour of the consumer (*in dubio pro consumer, contra proferentem*) was refused by Uruguay.[33] Instead, the Draft provided a mandatory rule as to its application in the MERCOSUR markets to all consumer contracts, transactions and torts as the highest level of protection to all consumers,[34] regardless of the origin of the product or service, or the place of the transaction or of the accident.[35] The Draft Proyecto also met problems in that it was proposed as a treaty with 53 articles, with binding force in two years, as a thorough unification of consumer law.

In the Meeting of Ministers of Justice, a specific Protocol on consumer jurisdiction was prepared and signed under CCM Decision No 10/96 (Protocolo de Santa Maria sobre jurisdição internacional em matéria de relações de consumo*),* but could not be enforced because its article 18 made a *renvoi* to the rejected Reglamento Común para la Defensa del Consumidor.[36] This Protocol on conflict of jurisdiction assures a special forum privilege for the consumer.[37] The Santa Maria Protocol on special consumer jurisdiction was finally signed in 1996 in Paraguay,[38] as a model for national laws.

Thus in 1996, MERCOSUR for the first time gave a definition of 'consumer' in CMG Resolution No 123/96, which was repeated in the Santa Maria Protocol on special consumer jurisdiction. Despite the fact that this Protocol has not yet come into force, since it was accepted by CCM Decision No 10/96, this definition can be seen as 'soft' or 'model' law. In the Annex (no 1, a) the Santa Maria Protocol defines 'consumer' very broadly,[39] as natural persons and legal entities or other third parties who directly enjoy, as final consignees, the services and products contracted for.[40] Legal entities that act for a purpose which can be regarded as within the scope of professional activity, or with the purpose of reselling, are excluded.

For me, therefore, this age can indeed be called a golden age, because through the Meeting of the Ministers of Justice (and later CT No 7) and the Santa Maria Protocol (not yet in force but accepted as a CCM Decision) consumer protection policy could now be perceived as a separate and autonomous policy. The initial approach of MERCOSUR, with CMG Subgroup No 10 conceiving of consumer protection policy as a by-product of the legislative harmonisation policy in article 1 of the Treaty of Asunción, was overruled, and the new body, CT No 7, could act as a political legislator; these efforts were complemented by the Meeting of Ministers of Justice, who in 1994 completed another treaty that can be

[33] Szafir, *El consumidor em El Derecho Comunitario* (n 33) 218. See also Wellerson Pereira, 'Suggestion for the Approximation of Consumer Credit Law in Mercosur' in Bourgoignie, *L'intégration économique régionale et la protection du consommateur* (n 3) 507.

[34] The Brazilian delegation's protest is in Szafir, *El consumidor en el Derecho comunitario* (n 33) 219.

[35] *cf* Szafir, *El consumidor en el Derecho comunitario* (n 33) 216.

[36] See Dreyzin De Klor and Saracho Cornet, *Trámites judiciales internacionales* (n 17) 510.

[37] Ibid 215.

[38] The first 'opinion consultiva' confirmed that Paraguay has not yet incorporated the Santa Maria Protocol.

[39] Dreyzin De Klor and Saracho Cornet, *Trámites judiciales internacionales* (n 17) 511.

[40] See ibid 511.

used by consumers, the Ouro Preto Protocol on Precautionary Measures.[41] Unfortunately, however, all that glitters is not gold, and the final Draft of the Common Regulation on Consumer Protection (Reglamento Común MERCOSUR para la Defensa del Consumidor) was very disappointing.

D Age of Realism (1997–2000)

From 1997 to 2000, the Member States completely revised the working methods of CT No 7 on consumer protection, and opted to work more topically and in favour of a minimal harmonisation.

Accordingly, in 1997, instead of drafting guidelines, a model law or other internal MERCOSUR regulations that would require internalisation by all four Member States to enter into force (articles 38 and 40 of the Ouro Preto Protocol), CT No 7 changed the instrument into a classical Convention, in the form of a binding treaty with 53 uniform provisions with definitions ('consumer', 'provider' and 'consumer relations'), and rules about advertising, contracts, good faith and unfairness of contract clauses, product liability and warranties, entitled Protocolo Común de Defensa de los Consumidores.[42]

Academic opinion suggested that this 1997 MERCOSUR Treaty would derogate 26 rules of the 1990 Brazilian Consumer Code and 13 provisions of the 1993 Argentinean Consumer Law Act[43] (at that time Paraguay and Uruguay had no special consumer laws). Civil society in Brazil protested against such a MERCOSUR treaty having the effect of revoking Brazilian law and the 1997 Treaty wasconsidered to be against the Brazilian Constitution and *ordre public*.[44] Since in MERCOSUR legal texts have no direct applicability and Treaties thus need consensus to be enacted,[45] when Brazilian President Fernando Henrique Cardoso refused to sign the proposed Treaty in December 1997, the fate of the Protocolo Común de Defensa de los Consumidores was sealed.[46] Brazil's reasons were given as a refusal to reduce the level of consumer protection and the necessity to use international standards of consumer protection.

Of the five chapters approved in the 1996 Resolutions that did not come into force, two of them were re-used. Resolution No 127/96 became CMG Resolution No 42/98 on contractual warranties. The new Resolution directs CT No 7 to resume its efforts towards achieving

[41] See María Blanca Noodt Taquela, 'Embargos y otras medidas cautelares en el Mercosur' in *Liber Amicorum en Homenaje al profesor Dr. Didier Opertti Badán* (Montevidéo, FCU, 2006) 873.

[42] MERCOSUR-CCM-CT 7 Act No 8/98, Annexe I, Proyecto de Protocolo.

[43] See, eg Claudia Lima Marques, 'MERCOSUL como legislador em matéria de direito do consumidor: crítica ao projeto de protocolo de defesa do consumidor' (1998) 26 *Revista de Direito do Consumidor* (São Paulo) 75.

[44] Manifesto à nação de 8 de Dezembro de 1997 (sobre o Projeto de Protocolo do Mercosul que substituirá o código de defesa do consumidor), published in (1997) 23/24 *Revista de Direito do Consumidor* (São Paulo) 561. See also very critical, Antônio Herman Benjamin, 'El Código Brasileño de Protección del Consumidor' in *Política y Derecho del Consumidor* (Bogotá, El Navegante Editorial, 1998) 487.

[45] See Eduardo Antônio Klausner, *Direitos do Consumidor no MERCOSUL e na União Européia: Acesso e Efetividade* (Curitiba, Juruá, 2007) 66–71.

[46] Batisti, *Direito do Consumidor para o Mercosul* (n 27) 419. See also Szafir, *El consumidor em El Derecho Comunitario* (n 33) and Roberto López Cabana, 'Contratos de Consumo' in Roberto López Cabana (ed), *Contratos Especiales en el siglo XXI* (Buenos Aires, Abeledo-Perrot, 1999) 488.

uniformity[47] in consumer law, by organising a partial, topic-based minimal harmonised regulation for consumer protection, leaving each state room to adapt the rules to its necessities and market.[48] In 2004, CMG Resolution No 21/04 on advertising was also approved, with the same text as the former Resolution No 126/96 and a new article confirming its minimal character.

On 10 December 1998, the Presidents of Argentina, Brazil, Paraguay and Uruguay as members of MERCOSUR enacted a common soft law text on consumer protection (Comunicado Conjunto dos Presidentes do Mercosul). This Common Declaration confirms that consumer protection is an important element of the development of MERCOSUR, and declares that an adequate standard of consumer protection should be ensured, through legislative harmonisation, with the objective of securing certain rights to all consumers in the region, especially information, safety, education, redress of economic harm and access to justice and alternative forms of dispute resolution.[49]

In 1998 and 1999, Uruguay and Paraguay passed their own consumer protection laws.[50] The dynamism of MERCOSUR disappeared ('la parálisis del MERCOSUR')[51] and with the economic crises in Brazil and Argentina, the integration process slowed down.[52]

While MERCOSUR's harmonising legislative efforts have reached no success in MERCOSUR itself, they have assisted two countries, Paraguay and Uruguay, to enact their own consumer laws.[53] Today, all Member States have consumer laws (Brazil: Código de Defesa do Consumidor, Lei 8078/90; Argentina: Ley de Defensa del Consumidor, Ley No 24240/93, modified in 1998 by Ley No 24999/98[54] and in 2008 by Ley No 26361/08;[55] Paraguay: Ley No 1334, 27 October 1998;[56] Uruguay: Ley No 17189/99,[57] modified in

[47] On the differences in harmonised legislations, see Alejandre M Garro, 'Armonización y unificación del Derecho privado en America Latina: esfuerzos, tendencias y realidades' in Diego Fernandez Arroyo (ed), *España y la codificación internacional del Derecho internacional privado* (Madrid, Eurolex, 1991) 346.

[48] CMG Resolution No 42/98, (1999) 30 *Revista Direito do Consumidor* 246.

[49] Comunicado Conjunto dos Presidentes do Mercosul No 11, (1999) 30 *Revista Direito do Consumidor* 258.

[50] Ecio Perin, Jnr, *A Globalização e o Direito do Consumidor* (Baurú, Manole, 2003) 123; and Mauro André Mendes Finatti, 'A difícil implementação do Direito do Consumidor do Mercosul: balanço e prognósticos' (1996) 20 *Revista de Direito do Consumidor* 135, both emphasise the importance of MERCOSUR's assistance in the approval of these two laws, because previously in 1993 the Parliament of Paraguay had approved a consumer law, which had been subject to presidential veto, while two different drafts of a consumer law in Uruguay had waited more that two years without being voted into force.

[51] Expression used by Felipe de la Balze, 'El destino del Mercosur: entre la unión aduanera y la "integración imperfecta" in Felipe de la Balze (ed), *El Futuro del Mercosur: Entre retórica y el realismo* (Buenos Aires, CARI-ABA, 2000) 17.

[52] Augusto Jaeger, Jnr, *Liberdade de concorrência na União Européia e no Mercosul* (São Paulo, LTR, 2006) 564.

[53] See, eg, for Brazil, Batisti, *Direito do Consumidor para o Mercosul* (n 27); Fellous, *Proteção do consumidor no Mercosul e na União Européia* (n 130); Locatelli, *Proteção ao consumidor e comércio internacional* (n 12); Perin, *A Globalização e o Direito do Consumidor* (n 52); and Richter, *Consumidor & MERCOSUL* (n 8).

[54] Ley de Defensa del Consumidor, Ley No 24240/93, modified by Ley Nos 24568, 24787 and Ley No 24999, (1998) 27 *Revista Direito do Consumidor* 239. On these amendments, see Jorge Iturraspe Mosset, *Defensa del consumidor* (Santa Fé, Rubinzal-culzoni, 2003) 19. As to other modifications of the Argentinean Constitution, see Gabriel Stiglitz, 'Contratos, cláusulas abusivas y defensa del consumidor' in Aida Kemmelmajer De Carlucci, *Edición Homenaje a Jorge Mosset Iturraspe,* (Santa Fé, UNL, 2005) 517–32.

[55] For an in-depth study of the amendments, see Carlos A Hernández and Sandra A Frustagli, 'Primeras consideraciones sobre los alcances de la reforma a la Ley de Defensa del Consumidor con especial referencia a la materia contractual' (2008) 67 *Revista de Direito do Consumidor* 243.

[56] Ley No 1334, 27 October 1998, (1999) 30 *Revista Direito do Consumidor* 237.

[57] Ley de Defensa del Consumidor, Ley No 24240/93, modified by Ley No 24999, 1 July 1998, (1998) 27 *Revista Direito do Consumidor* 239. See Szafir, *El consumidor em El Derecho Comunitario* (n 33) 8. See also Gustavo Ordoqui Castilla, *Derecho del Consumo* (Montevidéo, Del Foro, 2000) 5–7; Dora. Szafir, *Consumidores* (Montevidéo, FCU, 2000) 17.

2000).[58] But we cannot conclude that consumer protection is part of the '*acquis*' of MERCOSUR, because the new Member State, Venezuela,[59] and the associated state, Chile,[60] have not changed their laws and Bolivia has no substantive special consumer legislation at present.[61]

E Age of Discovery (2000–2009)

In 2000, MERCOSUR was 'relaunched' (*relançamento*),[62] but with what was called 'minimal supranationality'.[63] In 2002, the Olivos Protocol created a Permanent Review Court in Paraguay, to complement MERCOSUR's arbitration panel system of dispute settlement.[64]

In 2000, the Presidents of the four Member States signed a Presidential Declaration on consumer rights (Declaración Presidencial de Florianópolis, Declaración de Derechos Fundamentales de los Consumidores del MERCOSUR) and declared their commitment to the protection of consumers as weaker parties,[65] and gave CT No 7 the mandate to establish a 'higher level of consumer protection' in future legislation. This Declaration of 15 December 2000 proclaimed 10 basic material and procedural rights for consumers, and was inspired by the 1998 Declaration, article 42 of the Argentinean Constitution and article 6 of the Brazilian Consumer Code. It is the most important piece of legislation from MERCOSUR to date.[66]

It is important to note that in 2000, CT No 7 attempted to enact a list of consumer rights by a Resolution, but it was only accepted as soft law in the Declaration of 15 December 2000.[67]

[58] Normas Relativas a las Relaciones de Consumo, Ley No 17189, 20 September 1999, (2000) 33 *Revista Direito do Consumidor* 262. And see Ley No 17250, 11 August 2000.

[59] See Ley de Protección al Consumidor y al Usuario, Ley No 37930, (1998) 26 *Revista de Direito do Consumidor* 309.

[60] See Ley No 19496, 1997, in López Cabana, *Contratos Especiales en el siglo XXI*(n 48) 479–80.

[61] See Érika Tinajeros Arce, 'Bolívia: protección del consumidor en el MERCOSUR: primeras observaciones sobre publicidad y oferta en el comércio eletrônico' *Alfa-Redi: Revista de Derecho Informático,* www.alfa-redi.org/revista/data/80–1.asp. See also Érika Tinajeros Arce, 'La protección del consumidor electrónico en los países del MERCOSUR' (2005) 14 *Revista de Direito do Consumidor* (São Paulo) 153.

[62] See Balze, 'El destino del Mercosur: entre la unión aduanera y la "integración imperfecta"' (n 53) 13 and Gerardo Caetano, 'Mercosul: quo vadis?' (2007) *Diplomacia, Estratégia e Política* 144.

[63] See also Carlos Eduardo Caputo Bastos and Gustavo Henrique Caputo Bastos, 'Os modelos de integração européia e do Mercosul: exame das formas de produção e incorporação normativa' (1999) 36(142) *Revista de Informação Legislativa* (Brasília) 231.

[64] Nádia Araújo, 'Dispute Resolution in Mercosur: the Protocol of Las Leñas and the Case Law of the Brazilian Supreme Court' (2001) 32(1) *Inter-American Law Review* 25.

[65] Text in Gustavo Ordoqui Castlla, *Derecho del Consumo: Ley 17.250, Dec.244/00* (Montevidéo, Ediciones del Foro, 2000) 342.

[66] Sheraldine Pinto Oliveros, 'Potencialidades y límites de la protección de los intereses económicos de los consumidores en el Mercosur' in Bourgoignie, *L'intégration économique régionale et la protection du consommateur* (n 3) 318.

[67] Ordoqui Castlla, *Derecho del Consumo: Ley 17.250, Dec.244/00* (n 67) 342–43 and Davis Fabio Esborraz, *Contrato y sistema em América Latina* (Buenos Aires/Rome, Rubinzal-Culzoni-CNR, 2006) 34.

The agenda in CT No 7 remains topical, currently focusing on international consumer contracts and tourism ('la defensa del consumidor frente al tiempo compartido y al comercio electrónico').[68] In 2004, a new CMG Resolution was passed dealing with e-commerce (CMG Resolution No 21/04).[69]

Since this Declaration, in almost 10 years CT No 7 has suggested only administrative rules about cooperation in consumer matters,[70] with an interesting alert system for defective products, and some proposals to revise the Resolutions about marketing and contractual warranty (Resolution No 42/98) and e-commerce (Resolution No 21/04). In my opinion, it is the enactment of the national consumer protection laws, and also the Presidential Declarations in the period of 1998–2000, which can be seen as the main achievements in MERCOSUR.[71]

From 2000 up to today, MERCOSUR has been searching for new topics and ideas on how the Member States can work together,[72] without jeopardising the actual progress in consumer protection in the four countries.[73] In 2008 and 2009, four meetings were organised, with results focused on the updating of comparative legal work, on the creation of the SIMDEC (MERCOSUR Common Information System about Consumer Protection and Defective Products),[74] and the choice of consumer over-indebtedness as a subject to be harmonised in times of a global financial crisis.[75]

In 2000, MERCOSUR's renewal included a new legal basis (CMG Resolution No 25/00), arising from concerns with the efficiency of the legislation already approved.[76] In 2002, under the new Olivos Protocol,[77] MERCOSUR created a new system of arbitration and the Permanent Review Court (Tribunal Arbitral Permanente de Revisión),[78] and the emerging MERCOSUR case law of gives new hope for consumer protection. In 2003, Argentina and Uruguay proposed to use the Santa Maria Protocol on consumer jurisdiction as a model for future Inter-American Conventions at the Organization of American States (OAS), and Brazil proposed to complement the Santa Maria Protocol with an Inter-American Convention on the Law applicable to Some Consumer Contracts and Transactions (CIDIP

[68] MERCOSUR-CCM-CT 7 Act No 1/2000, Defensa del Consumidor, *La Ley* (Buenos Aires), 6 April 2000, 3–4.

[69] See Luciana B Scotti, 'La (Des)protección Del ciberconsumidor em América: una mirada desde la Argentina y El Mercosur' in Fernandez Arroyo and Moreno Rodriguez, *Protección de los Consumidores en America-Trabajos de la CIDIP VII (OEA)* (n 1) 536.

[70] See 'Acuerdo interinstitucional de entendimiento entre los organismos de defensa del consumidor de los Estados Parte del Mercosur para la defensa del Consumidor visitante 2004' quoted in Myriam D Lucero De Godoy and Carlos Eduardo Echegaray De Maussion, 'La protección internacional del consumidor. Algunas propuestas para una codificación regional' in Fernandez Arroyo and Moreno Rodriguez, *Protección de los Consumidores en America-Trabajos de la CIDIP VII (OEA)* (n 1) 358.

[71] Of the same opinion, Pinto Oliveros, 'Potencialidades y límites de la protección de los intereses económicos de los consumidores en el Mercosur' (n 69) 316.

[72] On this new phase of MERCOSUR, see Augusto Jaeger, Jnr, *Mercosul e a livre circulação de pessoas* (São Paulo, LTR, 2000) 53 and Augusto Jaeger, Jnr, 'Para uma quinta liberdade econômica fundamental' (2001) 13 *Boletín Latinoamericano de Competência* 38.

[73] See José Souto Borges, *Curso de Direito comunitário* (São Paulo, Editora Saraiva, 2005) 575.

[74] See MERCOSUR-CCM-CT 7 Act 2/2008, nos 3, 4 and 5.

[75] See MERCOSUR-CCM-CT 7 Act 3/2008, no 12.

[76] See Adriana De Klor Dreyzin, 'El Mercosur en el 2003' (2004) *DeCITA* (January) 440.

[77] See Elizabeth Accioly, 'O atual mecanismo de solução de controvérsias no Mercosul: o Protocolo de Olivos' in Wagner Menezes (ed), *O Direito Internacional e o Direito Brasileiro- Homenagem a José Francisco Rezek* (Ijuí, Unijuí, 2004) 361.

[78] See Dreyzin De Klor, 'El Mercosur en el 2003' (n 79) 441.

VII) now under negotiation. In 2004, the Foro Permanente de Cortes Supremas del Mercosur y Asociados was created, and one of its first subjects was consumer protection through national courts.

In 2006, Venezuela aimed to become a full Member of MERCOSUR, but the accession Treaty has not yet been ratified by all Member States. Although there has been some impact on other MERCOSUR Treaties and derived laws, no special changes were made in the field of consumer protection.

The so-called democratic and social deficit in MERCOSUR;[79] the preference to use classical international public law instruments,[80] such as Conventions; the weak supranationality of the institutions;[81] and the many economic crises in the region and between the Members States,[82] have led much academic opinion to see MERCOSUR as a 'minimalist vision' (*visión minimalista*)[83] and lacking in what an economic integration process could achieve in developing private law.[84] The legitimacy of MERCOSUR to legislate in the area of consumer law is also very uncertain.[85]

III An Evaluation: Losing the Way, but Heading Towards the Light

In conclusion, it is useful to try to evaluate all the initiatives, both failed and successful, carried out by MERCOSUR. If MERCOSUR was a ship, we might say that the 'structural force' of this vessel was not very strong and that the winds of free trade were stronger, and thus the idea that a high level of consumer protection could harm the integrated markets prevailed until 2000. MERCOSUR's consumer policy, as a small, shabby and timid vessel, lost its way and only by following the light of the national constitutional values of a strong *ordre public* could it regain the right course.

The aspects of legitimacy and democratic representation in MERCOSUR are not much better. In MERCOSUR, consumer interests are only represented in the Economic and Social Forum, a consultative body of MERCOSUR. CT No 7 has a very limited power to

[79] Alberto do Amaral, Jnr, 'Mercosul: características e perspectivas' (2000) 37(146) *Revista de Informação Legislativa* 304.

[80] Maria Blanca Noodt Taquela, *El Arbitrage en Argentina* (Montevidéo, Corte de Arbitrage Internacional para el Mercosur, 2000) 13.

[81] Elaine Ramos Da Silva, *Rechtsangleichung im Mercosul* (Baden-Baden, Nomos Verlag, 2000) 82; Isabel Zivy and Ligia Maura Costa, 'Un Tribunal supranational dans le Mercosud' (1998) 3 *Revue Internationale de Droit Comparé* 923.

[82] Balze, 'El destino del Mercosur: entre unión aduanera y la "integración imperfecta"' (n 53) 22.

[83] *cf* Abraham Luis Vargas, 'El Tribunal de justicia permanente del Mercosur: una necesidad sistémica actual para satisfacer los conflitos, intereses y Derecho Comunitario involucrados' (1997) 1(3) *Revista de Derecho del Mercosur* (Buenos Aires/Porto Alegre) 46. See also Deisy Ventura, *Las asimetrías entre el Mercosur y la Unión Europea: Los desafíos de una sociación interrregional* (Montevidéo, Konrad Adenauer Stiftung, 2005) 55.

[84] The so-called 'claroscuros del DIPR mercosureño', see Fernandez Arroyo, *Derecho Internacional Privado Interamericano* (n 23) 78. See also Dreyzin De Klor, *El Mercosur generador de una nueva fuente de derecho international privado* (n 23) 261.

[85] See Diego P Fernández Arroyo, 'La neuva configuración del Derecho Internacional Privado del Mercosur: Ocho respuestas contra la incertidumbre' (1999) 3(4) *Revista de Derecho del Mercosur* (Buenos Aires) 38 and Claudia Lima Marques, A proteção do consumidor: aspectos de direito privado regional e geral' in *El Derecho Internacional Privado en las Américas (1974–2000), Cursos de Derecho Internacional, Parte 2* (Washington, Secretaría General-Subsecretaria de Asuntos Jurídicos/OEA, 2002) vol II, 657–79.

establish common legislation on consumer issues, so the most important rules come from the Meetings of Ministers of Justice and through treaties dealing with private international law, a classical instrument. The one Treaty which attempted to make a link between substantive consumer protection and conflict of law rules, the Santa Maria Protocol, failed to enter in force, and remains only a kind of 'model law' for the four Member States. The first advisory opinion (*opinión consultiva*) from the Permanent Review Court refused to consider a small company from Paraguay as a consumer.[86] The opinion is not binding, but held that the Buenos Aires Protocol should be used to allow choice of forum clauses in international contracts (rather than following the Santa Maria Protocol 'model' which forbids such clauses under the new MERCOSUR '*ordre public de protection*' established in that Protocol as soft law).

In my opinion, the Permanent Review Court in advisory opinion No 1 applied a restrictive definition of 'consumer' as a physical person, which was not included in CMG Resolution No 123/96 nor in the Santa Maria Protocol, as discussed above, but was only found in the 1997 *Proyecto*, which adopted an autonomous definition different from all four definitions of 'consumer' in the national laws of the Member States.[87] The Permanent Review Court stated:

> [C]ontracts with consumers are excluded from the application of the Protocol [of Buenos Aires] because of the special protection to which the weaker party in such contracts is entitled. It means that in contracts of sale with consumers, freedom of contract cannot be applied to the same extent as provided in the Protocol, concerning agreements on jurisdiction and the applicable law. Moreover, the Protocol of Santa Maria, still not internalized by any Member State, may only be evoked as a doctrinal reference or as soft law, since it is still not into force . . . We may conclude that the legislator's intention expressed in article 2, indent 6 of the Protocol of Buenos Aires was to establish a restrictive concept. It means that, where it excludes contracts of sale with consumers from its field of application, the Protocol of Buenos Aires entails a 'finalist interpretation', which only comprehends as consumer the one who buys a product for a personal use or for his family; this is the only interpretation coherent with the end of the interpreted provision and of the Protocol of Buenos Aires as a whole' (item III, F, 3).[88]

[86] Paragraph 3 of the decision reads: '3. (Voto unánime). Dejar interpretado que el Protocolo de Santa Maria sobre Relaciones de Consumo no tiene aplicabilidad al caso por este doble motivo: a) no estar vigente por no haber sido internalizado por ningún Estado Parte, b) por referirse a relaciones de consumidor, excluidas expresamente del Protocolo de Buenos Aires'.
Free translation: '3. (Unanimous vote). To interpret the Santa Maria Protocol on Consumer Relations so as to mean it is not applicable to the case for two reasons: (a) it is not in force for it was not internalized by any State Party; (b) because it refers to consumer relations expressly excluded from the Buenos Aires Protocol'.

[87] On this decision, see Pereira, 'Suggestion for the Approximation of Consumer Credit Law in Mercosur' (n 35) 523.

[88] In the original, the text reads: '3. Art. 2 PBA: la esencial interpretación que amerita el Art. 2 en relación al caso en cuestión es el inciso 6). En efecto, por este artículo y en especialidad por este inciso 6) quedan exceptuados los contratos de venta al consumidor, en razón de la especial protección que merecen la parte mas débil en tal tipo de contratos. Vale decir, en los contratos de venta al consumidor no se puede aplicar el alcance que se la da a la autonomía de la voluntad por tal Protocolo [de Buenos Aires] para escoger foro y derecho aplicable. Asimismo, cabe consignar que precisamente el PSM de Relaciones de Consumo a la fecha no internalizado por ningún Estado Parte, solamente puede ser invocado como un marco referencial doctrinario o como soft law dado que aún no se encuentra en vigor … No obstante, cabe interpretar sin duda alguna con o sin tal marco referencial citado, que dentro del Mercosur y dada la intención legislativa de este artículo 2 interpretado, no cabe la aplicación del presente Protocolo cuando una de las partes involucradas en el contrato no es un consumidor final. Nada obsta a que también se concluya de que un consumidor final pueda ser una persona física o jurídica. Concluimos que evidentemente la intención legislativa del artículo 2 inc. 6 del PBA acogió la segunda modalidad de conceptualización, vale decir, la más restringida. Es más, el PBA, al exceptuar del

MERCOSUR was extremely active in making rules, but failed to give then effectiveness, and almost all of them never entered into force. The main achievements were in private international law. In the light of the 2000 Presidential Declaration, a new consensus on consumer legislation has been reached and the MERCOSUR Member States have begun to work together in a proactive way, not only in MERCOSUR to create the basis for successful administrative and judicial cooperation, but also at other international fora, especially at the OAS, proposing and drafting a new Inter-American Convention on Consumer Protection.[89]

A Evaluating the Main Achievements in Private International Law and in Topical Substantive Consumer Law

The initial official approach of MERCOSUR, as demonstrated by Subgroup No 10, perceived consumer protection as a by-product of a legislative harmonisation policy and only the establishment of the Meeting of the Ministers of Justice changed this perception.

The establishment of the Meeting of Ministers of Justice (Reunión de Ministros de Justicia de los Estados de MERCOSUR)[90] in December 1991 shed new light upon MERCOSUR, and Conventions on the law applicable to international contracts; jurisdiction and recognition of judgments in civil, labour and commercial matters; injunctions; torts in car accidents; and commercial arbitration were agreed (Las Leñas Protocol;[91] Buenos Aires Protocol;[92] Ouro Preto Protocol;[93] San Luis Protocol;[94] Santa Maria Protocol on special consumer jurisdiction;[95] CCM Decision No 3/98, Acordo sobre Arbitraje Comercial; and CCM Decision No 49/00, Acordo de Acceso a la Justicia).

ámbito de su aplicación a los contratos de venta al consumidor evidentemente debe acoger "la interpretación finalista" que solamente incluye como consumidor a aquel que compra un producto para uso propio o de su familia, siendo esta la única interpretación coherente con el fin de la norma interpretada y de todo el PBA en general. Asimismo, debe culminarse la interpretación de este artículo concluyéndose que los contratos de agencia, representación o distribución no están incluidos dentro de este inc. 6) ni dentro de ningún otro, y en consecuencia a tal tipo de contratos le es perfectamente aplicable este PBA'. With thanks to Wellerson Pereira for the translation, see Pereira, 'Suggestion for the Approximation of Consumer Credit Law in Mercosur' (n 35) 523.

[89] Of the same opinion, Nadia de Araújo, 'A CIDIP VII e a defesa do consumidor. Primeiras reflexões sobre o andamento das discussões no Forum da OEA' in Stefan Grudmann and Margarida Dos Santos (eds), *Direito Contratual entre liberdade e proteção dos interesses e outros artigos alemães-lusitanos* (Coimbra, Almedina Editora, 2008) 251; and see Augusto Jaeger, Jnr, 'Impasses do Direito Processual Civil Internacional do Mercosul e a oportunidade para o revival das CIDIPS' in Grudmann and Dos Santos, *Direito Contratual entre liberdade e proteção dos interesses e outros artigos alemães-lusitanos* (ibid) 367.

[90] CCM Decision No 8/91, (1992) *Boletim de Integração Latino-Americana* (Edição Especial) 32. See Perugini, 'Aspectos jurídico-económicos de la jurisdicción internacional en el ámbito del consumidor' (n 2) 324.

[91] Dreyzin De Klor, *El Mercosur generador de una nueva fuente de derecho international* privado (n 87) 269–77, in force in Argentina, Ley No 24578, 25 October 1995; in Brazil, Decreto No 2067, 12 November 1996; in Paraguay, Ley No 270/93; and in Uruguay, Ley No 16791, 15 August 1998.

[92] In force in Argentina, Ley No 24669, 29 July 1996; in Brazil, Decreto No 2095, 17 December 1996; and in Paraguay, Ley No 597/95, 15 June 1995. As to Uruguay, see Tellechea Bergman, *La dimensión judicial del caso privado internacional en el ámbito regional* (n 15) 20.

[93] (1994) 15 *Boletim de Integração Latino-Americana* 334. In force in Argentina, Ley No 24579, 25 October 1995; in Brazil, Decreto No 2626, 15 June 1998; in Paraguay, Ley No 619/95, 6 August 1995; and in Uruguay, Ley No 16930, 20 April 1998.

[94] Protocolo de São Luiz sobre Matéria de Responsabilidade Civil Emergente de Acidentes de Trânsito entre os Estados partes do Mercosul, see www.mre.gov.br/dai/dip.

[95] See Dreyzin De Klor, *El Mercosur generador de una nueva fuente de derecho international* privado (n 87) 261 and Arroyo, *Derecho Internacional Privado Interamericano* (n 23) 72.

In MERCOSUR, as many as seven Conventions on private international law have been created and ratified in the region;[96] the Protocols of Las Leñas and Ouro Preto can be used to help consumers,[97] as can agreements on free legal assistance (CCM Decision No 49/00);[98] but only the Santa Maria Protocol of 1998 deals with consumer jurisdiction through special provisions relating to consumer protection (no instruments address the issue of the law applicable to consumer contracts).[99] It is noteworthy that the Santa Maria Protocol on special consumer jurisdiction was the only MERCOSUR Convention agreed by the Meeting of Ministers of Justice that did not enter into force[100] and it was ratified only by Paraguay.[101]

The reason for this refusal to ratify is explained by the fact that the Santa Maria Protocol makes a *renvoi* to the MERCOSUR Common Consumer Protection Code that was drafted by CT No 7 and later redrafted as a treaty and refused by the Brazilian government.[102] The equivalent treaty between the MERCOSUR Member States and the associated states, Bolivia, Chile and later on, Venezuel,a has also suffered the same fate. Perhaps the subject, special rules on consumer jurisdiction, is a particularly controversial issue, as the decade-long work of the Hague Convention on General Jurisdiction and Choice of Forum Clauses may indicate, because in the end, the 2005 Hague Convention excluded the special consumer forum from its scope of application in order to reach consensus.

The Meeting of Ministers of Justice has been at the forefront of all successful initiatives to build an '*acquis*' in civil, commercial and consumer matters, especially the Santa Maria Protocol.[103] This MERCOSUR institution has contributed to the evolution of private international law in the region, in particular through two treaties, the Las Leñas Protocol

[96] See Eduardo Tellechea Bergman, 'Protocolo de cooperação e assistência jurisdicional em matéria civil, comercial, trabalhista e administrativa entre os Estados-Membros do Mercosul' in Claudia Lima Marques (ed), *Estudos sobre a proteção no Brasil e no Mercosul* (Porto Alegre, Editora Livraria dos Advogados, 1994) 220.

[97] *cf* Eduardo Antônio Klausner, 'Reflexões sobre a proteção do consumidor brasileiro nas relações internacionais de consumo' in Carmen Tiburcio and Luís Roberto Barroso, *O Direito Internacional Contemporâneo- Estudos em homenagem a Jacob Dolinger* (Río de Janeiro, Renovar, 2006) 395.

[98] Klausner, 'Reflexões sobre a proteção do consumidor brasileiro nas relações internacionais de consumo' (n 100) 401.

[99] See José Moreno Rodriguez, 'La Convención de México sobre El derecho aplicable a La contractación international' in Fernandez Arroyo and Moreno Rodriguez, *Protección de los Consumidores en America-Trabajos de la CIDIP VII (OEA)* (n 1) 128 and Paula María.All, 'El Diseño y La progresiva construcción de um sistema de protección del consumidor a escala americana: avances y desafios pendientes' in Fernandez Arroyo and Moreno Rodriguez, *Protección de los Consumidores en America-Trabajos de la CIDIP VII (OEA)* (n 1) 284–88.

[100] See Dreyzin De Klor, *El Mercosur generador de una nueva fuente de derecho international* privado (n 87) 261; Fernandez Arroyo, *Derecho Internacional Privado Interamericano* (n 23) 72; as to the Santa Maria Protocol on special consumer jurisdiction, see Perugini, 'Aspectos jurídico-económicos de la jurisdicción internacional en el ámbito del consumidor' (n 2) 320–28 and Eduardo Klausner, 'Jurisdição internacional em matéria de relações de consumo no MERCOSUL: sugestões para a reedição do Protocolo de Santa Maria' (2005) 14(54) *RDC* 116.

[101] Tellechea Bergman, *La dimensión judicial del caso privado internacional* (n 15) 20.

[102] As to this refusal, see the special issue of (1997) 23/24 *Revista de Direito do consumidor* 512 and Claudia Lima Marques, 'Regulamento comum de defesa do consumidor do Mercosul: primeiras observações sobre o Mercosul como legislador da proteção do consumidor' (1997) 23/24 *Revista de Direito do Consumidor* 79. For a discussion of Argentinean academic opinion, see Adriana Dreyzin De Klor and Diego Fernández Arroyo, 'O Brasil diante da institucionalização e ao Direito do Mercosul' in Menezes, *O Direito Internacional e o Direito Brasileiro* (n 80) 318–53. See also Luiz Olavo Baptista, 'Impacto do Mercosul sobre o sistema legislativo brasileiro' in Luiz Olavo Baptista, Araminta de Azevedo Mercadante and Paulo Borba Casella (eds), *Mercosul: das negociações à implantação*, 2nd edn (São Paulo, LTR 1998) 17–30.

[103] See Araújo, Marques and Reis, *Código do Mercosul: Tratados e Legislação* (n 7) 159–67.

of 1992[104] and the Buenos Aires Protocol of 1994.[105] The Las Leñas Protocol provides a new and efficient procedure for information on foreign law (the Central Authorities System), cooperation between authorities and judges and recognition of judgments in civil and commercial matters. The goal of the Las Leñas Protocol is to facilitate trade between MERCOSUR countries. The Buenos Aires Protocol on jurisdiction over contracts provides a choice of forum rule, but article 2 excludes consumer sales and transportation.[106] With this impetus, the forum selection clause has recently begun to be more accepted by the courts in the region, with the exception of consumer cases.[107]

The Santa Maria Protocol concerns the special jurisdiction for contracts involving consumers.[108] Article 4 allows consumers a free choice between the forum of their domicile, the place of performance and the domicile of the provider.[109] Providers and suppliers can only bring a claim in the forum of the domicile of the consumer. Any choice of another forum is prohibited. Unfortunately, this instrument is not yet in force.

As mentioned above, the Santa Maria Protocol defines 'consumer' very broadly, as natural persons and legal entities, or other third parties who directly enjoy, as final consignees, the services and products contracted for.[110]

Academic opinion has always been that the country of origin rule could not be adopted in MERCOSUR, as the differences in the national level of protection among the four countries would leave the consumers of addressee countries unprotected.[111] This was indeed the approach taken under CMG Resolution No 126/94,[112] approved on 16 December 1994, which imposed the commercial market rule as the applicable law as regards consumer protection, until the efforts towards legislative harmonisation have led to positive results.[113] This is a specific unified private international law rule aimed at the protection of consumers by determining (indirectly) which is the applicable law in case of consumer disputes and imposing the country of destination rule: the products and services that normally move throughout MERCOSUR must respect the law of the country where they are commercialised, the law of the market of destination, as regards consumer

[104] Protocolo de Las Leñas sobre cooperação e assistência jurisdicional em matéria civil, comercial, laboral e administrativa de 1992. See José Carlos de Magalhães, 'O Protocolo de Las Leñas e a eficácia extraterritorial das sentenças e laudos arbitrais proferidos nos países do Mercosul' (1999) 144 *Revista de Informação Legislativa* 251.

[105] Protocolo de Buenos Aires sobre jurisdição internacional em matéria contratual, Decreto No 2095, 17 December 1996, (1994) 13 *Boletim de Integração Latino-Americana* 101. See Jürgen Samtleben, 'Ein Gerichtsstandübereinkommen für den Südamerikanischen Gemeisamen Markt (MERCOSUL)' (1995) *IPRax* (Heidelberg) 129.

[106] The text reads (in Portuguese): 'Artigo 2. O âmbito de aplicação do presente Protocolo exclui: . . . 6. os contratos de venda ao consumidor; 7. os contratos de transporte'.
Free translation: 'Article 2. The scope of application of the Protocol excludes: [. . .] 6. consumer sale contracts; 7. transport contracts'.

[107] See Superior Tribunal de Justiça-Brazil, Conflito de Competência, Judge Ari Pargendler, DJ 11 March 2002.

[108] CCM Decision No 10/96, Protocolo de Santa Maria sobre Jurisdição Internacional em Matéria de Relações de Consumo. See Araújo, Marques and Reis, *Código do Mercosul: Tratados e Legislação* (n 7) 161.

[109] See Deisy Ventura (ed), *Direito Comunitário do Mercosul* (Porto Alegre, Livraria dos Advogados, 1997) 315, 309.

[110] Ibid 312, 319.

[111] See Dromi, *Mercosur y empresas* (n 13) 365. This was also proposed by Gabriel Stiglitz, 'El derecho del consumidor en Argentina y en el Mercosur', published in Argentina in *La Ley*, 19 May 1995, and in Brazil in (1993) 6 *Direito do Consumidor* 20.

[112] CMG Resolution No 126/94, (1994) 15 *Boletim de Integração Latino-Americana* 133.

[113] CMG Resolution No 126/94.

protection. This rule fixes a field of territorial application for the national rules of consumer law[114] and rejects the European Union rule which applies the law of the country the product or service comes from.

MERCOSUR itself is a subregional integration process under the auspices of the Latin American Integration Association (ALADI, Asociación Latinoamericana de Integración).[115] So it is important to note that article 50 of the ALADI Treaty provides an exception to free trade, allowing consumer legislation linked to safety and health, which cannot be seen as a non-tariff barrier.[116]

Accordingly, MERCOSUR has tried to reconcile the application of regional free trade rules with national measures aimed at protecting consumers' interests through harmonisation of legislative provisions on metrology, standards of safety and consumer information.[117] These initiatives have been about food, especially milk and meat (CMG Resolutions Nos 31/92, 19/93, 46/93, 83/93, 91/93, 55/94,[118] 19/93,[119] 56/94, 31/93, 82/93, 63/94,[120] 69/93, 70/93, 72/93,[121] 32/92, 59/93, 11/93, 44/93, CCM Decision No 6/93 (Acordo Sanitário e Fitosanitário do Mercosul),[122] CMG Resolutions Nos 57/94, 59/94, 60/94, 62/94, 64/94, 65/94, 66/94, 67/94);[123] medicines (CMG Resolution No 4/92); toys (CMG Resolution No 54/92);[124] products (CMG Resolution No 58/92),[125] especially automobiles (CMG Resolutions Nos 9/91, 6/92, 9/91, 26/93), dangerous products (CCM Decision No 14/94) and sprays (CMG Resolution No 80/93); and then, after 1994, the main focus was on services, with Resolutions on tourism, financial services, educational services, insurances, and others.

Legislative harmonisation in (substantive) consumer law in MERCOSUR today has a topical and minimal approach.[126]

B Consensus on Topical Harmonisation to Avoid a 'Race to the Bottom' and the Future: Some Conclusions about Consumer Policy in MERCOSUR

It is not easy to draw conclusions about the ever-changing consumer policy in MERCOSUR. Brazilians normally conclude that MERCOSUR has failed to establish a real and effective common consumer policy that could enhance the 'quality of life of the people in

[114] See also Miguel Angel Ciuro Caldani, 'Hacia la protección equilibrada del consumidor en el Derecho Internacional privado' (1991) 18 *Investigación y docencia* (Rosario) 50.

[115] MERCOSUR is ALADI ACE No 18, see Mario AR Midón, *Derecho de la integración: Aspectos institucionales del Mercosur* (Buenos Aires/Santa Fé, Rubinzal-Culzoni, 1998) 292.

[116] See my article in Ghersi, *Mercosur: Perspectivas desde el derecho privado, Parte II* (n 19) 217.

[117] Dromi, *Mercosur y empresas* (n 13) 364. See also in general 'Nomenclatura Común del Mercosur (NMC)' in Dreyzin De Klor, 'El Mercosur en el 2003' (n 79) 588.

[118] See (1994) 15 *Boletim de Integração Latino-Americana* 93.

[119] See (1993) 12 *Boletim de Integração Latino-Americana* 41.

[120] See (1994) 15 *Boletim de Integração Latino-Americana* 94–97.

[121] See (1993) 12 *Boletim de Integração Latino-Americana* 70.

[122] See (1993) 12 *Boletim de Integração Latino-Americana* 32–36.

[123] See (1994) 15 *Boletim de Integração Latino-Americana* 95.

[124] See (1993) 12 *Boletim de Integração Latino-Americana* 34–38.

[125] INMETRO Portarias Nos 64/93 and 75/93, (1993) 12 *Boletim de Integração Latino-Americana* 39.

[126] Lucero De Godoy and Echegaray De Maussion, 'La protección internacional del consumidor' (n 73) 359.

the region', as promised in the Preamble to the 1991 Treaty of Asunción.[127] Indeed, from the Brazilian point of view, MERCOSUR's activities have been more negative than positive.[128] This opinion has been sufficiently strongly held to the point that civil society, and the well-established (more than 30-year-old) Brazilian consumer movement, have begun to fear that the 'free trade discourse' would prevail over the good intentions (and the 2000 Presidential Declaration) to maintain the currently high level of consumer protection in Brazil. MERCOSUR has helped Brazil integrate itself into the Inter-American System and to become more proactive in its proposals on consumer protection, but it can be questioned whether almost all of MERCOSUR's positive results in the field of consumer protection could in fact have been achieved without an integration process and with normal instruments of bilateral and multilateral cooperation.

Argentineans normally conclude that consumer protection remains as open issue in MERCOSUR,[129] because of its institutional weakness[130] or because of the lack of a national consumer policy.[131] Carlos Alberto Ghersi concludes that, in Argentina at the end of the twentieth century, the discourse of free trade has overwhelmed more social issues such as consumer protection.[132]

Some Uruguayans have criticised the multiplication of treaties on the same issues among the Member States[133] and also the 'poor quality' of the new rules on private international law.[134]

Others scholars from Uruguay see the role played by MERCOSUR in establishing consumer protection law in Uruguay very positively,[135] as having promoted joint action to reduce the legal asymmetry of the Member States, elaborating a new set of more effective treaties on private international law which have been ratified and are used (as law in action) by all Member States, including Brazil.[136] Jean Michel Arrighi comments that a new era of consumer protection in the Americas is now possible, indirectly because of this new consensus on minimal substantive consumer law which has been consolidated since 2000 in MERCOSUR. Scholars from Paraguay also seem to view the work of MERCOSUR positively, and its efforts at the OAS CIDIP VII.[137]

As pointed out above, there was no 'race to the bottom' in consumer legislation in MERCOSUR because of the new free trade rules of the Treaty of Asunción. But this was not because CT No 7 had not tried (indeed MERCOSUR itself had tried in the 1990s) to

[127] See, eg Beyla Esther Fellous, *Proteção do consumidor no Mercosul e na União Européia* (São Paulo, RT, 2003) 215.

[128] *cf* Locatelli, *Proteção ao consumidor e comércio internacional* (n 12) 165.

[129] See, eg Gabriel Stiglitz, 'Balance a diez años de vigencia de la ley 24.240' (2003) 13 *Derecho del Consumidor* (Buenos Aires) 25.

[130] See Dreyzin De Klor and Saracho Cornet, *Trámites judiciales internacionales* (n 17) 70 and Fernández Arroyo, 'La neuva configuración del Derecho Internacional Privado del Mercosur' (n 88) 38.

[131] Stiglitz, 'Balance a diez años de vigencia de la ley 24.240' (n 132) 15.

[132] Carlos Alberto Ghersi, 'El Derecho de los consumidores y las políticas económicas de la década de los noventa' (2003) 13 *Derecho del Consumidor* (Buenos Aires) 38.

[133] Eduardo Vescovi, *Derecho Procesal Civil International: Uruguay, el Mercosur y América* (Montevidéo, FCU, 2000) 28.

[134] Expression used by Vescovi, ibid 27.

[135] Szafir, *El consumidor en el Derecho Comunitario* (n 33) 213.

[136] Tellechea Bergman, *La dimensión judicial del caso privado internacional en el ámbito regional* (n 15) 27.

[137] See, eg Roberto Ruiz Díaz Labrano, 'Las relaciones internacionales de Consumo y El derecho internacional privado. Algunos Aspectos a considerar sobre la ley aplicable y jurisdicción competente' in Fernandez Arroyo and Moreno Rodriguez, *Protección de los Consumidores en America-Trabajos de la CIDIP VII (OEA)* (n 1) 514–15.

unify—and reduce—the level of consumer protection in all Member States. Such general substantive 'total harmonisation' through a treaty (*Reglamento común*) was refused, through the efforts and action of civil society and the social movements from Brazil. MERCOSUR changed its methodology and became a sporadic (almost paralysed) legislator in the region.

On the other hand, in the sphere of private international law, through the Meeting of Ministers of Justice, an informal body of MERCOSUR, a very successful level of cooperation has been achieved, with the creation of new and innovative instruments (the Las Leñas, Ouro Preto, Buenos Aires Protocols) and good models, such as the Santa Maria Protocol's privileged forum for consumers and its very innovative distance procedural assistance in two languages.[138] This activity of the Reunión de Ministros de la Justicia has given Brazil the chance to adhere also to 15 Inter-American Conventions, and to catch up with Argentina, Uruguay, Paraguay and Venezuela in the OAS Convention System, so that today Brazil is acting together with these countries to propose a new Inter-American Convention on consumer protection, which provides for the application of the most favourable law to consumers in e-commerce throughout the Americas, and also reasonable protection for tourists (Brazilian Proposal of an Inter-American Convention on the law applicable to international consumer contracts and transactions).[139] Argentina and Uruguay[140] have also suggested, at the OAS level, that the Santa Maria Protocol could be used as a model for a future Inter-American Convention on special jurisdiction for consumer contracts.[141]

Because 'El MERCOSUR ampliado' is a little lost in a complex net of parallel free trade treaties,[142] it shows no special progress in consumer protection.[143] Consumer protection has in fact found a better discussion forum at the OAS,[144] with the Brazilian proposal on an Inter-American Convention on the law applicable to some international consumer contracts and transactions of 2003,[145] and the discussions which have taken place in

[138] As to the Meeting of Ministers of Justice, see Alicia Perugini, 'O estágio atual da integração: evolução das questões jurídicas do Mercosul' in Ventura (ed), *Direito Comunitário do Mercosul* (n 112) 26–27.

[139] Claudia Lima Marques, 'As lições da reunião preparatória de Porto Alegre da Conferência Especializada de Direito Internacional Privado-CIDIP VII de Proteção dos Consumidores e das negociações posteriores' in Fernandez Arroyo and Moreno Rodriguez (eds), *Protección de los Consumidores en America-Trabajos de la CIDIP VII (OEA)* (n 1) 179.

[140] See Diego Fernandez Arroyo, 'La redefinición de la Codificación Americana Del Derecho Internacional Privado: Hay vida después de la CIDIP VII?' in Fernandez Arroyo and Moreno Rodriguez (eds), *Protección de los Consumidores en America-Trabajos de la CIDIP VII (OEA)* (n 1) 81–82.

[141] Diego Fernandez Arroyo, 'Acerca de la necesidad y las posibilidades de una Convención Interamericana sobre competencia judicial en casos de Derecho Internacional Privado' in *Liber Amicorum en Homenaje al profesor Dr. Didier Opertti Badán* (Montevidéo, FCU, 2006) 113 and see the Telechea Proposal, available at www.oas.org, comment by Claudia Lima Marques, 'A proteção da parte mais fraca em direito interacional privado e os esforços da CIDIP VII de proteção dos consumidores' in Comité Jurídico Interamericano (ed), *XXXIV Curso de Derecho Internacional* (Washington, Secretaría General-OAS, 2007) 261.

[142] Secretaría General de la ALADI, *Retos y Dificultades de La Integración Latinoamericana* (Montevidéo, ALADI, 2005) 18–19. See CCM Decision No 32/2000.

[143] All, 'El Diseño y La progresiva construcción de um sistema de protección del consumidor a escala americana: avances y desafios pendientes' (n 102) 281–89.

[144] See Jean Michel Arrighi, 'Algunos apuntes para el estudio del tema de la protección de os consumidores en la OEA' in Fernandez Arroyo and Moreno Rodriguez, *Protección de los Consumidores en America-Trabajos de la CIDIP VII (OEA)* (n 1) 17.

[145] See Claudia Lima Marques, 'A insuficiente proteção do consumidor nas normas de DIPr: Da necessidade de uma Convenção Interamericana sobre a lei aplicável a alguns contratos relações de consumo' in Diego Fernández Arroyo and Fabio Mastrangelo (eds), *El futuro de la codificación del Derecho internacional privado en*

CIDIP VII on consumer protection.[146] The MERCOSUR Member States are acting together and proactively in the OAS forum.[147] Consumer protection policy in the region gains in importance with this increasing cooperation, which has allowed the creation of an Inter-American School on consumer protection.[148] In 2009, because of the global financial crisis, the headline subject in MERCOSUR was consumer over-indebtedness, a novel issue not yet regulated in any of the five current Member States.[149] The prospects for progress on consumer protection appear positive.[150]

America: De la CIDIP VI a la CIDIP VII (Córdoba, Alveroni, 2005) 105–65; and Lima Marques, 'Consumer Protection in Private International Law Rules' (n 1) 145–90.

[146] See the conclusions of María Laura Estigarribia, 'Cláusulas abusivas en contratos de consumo. Su previsión en Latinoamerica. La posible influencia del Proyecto de CIDIP VII' in Fernandez Arroyo and Moreno Rodriguez (eds), *Protección de los Consumidores en America-Trabajos de la CIDIP VII (OEA)* (n 1) 382.

[147] Of the same opinion, Jaeger, 'Impasses do Direito Processual Civil Internacional do Mercosul e a oportunidade para o revival das CIDIPS' (n 92) 367.

[148] Regarding the link between the efforts of MERCOSUR CT No 7 and the OAS towards CIDIP VII on consumer protection, see MERCOSUR-CCM-CT No 7 Act 2/2008, no 2 and MERCOSUR-CCM-CT No 7 Act 3/2008, nos 2, 3 and 4.

[149] See Karen RD Bertoncello and Clarissa C De Lima, 'Overindebtedness in Mercosur Countries' in Bourgoignie (ed), *L'intégration économique régionale et la protection du consommateur* (n 3) 455.

[150] Of the same opinion, Grassi, 'La politique de protection du consommateur dans le système d'intégration régionale du Mercosur' (n 5) 353.

19

Human Rights in MERCOSUR

LUCAS LIXINSKI*

I Introduction

In this chapter I will look at how human rights are addressed within MERCOSUR. The topic has deserved attention both from a political and legal perspective, but fairly little literature exists on the topic. At the political level, the instability of some governments in the bloc has threatened the enjoyment of human rights, and thus raised concerns; at the legal level, instruments with human rights implications have recently been approved within MERCOSUR. Further, and perhaps more importantly, a controversy regarding protests blocking a bridge between Argentina and Uruguay and preventing the circulation of goods, in contravention to MERCOSUR norms, has been decided by the dispute settlement system created by the Olivos Protocol. The arbitral award discussed precisely the clash between the enjoyment of a human right (freedom of assembly and protest) and a market freedom (freedom of circulation of goods).[1]

As MERCOSUR often draws inspiration from the European Union, this analysis will take into account the two key cases on this issue before the European Court of Justice (ECJ): the *Commission v France* and *Schmidberger* cases.[2] However, my intention here is

* Part III of this chapter is based on (and, to a large extent, a reproduction of an excerpt of) the author's chapter 'Limiting Freedom of Assembly Based on Harms to Third Parties: The Balancing of Economic Freedoms and Fundamental Rights in the European Union and MERCOSUR' in A Sajó (ed), *Free to Protest: Constituent Power and Street Demonstration* (Utrecht, Eleven International Publishing, 2008) 127. That contribution, however, was more focused on freedom of assembly and protest than on general human rights protection in economic integration processes. In this chapter, I look at human rights more generally. I would like to thank Marcílio Toscano Franca Filho for his comments on an early draft. All errors remain my own.

[1] Laudo del Tribunal Arbitral 'Ad Hoc' de MERCOSUR Constituido para Entender de la Controversia Presentada por la República Oriental del Uruguay a la República Argentina sobre 'Omisión del Estado Argentino en Adoptar Medidas Apropiadas para Prevenir y/o Hacer Cesar los Impedimentos a la Libre Circulación Derivados de los Cortes en Territorio Argentino de Vías e Acceso a los Puentes Internacionales Gral. San Martín y Gral. Artigas que Unen la República Argentina con la República Oriental del Uruguay' (Award of the ad hoc arbitration court of MERCOSUR constituted to entertain the dispute presented by the Eastern Republic of Uruguay against the Argentinean Republic on the omission of the Argentinean State to adopt appropriate measures to prevent and/or stop the impediments to free movement arising from the blockages on Argentinean territory of the means of access to the international bridges General San Martín and General Artigas that unite the Argentinean Republic and the Eastern Republic of Uruguay), Award of 6 September 2006 (the *Bridges* case).

[2] Case C-265/95 *Commission v France*, Judgment of the ECJ of 9 December 1997; Case C-112/00 *Schmidberger*, Preliminary Ruling of the ECJ of 12 June 2003. For literature discussing these two cases specifically, *see* FR Agerbeek, 'Freedom of Expression and Free Movement in the Brenner Corridor: The *Schmidberger* Case' (2004) 29(2) *European Law Review* 255; J Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: *Schmidberger* and *Omega* in the Light of the European Constitution' (2006) 12 *European Law Journal* 15; C Brown, 'Eugen Schmidberger Transporte und Planzüge v. Austria' (2003) 40 *Common Market Law Review* 1499; G Facenna, 'Eugen Schmidberger Internationale Transporte Planzuge v. Austria: Freedom of Expression

not to engage in an in-depth comparative analysis between the two processes. I avoid such a comparison for two reasons: first, because it has become a sort of cliché in MERCOSUR legal literature which has the unwanted effect of overshadowing the analysis of the specific MERCOSUR issues; secondly, I do not believe that the two processes are as comparable as MERCOSUR scholars usually tend to assume. Some reference to these two cases is unavoidable, however, because the arbitral tribunal itself referred to them.

Nor will I approach the analysis of the protection of human rights in MERCOSUR by assessing the levels of human rights protection in its Member States. While it has been said that this is important for enabling the 'harmonisation' of levels of protection in the Member States,[3] I do not believe this exercise is useful, for two main reasons. First of all, just as in the case of the comparisons with the European Union, to use comparative law of the Member States has become a cliché in MERCOSUR literature; while this is useful for legal harmonisation,[4] I do not believe 'harmonisation' is the strategy to be adopted in MERCOSUR. This leads me to my second reason: one should not speak of harmonisation of human rights legislation in MERCOSUR, not because human rights standards in the Member States should not be high and roughly uniform, but rather because what is lacking at this point is a 'MERCOSUR dimension' to human rights which is not so dependent and related to the Member States, which is what my focus in this chapter will be. Furthermore, any attempt at harmonisation would necessarily lead to constitutional reform, which is still a very delicate and cherished sovereign issue in many of these states.

As to the structure of this chapter, I will first look at the discourses on human rights and economic integration in the MERCOSUR context, with particular attention to the idea that human rights promotion is a desirable goal of economic integration. Next, I will examine MERCOSUR instruments with regard to human rights protection. I will finally analyse the relationship between market freedoms and human rights, which was the subject of the arbitral panel's award.

II Human Rights as a Desirable Goal of Economic Integration

The debates that led to the creation of MERCOSUR began in the late 1980s, when the four original Member States were in the process of being re-democratised. This 'political environment', by promoting democratic values, gave impulse to economic integration, despite the resistance to openly stating these values in the constitutive documents of

and Assembly vs. Free Movement of Goods' (2004) 1 *European Human Rights Law Review* 73; L Lixinski, 'Limiting Freedom of Assembly Based on Harms to Third Parties: The Balancing of Economic Freedoms and Fundamental Rights in the European Union and MERCOSUR' in A Sajó (ed), *Free to Protest: Constituent Power and Street Demonstration* (Utrecht, Eleven International Publishing, 2008); and A Biondi, 'Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights' (2004) 1 *European Human Rights Law Review* 51.

[3] *See* EL Marques, 'Direitos Humanos no MERCOSUL' in PB Casella (ed), *MERCOSUL: Integração Regional e Globalização* (Río de Janeiro, Renovar, 2000) 529, 539.

[4] For a quick analysis of the comparative constitutional law of the Member States with regard to human rights protection, see AC Ramos, 'Direitos Humanos e o MERCOSUL' in Casella, *MERCOSUL: Integração Regional e Globalização* (n 3) 867, 878–81; and RJ Sant'Anna Rosa, 'MERCOSUL: em busca de uma identidade humanitária' in Casella, *MERCOSUL: Integração Regional e Globalização* (n 3) 981, 997–1001.

MERCOSUR.[5] Following its creation, the role of MERCOSUR in guaranteeing political stability became evident during the political crises that threatened the Paraguayan state in the late 1990s, which included an attempted *coup d'état*.[6]

The Joint Parliamentary Commission (CPC, Comissão Parlamentar Conjunta) has played an important role in adding human rights to the MERCOSUR agenda. As it represents the political ideals of the integration process, the Commission has had the freedom to advance political issues within the bloc for many years. Its relatively low profile has guaranteed that, even though it is a highly political organ, very little interference from the Member States actually takes place. Much of this activity has been aimed at promoting democratic values within the bloc, and in restating, at the political level, that democracy is a *conditio sine qua non* for the success of the integration process.[7] The Rules of Procedure of the Commission state that the CPC's aim is to 'protect peace, freedom, democracy and the effectiveness of human rights'.[8]

The references to democracy have quickly also become references to the democratic rule of law (*Estado Democrático de Direito* in Portuguese or *Rechtstaat*, to use the German expression), and, as a key element of the rule of law, the respect for human rights quickly became an issue, even if only a rhetorical one at the initial stage. A wide range of instruments began to mention the respect for human rights alongside the need to uphold democratic values, and this tendency has continued to this day.[9] For instance, in 1992 the CPC recommended that a 'democratic safeguard' clause be inserted in the Treaty of Asunción,[10] and this eventually became the Ushuaia Protocol on Democratic Commitment in MERCOSUR (Protocolo de Ushuaia sobre Compromisso Democrático no MERCOSUL).[11] All this has meant that democracy and human rights are inextricably connected at the MERCOSUR level, and are often framed as being important goals to be advanced in the integration process, as a means of guaranteeing the necessary stability for the region to prosper economically.

Currently, it is the relatively new MERCOSUR Parliament (Parlamento do MERCOSUL or PARLASUR)[12] that has been performing many of the functions once performed by the CPC. The much higher visibility of this organ can potentially contribute enormously to the 'mainstreaming' of human rights in MERCOSUR, but at the same time the positions adopted by the PARLASUR may be more cautious, precisely because of its greater visibility and the pressure that may come from national governments upon it. It is still too early to

[5] *See* MC Drummond, 'Democracia e Direitos Humanos no MERCOSUL' in *Trends in the International Law of Human Rights, Liber Amicorum Antonio Augusto Cançado Trindade* (Porto Alegre, Sérgio Antonio Fabris, 2005) book 6, 465.

[6] *See* Ramos, 'Direitos Humanos e o MERCOSUL' (n 4) 867, 888; and Drummond, 'Democracia e Direitos Humanos no MERCOSUL' (n 5) book 6, 465, 467.

[7] *See* Ramos, 'Direitos Humanos e o MERCOSUL' (n 4) 867, 887; and Drummond, 'Democracia e Direitos Humanos no MERCOSUL' (n 5) book 6, 465, 469.

[8] *See* Marques, 'Direitos Humanos no MERCOSUL' (n 3) 529, 535.

[9] *See* Drummond, 'Democracia e Direitos Humanos no MERCOSUL' (n 5) book 6, 465, 470–2.

[10] *See* Sant'Anna Rosa, 'MERCOSUL: em busca de uma identidade humanitária' (n 4) 981, 987.

[11] Protocolo de Ushuaia sobre Compromisso Democrático no MERCOSUL, opened for signature on 24 July 1998, ratified by all Member States (plus Ecuador and Peru), entered into force 17 January 2002. See MERCOSUR, Estado de Ratificaciones y Vigencias de Tratados y Protocolos del MERCOSUR y Estados Asociados, available at www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/mercosurprincipal.htm.

[12] On the composition, mandate and functioning of the MERCOSUR Parliament, see Adriana Dreyzin de Klor, Chapter 3.

fully assess this aspect of the PARLASUR's activity, but it is important to note that human rights have been on the agenda. For instance, the PARLASUR has recently addressed relevant human rights issues such as human trafficking, violence against women and consumer protection.[13]

A Commission on Citizenship and Human Rights has also been created within the PARLASUR, and is currently preparing a Report on Human Rights in MERCOSUR, with specific regard to the implementation of MERCOSUR norms and their impact on human rights. This report is required by article 4.3 of the Protocol creating the PARLASUR,[14] and should become a valuable instrument in enhancing human rights in the bloc.

On another front, members of the judiciary of the Member States have been actively involved in the promotion of human rights values within the bloc. Most recently, Declaration No 23/2008 of the Sixth Meeting of MERCOSUR Supreme Courts created a Working Group responsible for drafting a MERCOSUR Charter of Fundamental Rights. One of the expectations is that such a Charter would resemble the EU Charter on Fundamental Rights in scope and reach, but that is still to be seen.

Finally, one must highlight the importance of MERCOSUR's external relations in the inclusion of human rights in the MERCOSUR discourse. It is not my intention to analyse here the relationship between MERCOSUR and other regional economic integration schemes.[15] Nevertheless, it is important to note that, in agreements concluded between MERCOSUR and other blocs (notably, the European Union), reference is made in these agreements to human rights (as protected by the Universal Declaration of Human Rights), which is considered an essential element of the agreement and of the amicable relations between the blocs.[16] Even though it is more likely that such a provision has been inserted as part of the standard practice of EU external relations than on MERCOSUR's initiative, it is still an indication of the ever-increasing role of human rights within the bloc, which is reflected in new instruments, analysed below.

III Human Rights Instruments in MERCOSUR

Turning to the role that human rights instruments play in MERCOSUR, it must be said that it is not substantial. There is only one specific human rights instrument within MERCOSUR, the Protocol of Asunción on the Commitment to the Promotion and Protection of Human Rights in MERCOSUR, which is not yet in force.[17] This Protocol contains few provisions, and deduces the necessity for protecting human rights from the

[13] The relevant debates can be found in detail on the Parliament's website, available at www.parlamentodelmercosur.org.

[14] PARLASUR, Continúan Audiencias Públicas para la elaboración del Informe de Derechos Humanos, available at www.parlamentodelmercosur.org/noticia_home.asp?i=1&id=210.

[15] See on this, Marcílio Toscano Franca Filho, Chapter 8.

[16] See Marques, 'Direitos Humanos no MERCOSUL' (n 3) 529, 535; and Sant'Anna Rosa, 'MERCOSUL: em busca de uma identidade humanitária' (n 4) 981, 982.

[17] Protocolo de Asunción sobre Compromiso con la Promoción y Protección de los Derechos Humanos del MERCOSUR, signed in Asunción on 20 June 2005. At the time of writing, Argentina and Paraguay have already ratified the Protocol, and the ratifications of Brazil, Uruguay and Venezuela are still pending to enable the entry into force of this Protocol. *See* MERCOSUR, Estado de Ratificaciones y Vigencias de Tratados y Protocolos del MERCOSUR y Estados Asociados, available at www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/mercosurprincipal.htm.

need to protect democracy.[18] Its scope of application is limited to persistent violations of human rights perpetrated by a Member State during a state of emergency.[19] In such cases, membership rights can be suspended.[20] Other instruments that affect human rights issues include the Social-Labour Declaration of MERCOSUR,[21] the Agreement on the Regularisation of Internal Migration in MERCOSUR[22] (with a mirror agreement including Bolivia and Chile, associate members of MERCOSUR),[23] the Agreement against the Illicit Traffic of Migrants among the Member States of MERCOSUR[24] (also with a mirror agreement for Bolivia and Chile),[25] the Agreement on Regional Cooperation for the Protection of Children in Situations of Vulnerability,[26] and the Agreement on the Implementation of Shared Databases of Children in Situations of Vulnerability in MERCOSUR and Associated States.[27] I will briefly look at these instruments.

The Social-Labour Declaration of MERCOSUR was the first instrument enacted by the bloc to mention human rights extensively. A detailed analysis of its content and reach is beyond the purposes of this chapter,[28] but it is important nevertheless to comment upon it at this point. Its Preamble reaffirms the commitment of MERCOSUR Member States to 'the legal heritage of mankind', and cites several human rights instruments which constitute this so-called heritage. Even though human rights values form an important part of the content of the Declaration, it has been noted that it is still essentially concerned with the economic goals of MERCOSUR, as it enunciates rights that are important for workers as economic actors in MERCOSUR.[29] Furthermore, it is a soft law instrument, and hence not directly enforceable, even though it is declaratory of important values upon which the dispute settlement system may eventually build in the future for resolving disputes.

Labour rights are a particularly relevant issue in economic integration processes, and a field in which harmonisation may be a valuable alternative, precisely because economic integration can promote a 'race to the bottom' in labour standards that can impact negatively on human rights protection. One author has suggested that the harmonisation

[18] Protocol of Asunción (n 17) Preamble.

[19] Ibid art 3.

[20] Ibid art 4.

[21] Declaração Sociolaboral do MERCOSUR, signed in Brasília on 10 December 1998.

[22] Acuerdo sobre Regularización Migratoria Interna de Ciudadanos del MERCOSUR, signed in Brasília on 5 December 2002. Not yet in force, pending the ratifications by Argentina and Paraguay.

[23] Acuerdo sobre Regularización Migratoria Interna de Ciudadanos del MERCOSUR, Bolivia e Chile, signed in Brasília on 5 December 2002. Not yet in force, pending the ratifications by Argentina, Bolivia and Paraguay.

[24] Acuerdo contra el Tráfico Ilícito de Migrantes entre los Estados Partes del MERCOSUR, signed in Belo Horizonte on 16 December 2004. Not yet in force, pending ratifications by Brazil, Paraguay and Uruguay.

[25] Acuerdo contra el Tráfico Ilícito de Migrantes entre los Estados Partes del MERCOSUR, la República de Bolivia y la República de Chile, signed in Belo Horizonte on 16 December 2004. Not yet in force, pending ratifications by Bolivia, Brazil, Paraguay and Uruguay.

[26] Acuerdo entre los Estados Partes del MERCOSUR y Estados Asociados sobre Cooperación Regional para la Protección de los Derechos de Niños, Niñas y Adolescentes en Situación de Vulnerabilidad, signed in San Miguel de Tucumán on 30 June 2008. Not yet in force, pending ratifications by four of the five Member States (Argentina, Brazil, Paraguay, Uruguay and Venezuela) and also open to ratification for associated states (Bolivia, Chile, Colombia, Ecuador and Peru).

[27] Acuerdo para la Implementación de Bases de Datos Compartidas de Niños, Niñas y Adolescentes en Situación de Vulnerabilidad del MERCOSUR y Estados Asociados, signed in San Miguel de Tucumán on 30 June 2008. Not yet in force, pending ratifications by all Member States (Argentina, Brazil, Paraguay, Uruguay and Venezuela) and associated states (Bolivia, Chile, Colombia, Ecuador and Peru).

[28] For a more detailed analysis, see Hugo Roberto Mansueti, Chapter 13.

[29] *See* Drummond, 'Democracia e Direitos Humanos no MERCOSUL' (n 5) book 6, 465, 473.

has been achieved in a very peculiar way, not by looking at the municipal levels of protection in each Member State, but rather by examining the international standards to which all Member States are parties (more specifically, the relevant International Labour Organisation conventions), and from there drawing the inspiration for common standards.[30] However, it might be the case that this approach to harmonisation responds better to the needs of MERCOSUR as an international legal process of economic integration. Further, it answers concerns about constitutional reform by avoiding any constitutional reform at all. It is thus a model that could perhaps be expanded to human rights at large, if harmonisation of human rights standards is ever seriously considered in future within the bloc.

The agreements on migration policy, like the Socio-Labour Declaration, also refer to human rights promotion as part of the advancement of economic goals. These protocols serve, to put it simply, as a means to give legal recognition to the freedom of circulation of persons. While this freedom can arguably be considered to be the economic expression of an important human right (the right to freedom of movement), these instruments do not view human rights promotion in MERCOSUR 'disinterestedly'. Human rights as such are not even mentioned in these agreements.

On the other hand, the agreements on illicit trafficking of migrant workers represent a step forward in terms of human rights protection in the bloc. Even though these instruments are typical instruments of cooperation in criminal matters, they both have claw-back clauses in common article 9 to these instruments. This article states that the application of the instrument must not clash with the human rights obligations of the parties, especially with regard to the protection of refugees and the principle of *non-refoulement*. While the issue of the trafficking of human beings is not framed as a human rights issue, some regard at least is given to human rights as a safeguard for the victims of trafficking.

The agreement on the protection of children reaffirms the need to safeguard the best interests of children as protected by instruments such as the United Nations Convention on the Rights of the Child and the American Convention on Human Rights.[31] The agreement does not include the civil aspects of the international abduction of children, which are regulated by the Hague and Inter-American Conventions of 1980 and 1989, respectively, and it is restricted to creating a database of children at risk for use by the administrative and judicial authorities of MERCOSUR.[32] This is regulated by the specific Agreement on Databases, which also provides the definition of 'children'. This definition, interestingly, is drawn from national criteria, instead of international standards. More specifically, the age for adulthood is that of national legislation (18 years of age in all participating countries, except for Argentina, where the age is 21).[33] On a generic level, this represents an interesting development, as it seems to indicate that, at the international law-making level, the treaty-makers are willing to pay attention to municipal rules in the determination of human rights protection. In this specific situation, it is regrettable that the more protective international threshold has not been imposed.

[30] *See* Sant'Anna Rosa, 'MERCOSUL: em busca de uma identidade humanitária' (n 4) 981, 1003–4.

[31] Acuerdo entre los Estados Partes del MERCOSUR y Estados Asociados sobre Cooperación Regional para la Protección de los Derechos de Niños, Niñas y Adolescentes en Situación de Vulnerabilidad (n 26) Preamble.

[32] Ibid art 1.

[33] Acuerdo para la Implementación de Bases de Datos Compartidas de Niños, Niñas y Adolescentes en Situación de Vulnerabilidad del MERCOSUR y Estados Asociados (n 27) art 2.

Human rights therefore do not play a key role in the institutional structure of MERCOSUR, at least inasmuch as the instruments that advance human rights goals are not yet in force. Nevertheless, such instruments do help to foster an environment favourable to human rights values, and it is expected that they will come into force, which would greatly strengthen human rights in the bloc. Considering the lack of clear rules in force, it is important to examine to what extent human rights play a role in the dispute settlement bodies of MERCOSUR, as they may operate as the first step towards implementing enforceable rules in the economic integration context.

IV Human Rights and Market Freedoms: The *Bridges* Case

Even though one author has maintained that it would be very difficult to ensure human rights protection at the MERCOSUR level in the absence of a permanent court for the settlement of disputes,[34] an ad hoc arbitration court established under the Olivos Protocol tackled the issue. The ad hoc arbitration court in the *Bridges* case[35] was established in June 2006, pursuant to the rules of the Olivos Protocol. The complaint brought by Uruguay concerned the stoppage of traffic by means of blockages of two international bridges between Argentina and Uruguay. These blockages were caused by environmentalist groups protesting against the construction of pulp mills on the Uruguay River, which forms the border between the two countries.[36] The events occurred on several different occasions between December 2005 and May 2006 and, according to Uruguay, the Argentinean authorities failed to adopt appropriate measures to halt the interference with the traffic on the bridges, even though, allegedly, the number of protesters was very small and the situation could easily have been handled by law enforcement authorities.[37]

The disruption of traffic, according to Uruguay, caused damage to several businesses involved in the import/export of goods, as well as to tourism and the land transport of people and goods,[38] thus affecting the free circulation of goods, as well as of services within MERCOSUR. Uruguay further alleged that the effect on the free circulation of people was in contravention of international commitments in the field of international human rights law.[39] Finally, Uruguay made reference to the ECJ decision in *Commission v France*, and suggested that a similar approach should be adopted by the ad hoc arbitration court.[40]

[34] See Sant'Anna Rosa, 'MERCOSUL: em busca de uma identidade humanitária' (n 4) 981, 994–7.
[35] *Bridges* case (n 1).
[36] Ibid para 17.
[37] Ibid para 19.
[38] Ibid para 21.
[39] Ibid para 27.
[40] Ibid para 31. In *Commission v France*, a series of protests in France caused by the discontent of farmers over competition with farmers from other Member States (mainly Spain, but also Belgium and Italy) gave rise to concern from the European Commission, which entered into communications directly with France and, seeing no result, decided to bring an action before the ECJ. In the Commission's view, the events in France amounted to an impediment to the free circulation of goods, a fundamental economic freedom. The Commission attributed this interference to the French state, even though it was committed by private parties, since French authorities had not taken any steps to prevent the actions of the farmers. The issue before the ECJ was whether the actions of these private individuals amounted to a violation of the freedom of movement of goods, and whether they were attributable to the French state. The Court found that the interruption of means of transport, the damage to the

The Argentinean response aimed to show the protests in a more favourable light. As an antecedent of the protests on the bridges, the Argentinean government referred to 'The Hug of Solidarity' (*El Abrazo Solidario*) as the key protest that gave rise to the movement from which the protests on the bridges derived. This was a five-hour long protest that happened in April 2005, gathering 40,000 people in a demonstration in the Argentinean city on the opposite bank to the Uruguayan city where the pulp mills were to be constructed.[41] In response to the Uruguayan claim that the blockages had caused harm to their economy, Argentina asserted that the blockages were announced beforehand and that drivers therefore had the possibility of planning alternative routes accordingly[42] (similar to the facts of the *Schmidberger* case mentioned above). The Argentinean customs authorities had put in place an emergency scheme of operation so as to guarantee the normal flow of international trade, increasing the personnel in alternative access routes into the country.[43]

Another defence put forward by Argentina, and the crux of the present analysis, is that demonstrations were permitted in the interest of protecting freedom of expression and assembly, which is protected by international instruments and Argentinean constitutional law.[44] Argentina referred expressly to the *Schmidberger* decision, interpreting it to mean that, in economic integration processes, respect for human rights norms can justify restricting rights enshrined in the integration treaty.[45]

Argentina also argued that compliance with the MERCOSUR agreements only required measures to be taken with regard to governmental structures, and not non-state actors.[46]

agricultural goods being transported, and the climate of insecurity generated by the events, amounted to an obstacle to the freedom of circulation of goods within the Community, and that France was required to take action to secure such freedom, even if this entailed measures against private individuals. One interesting feature of the case is that the actions of the French farmers were never characterised by the Commission or the French government as an exercise of the right to protest; rather, these acts were referred to as 'acts of violence'. The only instance in which a justification was attempted was when France put forward the motivation for the acts of the French farmers, which was said to be general discontent and deep concern over the loss of business caused by the competition with foreign products. To this, the ECJ replied that '[a]pprehension of internal difficulties cannot justify a failure by a Member State to apply Community Law correctly'.

[41] *Bridges* case (n 1) para 40.

[42] Ibid para 42.

[43] Ibid para 94.

[44] Ibid para 44.

[45] Ibid para 51. In *Schmidberger*, a preliminary ruling procedure, environmental activists in Austria wanted to organise a demonstration to raise awareness about the issue of air pollution on the Brennen road, as part of a much broader and very sensitive issue regarding environmental protection in the Brennen road area. To organise their demonstration, the protesters requested an authorisation from the public authorities, which was granted. In order to reduce the inconvenience related to such a demonstration, an early warning about the demonstration taking place was given and an alternative route was organised, among other measures designed to minimise the effects of the demonstration on traffic in the area. The question was referred to the ECJ asking whether the activities of the public authorities in allowing the demonstration to happen constituted an interference with the fundamental freedom of free circulation of goods. Reviewing the case law of the ECJ in terms of fundamental rights, the ECJ concluded that fundamental rights, as protected by the constitutional traditions of the Member States, and given special relevance through the provisions of the European Convention on Human Rights (ECHR), could be deemed to be justifiable interferences with economic freedoms. According to the ECJ, measures incompatible with the fundamental rights recognised in the ECHR and in constitutional traditions are not acceptable within the Community. The ECJ went on to say that, since both the Community and the member states must protect human rights, the protection of these rights is an interest that in principle justifies interfering with an economic freedom. The ECJ concluded that national authorities were entitled, in the exercise of their margin of appreciation, to conclude that the legitimate aim of such demonstrations could not be achieved by means less restrictive of Community principles.

[46] *Bridges* case (n 1) para 46.

Another argument was that Argentina was not responsible for the lack of interference by the police, since police forces were controlled by the provinces, and not by the federal state[47]—an argument quickly dismissed in the analysis of the merits of the case.[48]

There was a procedural question in the case regarding a side dispute over the designation of one of the arbiters,[49] which was settled as a preliminary issue. On the merits, the ad hoc arbitration court first dismissed the arguments relating to the free circulation of persons, arguing that such freedom was encompassed by the freedom of circulation of goods and services.[50] The arbitration court then decided that the actions of private parties in the case amounted to an interference with the free circulation of goods, which could engage the responsibility of the state if the state did not act with due diligence.[51]

Such due diligence, however, was to be exercised by the state using its own margin of discretion in choosing the best means to achieve the goal of enabling the free circulation of goods.[52] In this regard, the arbitration court suggested that the state was not required to make provision to achieve the goal without giving due regard to the legitimate claims of the protesters, whose quality of life was threatened by the construction of the pulp mills.[53]

The arbitration court accepted that the Argentinean government was acting in good faith in this regard,[54] but stated that good intentions were not enough. After dismissing the ECJ precedents invoked by the parties on the grounds of differences of fact and legal structure (in the latter case between the European Union and MERCOSUR),[55] the arbitration court held that, since the measures adopted were not sufficient to halt the harm done to the economic freedom in question, there had been a breach of the obligation to respect such freedom, since to legitimise the blockages would lead to a state of legal uncertainty with respect to MERCOSUR norms, which would ultimately be harmful to the integration process.[56]

On the arguments regarding human rights, the arbitration court responded to the allegation by one of the parties that it was not competent to entertain such claim by initially saying that human rights form the core of any legal order, and thus constituted an

[47] Ibid para 55.
[48] Ibid para 156.
[49] This dispute became the object of an appeal to the Permanent Review Court, where it was dismissed. The Permanent Review Court argued that its mandate extended only to the appeal of an award in its entirety, and not the appeal of interlocutory decisions. See Laudo No 2/2006, Laudo do Tribunal Permanente de Revisão, Constituído em Plenário para Julgar o Recurso de Revisão Apresentado pela República Argentina contra a Decisão do Tribunal Arbitral Ad Hoc, de 21 de Junho de 2006, que Foi Constituído para Julgar a Controvérsia Promovida pela República Oriental do Uruguai contra a República Argentina sobre a Questão: 'Impedimentos Impostos à Livre Circulação pelas Barreiras em Território Argentino de Vias de Acesso às Pontes Internacionais Gal. San Martín e Gal. Artigas' (Award No 2/2006, Award of the Permanent Review Court, instituted in its plenary form to judge the appeal presented by the Argentinean Republic against the decision of the Ad Hoc Arbitral Tribunal of 21 June 2006, that was instituted to judge the controversy brought by the Eastern Republic of Uruguay against the Argentinean Republic on the question of the impediments promoted to the free circulation through the barriers on the Argentinean territory of the access ways to the international bridges General San Martín and General Artigas of 6 July 2006.
[50] *Bridges* case (n 1) para 105.
[51] Ibid para 116.
[52] Ibid para 119.
[53] Ibid para 122.
[54] Ibid para 144.
[55] Ibid paras 150–52.
[56] Ibid para 155.

important element of the arbitration court's considerations in the case.[57] However, Argentina based its argument on the hierarchy of human rights norms in its municipal law (which puts international human rights on the same level as the Constitution),[58] a notion dismissed by the arbitration court on the grounds that a state cannot invoke its internal law as a justification for failing to comply with its international obligations.[59]

Perhaps one of the reasons why the human rights argument in the case failed is precisely because it relied excessively on Argentina's constitutional provisions. While reliance on the constitutional provisions of Member States has invariably been successful in the European Community context,[60] the ECJ always made reference to the constitutional traditions 'common to all Member States', rather than the traditions of one particular Member State. MERCOSUR has recently been struggling for a greater degree of legal autonomy,[61] and distancing itself from the internal law of its Members seems almost to be a required step in this context.

When analysing the clash between the fundamental economic freedoms and the human rights Argentina claimed to be protecting in the case, the arbitration court held that interferences with free trade are permissible when such interferences are based on principles recognised by the international community, among which are human rights. In such cases, the arbitration court stated, it was necessary to promote a balancing of the conflicting interests, so as to guarantee that one interest would not be nullified by another.[62]

In the view of the arbitration court, moreover, measures restricting international trade could be 'tolerated' when these were adopted with the necessary precautions to minimise their effects, which did not happen in the instant case.[63] The arbitration court went on to

[57] Ibid para 125.

[58] Ibid para 127.

[59] Ibid para 128. This rule is enshrined in Vienna Convention on the Law of Treaties, art 27, explicitly referred to by the arbitration court.

[60] See eg cases involving Germany, which greatly helped the development of fundamental rights within the European Union. The contribution of Germany is especially mentioned by P Craig and G de Búrca, *EU Law* 3rd edn (Oxford, Oxford University Press, 2003) 319–20. Advocate-General Jacobs pointed out in his Opinion in the *Schmidberger* case, however, that not every fundamental right found in a national Constitution deserves consideration at the Community level. In some instances, it is even imaginable that certain fundamental rights could be recognised as illegitimate objectives by the Community. The ECHR is regarded as providing a good reference for the common ground of fundamental rights to be protected within the Community legal order (for example, the right to dignity in the *Omega* case). For a commentary on this, see G Facenna, 'Eugen Schmidberger Internationale Transporte Planzuge v. Austria: Freedom of Expression and Assembly vs. Free Movement of Goods' (2004) 1 *European Human Rights Law Review* 73, 79. It should be noted, furthermore, that the importance of national constitutional traditions has decreased significantly within the case law of the ECJ. This is due partly to the fact that the ECHR offers a better standard of commonality (and does not require extensive comparative law analysis), and partly to the adoption of the EU Charter of Fundamental Rights, which has recently been used by the European courts in some cases. *See* P Craig and G de Búrca, *EU Law* 4th edn (Oxford, Oxford University Press, 2007) 386–88.

[61] The issue of legal autonomy of MERCOSUR law was specifically raised in the first arbitral award of the Permanent Review Court under the Olivos Protocol, in which the Review Court considered the matter of the sources to be applied to decide on valid exceptions to the free circulation obligations of the Asunción Treaty. See Laudo No 01/2005, Laudo do Tribunal Permanente de Revisão para Entender do Recurso de Revisão Apresentado pela República Oriental do Uruguai contra o Laudo Arbitral do Tribunal Arbitral Ad Hoc de Data 25 de Outubro de 2005 na Controvérsia 'Proibição de Importação de Pneus Remoldados Procedentes do Uruguai' (Award No 01/2005, Award of the Permanent Review Court on the appeal presented by the Eastern Republic of Uruguay against the arbitral award of the Ad Hoc Arbitral Tribunal of 25 October 2005 on the dispute on the prohibition of importation of retreaded tyres originating from Uruguay of 26 December 2005.

[62] *Bridges* case (n 1) para 133.

[63] Ibid para 134.

state that the right to protest is not an absolute right (at least not as it is protected by international human rights instruments), and it can thus be limited by an economic freedom.[64] In thus holding, the MERCOSUR arbitration court adopted a position similar to that of the ECJ in *Schmidberger*, as it put human rights and economic freedoms on the same level.[65]

Even though restrictions on the time, place and manner of the exercise of freedom of assembly did not seem to play a role in the decision of the arbitration court, they featured as considerations in the discussion of the reasonableness of the actions of the protestors. While recognising that the objective pursued by the protesters was legitimate,[66] the arbitration court found that the protesters lost their legitimacy as time progressed, and they resorted to means more intrusive on the rights of others.[67] Furthermore, the fact that the controversy had been submitted to the International Court of Justice (ICJ)[68] was held to make the purpose of the protests less legitimate, as an appropriate forum was already addressing the protestors' grievances.[69]

For a better understanding of this dispute, and to grasp its underlying irony, it is important to say a few words about the context of the case. The protest was only one element of a larger dispute between Argentina and Uruguay over the construction of pulp mills on the margins of the Uruguay River, which forms the border between the two countries. The protests took place in the Argentinean city on the opposite bank to the Uruguayan city where the plants would be built.[70]

The official Argentinean position was that the construction of these plants, because of their harmful environmental effects, was in violation of an agreement between the two countries on the administration of the Uruguay River, signed in 1975. The issue has given rise to a case before the ICJ.[71] However, it could be suggested that the real reason for the

[64] Ibid paras 138–39.

[65] The relationship between human rights and international trade is not the subject of discussion of this chapter. For the present purposes, I would highlight that there are two main 'competing' theories regarding this relationship, one that considers international trade law to be a means of promoting human rights, and the other that sees the fields as separate, and generally regards human rights as a form of 'control' or 'brake' to international trade. This discord became particularly evident in the famous Alston–Petersmann debate. See EU Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621; P Alston, 'Resisting the Merger and Acquisitions of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *European Journal of International Law* 815; EU Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously, Rejoinder to Alston' (2002) 13 *European Journal of International Law* 845. If one adopts Petersmann's position, it is only to be expected that human rights and economic freedoms are on the same level, as ultimately fundamental rights can be found within fundamental freedoms, as being (at least partly) derived from them. However, it seems to me dangerous to grant protection to human rights to the extent they are concomitantly a part of an economic freedom, as this would imply giving human rights the value of an accessory to the ultimate goal of free trade, rather than the other way around. Elements of this debate have recently been played out again, this time involving EU Petersmann and R Howse. See EU Petersmann, 'Human Rights, International Economic Law and "Constitutional Justice"' (2008) 19 *European Journal of International Law* 769; R Howse, 'Human Rights, International Economic Law and Constitutional Justice: A Reply' (2008) 19 *European Journal of International Law* 945; and EU Petersmann, 'Human Rights, International Economic Law and Constitutional Justice: A Rejoinder' (2008) 19 *European Journal of International Law* 955.

[66] *Bridges* case (n 1) para 157.

[67] Ibid para 158.

[68] See n 71 and accompanying text.

[69] *Bridges* case (n 1) para 160.

[70] Ibid para 85.

[71] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ, 4 May 2006. The interruption of traffic on the bridges also formed part of an issue before the ICJ regarding provisional measures. The request by Uruguay for

controversy, at least at the governmental level, was not because the pulp mills might harm the environment (since Argentina in fact has several pulp mills on its own territory),[72] but rather because Argentina was not willing to share with Uruguay the environmental costs of industrial plants that would bring economic benefits only to its neighbour.

A significant irony of the Argentinean defence in the case was its position with regard to protests. Uruguay alleged that Argentinean practice was to suppress protests, to which Argentina replied that its practice was only to disperse demonstrations that were violent, which was not the case with regard to the protesters on the bridges.[73] Argentina clearly stated before the arbitration court its commitment, at least in theory, to protecting the right to freedom of assembly.[74] However, this seems inconsistent with Argentinean judicial practice.

The practice of social protesting in Argentina is to provoke road blockages in order to draw public attention to a certain issue.[75] In Argentinean judicial practice, such protesters are prosecuted when their actions interfere with the rights of others, thus making necessary a balancing of rights. As the practice of protesting in Argentina consists of blocking traffic in roads and other public spaces, it is seen as interfering with public order, and thus as falling within the domain of criminal law in the Argentinean system. This leads to a general impression that such protests are considered to be 'criminal acts', which has the effect in the balancing exercise of weighing against the protesters, who generally lose.[76]

Another aspect of the human rights argument before the arbitration court is that Argentina understood the right to freedom of assembly as meaning the right to demand the exercise of other rights, including necessarily the right to choose the venue that would be most effective for conveying the protestors' message.[77] This seems to be in contradiction with the general principle permitting time, place and manner restrictions on freedom of assembly, which imposes a lower threshold on the state to justify such restrictions than if the state proposed to ban the demonstration altogether. These arguments are frequently used by Argentinean judges when finding against road protesters. The general argument is that other venues that would cause less harm to the rights of others (in effect, a place restriction) could have been chosen.[78]

The fact that Uruguay as one of its arguments put forward the idea of the free circulation of persons as a human right (the human right to freedom of movement) brought into the discussion a new perspective on what the limitation on freedom of assembly may consist of in any given case—not only economic freedoms may be at stake,

provisional measures was rejected by the ICJ, however, by order of 23 January 2007. No element of the ICJ dispute refers to freedom of assembly; the dispute mainly concerns the application of the Statute of the Rio Uruguay, a joint treaty on the uses of this river, which forms the border between the two countries.

[72] See the official Argentinean report of the National Institute of Agricultural Technology by MS Acosta and L Vera, Situación foresto-Industrial de Argentina al 2005, available at www.inta.gov.ar/concordia/info/documentos/Forestacion/Sanchez%20Acosta%20Situacion%20for%20ind%20Argentina%202005%20final.pdf.

[73] *Bridges* case (n 1) para 59.

[74] Ibid para 130.

[75] See R Gargarella, 'A Dialogue on Law and Social Protest' in A Sajó (ed), *Free to Protest: Constituent Power and Street Demonstration* (Utrecht, Eleven International Publishing, 2008) 61.

[76] Ibid 63.

[77] *Bridges* case (n 1) para 52.

[78] See Gargarella, 'A Dialogue on Law and Social Protest' (n 75) 61, 75–78.

but also the right of other people to circulate freely. This is in many ways a better approach to the question of balancing limitations on the right to freedom of assembly with the rights of others, in comparison with the approach adopted by the ECJ, but it carries some risk of making human rights claims a part of claims concerning economic freedoms.[79]

Since, in this particular case, the freedom of movement at issue was no more than the expression of an economic freedom, it is arguable to what extent (if any) human rights should be considered as having automatic precedence over such freedoms. This argument was not considered by the arbitration court, however.

The outcome of the case has been deemed a political success, as it reached a compromise decision which left both parties satisfied, and helped to soothe the tensions between Argentina and Uruguay. From a legal point of view, however, the reasoning appears to be vague in parts, and aimed more at achieving a compromise than coming to a legally clear decision.[80]

In summary, putting the specific aspects of this case into a more general context, the principle applied seems to be the following: the exercise of a human right can be considered as a justifiable interference with an economic freedom, as long as the exercise of the human right pursues a legitimate aim, and the gain from the human rights activity is proportional to the hampering of the economic freedom. If such is the case and, in a balancing exercise, it is shown that the economic freedom is not gravely affected and that the state has taken positive measures to minimise the impact of the exercise of the human right in question on the economic freedom, there is no violation of any economic integration norms.

This approach gives clear precedence to the goals of economic integration. Considering that MERCOSUR is still struggling to achieve a more effective economic integration, such a narrow ruling is only to be expected.

V Concluding Remarks

At the political level, human rights in MERCOSUR have been consistently promoted by the Joint Parliamentary Commission as deriving from the value of democracy, and simultaneously, essential for it. Now that the Parliament of MERCOSUR has come into being, the concept of human rights has taken on a deeper meaning, as it is no longer dependent upon democracy and is an independent value worthy of protection, as the preparation of reports on human rights in MERCOSUR shows.

At the present time, the positive legal framework is still rather fragmented, and none of the relevant instruments have come into force. While this is a fact to be acknowledged as a shortcoming of the current state of affairs, at the same time one has to bear in mind that these instruments lay the foundations for protecting human rights and creating an authentic 'human rights law of MERCOSUR', and that they strengthen the idea that human rights are a relevant part of commercial policy decisions.

[79] *See* n 45.

[80] See AE Appleton and BU Graf, 'Freedom of Speech and Assembly versus Trade and Transit Rights: Roadblocks to EU and MERCOSUR Integration' (2007) 34 *Legal Issues of Economic Integration* 255.

The decision of the arbitration court in the *Bridges* case also suggests that human rights are to be taken into account when implementing market rules, and that the safeguarding of human rights is a permissible exception to trade rules. All things considered, MERCOSUR seems to be slowly moving in the right direction to become a major force in promoting human rights in the continent and in the world, highlighting even further the importance of this issue.

20

Data Protection as a Trade Resource in MERCOSUR

A Data Protection Framework as an Integrative Tool

DANILO DONEDA AND MARIO VIOLA DE AZEVEDO CUNHA*

I Introduction: The Importance of Information and the Necessity to Protect Privacy

It was only at the end of the nineteenth century that the need to protect privacy began to be widely discussed, prompted by the famous article 'The Right to Privacy', written by Louis Brandeis and Samuel Warren,[1] which dealt with several aspects of the protection of privacy, but not data protection. This latter issue only came into focus in the 1960s,[2] even though personal data had been collected for credit purposes since the first half of the nineteenth century, a good example being the activities of the British bank Baring Brothers.[3] With the increase in trade, many credit information agencies were created, culminating in the development of huge consumer information databases, with the aim of facilitating credit.

As mentioned above, governments began to be concerned with the protection of personal data in the 1960s, however, the first international instruments dealing with data protection were in fact developed only at the beginning of the 1980s. One of the first instruments was Council of Europe Convention No 108 of 21 January 1981, for the protection of individuals with regard to the automatic processing of personal data. Its Preamble states that:

> [I]t is desirable to extend the safeguards for everyone's rights and fundamental freedoms, and in particular the right to the respect for privacy, taking account of the increasing flow across frontiers of personal data undergoing automatic processing.[4]

* A version of this article was presented at the Sixth Annual Conference of the Euro-Latin Study Network on Integration and Trade (ELSNIT) in Florence, Italy.

[1] D Doneda, 'Considerações iniciais sobre os bancos de dados informatizados e o direito à privacidade' in G. Tepedino (ed), *Problemas de direito civil-constitucional* (Rio de Janeiro, Renovar, 2000) 111–36.

[2] See the 'National Data Center Case' in D Danilo (ed), *Da privacidade à proteção de dados pessoais* (Rio de Janeiro, Renovar, 2006) 184–90.

[3] AC Efing, *Bancos de Dados e Cadastros de Consumidores* (São Paulo, Revista dos Tribunais, 2002) 22–23.

[4] Available at http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm.

The recent advances in technology have undoubtedly increased the treatment and the flow of personal data, facilitating and increasing trade all over the world. Despite the positive aspects of such advances, however, they can lead to violations of freedoms and fundamental rights, in particular the right to privacy, making it necessary to create instruments that both guarantee the protection of the individual concerning the use of his personal data, and give the economic institutions which use personal data the necessary confidence to lawfully develop their activities, which requires a reasonable flow of information to be allowed.

The creation of economic blocs, such as MERCOSUR, increases trade between the member states and thus intensifies cross-border flow of personal data as a consequence of such increase of trade between the member states, making it necessary to establish a uniform trade environment which guarantees the protection of personal data within the block, avoiding different levels of protection among member states. Such different levels of protection could create barriers to the free movement of goods and services that use this kind of information.

Accordingly, the establishment of a minimum level of data protection within MERCOSUR with respect to economic activities that use personal data to develop their business would facilitate the usage and the exchange of personal data among its Members States. The same would be true as regards the relationships between MERCOSUR and other states or economic blocs with higher data protection law standards, creating an appropriate environment for industries that use personal data for the development of their activities.

A good example that could serve as a model for MERCOSUR is the European harmonisation of data protection rules among its member states, represented by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,[5] and by the work that has been developed by the article 29 working party, aimed at facilitating the flow of personal data among the member states, allowing the free movement of services that use this kind of data (eg the financial sector), and strengthening its integration process.

Nevertheless, the adoption of norms concerning data protection in MERCOSUR would require, alongside a mandatory legislative process, specific changes in the behaviour of actors in the private and public sectors, who would have to observe additional procedures when dealing with personal information. This change, which would include, for example, the training of specialised staff in the field of data protection and reviewing the adequacy of internal and external procedures, would have a direct impact on the overall costs of their activities. On the other hand, the adoption of such procedures would allow these entities to access a larger number of markets, as well as to improve their image through the legitimate processing of personal data and their endorsement of a policy that respects individual rights.

Taking these considerations into account and evaluating personal data protection as an integrative tool, this chapter will analyse the different systems of data protection of the MERCOSUR Member States, pointing out their differences and similarities. The chapter

[5] [1995] OJ L281/31–50. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML.

will also suggest solutions, legislative and non-legislative, aimed at harmonising data protection within the bloc and thus assisting the development of the integration process of MERCOSUR.

II The International Nature of Data Protection

Personal information plays an increasingly important role in international commerce as the gathering and treatment of such information becomes easier and more useful due to the recent progress of technology. Even though this has implications in various fields, its international dimension is something more than just the global-scale projection of some country-specific situations. Indeed, it is crucial to bear in mind the international dimension of data protection, even when dealing with issues of national or regional interest.

Recent legislative developments related to data protection usually stress two main points: the fact that the protection of personal data is a necessary step for the protection of individuals at a time when a substantial part of our data (and our lives) is in digital form; and that the coherence between the set of rules regarding data protection in different countries is crucial if a legitimate flow of information, and of commercial relations, between these countries is to be possible and efficient.

Therefore, a data protection framework would be of interest not only to those countries that feel the need to protect their citizens from the effects of abusive use of their personal information, but also to regional blocs of countries that, in addition to their citizens' interests, would be keen to make their laws regarding data protection compatible and even interchangeable, in order to render transactions involving the international transfer of personal data as 'noise-free' as possible, whenever such operation does not interfere with their citizens' rights.

Regional efforts to build such regional frameworks are anything but new. The roots of the European experience can be traced back at least to the above-mentioned Convention No 108 of the Council of Europe in 1981.[6] Recently, in 2005, APEC (Asia-Pacific Economic Cooperation) attempted to ensure a common approach to privacy and data protection amongst its member states by issuing the APEC Privacy Framework.[7] MERCOSUR is still at a very early stage in dealing with data protection, although the discussions about this issue have already begun. One of MERCOSUR's Member States, Argentina, already has its own data protection framework which complies with European Union standards (as recognised by the European Commission).[8]

The international dimension of data protection has to be taken into account whether we are looking at it from a global perspective or within a single country's framework. This is because technology permits information to be transmitted almost regardless of physical barriers. Technology, thus, is the main element to be considered, as in earlier stages of

[6] C Kuner, *European Data Protection Law and Online Business* (New York, Oxford University Press, 2003) Preface, ix.

[7] More information on the Framework and Principles is available at www.apec.org/content/apec/publications/free_downloads/2005.html and www.apec.org/content/apec/apec_groups/committees/committee_on_trade/electronic_commerce.html.

[8] See decision of 30 June 2003 (C(2003)1731 final), available at http://ec.europa.eu/justice_home/fsj/privacy/docs/adequacy/decision-c2003–1731/decision-argentine_en.pdf.

privacy protection at a time when databases were not digitised, there was no significant concern about international transfer of data, simply because there was no easy way to transfer cheaply and flawlessly great amounts of data.

The situation today is very different: through advances in technology, many of the barriers preventing personal data being accessed globally have been dismantled. As technology is basically permissive, the role of establishing rules for the transmission and use of personal information is played by the law. Given the state of the art, inevitably the companies and entities that make use of personal data prefer to do this in an environment as free as possible of legal constraints in order to obtain the maximum possible usefulness of this data. This has led to a trend for the handling of personal data to be 'attracted' to countries with a weak legal framework on data protection (in some cases virtually 'no-law' zones) which permit operations in respect of personal data that would be prohibited in their country of origin. In fact, the perceived need to think globally on information-related issues to combat such tendencies dates back to 1896, to the Berne Convention that harmonised the law on intellectual property.

Legislative development in the field of data protection is guided by the need to keep pace with the global dimension of commercial relations. One of the earliest international documents that addressed the internationalisation of data protection thus took into account the need to harmonise regulation in order to avoid compromising international commercial relations, such as in the case of the OECD Guidelines of 1980.[9]

Some authors, such as Colin Bennett, argue that data protection laws face an inclination to convergence,[10] as can be seen in the adoption of similar sets of rules in different countries, as well as in the reduced role that national particularism usually plays. Indeed, one of the questions to be answered in the following decades is whether data protection will be able to be independent of national regulation and if this is a desirable goal.[11]

At present, there is no global treaty or agreement regulating data protection in a consistent way. Given the lack of formal global regulation, the most prominent legal instruments related to data protection issues seem to be the OECD's Guidelines on the Protection of Privacy and Transborder Flows of Personal Data of 1980, the EU Data Protection Directive 95/46/EC, and the APEC Privacy Framework of 2005.

The emergence of global data protection rules is also part of the debate, since the global impact of this issue has been recognised. Apart from the viability of such rules, it should be noted that some would argue that (perhaps not only for practical reasons) the European Union's standards are in the course of becoming a de facto global norm. A survey carried out by the International Monetary Fund, for example, noted that 29 out of the 31 countries whose economy is qualified by IMF as 'advanced' have privacy legislation that is broadly similar to EU standards, the only exceptions being the United States and Singapore. The prominence of the European Union's standards is also supported by the observation that international harmonisation in this field tends to be carried out among states with higher degrees of protection rather than lower ones.[12]

[9] Recommendation of the Council concerning guidelines governing the protection of privacy and transborder flows of personal data, available at http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(80)58.

[10] See C Bennett, *Regulating Privacy, Data Protection and Public Policy in Europe and the United States* (Ithaca, NY, Cornel University Press, 1992) 116–52.

[11] N Irti, *Norma e luoghi. Problemi di geo-diritto* (Laterza, Bari, 2001) 11.

[12] M Henry, *International Privacy, Publicity and Personality Laws* (London, Butterworths, 2001) 5: 'As the process of globalization of our culture continues, there will be increasing pressure towards harmonization of

Accordingly, as the global context plays a decisive role in the efficacy of any national standard to be adopted, it can be established that data protection law tends to be harmonised first at a regional level and then at the international level. The regional experience can demonstrate that the existence of data protection laws in one country can directly affect its neighbouring countries; for example in a hypothetical case when neighbouring countries with strong commercial ties do not share equivalent standards of data protection, leading to personal data being processed in the country with less restrictive rules and, thus, submitting citizens of both countries whose personal data is involved to the less protective law.

It is not an easy task to analyse the different approaches to data protection between different countries, but some general conclusions can be drawn empirically: the countries with the most developed laws about data protection are mostly developed and industrialised countries, whereas those with weak or no legislation at all are mostly developing countries.[13] This is probably largely because the legal initiatives for data protection came later to these countries, which is the case of all of the MERCOSUR Member States.[14]

The regional impact of data protection laws arises in two main situations: (i) the mere fact of the close political, social and commercial relations resulting from neighborhood can cause one country's law about data protection to have a direct impact on another's; (ii) political moves towards commercial integration in a certain region will generally, sooner or later, address the issue of harmonisation of data protection rules within those countries, in order to avoid extra costs and social damage.

MERCOSUR, as a regional trade agreement between Argentina, Brazil, Paraguay and Uruguay, is a typical case of regional integration that could profit from a common data protection framework, both in economic and in integrative terms, as can be perceived from the European Union's example. As in Europe, it could be a tool for economic integration, the benefits of which would be perceived both from the inside (eliminating barriers caused by the incompatibility of data protection laws) and from the outside (making it possible for MERCOSUR Member States to access foreign markets that have their own laws establishing a certain level of protection to personal information).

Apart from the economic arguments, it must also be remembered that the very essence of data protection is its goal to protect people's privacy in the 'information society' and this point must be taken into account when proposing a MERCOSUR framework on data protection. As mentioned previously, data protection is a right with two different but indispensable goals: protecting people's privacy and creating an appropriate environment

international law relating to publicity and personality rights … From experience derived from the harmonization of European laws on copyright and related rights, the probability is that harmonization will tend to select high degrees of protection rather than low ones. Two factors determine this outcome. First, European Union law respects vested rights of individuals: any harmonization which results in individuals in any European Union State receiving a lesser degree of protection than they enjoyed before harmonization is therefore out of the question. Secondly, on pure pragmatic grounds, equality of protection between contracting States can be effected as soon as legislation is implemented, without any need for a transitional period, if the maximum term of protection is selected. If, however, the minimum level of protection is selected, a significant transition period would be required before equalization was achieved in all contracting States'.

[13] As can be observed in the global map of data protection laws made by David Banisar in May 2007 (in a Privacy International survey). Available at www.privacyinternational.org/survey/dpmap.jpg.

[14] Indeed, the first data protection law was enacted in a country where the welfare state had reached a very sophisticated level of planning and implementation, thus creating the need for an instrument for the protecion of citizens' private data. This law was the Swedish Datalag of 1967.

for international commerce. The tension between these two goals is used to promote data protection sometimes as a commercial resource and at other times as a fundamental right that must be considered.[15] It is, moreover, one of the main factors behind the tendency to tie together data protection and international commerce and to push for international rules, as Joel Reidenberg once noted: 'A new international data privacy treaty will be essential for the long-term, robust growth of e-commerce'.[16]

III The European Model of Data Protection as an Integrative Tool

The European model, as stated before, is a clear example of how data protection can act as an important factor in the integration process, especially concerning the establishment of a single market. Since it has as its main purposes '(1) to allow for the free flow of data within Europe, in order to prevent the Member States from blocking inter-EU data flows on data protection grounds, and (2) to achieve a harmonized minimum level of data protection throughout Europe'[17] it can be used as a source of inspiration for other economic blocs, such as MERCOSUR.

This free flow of information among the member states of the bloc plays an important role in the creation of a single market, since '[i]nformation has become the new raw material of the world economy. Just as, in past centuries, iron, wood, and coal were the foundation upon which the economy was based, so nowadays it is data and information'.[18]

In this section, we will analyse Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which contains the general regulation of data protection in the European Union, and that has as its objectives, on the one hand, to guarantee the protection of individuals' privacy and, on the other, to allow the free flow of data among the EU Member States, strengthening the internal market.[19] Directive 95/46/EC, article 1(1), (2) provides:

> Article 1
>
> Object of the Directive
> 1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
> 2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.[20]

[15] This tension is most visible in the EU legislation analysed below.

[16] J Reidenberg, 'E-commerce and Transatlantic Privacy' (2001) 38 *Houston Law Review* 717, 749.

[17] C Kuner, *European Data Protection Law and Online Business* (n 6) 17.

[18] Ibid Preface, ix.

[19] 'The legal basis of the General Directive was Article 100 of the Treaty of Rome (currently Article 95 of the Amsterdam Treaty), which provides for the adoption of "measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market" and mandates "a high level of protection" in matters concerning consumer protection': Kuner, *European Data Protection Law and Online Business* (n 6) 29.

[20] 'This means that Member States cannot impose legal restrictions on data transfers or data flows to another Member State based on the level of data protection in such other Member State': Kuner, *European Data*

This flow of information among the member states of an economic bloc is of vital importance for the free movement of services, especially financial services, since such businesses depend on the gathering of personal data. The existence of different levels of data protection, such as can be found in MERCOSUR, increases the costs for the movement of services among its Member States, since companies will have to adapt themselves to different models of protection. The establishment of a common level of data protection, like the one implemented by the European Union through Directive 95/46/EC, could reduce such differences and facilitate cross-border services.

The above-mentioned Directive is divided into three basic pillars: (1) data protection itself, with the establishment of limits on the collection and use of personal data; (2) control over storage, transfer and flow of data; and (3) creation of a regulatory and institutional structure to monitor the application within the EU member states of the provisions of Directive 95/46/EC. We will discuss each of these pillars below.

A Limits on the Collection and Use of Personal Data

In its first part, Directive 95/46/EC deals with the limits on the collection and use of personal data. Some of the most important issues here are those related to the consent of the data subject. The first legislation to regulate data protection adopted a similar approach, making consent an important element to legitimise the collection of personal data.[21]

Under the provisions of Directive 95/46/EC, on the hypothesis that a company, such as an insurer, intends to send information about a consumer to a joint database of the insurance market, for example concerning a subscribed insurance policy or a loss, such insurer will have to obtain explicit authorisation from the insured party, which could be obtained through a contractual clause observing the provisions of articles 4 and 5 of Directive 93/13/EC on unfair terms in consumer contracts.[22]

Protection Law and Online Business (n 6) 29. It is important to note that all member states of the European Union have to observe the provisions of Directive 95/45/EC which guarantees a standard level of personal data protection and allows free data transfers or data flows among member states.

[21] See French Act No 78–17 of 6 January 1978 on Data Processing, Data Files and Individual Liberties, art 7, available at www.cnil.fr/fileadmin/documents/approfondir/textes/CNIL-78–17_definitive.pdf.

[22] Directive 93/13/EC, art 4: '1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent. 2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language'.

Article 5: 'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2)'.

Although consent on its own is not enough to authorise the collection and use of personal data, it is essential that the data subject be able to give free[23] and informed[24] consent. In this regard, Directive 95/46/EC, article 7(a) establishes that 'Member States shall provide that personal data may be processed only if: (a) the data subject has unambiguously given his consent'.[25]

This means that the data subject must be provided with an exact understanding of why his personal data is being collected and what is to happen to it, and thus be able to give informed consent.[26] In consumer credit contracts, for example, which are typical mass contracts, if the consumer refuses to give the information asked for by the bank, he will not be able to conclude the contract.

Consent is therefore necessary but it is only the first step, and must be followed by other steps, to authorise[27] the collection and use of specific personal information.[28] The other steps required to legitimise the collection and use of personal data, according to Directive 95/46/EC, are the principles of finality (or purpose)[29] and of proportionality and the duty to give details of the data collector (information principle).[30] The former functions as a

[23] Article 29 working party on data protection, *Working Document on the Processing of Personal Data relating to Health in Electronic Health Records*, adopted on 15 February 2007, available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2007/wp131_en.pdf, at 8: 'Consent must be given freely: "Free" consent means a voluntary decision, by an individual in possession of all of his faculties, taken in the absence of coercion of any kind, be it social, financial, psychological or other. Any consent given under the threat of non-treatment or lower quality treatment in a medical situation cannot be considered as "free". Consent given by a data subject who has not had the opportunity to make a genuine choice or has been presented with a fait accompli cannot be considered to be valid'.

[24] Ibid 9: 'Consent must be informed: "Informed" consent means consent by the data subject based upon an appreciation and understanding of the facts and implications of an action. The individual concerned must be given, in a clear and understandable manner, accurate and full information of all relevant issues, in particular those specified in Articles 10 and 11 of the Directive, such as the nature of the data processed, purposes of the processing, the recipients of possible transfers, and the rights of the data subject. This includes also an awareness of the consequences of not consenting to the processing in question'.

[25] The article 29 working party created four criteria to verify if the consent is valid: 'consent must be a clear and unambiguous indication of wishes; consent must be freely given; consent must be specific; consent must be informed': C Kuner, *European Data Protection Law: Corporate Compliance and Regulation* 2nd edn (Oxford, Oxford University Press, 2007) 67.

[26] Directive 95/46/EC, art 2(h) establishes that 'the data subject's consent shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed'.

[27] Directive 95/45/EC contains some exceptions concerning the obligation to obtain the consent of the data subject. One such exception is where the data is necessary for the performance of a contract to which the data subject is party, or in order to take steps at the request of the data subject prior to entering into a contract. See P Carey, *Data Protection: A Practical Guide to UK and EU Law* 2nd edn (New York, Oxford University Press, 2004) 7.

[28] D Doneda, *Da privacidade à proteção de dados pessoais* (n 2) 373–78.

[29] Article 29 working party on data protection, *Working Document on the Processing of Personal Data relating to Health in Electronic Health Records*, (n 23) 6: 'Use limitation principle (purpose principle): This principle partially embodied in Article 6(1)(b) of the Directive, among others, prohibits further processing which is incompatible with the purpose(s) of the collection'.

[30] There are other data protection principles in the Directive that are recognised by the doctrine, but some of them are included in the above- mentioned principles (legitimacy and transparency) and others are not relevant to the limits on use and collection of personal data, which are the focus of this chapter. See C Kuner, *European Data Protection Law and Online Business* (n 6) 17–18: 'The content of the General Directive is often expressed in terms of six main principles which underlie it: Legitimacy: personal data may only be processed for limited purposes; Finality: personal data may only be collected for specified, explicit and legitimate purposes and may not be further processed in a way incompatible with those purposes; Transparency: the data subject must be given information regarding data processing relating to him; Proportionality: personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and further processed;

limit on consent, excluding the idea of generality. According to this principle, consent has to be given for one or more specific purposes.[31] Thus, generic consent for any use of the data cannot be accepted.[32]

It should be noted that the data collected has to be relevant and compatible with the purposes of the collection,[33] and not excessive.[34] Thus, an insurer (to use the same example), for health insurance purposes cannot ask the insured party for information about his car or computer, and for car insurance, it cannot ask information about the insured party's health.

Directive 95/46/EC, article 6(1)(a), (b) establishes that the purposes for the collection of personal data must be specified in detail at the moment of its collection, which means that the use of the data is predetermined. In this case, the data collector has the duty to identify all potential uses of the collected data and to ensure that the data subject will be adequately informed.[35] The data collector also has the duty to inform the data subject about who will have access to such data and if it can be transferred to third parties. Thus, if a company obtains personal data for a specific purpose, such as the conclusion of a contract, the company must not make this information available to other companies of the same economic group. This would only be allowed if the data subject had authorised the data transfer.[36]

Moreover, the kind of data that can be transmitted to third parties must be related to the object of the contract concluded between the data subject and the data collector, and has to be linked to the new destination of such data, for example a new contract.[37] Therefore, as discussed above, consent on its own is not sufficient to legitimise the collection and use of personal data. Such collection and use must be carried out in observation of the finality and proportionality principles and the data collector has to inform the data subject about all the possible uses of his personal data. This is clearly

Confidentiality and security: technical and organizational measures to ensure confidentiality and security must be taken with regard to the processing of personal data; and Control: supervision of processing by DPAs must be ensured'.

[31] Article 29 working party on data protection, *Working Document on Genetic Data*, adopted on 17 March 2004, available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2004/wp91_en.pdf, 6: 'The respect of the finality and proportionality principles imply a clear determination of the purpose for which genetic data are collected and further processed. To avoid incompatible re-use it is essential that the purposes for processing genetic data are clearly defined'.

[32] D Doneda, *Da privacidade à proteção de dados pessoais* (n 2) 383.

[33] Article 29 working party on data protection, *Working Document on the Processing of Personal Data relating to Health in Electronic Health Records* (n 23) 9: 'The data quality principle: This principle in the Directive requires personal data to be relevant and not excessive for the purposes for which they are collected. Thus, any irrelevant data must not be collected and if it has been collected it must be discarded (Article 6(1)(c)). It also requires data to be accurate and kept up-to date'.

[34] Article 29 working party on data protection, *Working Document on Biometrics*, adopted on 1 August 2003, available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2003/wp80_en.pdf, 6: 'According to Article 6 of Directive 95/46/EC, personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. In addition, personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and further processed (purpose principle) … Furthermore, an evaluation of the respect for proportionality and the respect for legitimacy is necessary, taking into account the risks for the protection of fundamental rights and freedoms of individuals and notably whether or not the intended purpose could be achieved in a less intrusive way'.

[35] P Carey, *Data Protection: A Practical Guide to UK and EU Law* (n 27) 54.

[36] D Doneda, *Da privacidade à proteção de dados pessoais* (n 2) 339.

[37] P Carey, *Data Protection: A Practical Guide to UK and EU Law* (n 27) 54.

provided in Directive 95/46/EC, articles 6(1)(b), (c) and 7.[38] Moreover, under articles 5 and 6(1)(a), personal data must be processed in a fair and lawful way.[39]

In summary, the limits on legitimising the collection and use of personal data are the principles of finality and proportionally, and such collection and use must be preceded by the data collector's informing the data subject about the purposes of the collection, the destination of the data, if that data will be transferred to third parties and any other details required to guarantee the free and informed consent of the data subject and the observation of the finality and proportionality principles.

B Storage and Transfer of Personal Data

The second part of Directive 95/46/EC regulates the storage, transfer and flow of information, and we would say for a good reason: 'Gradually the world economy is transforming itself from an industrial-based economy to an information-based economy, in which the free exchange of information has became the life-blood of modern business life'.[40] Let us start with an important source of information for the financial markets, access to existing databases (eg credit databases).[41] Both banks and insurance companies,

[38] Directive 95/46/EC, art 6: '1. Member States shall provide that personal data must be: … (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards; (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed'.

Article 7: 'Member States shall provide that personal data may be processed only if: (a) the data subject has unambiguously given his consent; or (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or (d) processing is necessary in order to protect the vital interests of the data subject; or (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1)'.

[39] Directive 95/46/EC, art 5: 'Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful'.

Article 6: '1. Member States shall provide that personal data must be: (a) processed fairly and lawfully'. On the fairness of the processing of personal data, see M Webster, *Data Protection in the Financial Services Industry* (Aldershot, Gower Publishing Ltd, 2006) 22–23. The author presents the criteria used by the UK Information Commisioner to evaluate if there has been fair and lawful processing of personal data: 'Some of the questions the Information Commissioner will ask when assessing fairness are: Was the person supplying the data under the impression that it would be kept confidential by the data controller and was that the impression justified by the circumstances? Was any unfair pressure used to obtain the information? Were any unjustified threats or inducements made or offered? Was the person improperly led to believe that they must supply the information, or that failure to provide it must be disadvantage them? … Personal data must be processed in accordance with any relevant legal requirements, both civil and criminal'.

[40] ACM Nugter, *Transborder Flow of Personal Data within the EC: A Comparative Analysis of the Privacy Statutes of the Federal Republic of Germany, France, the United Kingdom and The Netherlands and their Impact on the Private Sector* (Deventer, Kluwer Law and Taxation Publishers, 1990) 1.

[41] In the United States, for example, the insurance industry has a joint database called MID (Medical Information Bureau) that collects information about the health status of insurance applicants. See B Allen and R Mosely, 'Privacy and Health Insurance: Can Oil and Water Mix?' in RF Almeder; JM Humber (eds), *Privacy and Health Care: Biomedical Ethics Reviews* (Totowa, Humana Press, 2001) 135: 'The MID is an insurance-industry clearinghouse that collects information on insurance applicants submitted by member insurance companies and releases that data to other insurance companies who may be considering the applicant's request for new or increased coverage. The MIB contends that its files do not contain raw medical data, but merely codes noting that

as a first step, consult internal and external databases (consumer credit databases, for example) to confirm the authenticity of the data provided by the potential client and to obtain other information that might be important for accurate risk analysis. However, the data subject is protected by the provisions of Directive 95/46/EC, article 12.[42]

The maintenance of such databases involves the respect of certain rights in favour of the data subject. The first of the data subject's rights concerning the collection and storage of his personal data is the right to be informed by the controller 'in an intelligible form of the data undergoing processing and of any available information as to their source' (article 12(a), second paragraph). It is important to note that, despite the fact that no provision is included in the Directive concerning the time when such communication has to be made, there is a unanimous view that the data subject must be informed before the information is entered into the database.[43]

Another important right of data subjects concerning the storage of their personal data on databases is the right to gain access to their information and to check if information related to them is being processed, the purposes of the processing, the categories of data concerned and the recipients or categories of recipients to whom the data are disclosed (article 12(a), first paragraph). After gaining access to such information, the data subject will have the possibility to rectify, erase or block the processing of data if there is any inaccuracy (articles 12(b) and 6(1)(d)).[44]

Thus, at any moment, a consumer has the right to request the database controller to provide access to his personal data stored on the database, and, if he finds an error, he can request rectification, erasure or blocking of the respective data. If the administrator of the database refuses to give access or to rectify, erase or block the personal data, the data

some member insurer has declined or restricted coverage based on categories of medical data it ascertained. MID policy states that other member insurers are not allowed to make underwriting decisions based on the information from the MID. Rather, the information merely serves as a red flag alerting the insurer considering the application that the applicant has sought coverage before and the category of the data, which may lead the insurer considering coverage to conduct their own investigation or to request information from the applicant's medical record. It is impossible to verify whether this is how the information is actually used'.

[42] Directive 95/46/EC, art 12: 'Right of access. Member States shall guarantee every data subject the right to obtain from the controller: (a) without constraint at reasonable intervals and without excessive delay or expense: – confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed; – communication to him in an intelligible form of the data undergoing processing and of any available information as to their source; – knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15(1); (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data; (c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort'.

[43] Article 29 working party on data protection, *Working Document on Blacklists*, adopted on 3 October 2002, available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2002/wp65_en.pdf, 8 n 8: 'One way of avoiding errors and problems would be to lay down a reasonable period between notification of the data subject and the actual entering of the information on the joint file, and this procedure could also apply to files on breaches of monetary obligations'.

[44] Directive 95/46/EC, art 6(1)(d) establishes that '1. Member States shall provide that personal data must be: … (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified'.

subject will be able to utilise not only administrative measures through national supervisory authorities (article 28)[45] but also judicial remedies regulated by national rules of the member states (article 22).[46]

Another important issue relates to the period during which personal data can be stored. Directive 95/46/EC, article 6(1)(e) establishes:

> Article 6
>
> 1. Member States shall provide that personal data must be: …
>
> (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

However, there is no provision in Directive 95/46/EC nor is there any unanimous view on how long this period should be, since information stored in a file or database must be accurate and up to date (article 6(1)(d)):

> [T]his entry may not be maintained once a debt has been paid off, even when overdue, while in other cases the information may stay on record for a maximum period which varies from one country to another. Notwithstanding these divergences, what is clear is that the principle of updating information entails an obligation clearly to reflect the fact that the debt has been paid off even if the entry on non-payment is maintained beyond the date of full repayment.[47]

[45] Directive 95/46/EC, art 28: 'Supervisory authority. 1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive. These authorities shall act with complete independence in exercising the functions entrusted to them. 2. Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data. 3. Each authority shall in particular be endowed with: – investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties; – effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions; – the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities. Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts. 4. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim. Each supervisory authority shall, in particular, hear claims for checks on the lawfulness of data processing lodged by any person when the national provisions adopted pursuant to Article 13 of this Directive apply. The person shall at any rate be informed that a check has taken place. 5. Each supervisory authority shall draw up a report on its activities at regular intervals. The report shall be made public. 6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State. The supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information. 7. Member States shall provide that the members and staff of the supervisory authority, even after their employment has ended, are to be subject to a duty of professional secrecy with regard to confidential information to which they have access'.

[46] Directive 95/46/EC, art 22: 'Remedies. Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question'.

[47] Article 29 working party on data protection, *Working Document on Blacklists* (n 43) 5.

In the words of ACM Nugter:

> it should make no difference to either multinational companies or data subjects whether data processing operations take place in one country or in one or more other countries. The same fundamental rules should apply and data subjects should be given the same safeguards for the protection of their rights and interests.[48]

These are the main objectives of Directive 95/46/EC: to allow the free flow of data within the European Union while at the same time guaranteeing the right to privacy of the individuals.

C Institutional and Regulatory Bodies

The last part of Directive 95/46/EC, but not the less important, establishes a regulatory structure to be created by the member states with the aim of enforcing the provisions of the Directive and also the national rules that incorporate such provisions. Article 28(1)(2) establishes that:

> Article 28
>
> Supervisory authority
> 1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.
> These authorities shall act with complete independence in exercising the functions entrusted to them.
> 2. Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data.

These authorities have investigative powers, effective powers of intervention and powers to engage in legal proceedings.[49] The purpose of all these powers is to enable the authorities to monitor the application of the Directive's provisions in their member states and play an important role in the development of a single internal market and a free area of data transfer and data flow, since 'the existence of divergent national provisions leads to additional costs, administrative and organizational problems, or may even lead, though in practice only occasionally, to a total prohibition' of data flow or data transfer among the countries involved which, of course, 'creates uncertainty for those who are dependent on the free flow of personal data', such as financial services.[50]

[48] ACM Nugter, *Transborder Flow of Personal Data within the EC* (n 40) 4.

[49] See Directive 95/46/EC, art 28(3): '3. Each authority shall in particular be endowed with: – investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties; – effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions; – the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities. Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts'.

[50] ACM Nugter, *Transborder Flow of Personal Data within the EC* (n 40) 320.

Besides this supervisory structure, article 29 of the Directive creates a working party on the protection of individuals with regard to the processing of personal data (known as the article 29 working party), which is an independent and advisory body, composed of the representatives of the data protection authorities of all member states, which has as its main tasks: (a) to examine any question covering the application of the national measures adopted under the Directive in order to contribute to the uniform application of such measures; (b) to give the European Commission an opinion on the level of protection in the Community and in third countries; (c) to advise the Commission on any proposed amendment of the Directive, on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data and on any other proposed Community measures affecting such rights and freedoms; and (d) to give an opinion on codes of conduct drawn up at Community level.[51]

Since the working party is composed of representatives of all member states who work in the field of data protection, it is possible to assume that it has a privileged view of the situation in all the member states with regard to the issues arising from the use, transfer and flow of personal data, and is able to identify where there are differences among the laws or practices of member states, and propose solutions.[52]

Finally, looking at the system created by Directive 95/46/EC, it is possible to say that the European model of data protection acts as an integrative tool, in the sense that it allows the free flow of personal information among its member states, creating a proper environment for the free movement of services (or at least of financial services).

IV Data Protection in MERCOSUR

MERCOSUR, as the regional trade agreement among Argentina, Brazil, Paraguay and Uruguay, as yet has no regulation regarding data protection, although this issue is being discussed internally, as mentioned above.

Data protection in the region is regulated by means of national legislation and MERCOSUR's Member States present a distinct divergence as regards their own data protection laws. Briefly, Argentina has a strong general law based on European standards; Uruguay has a brand new law also with concrete ties to European standards; Brazil relies on some general constitutional provisions together with a reasonably strong sectorial data protection regulation but no general data protection law; and finally, Paraguay also relies

[51] Directive 95/46/EC, art 30: '1. The Working Party shall: (a) examine any question covering the application of the national measures adopted under this Directive in order to contribute to the uniform application of such measures; (b) give the Commission an opinion on the level of protection in the Community and in third countries; (c) advise the Commission on any proposed amendment of this Directive, on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data and on any other proposed Community measures affecting such rights and freedoms; (d) give an opinion on codes of conduct drawn up at Community level'.

[52] Directive 95/46/EC, art 30(2), (3), (4): '2. If the Working Party finds that divergences likely to affect the equivalence of protection for persons with regard to the processing of personal data in the Community are arising between the laws or practices of Member States, it shall inform the Commission accordingly. 3. The Working Party may, on its own initiative, make recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the Community. 4. The Working Party's opinions and recommendations shall be forwarded to the Commission and to the committee referred to in Article 31'.

on constitutional provisions as well as a data protection law. Therefore, it will be worthwhile to consider in detail the internal provisions of these countries.

Data protection, not only inside MERCOSUR but in Latin America as a whole, is a more recent issue than it is in Europe or the United States. Earlier specific mention of issues regarding personal data was generally linked to the need to rebuild society after the events linked to dictatorship, particularly as regards the fate of 'disappeared people'—and with this aim in mind the writ of *habeas data*, or the right to access, was set up. *Habeas data* is a tool to access and to correct personal data typical of some Latin America countries' legal systems. The writ, first introduced by the Brazilian Constitution of 1988, has exerted a consistent influence in many Latin American countries, and in all of MERCOSUR's Member States.

A The Argentinian System

Of MERCOSUR's Member States, it is Argentina that has the richest experience in data protection. The fact that a general data protection law has existed since 2000 plays a major role, and the consistent academic and jurisprudential attitude towards data protection adds to the fact that it is in Argentina where the major judicial and cultural penetration of data protection issues can be found in MERCOSUR, and probably in the whole of Latin America.[53]

The basis of Argentina's framework is its constitutional provision for the protection of private life (article 19 of the Constitution)[54] and the right to privacy, as stated in article 1071 of the Civil Code.[55]

[53] Even before the Argentinian data protection law was enacted, some commentators stressed the strength of the country's constitutional provisions regarding data protection. CM Clève, '*Habeas data:* algumas notas de leitura' in TAA Wambier (ed), *Habeas Data* (São Paulo, Revista dos Tribunais, 1998) 74–82.

[54] 'Article 19: 'Las acciones privadas de los hombres que de ningún modo ofendan al orden y a la moral pública, ni perjudiquen a un tercero, están sólo reservadas a Dios, y exentas de la autoridad de los magistrados. Ningún habitante de la Nación será obligado a hacer lo que no manda la ley, ni privado de lo que ella no prohíbe'. (English version available at www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf. Section 19: 'The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit').

[55] Article 1071bis: 'El que arbitrariamente se entrometiere en la vida ajena, publicando retratos, difundiendo correspondencia, mortificando a otro en sus costumbres o sentimientos, o perturbando de cualquier modo su intimidad, y en hecho no fuere un delito penal, será obligado a cesar en tales actividades, si antes no hubieren cesado, y a pagar una indemnización que fijará eqüitativamente el juez, de acuerdo con las circunstancias; además, podrá este, a pedido del agraviado, ordenar la publicación de la sentencia en un diário o periódico del lugar, si esta medida fuese procedente para una adecuada reparación' ('The one who arbitrarily interferes in someone else's life, publishing photographs, spreading correspondence, mortifying another in their customs or feelings, or otherwise disturbing their intimacy, and if not committing a criminal offense, they shall cease such activities, if they have not ceased befote, and pay compensation that shall be equitably determined by the Judie, according to the circumstances; moreover, the Judie may, upon the claimant's request, order the publication of the judgment in a local periodical, if this measure is deemed compatible with just compensation'. For an explanation of the courts' approach to these rules, see AG Carbó, *El derecho a la intimidad y a la autodeterminación informativa* (Buenos Aires, La Ley, 2001) 21–25.

In 1994, a specific provision with respect to personal data was introduced into Argentina's Constitution which became known as the *habeas data* clause, located in the third part of article 43.[56] It is worth noting that even before *habeas data* became part of Argentina's legal system, some regional provinces had already introduced their own law on this subject.

The Argentinian *habeas data* is a writ based on the *amparo*.[57] It establishes a right of access to personal data in the hands of third parties, as well as a right to rectify, update or, where possible, delete the information. The usefulness of the provision prompted various provinces to enact their own data protection laws based on the Constitution, with the effect that *habeas data* assumed a number of roles related to data protection.[58] Later, a national data protection law was enacted in 2000 (Law No 25326 of 4 October 2000) regulating *habeas data,* although it can also be considered a general data protection law. It is modelled on the Spanish data protection law and thus follows in general terms the European standards.[59] In fact, after clearing some points of its effectiveness in *Decreto Regulamentario* No 1558/2001, Argentina successfully applied for its data protection framework to be recognised under the procedures described in article 25 of Directive 95/46/EC, thus becoming the first Latin American country with a data protection framework that is considered by the European Commission to comply with the European Union's standards. This has allowed Argentina to benefit from the commercial advantages of this situation.[60]

A closer look at Law No 25326 reveals its resemblance to the European model in some main points: the role of informed consent;[61] the special regimen of treatment for sensitive

[56] Article 43, third para.: 'Toda persona podrá interponer esta acción para tomar conocimiento de los datos a ella referidos y de su finalidad, que consten en registros o bancos de datos públicos, o los privados destinados a proveer informes, y en caso de falsedad o discriminación, para exigir la supresión, rectificación, confidencialidad o actualización de aquellos. No podrá afectarse el secreto de las fuentes de información periodística'. (English version available at www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf: 'Any person shall be able to request this writ in order to obtain information on data about themselves and their purpose, registered in public records or databases, or in private ones intended to supply information; and in case of innaccuracy or discrimination, this writ may be requested to request the suppression, rectification, confidentiality or updating of said data. The secret nature of the sources of journalistic information shall not be impaired.)'.

[57] The writ of *amparo,* as stated in art 43 of Argentina's Constitution, plays a principal role in protecting fundamental rights, as it is the only instrument able to deliver immediate protection. See O.A. Gozaíni, *Habeas data. Protección de datos personales* (Buenos Aires, Rubinzal-Culzoni, 2001) 387.

[58] According to Oscar Puccinelli, *habeas data* can be used to achieve different goals, such as to access personal data, to correct it, to add to it, to update it, to delete it, to block or to suspend the treatment of personal data, to eliminate the association of the data with the data subject, among other things. O Puccinelli, *El habeas data en Indoiberoamerica* (Bogotá, Temis, 1999) 220–25.

[59] That is the evaluation of Argentinean scholars about their national law. See Carbó, *Il derecho a la intimidad y ala autodeterminación informativa* (n 55) 37.

[60] The standards of data protection in Argentina were recognised as adequate by the article 29 working group in Resolution No 4/2002 of 3 October 2002, available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2002/wp63_en.pdf, and were finally considered as adequate by the European Commission in a Decision of 30 June 2003 (C(2003)1731 final), available at http://ec.europa.eu/justice_home/fsj/privacy/docs/adequacy/decision-c2003–1731/decision-argentine_en.pdf.

[61] Ley No 25.326, art. 5: '1. El tratamiento de datos personales es ilícito cuando el titular no hubiere prestado su consentimiento libre, expreso e informado, el que deberá constar por escrito, o por otro medio que permita se le equipare, de acuerdo a las circunstancias' (Free translation by the authors: 'The usage of personal data is lawful when its owner consented in a free, explicit and informed way, whether in written form or by any other reasonable means').

data;[62] the presence of the major data protection principles such as the principle of finality, the principle of information[63] and the principle of proportionality.[64]

The Law also established an administrative office in charge of enforcing the data protection law, the National Office for the Protection of Personal Data (DNPDP, *Dirección Nacional de Protección de Datos Personales*).[65] This office is located inside the Ministry of Justice and thus cannot be considered to have an independent status at the same level as its equivalents in the European Union, even allowing for its functional autonomy.[66]

B The Paraguayan System

In Paraguay, the framework is not as developed as in Argentina, even taking into account the legal provisions directly related to data protection included in its legal system. Its 1992 Constitution recognises in article 33 the right to privacy in terms of the inviolability of personal and familiar intimacy;[67] in article 36 the inviolability of personal documents and of their communication;[68] and in article 135[69] establishes *habeas data* as a writ to access

[62] Ibid art 2: 'Datos sensibles: Datos personales que revelan origen racial y étnico, opiniones políticas, convicciones religiosas, filosóficas o morales, afiliación sindical e información referente a la salud o a la vida sexual' (Free translation by the authors: 'Sensitive data: Personal data which reveals ethnic and racial origins, political opinions, religious, philosophical or moral beliefs, trade association or data regarding health or sexual life').

[63] Ibid art 6.

[64] Ibid art 11.1.

[65] Ibid art 29.

[66] The director of DNPDP is chosen by the Executive and then is approved by the Senate: Ibid art 30.

[67] Artículo 33: 'Del derecho a la intimidad (1) La intimidad personal y, así como el respeto a la vida privada, son inviolables. La conducta de las personas, en tanto no afecte al orden público establecido en la ley o a los derechos de terceros, está exenta de la autoridad pública. (2) Se garantizan el derecho a la protección de la intimidad, de la dignidad y de la imagen privada de las personas' (Free translation by the authors: 'Article 33 on the Right to Privacy. (1) Personal and family privacy, as well as the respect of private life, are inviolable. Individual behaviour that does not affect public order as established by law or the rights of third parties is exempted from the authority of public officials. (2) The protection of the privacy, dignity, and private image of each individual is hereby guaranteed').

[68] Artículo 36: 'Del derecho a la inviolabilidad del patrimonio documental y la comunicación privada (1) El patrimonio documental de las personas es inviolable. Los registros, cualquiera sea su técnica, los impresos, la correspondencia, los escritos, las comunicaciones telefónicas, telegráficas o de cualquier otra especie, las colecciones o reproducciones, los testimonios y los objetos de valor testimonial, así como sus respectivas copias, no podrán ser examinados, reproducidos, interceptados o secuestrados sino por orden judicial para casos específicamente previstos en la ley, y siempre que fuesen indispensables para el esclarecimiento de los asuntos de competencia de las correspondientes autoridades. La ley determinará modalidades especiales para el examen de la contabilidad comercial y de los registros legales obligatorios' (Free translation by the authors: 'Article 36 on the Inviolability of Personal Documents and Private Correspondence. (1) Personal documents are inviolable. Records, regardless of the technique used, accounts, printed matter, correspondence, writings, telephonic communication, telegraphic communication, or any other type of communication, collections or reproductions, testimonies or objects of testimonial value, as well as their respective copies, cannot be reviewed, reproduced, intercepted, or seized unless a court order is issued in specific cases established in the law, and then only when action is essential for clearing up matters falling within the jurisdiction of the respective competent authorities. The law will establish special procedures for reviewing commercial accounting books and mandatory record books').

[69] Artículo 135: 'Del Habeas Data. Toda persona puede acceder a la información y a los datos que sobre si misma, o sobre sus bienes, obren en registros oficiales o privados de carácter público, así como conocer el uso que se haga de los mismos y de su finalidad. Podrá solicitar ante el magistrado competente la actualización, la rectificación o la destrucción de aquellos, si fuesen erróneos o afectaran ilegítimamente sus derechos' (Free translation by the authors: 'Article 135 on *Habeas Data*. Everyone may have access to information and data available on himself or his assets in official or private registries of a public nature. He is also entitled to know how

personal information. There is also a data protection law, Law No 1682 of 2001, amended by Law No 1696 of 2002, which makes general provision about which data should be considered public or private and establishes special protection for sensitive data, and which also provides specific measures for credit reporting, without going as far as, for instance, Argentina's law in terms of compliance with European standards.

C The Uruguayan System

The recent evolution of data protection in Uruguay was directed at updating its system in order to further a future application for recognition by the European Commission of compliance with EU standards. Although the Constitution does not specifically mention privacy or data protection, it is possible to identify specific sectoral rules in this field and it should be noted that recent years have seen the enactment of a series of laws regarding data protection that have marked a significant evolution in regulation of this issue. In 2004, a law establishing the writ of *habeas data* specifically for commercial reports was enacted,[70] followed by Law No 17948 in 2006, which dealt with credit scoring, and finally by Law No 18331,[71] a data protection law with general application, the inspiration for which was, in general terms, the Spanish data protection law.

D The Brazilian System

Brazil, as mentioned above, has no general data protection regulation,[72] relying only on some general constitutional provisions and sectoral data protection rules. The Brazilian Constitution recognises, in article 5.X, private life, intimacy, honour and image as fundamental rights. The same article 5 guarantees the protection of other aspects of privacy (article 5.XI, XII, XIV),[73] establishing the writ of *habeas data* in article 5.LXXII as

the information is being used and for what purpose. He may request a competent judge to order the updating, rectification, or destruction of these entries if they are wrong or if they are illegitimately affecting his rights').

[70] Law No 17838.

[71] Law 18331 with regard to the protection of personal data to be used in commercial reports and to the *Habeas Data* action (Ley no 17.838 sobre la 'Protección de Datos Personales para ser Utilizados en Informes Comerciales y Acción de Habeas Data') was enacted on 8 September 2008, available at www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=17838&Anchor=.

[72] See Maria Celina Bodin de Moraes, in her introduction to the Portuguese translation of S Rodotà, *A vida na sociedade da vigilância: Privacidade Hoje* (Río de Janeiro, Renovar, 2008) 12.

[73] See Electronic Privacy Information Center, *Privacy and Human Rights 2006: An International Survey of Privacy Laws and Developments* (Washington, DC) and Privacy International (USA, 2006), available at www.privacyinternational.org/article.shtml?cmd[347]=x-347–559539: 'Article 5 of the 1988 Constitution of Brazil 1. provides that "the privacy, private life, honor and image of people are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured". 2. The Constitution also holds the home as "inviolable," and "no one may enter therein without the consent of the dweller, except in the event of *flagrante delicto* or disaster, or to give help, or, during the day, by court order". 3. Correspondence and electronic communication are also protected, except by court order "for purposes of criminal investigation or criminal procedural finding of facts". 4. "Access to information is ensured to everyone and the confidentiality of the source shall be safeguarded, whenever necessary to the professional activity". 5. Finally, the Constitution provides for *habeas data*, which guarantees the rights: (a) to ensure the knowledge of information related to the person of the petitioner, contained in records or databanks of government agencies or of agencies of a public character; and, b) for the correction of data, when the petitioner does not prefer to do so through a confidential process, either judicial or administrative'.

a new judicial remedy.[74] Similarly, the Brazilian Civil Code included in its article 21 the right to privacy as a 'personality right'.

However, the only legislation dealing with data protection besides the Constitutional *habeas data* remedy is the Brazilian Consumer Code, articles 43 and 44 of which regulate the maintenance of databases and consumer files, establishing some rights for consumers.

The first of these consumer rights is the right to be informed by the data controller[75] that one's personal data is being processed (article 43, paragraph 2) and such communication[76] has to be made before such data is available in the public domain,[77] in order to allow the consumer to exercise his rights of access and rectification, the other rights guaranteed by article 43.[78] If the data controller does not inform the consumer within a reasonable time, the consumer will be able to claim for damages.

The other rights, as mentioned above, are the rights of access[79] and rectification,[80] under which the consumer may access any personal information stored and rectify it if he finds any inaccuracy (article 43, heading and paragraph 3). If the data controller does not allow the consumer to exercise such rights, he will be able to claim damages and to pursue his rights through ordinary proceedings (article 43, paragraph 4) or through the above-mentioned *habeas data* writ.[81]

Moreover, article 43, paragraphs 1 and 5, state that any negative information about the consumer which could restrict his access to credit must not be stored for more than five years. Again, if the data controller fails in such an obligation, the consumer will be able to claim damages and to request the exclusion of the respective negative information.

V Conclusions

As stated above, there is no specific data protection regulation in MERCOSUR, mostly because the regional bloc has not yet reached a higher level of integration than that of a regional trade agreement, so that political as well as economic issues have to be resolved before reaching a higher level of integration. Occasionally, however, personal information has been the subject of a MERCOSUR regulation, such as CMG Resolution No 21/04 concerning the right of the consumer to information in transactions made through the

[74] LR Bessa, *O Consumidor e os Limites dos Bancos de Dados de Crédito*, Biblioteca de Direito do Consumidor vol 25 (São Paulo, Revista dos Tribunais, 2003) 107.

[75] Although the Brazilian Consumer Code establishes a common responsibility between the data controller and the supplier of goods or services which included the consumer data in a database, the Brazilian Superior Court of Justice has held that sole responsibility for such communication rests with the data controller (Digest No 359 of the Brazilian Superior Court of Justice).

[76] The Brazilian Consumer Code does not specify the time within which the communication has to be made, however, both doctrine and jurisprudence suggest that the communication must give the consumer enough time to exercise his rights before his personal data is available in the public domain.

[77] A local law in Río de Janeiro establishes the period of 10 days as a reasonable one (Law No 3.244, 6 September 1999, available at www.alerj.rj.gov.br/processo2.htm).

[78] AHV Benjamin *et al*, *Código Brasileiro de Defesa do Consumidor comentado pelos autores do anteprojeto* (9th edn, São Paulo, Forense, 2007) 405.

[79] Ibid 413.

[80] Ibid 416.

[81] *Habeas data* proceedings are regulated by Federal Law No 9.507 (12 November 1997, available at www.planalto.gov.br/ccivil_03/Leis/L9507.htm).

Internet,[82] article 3 of which mentions the requirement for the seller to have in place a privacy policy when trading online and collecting personal information.

The issue of compliance with EU standards has driven the legislators of Argentina and, most recently, of Uruguay, to adopt a general data protection law both tailored to suit their own needs but also taking care to maintain a degree of resemblance with the European standards. The same does not seem to apply in Paraguay or Brazil, both countries that have not officially (at least not yet) moved in this direction. The case of Brazil is interesting because the country, even though a pioneer in first introducing the *habeas data* writ, has not developed its own data protection framework towards a recognition of data protection as a fundamental right, nor has any intention been expressed to adopt a general data protection law in the near future.

MERCOSUR undoubtedly has a very important role to play in helping its Member States to reach a certain degree of harmonisation of their laws, and data protection could surely be a key issue as it represents elements of both internal and external integration. The internal benefits of integration would be seen in the reduction of commercial costs as a result of all MERCOSUR's Member States sharing the same core principles in their data protection law, allowing each Member State's citizens to have the same expectation of privacy regarding his personal data throughout MERCOSUR. The external benefits of integration also arise as a result of this common data protection framework and can be seen as an increase in the competitiveness of the Member States' markets as a whole, as they are more likely to reach agreements with other countries whose legislation blocks the transfer of personal data to countries without reasonable protection in place (which is typically the case of European countries).

It is worthy of emphasis how the atypical nature of data protection helps it play a distinctive role whenever it forms part of a legal system. Its international nature has been pointed out, its double nature of being both a fundamental right and a tool that can help to bring harmony to the market (it has even been linked symbolically to Janus, the Roman god with two heads). In the specific case of MERCOSUR, and considering some of its inherent weaknesses, such as the difficulties faced in trying to foster closer commercial ties and the distance between MERCOSUR itself and the citizens of its Member States, data protection could be of specific use in achieving some desirable goals: (1) raising the experience of integration to another level by enforcing data protection as essential to commercial activity and, at the same time, providing a general benefit to MERCOSUR's citizens by affording them a higher level of protection of their personal data; (2) promoting the citizen's trust in MERCOSUR by enacting rules on data protection which will have a positive effect on their rights and so improve the relation between the bloc and the individual. In doing so, it may become possible for MERCOSUR to experience a

[82] Resolução nº 21/04 do Grupo Mercado Comum, relativa ao Direito à informação do consumidor nas transaçoes comerciais efetuadas atraves da internet. Other examples of MERCOSUR regulation related to some degree to personal data are (a) CCM Decision No 26/08 establishing an agreement for the implementation of shared databases of children and teenagers in a vulnerable situation in MERCOSUR and associate states (Acordo para a implementação de bases de dados compartilhados de crianças e adolescentes em situação de vulnerabilidade do Mercosul e Estados Associados); and (b) CCM Decision No 19/05 establishing rules concerning procedures and security on the interchange and access to information stored in customs automated systems (Decisão no 19/05 do Conselho do Mercado Comum, que estabelece a norma relativa aos procedimentos e segurança no intercâmbio e na consulta de dados existentes nos sistemas informatizados aduaneiros).

process of integration through citizenship and the respect of fundamental rights in a way that goes beyond mere rhetoric—or as referred to by Stefano Rodotà in another sphere, by a kind of globalisation through Law.

It is, however, far from easy to work out how to enforce such a framework, but the first steps have surely already been taken by the Argentinian Republic in proposing a Treaty on personal data protection in MERCOSUR in 2004. Apart from the challenges of enacting such legislation which will have effect in fields not yet covered by existing MERCOSUR norms, the following procedures are suggested to assist in the discussion and implementation of such a treaty: (i) the adoption of a specific agenda that recognises the problems faced by the countries in the bloc related to data protection and establishes a set of data protection principles to be observed as a starting point for the harmonisation of each country's internal law on this issue; and (ii) the creation of a MERCOSUR office or organ responsible for the enactment of these principles. The pertinence of the issue of data protection and its importance both to MERCOSUR and to its citizens' fundamental rights seem also to be an excellent opportunity to further MERCOSUR's future evolution.

As regards an appropriate set of data protection principles, we believe that the principles that we highlighted when analysing European Directive 95/46/EC—finality, proportionality and information—should be adopted as a starting point for the harmonisation of the legislation of the MERCOSUR Member States.

Finally, as regards the proposition for a MERCOSUR office or organ responsible for data protection issues, a good source of inspiration would be the article 29 working party created by Directive 95/46/EC, which, as stated above, is an independent and advisory body, composed of the representatives of the data protection authorities of all member states, giving it a privileged view of the situation in all member states and enabling it to identify the differences among them and to propose common solutions.

21

Energy Markets: Aspects of Energy Integration and MERCOSUR

HANNES HOFMEISTER

I Introduction

Prima facie, the energy supply situation in Latin America looks very positive. The continent is well endowed with fossil resources; for instance, 10 per cent of the world's oil resources and 5 per cent of its gas reserves are to be found in South America. The situation becomes, however, less promising, when taking into account the regional distribution of these energy resources. Gas and oil reserves are mainly concentrated in a small number of politically unstable states, such as Venezuela,[1] which boasts almost 80 per cent of the region's oil resources, as well as 70 per cent of its gas supplies. Bolivia, too, is well endowed with gas supplies and so is Ecuador with oil reserves. Further south, the situation looks rather gloomy. In particular, Chile, having almost no oil and gas resources of its own, is to a large extent dependent on energy imports. Argentina and Brazil, while fairly well endowed with natural resources, are witnessing an increasing demand for energy due to their large populations and economic growth. Hence, Argentina recently changed from a net exporter of energy to a net importer. Brazil, too, imports large amounts of gas from Bolivia.[2] Yet, this dependence on Bolivian gas imports has also turned out to be a very risky strategy. Production downtimes and political instability caused by the Bolivian government affect the whole region. Electricity and gas rationing, such as occurred in Argentina in the winter of 2007, now also loom large in countries such as Brazil, Chile and Paraguay, all members of MERCOSUR. In light of these developments, the Member States of MERCOSUR have been forced to seriously reconsider their energy policy and to contemplate closer energy cooperation to ensure security of supply.

This chapter will therefore examine whether such energy integration is possible (and promising) in MERCOSUR. In order to do so, it will first analyse the energy profile and the current state of regulation in the various MERCOSUR Member States. Having done that, it will then examine the prospects for energy integration, followed by a short conclusion.

[1] Venezuela has applied for membership but its application has not yet been approved by Paraguay, in particular the External Relations Commission of the Paraguayan Chamber of Senators. See 'Senado de Paraguay no aprueba ingreso de Venezuela al Mercosur', *El universal*, 4 March 2009, available at www.eluniversal.com/2009/03/04/eco_ava_senado-de-paraguay-n_04A2242243.shtml.

[2] Bolivia is currently an associate state of MERCOSUR. See Acuerdo de Complementación Económica Mercosur-Bolivia signed on 17 December 1996.

II Current State of Regulation and Energy Profile of Individual Member States

There are significant differences both in the overall size of the economies and in the energy resource endowments of the MERCOSUR Member States. Table 22.1 illustrates these points.

Table 22.1 Energy profile of MERCOSUR Member States (2005)

Country	*Population (million)*	*Net generation of electricity (bkWh, 2005)*	*Net consumption of electricity (bkWh, 2005)*	*GDP (billion US$)*
Argentina	40	101	89	338
Brazil	189	396.3	368.5	1463
Paraguay	6.1	50.6	4.5	11.9
Uruguay	3.5	7.5	6.5	37

Source: Energy Information Administration (EIA), *Country Analysis Briefs* (2008)

I will now turn to the current situation in each Member State, starting with Argentina where the liberalisation process began in the 1990s.

A Argentina

Argentina's energy sector can (at least to a certain extent) be regarded as a role model for other Latin American states considering liberalisation. Since the early 1990s, it has undergone a profound restructuring process that included the separation of 'the electricity and natural gas companies, electricity competition and—to a lesser extent—in oil and natural gas production, as well as competition in the electricity and natural gas wholesale markets (including contracts market and spot market)'.[3]

As regards the electricity sector, the three main functions of generation, transmission and distribution were unbundled in the 1990s and are thus open to the private sector. There are, however, certain limitations on cross-ownership between these three branches in order to prevent the abuse of a dominant position.[4]

Electricity generation takes place in a competitive and, to a large extent, deregulated market.[5] Hence, both state-owned and private companies can and do participate in this market. For instance, some 75 per cent of electricity generation is now in the hands of private investors. The eventual sale of electricity by the individual power generators takes

[3] W Lutz, *Reformas del sector energético, desafíos regulatorios y desarrollo sustentable en Europa y América Latina,* Serie Recursos Naturals e Infraestructura No 26 (Santiago de Chile, CEPAL, 2001), quoted in I F Lara, 'The Development of MERCOSUR and Potentialities of the Energy Sector', 6(1) *Crossroads* (2006) 46–95, 75–76.

[4] Energy Information Administration (EIA), *Country Analysis Briefs: Argentina* (2008) 7.

[5] Ibid 7.

place in a wholesale market operated by CAMMESA (Compania Administradora del Mercado Mayorista Electrico), whose board is comprised of corporate, government and user representatives.[6]

The transmission grid is operated by Transener (Compañía Nacional de Transporte Energético en Alta Tensión) under a long-term contract with the government.[7] Under this, access to the grid is guaranteed.[8] The underlying idea is that it will foster the creation of a competitive environment and will enable electricity firms to supply customers throughout the country.[9]

Last but not least, the distribution sector is generally less competitive, with three main distribution companies (Edenor, Edesur and Edelap) controlling the market.[10]

The natural gas sector also has a long history of deregulation, with both the transmission system and the distribution sector now being controlled by a small number of companies, such as Transportadora de Gas del Sur (TGS) and Transportadora de Gas del Norte (TGN), which dominate the transmission system, and MetroGas SA, Gas Natural Ban SA, Camuzzi Gas Pampeana SA and Camuzzi Gas del Sur SA, which by and large control the distribution system.

Finally, the oil sector is largely privatised too, although Repsol YPF still dominates exploration and production.[11]

Despite it approaching role model status, the Argentinean system also suffers from some weaknesses. For instance, the market is still dominated by a few companies which control the oil and natural gas markets. Minor problems also result from inadequate capacity and transmission investment. This has led to a highly problematic supply-demand situation in recent years as reserve margins have declined significantly.[12] In conjunction with the deterioration in distribution companies' services (eg transformers, etc), this could seriously endanger energy supply in the future.[13]

B Brazil

Until the early 1990s, the Brazilian energy sector was almost entirely under state control. Following a series of market reforms in the 1990s, necessitated by a lack of fresh capital, Brazil's energy sector is now largely open to private firms as well. Nevertheless, it still remains under the domination of two big state-controlled companies: Petrobras in the oil and gas sector[14] and Electrobras in the electricity sector.[15]

Under Brazilian law

> electricity generating plants are subject to contracts, authorisations or registry according to the type of plant, the capacity to be installed and the energy's destination. In terms of energy destinations, the generation plants may be classified as:

[6] As a further safeguard measure, the Argentinean regulatory structure also limits generation market share.
[7] EIA, *Country Analysis Briefs: Argentina* (2008) 7.
[8] Ibid 7.
[9] Ibid 7.
[10] Ibid 7.
[11] Ibid 7.
[12] Antonio Rossi, 'La situación energetica', *El Pais*, 11 October 2006.
[13] Ibid.
[14] In which the state holds a 54 per cent stake.
[15] In which the state holds a 52 per cent stake.

— electricity generators for public service distribution;
— independent generators (who take on the risk of supplying electricity to distributors or free consumers);
— auto-producers (who generate electricity for their own consumption and may also supply excess capacity if they are authorised to do so).[16]

Brazil's electricity transmission system has been gaining increasing significance as sufficient transmission capacity is key to managing the effects caused by regional droughts. In particular, an improved transmission system makes it possible to transfer electricity from humid regions to predominantly arid ones. For instance, the electricity shortage that took place in Brazil from June 2001 to February 2002 could have been averted had there been sufficient transmission capacity in place between the south (with its excessive supply) and the sout-east (with its electricity deficit).[17] Despite the general restructuring process of the electricity sector, the transmission sector has until recently been kept almost exclusively under government control.[18] However, under the new sector regulatory model, there are about 40 transmission concessions in Brazil, most of which remain under governmental control, with subsidiaries under the federal company Electrobras holding 70 per cent of all transmission lines.[19]

'Public service electricity distribution contracts are granted by tender and define clauses relating to tariffs, regularity, continuity, safety, updating and quality of the services and supply provided to consumers and network users'.[20] They also specify certain penalties in case violations should occur.[21] When compared to the generation and transmission markets, the distribution market is the most privatised market, with state-owned companies only controlling as little as 35 per cent.

The oil sector was liberalised only in 1997 with the entry into force of petroleum investment legislation. In the course of this process, the Agência Nacional do Petróleo, Gás Natural e Biocombustíveis (ANP) was created to regulate the market. However, despite many new companies entering the market, there is still precious little competition for Petrobras. This becomes evident when comparing the allocation of concessions for drilling rights, of which state-controlled Petrobras is still the main beneficiary, despite increasing efforts by private companies to obtain a larger share.[22] Finally, in the course of this opening up process oil prices were also freed from state control.[23]

C Paraguay and Uruguay

Compared to Argentina and Brazil, Paraguay and Uruguay are minor players in the energy market.

[16] EDP, 'The Brazilian Electricity System' (2006), available at www.edp.pt/EDPI/Internet/EN/Group/AboutEDP/BusinessEnvironment/BrazilianElectricitySystem/ Default.htm.
[17] Ibid.
[18] Either through federal firms, such as Electrobras, or state companies, such as Minas Gerais-Cemig and Parana-Copel.
[19] Bear Stearns (2007).
[20] EDP, 'The Brazilian Electricity System' (n 16).
[21] Ibid.
[22] Georges Landau, 'Brasil' in Sidney Weintraub, Annette Hester and Veronica Prado (eds), *Cooperacao Energetica nas Americas* (Río de Janeiro, Elsevier, 2008) 254.
[23] Ibid 254.

Paraguay is actually one of the few Latin American countries which has so far resisted any trend towards liberalisation of the energy sector. Hence, it still maintains a state-run monopoly of its electricity sector. Paraguay's entire electricity market is controlled by one state-owned utility, the so-called Administracion National de Electricidad (ANDE). ANDE thus dominates not only electricity generation, but also transmission and distribution, making it a key player in Paraguay's comparatively small economy.[24] The government is, however, contemplating unbundling the vertically integrated ANDE.[25] Whether these plans will ever materialise remains questionable however, particularly in light of earlier failed attempts at privatising ANDE, which were mainly due to strong opposition by governmental employees against any form of privatisation.[26] Paraguay's main source of energy generation is the Itaipu dam (a joint project with Brazil), with a capacity of 12,600 MW, most of which is consumed by Brazil.[27] Paraguay is thus a net exporter of electricity. The Itaipu dam project is also interesting from another point of view: It constitutes one of the few successful examples of actual commercial exchange of electricity in the Southern Cone.[28]

For a long time Uruguay adopted a similar stance. It also tried to resist any moves towards liberalisation of the energy sector. Only a looming electricity shortage eventually brought about a change of mind. Uruguay thus gradually opened the way for foreign investments in the country's energy sector. Following the modification of the National Electricity Law in 1997, private firms now have the right to participate in the energy generation market.[29] Under this law, the share of the National Energy Company (UTE, Administración Nacional de Usinas Trasmisiones Eléctricas) of the energy market in Uruguay may fall, 'as more private players enter the market, but it will have the option to claim 40% ownership of any power plant built by the private sector'.[30] This underlines UTE's (still) dominant market position, although it no longer enjoys a monopoly. UTE now focuses 'its activities on the generation, transport, distribution and commercialization of electricity, including imports, and participates in the Salto Grande bi-national project (Uruguay's biggest hydroelectric dam, built in conjunction with Argentina)'.[31]

III The Case for Integration

One of the key arguments in favour of energy integration is security of supply for both industrial and private consumers. The following two examples serve to illustrate vividly the need for energy integration in Latin America.

[24] ABS Energy Research, *Energy Deregulation Report* (London, 2008) 309.
[25] Ibid 310.
[26] Ibid 310.
[27] Pierre-Olivier Pineau, Anil Hira and Karl Froschauer, 'Measuring International Electricity Integration: A Comparative Study of the Power Systems under the Nordic Council, MERCOSUR and NAFTA' (2004) 32 *Energy Policy* 1464.
[28] Ibid 1465.
[29] ABS Energy Research, *Energy Deregulation Report* (London, 2008) 313.
[30] Ibid 313.
[31] Canadian Energy Mission to Uruguay, Argentina and Chile, 'Sectoral Analysis: Uruguay', available at www.international.gc.ca/commerce_missions/uac/u2.aspx?lang=eng.

From June 2001 to February 2002, Brazil experienced a severe electricity shortage. The cause of this crisis was a sequence of unusually dry years, which hit the Brazilian electricity sector, which depends as to almost three-fourths of its output on hydropower, a much greater proportion than most of its neighbours. This crisis also demonstrated that Brazil had failed to heed earlier calls for a diversification of its electricity sector. Following the crisis, Brazilian consumers were forced to limit their electricity consumption for almost nine months, a period which was referred to by the press as the 'big blackout' ('*apagão*').[32]

Three years later, Argentina, too, suffered from a severe shortage of energy caused by a lack of natural gas supply. This highlighted very effectively Argentina's vulnerable and precarious situation. Making matters even worse, the Argentinean energy crisis affected not only Argentina itself but also Chile and Uruguay, which depend on Argentinean energy supplies (in particular gas).[33] Because of low energy prices as a result of price caps imposed by the Argentinean government, energy demand soared.[34] Demand thus quickly outstripped supply, eventually forcing the Argentinean government to stop its gas exports to Chile, thereby violating its contractual obligations to its neighbour.[35]

What are the lessons to be learned from these events?[36] The Argentinean energy crisis of 2004 highlighted the interconnectedness of energy markets in Latin America. The crisis was not confined to Argentina but eventually had a profound impact on two other states. Energy integration thus appears to be an important step towards ensuring security of supply for the whole region.

By enhancing energy cooperation in the region, the vast (although unequally distributed) resources could be used in a more efficient way. Costs would be reduced significantly as expensive investments for the construction of pipelines would be shared among the Member States. Prima facie, energy integration would seem to benefit above all the energy dependent countries in the South, as they could count on a reliable supply system. But what are the benefits for the resource-rich countries? What would be their incentive?

One possibility is that they would profit from a diversification of their supply relationships. They might also benefit from increased investment by the other Member States in their gas and oil production, something that is urgently needed in countries such as Venezuela. Moreover, MERCOSUR Member States possess a differentiated and complementary supply of energy (ranging from oil and gas to biofuels), which would allow them to interchange energy among countries, depending on current electricity surpluses/deficits. Last but not least, enhanced cooperation in the energy sector could also present an opportunity to revive the limping economic integration process in the region.

[32] Luiz Maurer *et al*, *Implementing Power Rationing in a Sensible Way: Lessons Learned and International Best Practices* (Washington, ESMAP, 2005) 47.

[33] Lara, *The Development of MERCOSUR and Potentialities of the Energy Sector* (n 3) 80.

[34] Ibid 81.

[35] Argentina even started to import natural gas from Bolivia.

[36] It also emphasises in particular the importance of strategic, long-term planning when it comes to energy issues. New power stations cannot become operational over night and therefore long-term strategies need to be devised to prevent such situations occurring again.

IV Conclusion: Towards Energy Integration or Mere Energy Interconnection?

Over the last decades, a plethora of energy crises has significantly hindered economic growth in the Southern Cone. These crises could have been avoided, or at least mitigated, had there been sufficient energy capacity in the regional system.

In order to prevent such situations from occurring again, the Heads of State of the MERCOSUR Member States, together with the associate states Chile, Colombia, Ecuador and Venezuela, signed the Acuerdo Marco sobre Complementación energética regional entre los Estados Partes del Mercosur y Estados Asociados (Framework Agreement on Regional Energy Complementarity among the Member States of MERCOSUR and Associated Members) in December 2005.

According to article 1, the agreement is designed to help promote regional energy integration in the production, transmission, distribution and marketing of energy in the states parties. Moreover, it aims at achieving the following objectives: to ensure stable energy supplies; to minimise the transaction costs of energy exchange between the states; to ensure a fair and reasonable use of those resources; to strengthen the processes of development in a sustainable way; and last but not least, when doing so, to respect existing international commitments and the existing regulatory frameworks in each state.[37]

In order to achieve these objectives, it is agreed that the parties will implement institutional coordination, regulatory and technical activities in the field of infrastructure projects and allow for the exchange of energy, thereby maximising the economic and social benefits for the region.[38]

The agreement thus appears very ambitious in its objectives. It must be emphasised, however, that it only constitutes a 'Framework Agreement'. It is in the specific agreements to be signed under the agreement that the parties will lay down the concrete conditions, through the coordination of national policies for the implementation of activities, projects and infrastructure, which will provide for energy interconnections, as well as for the most effective use of available resources.[39]

However, the 2005 Framework Agreement has so far encountered the same fate as many other ambitious projects in Latin America—it has failed to be implemented. More than three years after being signed, no country has yet managed to ratify the agreement.[40] This is hardly surprising, given the trend towards resurgent energy nationalism currently influencing the energy policies of (at least some) Latin American states.[41] While private projects may have made significant advances in recent years, moves towards a structured regional organisation of the energy market are making only halting progress. It thus seems appropriate to speak of increasing energy 'interconnectedness' but not 'integration'.[42]

[37] Acuerdo Macro sobre Complementacion energetica regional entre los estados partes del Mercosur y estados asociados, art 1.

[38] Ibid art 2.

[39] Ibid art 3.

[40] See www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/mercosurprincipal.htm.

[41] See for example the conflict between Brazil and Bolivia over gas.

[42] Eduardo Gudynas, *La diplomacia de la energía y el cruce de caminos en la integración suramericana, Programa de las Américas Observatorio Hemisférico* (Washington, DC, Center for International Policy, 20 June 2007), available at www.ircamericas.org/esp/4318.

Private gas and oil pipelines constitute important projects, but they are only (inter)connections that allow for the commercialisation of energy.[43] It would, however, be wrong to consider such agreements for interconnection as significant advances in integration, for they lack the necessary overall framework structure required.[44]

[43] Ibid.
[44] Ibid.

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Regional Integration and Development

A Legal/Institutional Analysis of FOCEM, the MERCOSUR Fund for Structural Convergence

FABIANO DE ANDRADE CORREA*

I Introduction

The ongoing transformations of the international scenario have affected the dynamics of international relations in the past decades. On the one hand, phenomena such as globalisation and interdependence have undermined state sovereignty and states' capacity to act independently.[1] Accordingly, new forms of governance have been established during the last century, with a growing number of regional and multilateral projects designed to shape new rules to respond to these challenges. On the other hand, the concept of public goods has been expanded, encompassing also issues that go beyond the national sphere and need to be promoted on a broader scale.[2] Development is one of these issues, being nowadays a mainstream subject on the international agenda and a goal which multilateral and regional organisations aim to promote.[3]

This chapter will analyse the recently created MERCOSUR Fund for Structural Convergence (FOCEM), as a case study of how regional integration can be a tool to promote development. The Common Market of the South was created in order to promote regional development through the establishment of a common market. Nevertheless, as the project

* An earlier version of this chapter has been presented at the Seventh Annual Conference of the Euro-Latin Study Network on Integration and Trade (ELSNIT), promoted by the Inter-American Development Bank on 24 October 2009 in Kiel, Germany.

[1] C Arenal, 'La nueva sociedad mundial y las nuevas realidades internacionales: un reto para la teoría y la política' in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2001* (Bilbao, Servicio Ed de la Universidad del País Vasco, 2002) 17–85.

[2] Such as international peace, the rule of law, economic stability and the global environment. See, in this regard, EU Petersmann, *Justice in International Economic Law? From the 'International Law among States' to 'International Integration Law' and 'Constitutional Law'*, EUI Working Paper (2006); M Carbone, *The European Union and International Development: The Politics of Foreign Aid*, Routledge-UACES Contemporary European Studies Series (London, Routledge, 2007).

[3] The many organisations involved with development issues include the United Nations, which in 1997 established the UN Development Group, which unites the 32 UN funds, programmes, agencies, departments and offices that play a role in development, and whose 'objective is to deliver more coherent, effective and efficient support to countries seeking to attain internationally agreed development goals, including the Millennium Development Goals', see www.undg.org/; the 'Bretton Woods' institutions, ie the World Bank and the International Monetary Fund (IMF); the Organization for Economic Cooperation and Development (OECD); and the World Trade Organization (WTO), as well as regional organisations worldwide.

evolved, it became clear that positive measures were also required in order to complement the integration process and reduce the severe asymmetries among Member States, and even within national regions, which were not benefitting from the gradual elimination of trade barriers. Thus, MERCOSUR has recently established FOCEM, regarded as one of its main achievements in recent years and designed to foster the development and structural convergence of less favoured regions within the bloc.

The scope of this chapter is to provide a critical and comparative perspective of FOCEM's legal and institutional framework and, for this purpose, it is divided into two main parts. First, an overview of the background which led to the creation of the fund is provided, followed by an overview of the legal framework designed to regulate its functioning and of the development policies that are being promoted. In the second part, a comparison is presented with a similar initiative of regional development, the structural funds of the European Union, which offers valuable insights for the analysis, because not only is the European Union the most advanced project of regional integration currently in operation, but FOCEM was itself inspired by the EU funds, which have played a significant role in the European integration project.

II The MERCOSUR Fund for Structural Convergence

A Background to the Establishment of FOCEM

MERCOSUR was created in 1991 by the Treaty of Asunción signed by Argentina, Brazil, Paraguay and Uruguay. It is said to have been inspired by the success of other regional integration initiatives, mainly the European Union (a more advanced and complex project of integration), as it aims not only to establish a free trade area, but to form a common market, asserting that 'the broadening of the current dimensions of national markets through integration is a fundamental condition to accelerate economic development with social justice'.[4]

Nevertheless, in contrast to the broad and ambitious objectives stated in the Preamble, the actual scope of the legal competences attributed to the bloc was drafted in a more limited way, with the establishment of the common market the main objective/task expressed in order to achieve such progress. In this regard, even though many authors have attempted to trace parallels with the European Union, the simplicity of the provisions in the founding treaties of MERCOSUR offer a considerable contrast to the European project. In the European Union, from the beginning, the creation of the common market was seen as an instrument for the achievement of 'a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States', to which several tasks were assigned, such as the creation of a Community commercial policy, a competition policy, a common agricultural policy, etc.[5]

[4] First recital of the Preamble of to the Treaty of Asunción.

[5] Provisions contained in articles 1 and 2 of the EC Treaty, signed in 1957 establishing the European Economic Community.

In MERCOSUR, the creation of the common market emerged as the main goal, and there was an expectation that this would by itself bring development with social justice. In addition, the institutional framework of MERCOSUR is typical of an intergovernmental organisation, as opposed to the supranational structure of its European analogue. It was given institutions which represent the sovereign will of its Member States, the principal ones being (i) the Council of the Common Market (CCM), the primary decision-making body, composed of the Ministers of Foreign Affairs and of the Economy of Member States; (ii) the Common Market Group (CMG), the executive body that implements policies, composed of representatives of the Ministries of Foreign Affairs and the Economy and the Central Banks of Member States; (iii) the MERCOSUR Trade Commission (MTC), which oversees commercial policy and may resolve trade disputes; and (iv) the Consultative Economic and Social Forum, through which businesses and trade unions may express their priorities. Decisions are taken by consensus, and the legal framework comprises the Treaty of Asunción (a framework agreement) and other protocols signed later, and the regulations issued by the institutions with decision-making powers. The majority of norms must be internalised in each Member State, except regulations on the organisation and internal functioning of the bloc.

All this has led MERCOSUR to become a highly political organisation and, after its initial success during the early 1990s, the process of integration started to encounter difficulties.[6] Nevertheless, it was not abandoned, and in 2000, the Member States decided to 'relaunch' MERCOSUR,[7] committing themselves to the achievement of the initial goals, such as macro-economic policy coordination and adoption of a common trade policy. Since then, important progress has been made: the conflict resolution system was improved with the creation of the Permanent Review Court;[8] the institutional structure was reformed, with the establishment of new bodies such as the Commission of Permanent Representatives (CRPM)[9] and the recently created Parliament; furthermore, an enlargement process was commenced with the accession of Venezuela in 2006.[10]

In addition to these institutional measures, the argument that free trade alone was not enough to address the development needs of the region began to gain support, and the parties reached agreement on the necessity to take positive measures to address one of the main challenges of the bloc—its internal asymmetries: the four current Member States are

[6] In this regard, it should be noted that currently MERCOSUR has only achieved the status of a customs union, with exceptions and non-tariff barriers still hindering trade flows among Member States, aggravated by the recent financial crisis and the threat of a new protectionist wave.

[7] A series of decisions of the Common Market Group signed in Buenos Aires on 29 June 2000. See more details in Institute for the Integration of Latin America and the Caribbean (INTAL), *Report No 6 on MERCOSUR* (Buenos Aires, 2000), available at www.iadb.org/Intal/aplicaciones/uploads/publicaciones/i-MERCOSUR_Report_6.pdf.

[8] Established by the Olivos Protocol, signed in 2002.

[9] Created by CCM Decision No 11/03, this body is a subdivision of the Council of the Common Market and performs the role of permanent representative of the Member States at the seat of MERCOSUR in Montevidéo; it is composed of one representative of each Member State and has among its functions to advise the CCM on matters related to the institutional functioning of the bloc and also on its external relations; the president of the CRPM may also play the role of representative of the bloc in its relations with third parties.

[10] In 2006, Venezuela's accession was agreed, but the process is still to be completed through ratification by the Brazilian and Paraguayan legislators. In addition, Chile, Colombia, Ecuador and Bolivia are associate countries, and the latter is being considered for full membership. Moreover, recently another integration scheme, which aims at uniting all South American countries, was created, the Union of South American Nations (UNASUR, Unión de Naciones Suramericanas). See further on UNASUR and its impact on MERCOSUR, Lucas Lixinski and Fabiano de Andrade Corrêa, Chapter 24.

not only very different in size and economic power, but also have different approaches to the project.[11] On the one hand, for the smaller partners Paraguay and Uruguay, intra-regional trade forms a very important share of their total trade and, given the fact that the completion of the common market has not been achieved so far, they claim that they are not reaping enough benefits from the integration process and are not being compensated for liberalising trade and agreeing not to negotiate bilaterally with third parties.[12] On the other hand, for the larger partners Argentina and Brazil, the situation is the opposite. Especially in the case of Brazil, the dominant player in the region, internal trade is not its only focus, and it is argued that MERCOSUR is seen by the Brazilian government as an instrument to support its ambitions to become a global actor. Participation in MERCOSUR has become a declared priority on the Brazilian diplomatic agenda, especially under the administration of President Lula (2002–2010), who has constantly stressed the importance of integration to the development of South America.[13] This has not, however, prevented difficulties arising in Brazil's attempts to harmonise its positions with the other larger partner, Argentina, and the bloc's functioning has thus been facing complications.

In this context, an important initiative was taken: the creation of a 'structural convergence fund', designed to address the challenge of overcoming the internal asymmetries in the region and balancing the weight of Member States in the bloc. This fund, said to be inspired by the structural funds of the European Union, has been regarded as one of MERCOSUR's most important achievements in recent years, and is especially noteworthy because it is not a 'negative measure' taken in order to remove barriers to the common market, but rather a 'positive measure' taken to strengthen the bloc as a whole by addressing the needs of its weaker areas.[14]

From a legal perspective, the creation of the fund was not determined under any specific competence of the bloc, but rather on a pragmatic basis that characterises many actions undertaken by, and with the discretion allowed to, an organisation that mainly

[11] These asymmetries are illustrated by some indicators of the four current members: Argentina: size: 2,780.4 sq. km; population: 40 million; GDP: US$328.4 billion; GNI per capita: US$7,200. Brazil: size: 8,514 sq. km; population: 192 million; GDP: US$1.612.5 billion; GNI per capita: US$7,350; Paraguay: size: 406.8 sq. km; population: 6.2 million; GDP: US$16 billion; GDP per capita: US$2,180; Uruguay: size: 176.2 sq. km; population: 3.3 million; GDP: US$32.2 billion; GNI per capita: US$8,260. Venezuela's accession would change the internal balance of the bloc: size: 921.1 sq. km; population: 27 million; GDP: US$313 billion; GNI per capita: US$9,230. Source: World Bank database (updated until 2008), available at www.worldbank.com.

[12] In particular, Uruguay has been threatening to sign free trade agreements with third countries due to dissatisfaction with the results of MERCOSUR. For more details regarding the economic situation of the bloc, see F Masi and A Hoste, *Economic Development and Asymmetries in MERCOSUR: The Prospects of a MERCOSUR Regional Development Fund*, Dante B Fascell North South Center Working Paper No 4 (University of Miami, 2002).

[13] See B Magalhaes and J Erthal, 'Brasil: as dificuldades internas da liderança regional' in MR Soares de Lima and MV Coutinho (eds), *Agenda Sul-Americana: mudanças e desafios no início do Século XXI* (Brasília, Fundaçao Alexandre de Gusmao, 2007). In addition, it should be noted that Brazil has ambitions to become a leading voice amongst developing countries, using its presence at international fora such as the G-20 in negotiations at the WTO Doha Round. This trend may be reinforced in the coming years, as the country has gained international recognition for economic developments achieved under recent political administrations, and a substantial amount of oil was recently found off its coasts, which could boost its importance on the international scene.

[14] It should be noted that, in terms of 'negative measures', the two smaller countries, Paraguay and Uruguay, from the beginning benefited from differential treatment regarding the accomplishment of the liberalisation of trade and removal of customs duties, as provided in Treaty of Asunción, art 6.

depends on political decisions to function.[15] Article 35 of the Ouro Preto Protocol authorises the CCM 'to carry out all the measures necessary to attain its objectives, according to its competences', and the idea behind the promotion of specific measures supporting the reduction of internal asymmetries emerged from the assumption that MERCOSUR 'should be a tool to promote the social and economic development of the Member States with social justice'; thus, if the liberalisation of trade had proved to be insufficient to reduce such imbalances, positive measures should be taken to achieve such objective.

The project of establishing the fund gained momentum in 2003, when the CCM issued Decision No 27/03, reaffirming this notion of solidarity in its Preamble and providing, in article 1, 'that studies should be made in order to establish structural funds to enhance the competitiveness of smaller countries and less favoured regions'. As a result, in 2004 CCM Decision No 19/04 created a 'high level group'[16] formed by the Ministers of Foreign Affairs and of the Economy of Member States in order to coordinate the steps to achieve this objective, identifying the initiatives and programmes to be taken and proposing ways of financing the implementation. Decision No 45/04 then officially created the MERCOSUR Structural Convergence Fund (FOCEM)[17] on 16 December 2004, with the objective of financing programmes to promote the competitiveness and social cohesion of Member States, reducing asymmetries of less developed Members and regions, and supporting the structural convergence of the bloc.

The 'high level group' continued its work and CCM Decision No 18/05, making provision for the regulation of the fund, was passed one year later, stating in its Preamble that in order to further the process of convergence towards the common market it was necessary to reinforce the principle of solidarity, and that the benefits of the market expansion resulting from integration would not benefit all parties while asymmetries still existed. The Decision thus established the programmes and priorities of FOCEM in four areas: structural convergence; competitiveness; social cohesion; and strengthening of the institutional structure and of the integration process as a whole.

It was further anticipated that FOCEM could play a role that went beyond structural convergence, and help to balance the asymmetries in size and economic power within the bloc. The functioning of the fund, which will be analysed in the next section, seems to support this intention.

B Functioning of FOCEM

The institutional framework and the regulation of the fund were established by CCM Decisions Nos 18/05 and 24/05, which established its functioning initially over a period of 10 years, with a budget of US$100 million per year. FOCEM appears to perform a redistributive role among Member States, since quotas have been established for each

[15] See, in this regard, ML Olivar Jiménez, 'La Adhesión de Nuevos Miembros al MERCOSUR: una cuestión fundamental para la evolución de la organización' in E Accioly (ed), *Direito no século XXI* (Curitiba, Juruá, 2008), where the author highlights the pragmatic character of the bloc, in which 'solutions are adopted as problems come up'.

[16] A dependent body of the CCM, formed in order to carry out specific tasks. The group was to be coordinated by the CRPM and assisted in its work by the Secretariat, and present its conclusions to the CCM meeting.

[17] In Portuguese, 'Fundo para a convergência estrutural do MERCOSUL'.

party, such that the larger countries, Argentina and Brazil, are responsible for providing, respectively, 27 and 70 per cent of the budget, while being entitled to benefit from only 10 per cent of the total amount each; Paraguay and Uruguay provide, respectively, 1 and 2 per cent of the budget and benefit from 48 and 32 per cent, respectively, of the total resources.[18] It thus operates as a form of compensation for the smaller countries for the disadvantages of liberalising trade with larger Member States. Moreover, the fund follows a rationale of complementarity to national efforts to promote development, since the resources are designated in the form of non-reimbursable donations, but Member States must finance at least 15 per cent of the total cost of approved projects.

The development process to be promoted by the fund is carried out through programmes which finance projects under the following four main pillars.[19]

Programme I Structural convergence: projects designed to contribute to the development and structural adjustment of smaller economies and less developed regions, including the improvement of broader integration structures and communication in general. Under this programme, projects may cover the following areas: construction and improvement of transportation routes which optimise the movement of production and promote the physical integration of Member States and their subregions; exploitation, transport and distribution of fossil and biofuels; generation, transportation and distribution of electric energy; implementation of infrastructure work to contain and conduct water systems, sanitation systems and drainage.

Programme II Development of competitiveness:[20] projects designed to contribute to the competitiveness of productive processes within MERCOSUR, including projects of production and labour improvement to facilitate intra-bloc trade, integration of productive chains and improvement of public and private institutions connected with production quality (technical standards, certificates, etc.) and research and development of new technologies. Under this programme, projects may cover the following areas: generation and diffusion of knowledge related to dynamic productive sectors; metrology and certification of quality in products and productive processes; tracing and control of animal and agricultural products and guarantee of quality and security of subproducts of economic value; promotion of the development of productive chains in dynamic and differentiated economic sectors; promotion of companies and productive and exporter groups; strengthening the conversion, growth and associability of small and medium-sized companies, their links with regional markets and the promotion of new enterprises; professional training in management and productive organisation for cooperatives and associations and entrepreneurial initiatives.

Programme III Social cohesion: projects designed to foster social development, especially in border zones, including programmes of community interest and health, poverty eradication and employment. Under this programme, projects may cover the following areas: healthcare projects aimed at reducing child mortality and enhancing living expectations, improving hospital capacity in remote zones and eradicating epidemic and

[18] Decision No 18/05, art 8 also allows the contributions of third countries and international institutions and organisations to the fund.

[19] Ibid arts 2 and 3.

[20] It should be noted, in this regard, that the CCM decided in 2008 to give priority to a 'productive integration' strategy, as stated in CCM Decision No 12/08, and thus there was a provision making it possible to use FOCEM resources for initiatives under this strategy; in addition, a new fund was established to promote this objective, but is still not operational.

endemic diseases resulting from poor living conditions; teaching programmes for young people and adults and professional training aimed at reducing illiteracy, enhancing the coverage of the educational system for the population, making provision for specific needs and reducing the disparities in access to education; training and certificating workers, providing micro-credit, promoting first employment opportunities and income from activities, especially in regions of lower employment rates, and in respect of young people; combating poverty, identifying most affected zones, promoting access to housing, health, food and education in vulnerable areas of poorer regions and border zones.

Programme IV Strengthening of the institutional structure and of integration: projects designed to improve the institutional structure of MERCOSUR.

In addition, in this initial phase, emphasis was given to the improvement of infrastructure in the bloc, since Decisions No 18/05, articles 12 and 13 determined that in the first four years of functioning, the fund's resources would be assigned in priority to projects under Programme I, with it also being possible to assign 0.5 per cent to projects under Programme IV; moreover, resources assigned to Programme I were to be used in projects to improve the intra-bloc infrastructure, in order to facilitate integration. After the fourth year, the results were to be analysed and these priorities reviewed.

The institutional structure designed to manage the fund comprises the following bodies:[21] (a) technical units in each Member State (National Technical Unit, NTU), which select the projects that will be presented to the main technical unit (FOCEM Technical Unit, FTU), and evaluate the projects already in force; the FTU also manages the implementation of the projects; (b) an ad hoc expert group (AHEG) formed by technical personnel assigned by each Member State, which provides technical support to the FTU in order to evaluate the projects presented by the NTUs and the projects in force; (c) the CRPM, which verifies the admissibility of the projects according to the established guidelines and requirements; (d) the CMG, which drafts a report to be presented to the CCM, giving information about the projects considered to be suitable for implementation; and finally (e) the CCM, which approves the projects to be carried out, with the corresponding designation of resources.

Under Decision No 24/05, articles 44 to 53, the procedure to present projects commences with the submission of proposals by Member States to the NTUs; the latter must verify whether the projects meet the criteria set out in Decision No 24/05, articles 32 to 39: (1) projects must be proposed by the public sector of one Member State (although multinational projects are also accepted) which must agree to finance at least 15 per cent of total costs; (2) projects must fit within the guidelines of one of Programmes I to IV; (3) the total cost must be a minimum of US$500,000 or more (except for projects falling under Programme IV); and (4) the rate of socio-economic return must meet a minimum amount, set every year by the CRPM. There are also environmental and social aspects: projects must optimise the use of natural resources and reduce environmental impact, and also respect the geographic, economic, social and cultural specificities of the place where it will be implemented.[22] It seems evident that the criteria were drafted in a very broad and vague way, leaving a large amount of discretion to Member States as regards presenting projects to fulfil their quota.

[21] As determined by CCM Decision No 24/05.

[22] According to ibid arts 40–43, each project must be presented with technical, financial, socio-economic, environmental and cost-benefit analysis.

The projects selected by each NTU are presented to the CRPM, which analyses again the fulfilment of all the criteria and, within 30 days, sends the approved projects to the FTU; the FTU, with assistance from the AHEG, drafts a technical report, specifying the viability, technical and financial feasibility and sustainability of the projects, serving as a means of comparison with other projects presented; this technical report is sent back to the CRPM, which drafts a memo to be presented to the CMG regarding the eligibility of selected projects; the CMG presents a final memo to the CCM, which finally analyses and votes on the approval of selected projects, assigning the corresponding resources to finance them. The Secretariat then signs legal instruments with the relevant Member State, which is responsible for the implementation of the project with the assigned funds.

The fund was finally implemented in 2007, after the first initial contributions by Member States. Under Decision No 18/05, article 21, pilot projects with significant impact were to be implemented in the first years, and the first projects were approved in 2008.[23] So far, 23 projects have been approved and are already being carried out: nine projects under Programme I, among which are seven assigned to Paraguay and two to Uruguay; five projects under Programme II, among which are three assigned to Paraguay, one to Uruguay and one multinational project (related to eradicating foot-and-mouth disease in cattle); six projects under Programme III, among which are three assigned to Paraguay and three to Uruguay; and three projects under Program VI, all related to institutional aspects. It should be noted, furthermore, that projects under Program I clearly receive the majority of financial resources.[24]

As stated before, this first series of projects are being carried out in an experimental way, aimed at causing an impact in related areas and intended to test the effectiveness of the programmes. On the other hand, it is interesting to note that, even though the regulations gave express priority to projects under Programme I in the initial years, a substantial amount of resources have been assigned to projects under the other programmes, showing a flexibility in the implementation of the rules—it cannot be assumed that this will form a continuing trend, however.

C In Summary

FOCEM is a new and welcome initiative, demonstrating the capacity of Member States not only to liberalise trade, but also to take joint decisions responding to a recognised obstacle to the further progress in MERCOSUR. On the other hand, the effectiveness of this initiative is still to be observed in the years to come, even though some conclusions can already be sketched regarding the legal/institutional framework and the development policies put forward.

First, as a fund created to promote development and structural convergence within the bloc, FOCEM was designed above all to address (at least in its initial stage) the inadequacy of infrastructure which was considered to be an obstacle to the completion of the common market, particularly with respect to the smaller partners; in this regard, it has established priority guidelines to signal which issues should be tackled first. Nevertheless,

[23] The current budget of FOCEM is US$302 million, according to CCM Decision No 51/08, which established the budget for 2009.

[24] For more details regarding the projects, see document available (in Spanish and Portuguese) at the official website of FOCEM, www.MERCOSUR.int/focem/index.php.

as it assigns quotas and leaves considerable discretion to Member States regarding the presentation of projects—they only have to respect the vague guidelines of the programmes and the (mostly technical) criteria set out in the regulations—the objectives of the fund may be jeopardised, since it is not necessarily the most backward regions which will benefit from these programmes, but also those areas which each Member State considers to be in its national interest to promote. It is, in the end, for each Member State to choose which sort of project to propose, and within which region of the country.

In addition, the quotas system underlines the redistributive role played by FOCEM, by compensating for the differences in the size and economic power among Member States. The decision-making procedure, which in the end falls within the framework of the CCM as responsible for approving the final projects and budget, follows the consensus rationale that characterises the institutions of the bloc, favouring this trend. It can be said, then, that FOCEM is a highly political tool, which will certainly help MERCOSUR to reduce some of its deficit, but will not necessarily lead to the socio-economic convergence of poorer regions. It should be noted, in this regard, that the larger partners of the bloc, Argentina and Brazil, also have severe internal asymmetries which will not be addressed by the fund's resources in this initial stage.

The following section presents a short description of a similar initiative which is said to have inspired FOCEM, the regional policy of the European Union, composed of a complex set of structural funds. A comparison between FOCEM and the EU structural funds may well be instructive, since not only is the European Union the most advanced example of a regional integration project, but it has also developed a regional policy that has been a central element in its integration project and which has proved to be effective in fostering development in many of its poorer member states.

III The Regional Policy of the European Union

The European Union has been committed to pursuing development goals since the establishment of the European Economic Community (EEC) in 1957. This section analyses the regional policy of the European Union, which is a good example of solidarity mechanisms created to generate economic convergence and foster development within the poorer areas, minimising the internal asymmetries and, thus, strengthening the integration as a whole. The focus of the analysis will be the European Regional Development Fund (ERDF), one of the main instruments of this policy, which had a prominent role in the EU project of integration and can provide important lessons for the experience in MERCOSUR.

A Background

The aim to promote development within the Community was a declared objective of the European Community since its creation by the EC Treaty in 1957. Two main provisions of the Treaty incorporate such aim: the fifth recital in the Preamble stated the will of the contracting parties 'to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions'; in addition, article 2 provided that:

> it shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

It was clear that, in establishing the EEC and a common market, the project was expected to further the development of member states, by reducing internal asymmetries and raising living standards within the Community.

However, no specific provisions with respect to such measures were included, and it was not until the 1970s that Community measures were adopted in order to implement a regional development policy. It was expected that growth associated with the establishment of the common market would be enough to assure distribution of the benefits from integration and balance regional asymmetries. Practice showed that this was not true, as the liberalisation of trade and the elimination of protectionist instruments, which were used to foster regional growth, made member states more vulnerable to foreign competition, and thus the use of state aid, with countries vying with each other to attract mobile investment, became common. This posed a risk to the undistorted competition sought through the establishment of the common market, and some kind of Community assistance to balance the different regional policies adopted by member states became necessary.[25]In 1972, at the Conference of Heads of State and Government held in Paris, at the fifth point of the final communication of the session, the parties agreed 'that a high priority should be given to the aim of correcting, in the Community, the structural and regional imbalances which might affect the realisation of Economic and Monetary Union', and requested the European Commission to prepare a report assessing the regional problems and putting forward a proposal to correct them. In response to this, the Commission published in 1973 a *Report on the Regional Problems in the Enlarged Community*[26] (the Thomson Report), a comprehensive document which analysed the regional imbalances in the Community, identifying as areas that should receive assistance 'agricultural problem areas' and 'areas suffering from industrial change'.

This thinking was reflected in another proposal made by the Commission in 1973, which ultimately led to the adoption, in 1975, of Regulation 724/75 establishing the European Regional Development Fund (ERDF).[27] The legal basis for the establishment of the fund was article 235 EC,[28] which provided for the adoption of Community measures regarding the objective established in Article 2 EC. The creation and regulation of the funds were later established through the adoption of regulations by the Council, under a proposal by the Commission and the approval of the Parliament, which were reviewed on a periodic basis (often coinciding with enlargement or other major institutional reforms carried out in the Community).

In this regard, it can be noted that the background to the establishment of the EU structural funds is similar to the context in which MERCOSUR has created FOCEM. It is

[25] A Evans, *EU Regional Policy* (Richmond Law and Tax Ltd, 2005) 19–21.

[26] COM73 (3 May 1973).

[27] Regulation 724/75/EC [1975] OJ L73.

[28] Article 235 EC: 'If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions'.

clear that the projects show significant differences, not only in general approach—the European Union has always operated through supranational institutions whose role is to defend the 'European interest', as opposed to the intergovernmental rationale of MERCOSUR—but also in scope: in the European Union, from the beginning, the common market was regarded not merely as a goal, but as a tool to promote development, with a broader mandate to pursue common policies on trade, agriculture, competition, etc, which were promoted to achieve this greater objective. Nevertheless, in both cases the projects reached a point where positive measures were deemed necessary to correct regional imbalances which were not being addressed by the integration project.

B Evolution and Functioning of the Funds

The rationale for the implementation of the funds was that correction of the regional imbalances was considered to be one of the conditions for continuing economic integration.[29] Regulation 724/57 designed the ERDF to be, initially, a tool to help member states to develop policies fostering the convergence of poorer regions and permitting, in conjunction with national aids, the progressive realisation of economic and monetary union. The most significant aspects, in this regard, were the concepts of complementarity and additionality, expressed in the Preamble to the Regulation, according to which 'the Fund's assistance should not lead the Member States to reduce their own regional development efforts but should complement these efforts'.

There were two categories of projects which could be financed—industrial handicraft and services activities and infrastructure investments—even though there was no definition of criteria of eligibility for assistance, article 3 stating that 'regions and areas which may benefit from the fund shall be limited to those aided areas established by Member States … When aid from the fund is granted, priority should be given to investments in national priority areas'. Moreover, there was a specification of quotas for each member state in article 2, and even though article 5 stated that it was the Commission's responsibility to determine which projects the funds should assist, member states had considerable discretion to submit proposals for projects which reflected, not necessarily the needs of the most disadvantaged regions, but rather their own political bargaining interests.

Consequently, the ERDF was greeted by many critics with scepticism regarding its functioning and it was argued that the fund was 'nationalised', representing an informal instrument of national policy-making.[30] It is interesting to note, in this regard, that the initial phase of the ERDF resembles the structure which has been designed to regulate FOCEM: the current system establishes a quota system, according to the size and economic power of the countries, follows a complementarity rationale according to which the funds should complement the efforts made by Member States to carry out development projects, and no regional development plan has been established at the initial stage.

[29] Some authors argue, however, that the purpose of the ERDF was not just (or not even principally) about regional development, but also, as noted by Evans, *EU Regional Policy* (n 25) 13–17, a form of compensation to member states for completing the internal market.

[30] J Scott, *Development Dilemmas in the European Community: Rethinking Regional Development Policy*, Law and Political Change Series (Open University Press, 1995).

Regulation 724/57 made provision for a review of its terms and operation by 1978. Following this, Regulation 214/79[31] was enacted, marking a slight shift in policy by amending article 3 to allow that 'the fund may also, where appropriate, give assistance in regions or areas other than those referred to in paragraph 1, for the solution of problems forming the subject of Community action, if the Member State concerned has also given assistance or does so at the same time'. It was a first step towards a horizontal development policy; this movement gathered pace in Regulation 1787/84,[32] which brought more innovations, the first being the end of the quota system, replaced by 'ranges' of fund assistance from which member states could benefit; this implied that a member state was no longer necessarily entitled to receive the whole of the amount of its quota, with allocation of funds 'depending on the implementation of the priorities and criteria laid down in this regulation' (article 4). In addition, the concept of Community programmes to be financed by the ERDF, alongside national programmes, was introduced; these Community programmes were intended to provide 'a better link between the Community's objectives for the structural development or conversion of regions and the objectives of other Community policies', and were given priority as regards the funds' resources (article 7).

The institutionalisation of a true regional policy was given impetus in the late 1980s, arising in the context of important changes in the Community: first, the accession of poorer Mediterranean countries (Greece in 1982, Spain and Portugal in 1986) 'highlighted the regional question in the Community context' as 'for the first time entire states, with large populations, were labelled as underdeveloped';[33] secondly, the process of institutional reform for the completion of the internal market reviewed the rationale and the commitment to regional development. A series of reforms were introduced, and new types of funds have been created; apart from the ERDF, other types of structural funds have been introduced over the years: the European Social Fund (ESF), which mainly provides assistance under the European employment strategy, and the European Agricultural Guidance and Guarantee Fund (EAGGF), which addresses both the development and the structural adjustment of rural areas whose development is lagging behind.

The Single European Act, in force since 1 July 1987, amended the EC Treaty, introducing a new section on 'economic and social cohesion': the new article 130a provided that '[i]n order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular the Community shall aim at reducing disparities between the various regions and the backwardness of the least-favoured regions'. Article 130b determined that '[t]he implementation of the common policies and of the internal market shall take into account the objectives set out in Article 130a and in Article 130c', which, in turn, redefined the scope of the ERDF to 'help redress the principal regional imbalances in the Community through participating in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions'. Finally, Article 130d recognised the need to reform the regulation of the funds in order to

[31] Council Regulation 214/79/EC [1979] OJ L35.

[32] Council Regulation 1787/84/EC [1984] OJ L169.

[33] Scott, *Development Dilemmas in the European Community* (n 30) 20. The accession of these countries to the European Community was accompanied by a promise of allocation of funds. See, in this regard, the Treaties of Accession, available at http://eur-lex.europa.eu/en/treaties/index.htm. In addition, in 1985 Regulation 1787/84/EC was amended by Regulation 3641/85/EC to include Portugal and Spain in the 'ranges' of the ERDF.

'clarify and rationalise their tasks in order to contribute to the achievement of the objectives set out in Article 130a and Article 130c, to increase their efficiency and to coordinate their activities between themselves and with the operations of the existing financial instruments', which was to be achieved within one year from the entry into force of the Act.

Accordingly, a new Regulation 2052/88 was passed in 1988[34] establishing a general framework for the operation of all the structural funds. The main innovation introduced by this reform was a list of five objectives of the regional policy to be pursued by the structural funds, thus providing horizontal criteria for their implementation. These five objectives were: (1) to promote the development and structural adjustment of the regions whose development was lagging behind; (2) to convert the regions, frontier regions or parts of regions (including employment areas and urban communities) seriously affected by industrial decline; (3) to combat long-term unemployment; (4) to facilitate the occupation integration of young people; (5)(a) to speed up the adjustment of agricultural structures and (b) to promote the development of agricultural and rural areas. Furthermore, it provided a definition of the regions which could benefit from the funds' assistance: 'administrative level NUTS II(4) regions where per capita GDP measured in terms of purchasing power parity is less than 75% of the Community average, and other regions whose per capita GDP is close to that of regions under 75% and whose inclusion is justified by special circumstances'.[35] As regards the ERDF, Regulation 2052/88 determined that its assistance could be utilised for objectives 1, 2 and 5(b), while 80 per cent of the resources were to be devoted to objective 1; in addition, a specific Regulation 4254/88[36] was passed, along with a 'coordination Regulation' 4253/88,[37] aimed at ensuring the proper functioning of the funds.

These innovations suggest some important insights in relation to FOCEM: first, they highlight the importance of defining a regional strategy for development, so that the funds can operate as an instrument to achieve it; secondly, the need to define clearer criteria for the selection of the beneficiaries of the funds is crucial if the funds are truly established in order to promote *regional development*, meaning the convergence of disadvantaged regions, to ensure that those regions are the ones to which the resources will be applied. In the case of the European Union, a quantitative economic indicator, GDP per capita, has been used for most of the funds' programmes; it should be noted that, even though many authors criticise this method, arguing that a more comprehensive set of indicators (such as the 'human development index' created by the United Nations) could be applied in order to accurately identify the most underdeveloped regions,[38] nevertheless, it has clear advantages if compared to the national quota system operating in FOCEM.

Some years later, the process of reform which led to the establishment of the European Union also had an impact on regional policy. The new wording of the Maastricht Treaty

[34] Council Regulation 2052/88/EC [1988] OJ L185.

[35] The Nomenclature of Territorial Units for Statistics (NUTS) was established by EUROSTAT more than 30 years ago in order to provide a single uniform breakdown of territorial units for the production of regional statistics for the European Union. The NUTS classification has been used in Community legislation since 1988, but it was only in 2003, after three years of preparation, that a Regulation was adopted specifically on this issue: Council Regulation 1059/2003/EC [2003] OJ L154/1.

[36] Council Regulation 4254/88/EC [1988] OJ L374.

[37] Council Regulation 4253/88/EC [1988] OJ L374.

[38] Scott, *Development Dilemmas in the European Community* (n 30) 29 and 56.

underlined, in its Preamble, the principle of solidarity among Member States (fourth recital); amended article 2 EC, which now stated that 'the Community shall have as its task, *by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote* throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, *and economic and social cohesion* and solidarity among Member States' (emphasis added); and included in article 3(j), among the activities of the Community, to promote the objectives of the previous article, the strengthening of economic and social cohesion. Cohesion became, thus, not only an objective of the European Union, but also a means for the realisation of the whole integration process, as one of the three pillars of the European Community, alongside the single market and economic union.

In addition, the treaty included a new fund, the European Cohesion Fund (ECF), which had the objective to help the poorest member states (Spain, Portugal, Greece and Ireland) by providing 'financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure'. As regards the ERDF, article 160 defined its objectives as to 'help to redress the main regional imbalances in the Community through participation in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions'.

Following these changes, the funds' regulations were revised in 1993 for the 1994–1999 period, and their objectives were slightly modified. A new framework Regulation[39] was enacted, with no substantive innovations regarding the scope of the policies, apart from including the newly created ECF. In 1994, following the accession of Austria, Sweden and Finland, an amendment to Regulation 2081/93 was made in order to include these new members in the policies, as well as introducing a new objective: '[u]ntil 31 December 1999, the Structural Funds, the Financial Instrument for Fisheries Guidance (FIFG) and the European Investment Bank (EIB) shall each contribute in an appropriate fashion to a further priority Objective … to promote the development and structural adjustment of regions with an extremely low population density (hereinafter referred to as "Objective 6")'.[40]

The next revision involved more substantive alterations under the so-called Agenda 2000, which has significantly altered the nature of the organising principles for the structural funds.[41] Regulation 1260/1999 established the framework for the period o2000–2006, as a first important change reducing the number of objectives to three, 'in order to increase the concentration and simplify the operation of the funds'. These new objectives were defined as:

[39] Council Regulation 2081/93/EC and Council Regulation 2082/93/EC [1993] OJ L193.

[40] Act 11994N/PRO/06 concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Protocol No 6 on special provisions for Objective 6 in the framework of the Structural Funds in Finland, Norway and Sweden, art 1 [1994] OJ C241.

[41] Council Regulation 1260/99/EC [1999] OJ L161.

— Objective 1: to promote the development and structural adjustment of regions whose development was lagging behind, understood as those in which average per capita GDP was less than 75 per cent of the EU average; it also covered remote regions and areas eligible under the former Objective 6 (areas with low population density) created by the Act of Accession of Austria, Finland and Sweden;
— Objective 2: (unified former Objectives 2 and 5(b)) to contribute to the economic and social conversion of regions in structural difficulties (other than those eligible under the new Objective 1) and other areas facing the need for economic diversification, areas undergoing economic change, declining rural areas, depressed areas dependent on fisheries and urban areas in difficulties; and
— Objective 3: (replacing the former Objectives 3 and 4) to gather all the measures for human resource development outside the regions eligible for Objective 1 and become the reference framework for all the measures taken under the new Title on employment inserted in the EC Treaty by the Treaty of Amsterdam and under the European employment strategy.

Moreover, as enlargement towards Eastern Europe was already envisioned, these reforms were also expected to 'ensure that structural policy plays a continuing role in the Union's future enlargement, bringing in the countries of central and eastern Europe'.[42] As regards the ERDF, Regulation 1260/1999 determined (article 2) that it was to assist in the pursuit of Objectives 1 and 2, and a new specific Regulation was passed to implement its functioning.[43]

Finally, the system was reformed again for the 2007–2013 period and the regulation of the funds was changed expressly to meet the goals of the overall reform envisioned for the European Union and the Lisbon Agenda.[44] A new framework Regulation was passed,[45] and three main priority objectives have been established:

(i) *Convergence*: to promote convergence of the least-developed member states and regions by improving conditions for growth and employment through investment in physical and human capital, the development of innovation and of the 'knowledge society', adaptability to economic and social changes, the protection and improvement of the environment, and administrative efficiency. This objective is the priority of the funds, and receives 81.54 per cent of the total budget (approximately €250 billion).
(ii) *Regional competitiveness and employment*: outside the least-developed regions, to strengthen competitiveness and attractiveness as well as employment by anticipating economic and social changes, including those linked to the opening of trade, through increasing and improving the quality of investment in human capital and through

[42] Communication from the Commission to the European Parliament and the Council of 16 July 2003 on the implementation of the commitments undertaken by the acceding countries in the context of accession negotiations on Chapter 21, regional policy and coordination of structural instruments (COM(2003)433).
[43] Council Regulation 1261/99/EC [1999] OJ L161.
[44] In 2005, the Commission issued a Communication COM(2005)330, in which it established the new priorities for the 'Lisbon Programme', focused on 'growth and employment' and aimed at modernising the 'economy in order to secure our unique social model in the face of increasingly global markets, technological change, environmental pressures, and an ageing population'; it was suggested that the structural funds be used to support these new priorities, which are part of an overall 'cohesion policy', and this idea was adopted by the Council in Decision of 6 October 2006 on Community strategic guidelines on cohesion[2006] OJ L291.
[45] Council Regulation 1083/2006/EC [2006] OJ L210.

innovation and the promotion of the knowledge society, entrepreneurship, the protection and improvement of the environment, and the improvement of accessibility, adaptability of workers and businesses as well as the development of inclusive job markets.

(iii) *Territorial cooperation*: to strengthen cross-border cooperation through joint local and regional initiatives, transnational cooperation by means of actions conducive to integrated territorial development linked to the Community priorities, and interregional cooperation and exchange of experience at the appropriate territorial level.

In addition, the budget of the funds has been enhanced to approximately €310 billion between 2007 and 2013 (nearly one-third of the total EU budget, being the second item in budget allocation, article 18), which testifies to the importance that regional development has achieved within the EU agenda.

Eligibility for structural funds under the convergence objective was again designated on the basis of GDP per capita, which should be less than 75 per cent of the Community average. However, there was no area designation at EU level for the regional competitiveness and employment objective; instead, it became the responsibility of the member states to determine the eligible NUTS I or II regions, the culmination of a trend of increasing national influence on the spatial coverage of this objective since 1993.[46]

The ERDF is currently the main instrument of regional policy, designed to support the three objectives and granted the major part of the structural funds' resources.[47] It thus remains the main tool in reducing the gap between the levels of development within the Community. It is clear that, since 1975, there has been a substantial evolution of regional policy, which is nowadays part of a larger strategy of cohesion established at the supranational level.

C In Summary

The analysis in this section leads to the following conclusions. First, regional policy, through the establishment of the structural funds, has evolved from being a 'side issue' merely intended to help member states to overcome their disadvantages, into a comprehensive and mainstream policy, considered not only as an objective in itself but also as a means of completing the integration project. Currently, it takes up approximately one-third of the Community budget, has a complex set of objectives defined at Community level, and has proved to be effective in many cases.[48]

Secondly, a series of reforms to this policy were undertaken as the European Union has been enlarged and reformed, in order to take into account the new objectives of the integration project; the goals of the policy have been expanded to form a comprehensive framework which encompasses the environment, social cohesion and globalisation.[49]

[46] As regards the debate concerning the government of the funds, see J Bachtler, 'Who Governs EU Cohesion Policy? Deconstructing the Reforms of the Structural Funds' (2007) 45(3) *Journal of Common Market Studies*, 535–564.

[47] Council Regulation 1080/2006/EC [2006] OJ L210 regulates the framework of the ERDF.

[48] See data from the EU regional policy website, http://europa.eu/scadplus/leg/en/lvb/l60013.htm.

[49] In this regard, it is worth mentioning the creation, in 2006, of a 'Globalisation Fund', 'designed to provide additional support for workers made redundant as a result of major structural changes in world trade patterns, to assist them with their retraining and job search efforts'.

Thirdly, while there has been an undeniable expansion of the scope of regional development policy, the main criteria to define the regions that might benefit from the policy have remained strongly quantitative—GDP per capita, which, in most cases must be below 75 per cent of the Community average. This means that even though the policy aims to address a series of different objectives, the concept of 'less developed regions' and 'regions that are lagging behind', which are the targets of the policy, is, in the end, measured in terms of economic growth. Notwithstanding this, the means to achieve such growth is envisioned in broader terms as part of an overall cohesion strategy in which all the policies of the European Union are involved, including education, technology and employment.

IV General Conclusions

As a general conclusion, it can be seen that regional integration may be an important means of promoting development. Integration projects such as the European Union and MERCOSUR create norms and policies which interfere in the national programmes of Member States and actively promote intra-regional development, as well as promoting free trade. The analysis of both MERCOSUR and EU policies shows that the two blocs have made efforts (at different levels, according to their capacity) to actively promote the development of their backward regions.

In comparing the EU funds and FOCEM, many considerations can be highlighted, and the lessons learned by the European Union during its long evolution (demonstrated by the various reform processes carried out over time) can suggest interesting insights in relation to MERCOSUR, respecting of course the enormous differences between the two projects.

First, it is clear that, compared to FOCEM, the regional policy of the European Union has become a mainstream policy, which has evolved from being an instrument helping to address the asymmetries resulting from the common market, into a broad policy that now takes up a substantial amount of the total budget of the bloc and is seen as an effective means of ensuring harmonious integration, by furthering the convergence of several regions within the Community. It thus shows that reducing the imbalances in internal development is an important feature of the integration project. FOCEM is, of course, a new and still modest initiative, which will need to prove its effectiveness in the South American context before it can be expanded. Nevertheless, the European case shows that this is an area which should be given greater attention in the future.

Secondly, in both schemes, the sectors which are considered to need support through the funds are selected at the higher level, by the determination of programmes and areas of action. Nevertheless, it can be noted that in the European Union there seems to be a clearer development strategy, focused on cohesion, which the funds were adopted to promote. In MERCOSUR, this idea is not so developed, as only programmes have been defined, but not a true regional development strategy. Moreover, the means to select which regions can benefit from these programmes differ substantially: in the European Union, there is a quantitative economic criterion (GDP per capita, which in most cases must be below 75 per cent of the Community average in order to make a region eligible for aid); in MERCOSUR, the fund is still at an initial stage, and it is interesting to note that it resembles the EU regional policy at its beginning. Member States can propose projects

which they consider as of interest to their national economies and the integration project as a whole, within their quotas of the fund's budget and the framework of the programmes established. This does not entail that states will not generally choose to address the problems of the less developed regions, but stricter criteria, defined at a higher level, would create a legal obligation to assign resources to those areas, not only among Member States but also within each Member State (Argentina and Brazil are countries with severe internal asymmetries, above all the latter, which is one of the most unequal countries in the world). This would help to ensure that FOCEM becomes an effective instrument to promote the development of the most backward regions, and thus to overcome the challenge of reducing the imbalances within the bloc.

Nevertheless, it can also be noted from the European case that an integration project involves a great deal of political manoeuvring, with member states being eager to retain power over the allocation of resources. In its initial phase, EU regional policy played a greater role than currently in the 'redistribution' of economic power among the member States, as is the case at the present day with FOCEM. This issue has been the subject of considerable debate in the European Union, and to a significant extent the funds are nowadays subject to an overall development initiative decided at the Community level; however, this still seems to be a sensitive issue.

A final consideration is regarding the decision-making procedures in each integration project, which certainly play an important role in the functioning of the funds, although these will not be compared in detail here given the considerable differences between the two blocs: while the European Union functions to a large extent (including in the case of the funds) as a supranational system, MERCOSUR works on an intergovernmental basis. Many authors argue that one of the reasons for the success of the European Union is its supranational structure; while this is very likely to be true (though very difficult to measure), it does not mean that a supranational system would work just as well in other regional integration projects. In any case, this should not prevent a project with an intergovernmental structure such as MERCOSUR from achieving its goals and policies through a fund such as FOCEM. Even in the European Union, there is still political debate regarding member states' control over the funds. In MERCOSUR, as stated above, the fund appears not only to play a convergence role, promoting the development of poorer regions, but also to provide compensation to the smaller Member States for their disadvantages in forming a common market with larger and stronger countries. The most important thing in such initiatives seems to be the creation of procedures guaranteeing that the resources can be assigned to the areas which are in greatest need of aid, and this can also be achieved through an intergovernmental method of operating.

All this leads to the conclusion that the European Union's regional policy can provide important lessons for FOCEM. More comprehensive criteria could be used to accurately identify regions which are backward in development, and there should be a more precise definition of a true regional development plan in MERCOSUR. Nevertheless, as a newly created initiative, FOCEM has made its appearance with strategic timing, to help the bloc to overcome its legitimacy crisis and to move forward by responding to Member States' differing expectations and needs.

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The Legal Future of MERCOSUR

LUCAS LIXINSKI AND FABIANO DE ANDRADE CORREA

I Introduction: A Long Way Travelled, Emerging Challenges

Regional integration has become a key issue in modern times. The ongoing transformations of the international scenario have affected the dynamics of international relations in the past decades, and phenomena such as globalisation and interdependence have undermined state sovereignty and states' capacity to act independently.[1] In the last decade, virtually every country in the world has become part of at least one regional or multilateral integration scheme,[2] promoting new methods of governance in order to face these new challenges. Moreover, there seems to be a trend towards deeper levels of integration and the regulation of more than just trade-related issues, such as security and the environment, which require regulation on a broader scale.

In Latin America, regional integration is not a new issue, and many attempts to establish regional schemes have been made during the twentieth century. MERCOSUR, in spite of all its difficulties, can be said to be the most successful of them. After the initial success during the early 1990s, the process began to face problems in moving forward. Nevertheless, it was not abandoned, and in 2000 the Member States decided to 'relaunch' MERCOSUR,[3] committing themselves to the achievement of the initial goals, such as macro-economic policy coordination and adoption of a common trade policy, and also adding a new approach to the project. The idea that free trade was not enough on its own to address the development needs of the region began to gain support, ant the parties reached agreement on the necessity to address not only trade issues but also social cohesion and development strategies. Since then, MERCOSUR has come a long way, as this book has hopefully shown, expanding further into new areas and coming closer to more advanced models of integration, surpassing strictly commercial goals and embracing much broader new objectives.

This concluding chapter, rather than summarise the findings of the preceding chapters, aims to shed some light on what may lie ahead for MERCOSUR, looking at three different challenges: the role and functioning of the MERCOSUR Parliament; the enlargement

[1] C Arenal, 'La nueva sociedad mundial y las nuevas realidades internacionales: un reto para la teoría y la política' in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2001* (Bilbao, Servicio Ed de la Universidad del País Vasco, 2002) 17–85.

[2] M Schiff and A Winters, *Regional Integration and Development* (Washington, DC, World Bank and Oxford University Press 2003) 1–10. The author notes, in this regard, that regional integration projects have been one of the major developments in international relations in the past decades.

[3] Series of decisions of the Common Market Group signed in Buenos Aires on 29 June 2000.

process beginning with the accession of Venezuela; and the creation of another integration process in the continent, the Union of South American Nations (UNASUR, Unión de Naciones Suramericanas). The latter poses a challenge entirely external to the bloc, one of 'replacement', as some functions of this new organisation may overlap with MERCOSUR; the other two challenges are internal, in different ways: the enlargement process requires internal adjustments to the bloc and poses new challenges to its already complicated functioning, while the role of the Parliament is related to an old challenge in MERCOSUR, the deepening of the integration process. We will start with an examination of the Parliament and its current and future role.

II The Challenge of Reorientation of MERCOSUR: The Parliament

The creation of the MERCOSUR Parliament (PARLASUR) has already been dealt with in preceding chapters,[4] so it is unnecessary to provide an exhaustive discussion of it. Rather, we will focus on the actual operation of the Parliament and the role it has adopted as regards the orientation of the bloc.

The operation of the Parliament aims in many ways at bridging the 'democratic deficit' in MERCOSUR, bringing the bloc and its policy- and law-making closer to the national polities. The objective to be achieved is thus representation, which it is intended will happen through direct elections of representatives for positions in PARLASUR. At present, the 'MERCO-parliamentarians' are still drawn directly from national parliaments (in the proportion of 18 parliamentarians per Member State), with the exception of Paraguay, which elected its representatives in 2008.[5] However, direct elections are scheduled in the near future in the other Member States, in accordance with their normal electoral calendars: in 2010 for Brazil, and 2011 for Argentina and Uruguay.[6]

The first issue to be resolved with respect to these elections, however, was representation. Because MERCOSUR is an asymmetric integration process, and there is a very large disproportion in size and population among its Members, it was not possible to make the number of parliamentarians for each Member State proportional to their corresponding population. A suggestion for simple proportionality would lead Brazil to have well over 50 per cent of the seats in the Parliament, which could have disastrous political consequences, jeopardising Brazil's efforts to prove that its size, population and economic power would not undermine the role of other Member States.

[4] See Adriana Dreyzin de Klor, Chapter 3.

[5] See Câmara dos Deputados, 'Acordo sobre Composição do Parlasul pode ser aprovado amanhã' ('Deal on representation in the PARLASUR might be approved tomorrow), available at the website of the Brazilian House of Representatives www2.camara.gov.br/internet/homeagencia/materias.html?pk=137756.

[6] Ibid. The elections of Brazilian representatives for 2010, however, have reached a stalemate. According to the Brazilian House of Representatives, it would have been necessary for the rules for this election to be approved by the end of September 2009, if elections were to take place in 2010, which was deemed impossible on 17 September 2009, when the Bill proposing the rules for these elections was withdrawn. Furthermore, according to the same source, these rules of representation still need to be approved by the Council of the Common Market, and this had not happened at the time of writing. See Câmara dos Deputados, 'Brasil não terá eleição direta para o PARLASUL em 2010' ('Brazil will not have direct elections to the PARLASUR in 2010'), available at www2.camara.gov.br/internet/homeagencia/materias.html?pk=140101.

In the end, the agreed proportions were as follows: 18 parliamentarians each for Paraguay and Uruguay, 26 for Argentina and 37 for Brazil, in the first phase of the institution's functioning; in 2014, the number of parliamentarians for Argentina and Brazil will be increased to 43 and 75 representatives, respectively.[7] This means that no single Member State 'controls the majority' of the Parliament (as Brazil will have 75 parliamentarians out of a total of 154). Even though the idea behind PARLASUR is precisely to prevent the formation of 'national interest blocs', and instead to represent the people of MERCOSUR, there was a clear concern to avoid one Member State having a majority of seats, which concern was addressed in this arrangement.

As regards its role, the Parliament is slowly developing into the voice of MERCOSUR, not only inwardly (that is, towards its citizens), but also outwardly. In this sense, it is noteworthy that the Parliament is organised around five Secretariats,[8] and that one of these aims precisely at developing MERCOSUR's 'external relations',[9] be it with third countries, international organisations such as the OAS or the United Nations, or other regional integration schemes.

Regarding the internal dimension of its activity, the Parliament has already started to fulfil its mandate to become the main forum for MERCOSUR debates. It has established Commissions on the following topics: legal and institutional affairs; economic, financial, commercial, fiscal and monetary affairs; international, interregional and strategic planning affairs; education, culture, science and sports; labour and employment policies, social security and social economics; sustainable development, territorial planning, housing, health, environment and tourism in the region; citizenship and human rights; internal affairs, security and defence; infrastructure, transportation, energy resources, agriculture, cattle breeding and fisheries; budgetary and internal affairs; and the internal delegation for the EUROLAT (Euro-Latin American Parliamentary Assembly).[10]

The Parliament has thus become a hopeful agent of transformation in MERCOSUR, which can help reignite the process and give it the credibility it lacks before national polities. By bringing MERCOSUR 'close to home', and by venturing into areas beyond commercial regulation, the Parliament can become a core element in the restructuring of MERCOSUR, reorienting the bloc and expanding its possibilities. Also, MERCO-parliamentarians can play a decisive role in pressurising national parliaments into internalising and implementing MERCOSUR legislation, which, as has been pointed out in this book, is still one of the great difficulties in the bloc.[11]

[7] Ibid.

[8] These are connected either to the Presidency of the Parliament, or its Directive Board. The three Secretariats connected to the Presidency are the following: Secretariat of the Presidency (Secretaría de la Presidencia), Secretariat of Institutional Relations and Social Communication (Secretaría de Relaciones Institutcionales y Comunicación Social), and Secretariat of International Relations and Integration (Secretaría de Relaciones Internacionales y Integración). The two Secretariats connected to the Directive Board are the Administrative Secretariat (Secretaría Administrativa), and the Parliamentarian Secretariat (Secretaría Parlamentaria). See Parlamento del MERCOSUR, available at www.parlamentodelmercosur.org/index1.asp.

[9] It is worth mentioning, in this regard, that MERCOSUR has legal personality (see particularly Marcílio Franca Filho, Chapter 8 for more details) and has already begun to develop relations with third parties, such as the free trade agreements signed with Israel in December 2007, and the negotiations for similar agreements with other parties such as the European Union. For more details, see INTAL, 'Informe MERCOSUL No 13', available at www.iadb.org/Intal/detalle_subtipo.asp?tid=6&idioma=POR&stid=5&cid=234.

[10] See Parlamento del MERCOSUR, available at www.parlamentodelmercosur.org/index1.asp.

[11] See María Belén Olmos Giupponi, Chapter 4 and Martha Lucía Olivar Jimenez, Chapter 10.

The hopes for the Parliament are high, but the challenge is still there to create the conditions which will allow this new institution to meet all these expectations. But this is not the only challenge ahead of MERCOSUR, as it is also seeking expansion. We now move to this issue.

III The Challenge of Expansion of MERCOSUR: Venezuela's Accession

The process of enlargement of MERCOSUR is taking place in a difficult context: on the one hand, the bloc faces many challenges in completing the implementation of the common market provisions and adjusting the differences between the current Member States, which could become even more complicated with the entry of a new member;[12] on the other hand, the political scenario in the region is rather tense.[13] Thus, the completion of this process faces complications that go beyond the procedural rules regarding the accession of a new Member and its inclusion in the free trade arrangements.

Nevertheless, it seems that MERCOSUR was always bound to encompass more countries in the continent. As has been pointed out in other chapters of this book, MERCOSUR was created under the umbrella of ALADI,[14] an organisation that involves all Latin American countries. From the beginning, the Treaty of Asunción had provided for the accession of other countries in Latin America, be it as new full Members, associates or observers.[15] The procedural rules for adherence to the bloc were, however, only regulated

[12] In this regard, it should be noted that MERCOSUR has currently only achieved the status of a free trade area, with many non-tariff barriers still hindering trade flows among Member States, aggravated by the recent financial crises and the threat of a new protectionist wave; moreover, the severe asymmetries among Member States also generate conflicts, as smaller states claim not to be benefiting from integration and are pushing for a change in course, in particular Uruguay, which has threatened to sign free trade agreements with third countries.

[13] For instance, the Presidents of the new candidate country, Venezuela, and of Brazil, the major player in the continent, seem to be competing for diplomatic leadership in the region. Other conflicts include the dispute between Uruguay and Argentina over the pulp mills on the Uruguay River, which was the subject of MERCOSUR arbitration and is now pending before the International Court of Justice (see Lucas Lixinski, Chapter 19). There is also an ongoing controversy involving Brazil and Paraguay concerning the Itaipu power plant, as well as the drug-related humanitarian crisis in Colombia, among other sources of tension.

[14] Latin American Integration Association (ALADI, Asociación Latinoamericana de Integración) established by the Treaty of Montevidéo, signed on 12 August 1980, an international legal framework that establishes and governs regional integration in the continent.

[15] In the Preamble to the Treaty of Asunción, the fifth recital stated that the treaty should be considered as a new step in the efforts towards the progressive development of Latin America's integration, according to the objectives of the Treaty of Montevidéo (ALADI). Moreover, art 20 of the Treaty of Asunción allows for applications for accession from ALADI Member States. As regards associate countries, CCM Decision No 14/96 provided that ALADI Member States with which MERCOSUR had signed free trade agreements would be entitled to participate in meetings of the bloc, on an ad hoc basis; under these provisions, Chile became an associate country in 1996, Bolivia in 1997 and Peru in 2003. In 2004 another CCM Decision No 18/04 was enacted specifically to regulate this issue, setting up a specific procedure for association applications (including accession to the Ushuaia Protocol on Democratic Commitment in MERCOSUR), and entitling the associates to participate in meetings, without a right to vote. Under this measure, Colombia, Ecuador and Venezuela became associated countries in 2004. Associate members do not enjoy full voting rights or complete access to the markets of full Members, but they do receive tariff reductions and are not required to impose the common external tariff that applies to full Members. Bolivia is currently being considered for full membership.

in 2005:[16] ALADI Member States can apply for accession to MERCOSUR by presenting a written request to the Council of the Common Market (CCM), which must approve it unanimously; if approved, the Common Market Group (CMG) will start negotiations with the candidate, which has necessarily to subscribe to all the 'MERCOSUR *acquis*', including all treaties and Protocols in force (including the Ushuaia Protocol on Democratic Commitment),[17] the common external tariff and the international agreements signed by the bloc. After the negotiations a Protocol will be signed, which must be ratified by all Member States before it enters into force.

Venezuela, an associate member since 2004, requested full membership, which was approved in 2005 by the CCM through Decision No 29/05. The Protocol of accession was signed on 4 July 2006;[18] its Preamble highlighted the importance of Venezuela's accession to the 'consolidation of the integration process of South America, in the context of the Latin American integration'. The Protocol contains a commitment by Venezuela to adopt, gradually, all MERCOSUR norms and trade arrangements, and a timetable of trade liberalisation with the other Member States; article 12 states that the Protocol will only enter into force 30 days after the deposit of all the instruments of ratification by the parties with Paraguay (which was named as the depositary).

Nevertheless, at the time of writing, three years after the accession Protocol was signed, it has still not come into force: Argentina and Uruguay have already ratified the Protocol, but the procedure is still pending for Brazil and Paraguay. This situation, more than reflecting a simple delay in the legislative process in those countries, highlights the political tensions surrounding Venezuela in the region. First, the political instability in Venezuela has provoked opposition to the entry of the country into the bloc. President Hugo Rafael Chávez Frias, in power since 1998, has been criticised for the reforms he has promoted, changing the rules in order to be re-elected; for his populist policies, the repression of the press and the nationalisation of several companies, which are seen as threats to the country's democracy; for violating the terms of the Ushuaia Protocol on Democratic Commitment,[19] and for his outspoken criticism of the United States.[20] Moreover, there appears to have arisen a clash of political agendas with other leaders in MERCOSUR, as Chávez has opposed trade liberalisation and advocated a shift in focus of the bloc, saying 'We need a MERCOSUR that *prioritizes social concerns*. We need a MERCOSUR that every day moves farther away from the old elitist corporate models of

[16] The procedure for adherence as a full Member operated on an ad hoc basis until 2005, when the CCM issued Decision No 28/05 regulating the issue.

[17] Protocolo de Ushuaia sobre Compromisso Democrático no MERCOSUL, opened for signature on 24 July 1998, ratified by all Member States (plus Ecuador and Peru). Entered into force on 17 January 2002.

[18] At the same time, Venezuela was required to withdraw from the Andean Community (CAN), a smaller trade bloc which includes Bolivia, Colombia, Ecuador and Peru, since MERCOSUR's charter does not allow its members to have free trade agreements with non-member nations.

[19] See, in this regard, ML Olivar Jiménez, 'La Adhesión de Nuevos Miembros AL MERCOSUR: una cuestión fundamental para la evolución de la organización' in E Accioly (ed), *Direito no século XXI* (Curitiba, Juruá, 2008); the author highlights the political character of the provisions of the Ushuaia Protocol, since its clauses do not specify the criteria to identify a threat or rupture of democratic order, leaving it to be determined by the Member States; she discusses whether it should be limited to a threat to the democratic institutions of the country, or also include situations such as breach of fundamental rights obligations by that country.

[20] The United States is generally regarded as not supporting MERCOSUR, but as fostering the implementation of another integration project involving all countries in the Americas, the Free Trade Area of the Americas (FTAA) to which most countries in South America are opposed, as it focuses only on trade liberalisation issues; nevertheless, other leaders in the region seek to maintain good relations with the United States.

integration that look for … financial profits, but forgets about workers, children, life, and human dignity'.[21] In addition, Chávez has also promoted another regional integration initiative, the Bolivarian Alliance for the Peoples of our America (*Alianza Bolivariana para los Pueblos de Nuestra América* or ALBA, as it is known in Spanish).[22]

The political tensions became evident in 2007 with an episode involving the Brazilian Senate,[23] which issued a resolution condemning Chávez's decision not to renew the public broadcast licence of RCTV, a network that he had accused of complicity in an attempted coup against him in 2005.[24] He responded by calling the Brazilian Senate a 'parrot that just mimics Washington'; President Lula da Silva replied that Venezuela should mind its own business, and members of two of the largest parties in the Brazilian Congress, the Brazilian Social Democratic Party and the Democratic Party, expressed opposition to MERCOSUR membership for 'a country that cannot respect disagreement in a civil manner'. At the present time, the lower chamber of the Brazilian Parliament has approved the accession, but the Senate is still blocking it, and the issue is the subject of a robust debate within Brazilian political circles—the current Brazilian administration supports Venezuela but the opposition parties do not.[25]

This uncertainty regarding Chávez's political plans has led to other aspects being highlighted, since the accession of Venezuela will have consequences in many areas, in particular the decision-making process, which, since it operates by consensus, could be even more complicated with the entry of a Member State whose president has a different and arguably radical agenda.

On the other hand, Venezuela's accession is important to the future of the bloc: one benefit will be the enlargement of the market, making the bloc a bigger player in the international scenario. From a geopolitical point of view, it would extend the free trade area up to the Caribbean Sea, favouring relations and trade with the rest of the continent. From an economic standpoint, the Venezuelan economy is fairly substantial, and this might help to dilute Brazil's supremacy in the bloc, and help to increase the trust of the other Member States in the integration process. In addition, Venezuela is also a country

[21] J Klonsky and S Hanson, *MERCOSUR: South America's Fractious Trade Bloc* (Council on Foreign Relations, 9 August 2009), available at www.cfr.org/publication/12762/mercosur.html.

[22] ALBA is regional integration project set up in 2004 with the signing of an agreement between Cuba and Venezuela; it now includes also Bolivia, Nicaragua, Dominica, Honduras, Ecuador, Antigua and Barbuda, and Saint Vicente and the Grenadines. According to its official website, www.alternativabolivariana.org, ALBA 'is a different proposal of integration … which emphasises the struggle against poverty and social exclusion … based on the creation of mechanisms that can compensate the existing asymmetries between the various nations of this hemisphere. The ALBA aims to eradicate poverty, correct social inequality and guarantee an increasing standard of life … being a Bolivarian and Venezuelan proposal, [it] joins forces with the movements, organizations and national campaigns that resist the implementation of the FTAA across the continent. In short, the ALBA is a manifestation of the historical decision adopted by the progressive forces of Venezuela to demonstrate that another America is possible'.

[23] See, in this regard, www.mercopress.com (and http://en.mercopress.com/2007/06/09/brazilian-senate-could-block-venezuela-s-mercosur-membership).

[24] Klonsky and Hanson, *MERCOSUR: South America's Fractious Trade Block* (n 21). This situation has also been debated in the PARLASUR, which further underscores its importance for the bloc. It is also noteworthy that the debate in the PARLASUR was prompted by communications made by Venezuelan citizens. See Câmara dos Deputados, 'Parlamentares do Mercosul Debatem Denúncias sobre Venezuela', available at www2.camara.gov.br/internet/homeagencia/materias.html?pk=138617&pesq=parlasul.

[25] It should be noted that not only in Brazil has there been a vigorous debate regarding this issue: also in Argentina, which has already ratified Venezuela's Accession Protocol, a proposal has been put forward to annul the law which approved the accession of the country to MERCOSUR (Cámara de Diputados, 'Proyecto de Ley por que se suspenden los efectos de la Ley 26.192'). (Source: Alejandro Perotti, *Electronic Bulletin* 9/09).

with a vast wealth of energy resources, which could prove of strategic benefit to the development of MERCOSUR. After Venezuela's accession, the bloc, which is already the fourth largest integration project in the world, will have more than 250 million inhabitants, an area of 12.7 million square kilometers, a GDP of over one trillion dollars (approximately 76 per cent of South America's GDP) and a global trade flow of over US$300 billion; it will also be one of the world's greatest producers of food, energy and manufactures, and the increase of trade flows will foster the development of infrastructure for transportation and communications in the northern part of the continent.[26]

Looking at the larger picture, it is important to bear in mind that government policy should not be confused with state policy—governments change but the state remains. The integration of the South American continent is a long-cherished project, which should not be jeopardised by political tensions among current administrations. However, great care is needed to prevent these tensions from jeopardising what has been achieved so far.

MERCOSUR's expansion may contribute to the consolidation of the Pan-American dream of Simón Bolivar, but it is not the only alternative being currently pursued. The Union of South American Nations is being showcased as a complement to MERCOSUR, and to this alternative we move next.

IV The Challenge of 'Replacement' of MERCOSUR: UNASUR

On 23 May 2008, the Heads of State of the 12 South American countries signed the treaty creating the Union of South American Nations (UNASUR, Unión de Naciones Suramericanas).[27] This treaty, which had been in negotiation for at least three years (but from long before as an ideal),[28] aims at the creation of an international organisation responsible for promoting the integration of these 12 nations. It is not the role of this chapter to provide a thorough analysis of the UNASUR Treaty, but rather to look at how it relates to MERCOSUR.[29] We must ask, then, what role, if any, MERCOSUR (and the Andean Community (CAN), the other economic integration process in the continent) will play with regard to UNASUR.

The answer is twofold: first of all, MERCOSUR (and CAN)[30] played a significant role in creating the foundations for integration in the continent, in many ways thus serving as a source of inspiration for UNASUR;[31] secondly, UNASUR does not aim to replace MERCOSUR (at least not initially). This second assertion requires further explanation.

[26] Congressman Dr Rosinha, Brazilian Representative to PARLASUR, in the memorandum submitted to the National Congress regarding the approval of the Protocol of Accession of Venezuela to MERCOSUR, available at http://www.camara.gov.br/sileg/integras/493772.pdf. Dr Rosinha, *rapporteur* of the memorandum, was in favour of Venezuela's accession.

[27] The full text of the Treaty is available in English at www.comunidadandina.org/ingles/csn/treaty.htm.

[28] P Solón, 'Reflexiones a Mano Alzada sobre el Tratado de UNASUR' (2008) 2 *Revista de la Integración* 12.

[29] For a detailed analysis of UNASUR, see (2008) 2 *Revista de la Integración* (July), available at www.comunidadandina.org/public/revista_2.htm.

[30] Most of what will be said here referring to MERCOSUR is also applicable to CAN. However, as the focus of this chapter is to discuss MERCOSUR, further references will be to MERCOSUR alone.

[31] See particularly María Alejandra Saccone, 'UNASUR: Visiones desde el MERCOSUR' (2008) 2 *Revista de la Integración* 31.

UNASUR was created to fulfil several objectives, including those relating to the environment, cultural affairs, defence, food security, infrastructure, energy, education, development, the protection of traditional (indigenous) knowledge, among many others.[32] However, the promotion of commercial goals is not included among the objectives. Thus, UNASUR may be considered as complementary to MERCOSUR, and not as a replacement or competing integration process.[33] However, this would have the bizarre implication of reducing MERCOSUR to the mere advancement of commercial policies (and even other economic goals, such as development, would be outside its scope, as they are among the objectives of UNASUR). While economic considerations are what prompted Member States to sign the Treaty of Asunción in 1991, MERCOSUR has long

[32] The relevant provisions of the UNASUR Treaty are the following: 'Article 2. Objective. The objective of the South American Union of Nations is to build, in a participatory and consensual manner, an integration and union among its peoples in the cultural, social, economic and political fields, prioritising political dialogue, social policies, education, energy, infrastructure, financing and the environment, among others, with a view to eliminating socio-economic inequality, in order to achieve social inclusion and participation of civil society, to strengthen democracy and reduce asymmetries within the framework of strengthening the sovereignty and independence of the States.

Article 3. Specific Objectives. The South American Union of Nations has the following objectives: (a) The strengthening of the political dialogue among Member States to guarantee a space for consultation in order to reinforce South American integration and the participation of UNASUR in the international arena; (b) The inclusive and equitable social and human development in order to eradicate poverty and overcome inequalities in the region; (c) The eradication of illiteracy, the universal access to quality education and the regional recognition of courses and titles; (d) Energy integration for the integral and sustainable use of the resources of the region, in a spirit of solidarity; (e) The development of an infrastructure for the interconnection of the region and among our peoples, based on sustainable social and economic development criteria; (f) Financial integration through the adoption of mechanisms compatible with the economic and fiscal policies of Member States; (g) The protection of biodiversity, water resources and ecosystems, as well as cooperation in the prevention of catastrophes and in combating the causes and effects of climate change; (h) The development of concrete and effective mechanisms to overcome asymmetries, thus achieving an equitable integration; (i) The consolidation of a South American identity through the progressive recognition of the rights of nationals of a Member State resident in any of the other Member States, with the aim of attaining a South American citizenship; (j) Universal access to social security and health services; (k) Cooperation on issues of migration with a holistic approach, based on an unrestricted respect for human and labour rights, for migratory regularisation and harmonisation of policies; (l) Economic and commercial cooperation to achieve progress and consolidation of an innovative, dynamic, transparent, equitable and balanced process focused on an effective access, promoting economic growth and development to overcome asymmetries by means of the complementarities of the economies of the countries of South America, as well as the promotion of the wellbeing of all sectors of the population and the reduction of poverty; (m) Industrial and productive integration, focusing especially on the important role that small and medium size enterprises, cooperatives, networks and other forms of productive organisation may play; (n) The definition and implementation of common or complementary policies and projects of research, innovation, technological transfer and technological production, aimed at enhancing the region's own capacity, sustainability and technological development; (o) The promotion of cultural diversity and the expression of the traditions and knowledge of the peoples of the region, in order to strengthen their sense of identity; (p) Citizen participation through mechanisms for interaction and dialogue between UNASUR and the various social actors in the formulation of South American integration policies; (q) Coordination among specialised bodies of the Member States, taking into account international norms, in order to strengthen the fight against corruption, the global drug problem, trafficking in persons, trafficking in small and light weapons, terrorism, transnational organised crime and other threats as well as for disarmament, the non-proliferation of nuclear weapons and weapons of mass destruction, and elimination of landmines; (r) The promotion of cooperation among the judicial authorities of the Member States of UNASUR; (s) The exchange of information and experiences in matters of defence; (t) Cooperation for the strengthening of citizen security; (u) Sectoral cooperation as a mechanism to deepen South American integration, through the exchange of information, experiences and capacity building'.

[33] Pablo Solón, 'Reflexiones a Mano Alzada sobre el Tratado de UNASUR' (2008) 2 *Revista de la Integración* 12 at 15.

since evolved beyond the mere promotion of commercial policy and trade, as this book has demonstrated, and as the establishment of the Parliament, mentioned above, also indicates.

Therefore, it is illusory to imagine that UNASUR and MERCOSUR will not overlap in terms of their fields of activity. What is necessary is to determine how such overlapping activity could be coordinated and which particular policies should be dealt with by one or other process.

One criterion to help in regulating such overlapping activity is naturally the territorial one. With regard to programmes that affect states other than those of MERCOSUR, competence should immediately be granted to UNASUR. However, it does not automatically follow that matters involving solely MERCOSUR Member States should be addressed by MERCOSUR and *not* UNASUR. A case must be made for the preference for either integration process.

On the one hand, UNASUR offers a much broader explicit mandate, whereas MERCOSUR has often had to rely on 'implied' attributions of competence, or had to justify competence by translating areas of activity into commercial goals.[34] This would not happen in UNASUR, as its extensive list of objectives gives it the competence to pursue numerous goals.

Further, programmes initiated within UNASUR can much more easily be expanded to the whole continent than programmes commenced within MERCOSUR. UNASUR is after all a more inclusive process, and it deserves some credit for it. Therefore, if a programme is of potential relevance to the entire continent, and does not address the interests only of MERCOSUR Member States, there is a persuasive argument for the pursuing of policies and legislation within UNASUR, and not MERCOSUR.

These two arguments, however appealing, are nevertheless counterbalanced by consideration of the structural deficiencies of UNASUR, in the arrangement put together by the 12 South American Heads of State. For one thing, all decision-making within UNASUR must be taken by consensus,[35] which can lead to watered-down decisions, or simply to no decision at all on important sensitive matters such as environmental and human rights issues. UNASUR is constituted as a strongly intergovernmental organisation,[36] and the

[34] Such a mechanism is not unheard of, as it is often the case with the European Union that its activity must be justified in terms of its effects on trade, and it even appears in the US model of federalism, where the 'commerce clause' of the Constitution is the primary grounds upon which legislative competence is attributed to the federal government over state governments.

[35] The relevant provision of the UNASUR Treaty is the following: 'Article 12. Approval of the Legislative Measures. All the norms of UNASUR will be adopted by consensus. The Decisions of the Council of Heads of State and Government, the Resolutions of the Council of Ministers of Foreign Affairs and the Provisions of the Council of Delegates may be adopted with the presence of at least three-quarters (3/4) of the Member States. The Decisions of the Council of Heads of State and Government, the Resolutions of the Council of Ministers of Foreign Affairs adopted without the presence of all Member States, shall be forwarded by the Secretary General to the absent States, which shall make known their position within thirty (30) days after receipt of the document in the appropriate language. In the case of the Council of Delegates, that deadline shall be fifteen (15) days. The Working Groups shall hold sessions and make proposals as long as they have a quorum of half plus one of the Member States. The legislative measures emanating from the organs of UNASUR will be binding on the Member States once they have been incorporated into each Member State's domestic law, according to its respective internal procedures'.

[36] On the debate among drafters that led to the decision not to have elements of supranationality, see Diego Cardona Cardona, 'El ABC de UNASUR: Doce Preguntas y Respuestas' (2008) 2 *Revista de la Integración* 19 at 23. See also Pablo Solón, 'Reflexiones a Mano Alzada sobre el Tratado de UNASUR' (2008) 2 *Revista de la Integración* 12 at 14.

lack of any inclination towards supranational competence is yet another indication that strong decision-making may be rather difficult within the organisation.

Furthermore, UNASUR lacks a dispute settlement system. All disputes as to the interpretation and implementation of the UNASUR Treaty are to be resolved by direct negotiations between the parties, and, failing that, by referral to the political organs of UNASUR.[37] A strong dispute settlement system was rejected because creating it would imply to some extent a grant of power to the organisation instead of the states. This in theory weakens the initiative as a whole, and compromises its appeal and competence for pursuing some of its goals.[38] On the other hand, the Organization of American States also has no judicial organ, and it still effectively promotes policies in many areas and throughout the continent.

Therefore, while the lack of a dispute settlement body is, if anything, only a 'psychological' barrier to the effectiveness of UNASUR (even though it may have some very real implications when choosing between UNASUR and MERCOSUR), it is perhaps the lack of strong decision-making competences that seems to be the most difficult obstacle to transferring competences from MERCOSUR to UNASUR.

However, UNASUR's clearer mandate, along with its broader appeal, may in time narrow down the field of activity of MERCOSUR to commercial goals. This may help MERCOSUR overcome some of its own difficulties, as it is easier to implement legislation that is merely commercial, and such a 'MERCOSUR-lite' can become a more effective actor and regain some of the momentum it has lost due to the economic crises that have affected its Member States.

On the other hand, MERCOSUR's pursuit of non-commercial goals has led to the realisation that commercial objectives cannot be successfully separated from their environmental, social and general human implications. This means that, while it may be desirable that some of the competences in non-commercial areas currently within the scope of MERCOSUR are transferred to UNASUR, it is by no means desirable (or advisable) that all such competences should be transferred, as this may lead MERCOSUR to lose the broader perspective that trade and commercial policies should be pursued only to the extent that they can promote environmental, social and ultimately human goals.

V Concluding Remarks: What Lies Ahead?

MERCOSUR still faces many challenges to its future progress. Nevertheless, despite much criticism and the claims that the integration process was bound to fail, it seems that it is

[37] The relevant provision of the UNASUR Treaty is the following: 'Article 21. Dispute Settlement. Any dispute that may emerge between States Parties regarding the interpretation or implementation of the provisions of this Constitutive Treaty will be settled through direct negotiations. In the case where a solution is not reached through direct negotiation, the Member States involved will submit the dispute for the consideration of the Council of Delegates, which will formulate within 60 days, the appropriate recommendations for the settlement of the dispute. If a solution is not reached by the Council of Delegates, the dispute will be taken to the Council of Ministers of Foreign Affairs, which will consider it at its next meeting'.

[38] See Cardona Cardona, 'El ABC de UNASUR: Doce Preguntas y Respuestas' (n 36) 27.

moving forward, at its own pace. In our opinion, it is vital that MERCOSUR does continue to make progress, as a large part of the region's development potential rests on MERCOSUR's development.

The three challenges discussed in this chapter, at the end of the day, converge in the challenge of expanding MERCOSUR's reach and consolidating MERCOSUR's role as an important international player. As MERCOSUR moves beyond strictly commercial and trade-related policies, it gains in strength and recognition; when it establishes a Parliament, it gains internally in reliability and visibility, which has a very welcome external spillover in that a bloc that is trusted internally is more likely to succeed externally; by including new Member States, it enlarges its market and raw negotiating power; by becoming one of the foundational pillars of UNASUR, MERCOSUR demonstrates how far it has come, and how much further it can go.

It is the hope of the editors and contributors to this book that MERCOSUR does indeed go much further, creating the conditions not only for economic prosperity in the region, but more importantly for what economic prosperity engenders: sustainable social development, respect for human rights and the ultimate realisation of human needs.

24

An Introduction to the English Version of MERCOSUR Treaty and Protocols

LUCIANA CARVALHO*

According to the *Vienna Convention on the Law of Treaties*, there is a presumption that when a treaty has been authenticated in two or more languages, there is a presumption that the text is equally authoritative in each one (Article 33, 1). In the case of the MERCOSUR instruments herein, the equally authoritative texts are in Portuguese and Spanish.

In the same article, the *Vienna Convention* establishes that a version of the treaty in a language other than that in which the text has been authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree (Article 33, 2). This is not the case of the English translations presented here.

Despite there being no official English language versions of MERCOSUR instruments, translations into English are available at OAS (Organization of American States) and UN websites. Therefore, based on these pre-existing translations, we checked the texts in general terms – for spelling, grammar and omissions[1] – and made a number of changes to the translation in an attempt to both standardise phraseology and terminology and ensure readability and accuracy.

Due to the lack of official English translations, elementary phraseology, such as the very names of States Parties[2], MERCOSUR bodies[3] and protocols have appeared in more than one translation. The translation for *MERCOSUR* mirrored this lack of uniformity. At times it was translated as the *Common Market of the Southern Cone* or– the preferred version – the *Southern Common Market.*

One of the important aspects in reviewing the existing translations was making small changes that resulted in more idiomatic solutions – ie more naturally occurring – by replacing lengthy and wordy renderings far too close to the source language. To this end, phrases such as:

— *the judicial body making the request* became *the requesting judicial body*;

* Luciana Carvalho, LLB MA is a Doctoral Candidate at the University of São Paulo (USP) and a professor of Legal Translation at the Pontifical Catholic University of São Paulo (PUC/SP). E-mail: luciana.carvalho@tradjuris.com.br.

[1] The English translation of Art 29 of the Las Leñas Protocol omitted the phrase *international private law*; Art 12 of the English version of the Treaty of Asunción omitted the term *ministries*, to list but a few.

[2] The *Eastern Republic of Uruguay* was also translated as the *Oriental Republic of Uruguay*.

[3] The *Permanent Court of Review* was also sometimes translated as the *Permanent Review Court*, which could perhaps give margin to a slight change in meaning.

— *at the request of a State that is not a party to it* became *at the request of a third-party State*.

Special attention was also given to over reliance on cognates in the translated texts. Cognates are words derived from the same ancestral root; for example, English *name* and Portuguese *nome*. However, despite being etymologically, morphologically and semantically related, the pragmatics (ie language use) of these words can sometimes greatly differ across languages and cultures. To illustrate, the phrase *órgão executivo* had been rendered *executive organ*, whereas the most common and naturally occurring phrase in English is *executive body*. Other examples include:

— *adesão* at times translated as *adhesion*, and replaced by *accession*
— *estrutura institucional* translated as *institutional structure*, despite the preferred form being *organisational structure* – as adopted by the European Union;
— *esfera de competência* translated as *sphere of competence* was replaced by the more idiomatic *scope of authority*;
— *interrogatórios* translated as *interrogatories* – which in English means the written text of both questions and answers – whereas the term in Portuguese clearly refers to *questions* only.

The latter example also illustrates our attempt to avoid culturally marked terms in the Common Law (eg *interrogatories*) – whose concepts are inevitably conveyed in translating into English – but to otherwise maintain culturally marked terms in the Civil Law, such as *ordem pública*, translated as *public policy (ordre public)*.

With regard to the Latin phrases used in the original texts in Portuguese, not one had been translated in the versions we examined despite the fact that some Latin phrases do not occur naturally in texts originally written in English. To rectify this situation, while reviewing the texts, Latin phrases, such as *ex aequo et bono* and *ad hoc,* conveying the same meaning in both languages, or highly marked in the legal system of the source language (Portuguese), such as *res judicata,* were left unchanged. On the other hand, Latin phrases having completely different meanings across the two languages, as is the case of *ex officio*[4], were replaced, when applicable, by a more idiomatic equivalent to ensure accuracy and readability.

In conclusion, by reviewing the translations of the MERCOSUR treaty and protocols and by making non-exhaustive changes to the texts in English, our main goal was to make the texts clearer and more uniform without compromising meaning or legal language conventions.

Sources of the English Translations:

— Treaty of Asunción: http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp
— Las Leñas Protocol: http://untreaty.un.org/unts/144078_158780/12/10/5005.pdf
— Olivos Protocol: http://untreaty.un.org/unts/144078_158780/5/7/13152.pdf
— Ouro Preto Protocol: http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp

[4] See Carvalho, L (2008) *Ex officio: Ex-officio?* at http://www.migalhas.com.br/mig_law_english.aspx?cod=65292&lista=S

TREATY OF ASUNCIÓN

Treaty Establishing a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay

The Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, hereinafter referred to as the "States Parties",

Considering that expanding their domestic markets through integration is a vital prerequisite for accelerating their processes of economic development with social justice;

Believing that this objective is to be achieved by: making optimum use of available resources, protecting the environment, improving physical connections between the States Parties, co-ordinating macroeconomic policies, and ensuring the different sectors of the economy of the States Parties are supplementary in nature, and that the objective of this treaty be based on the principles of gradualism, flexibility and balance,

Bearing in mind the development of international trends, especially the trend towards the formation of large economic areas, and the importance of securing the States Parties an adequate position in the international economy;

Understanding that this integration process is an appropriate response to such trends,

Being aware that this Treaty must be considered a new step towards the efforts to continuously build Latin American integration pursuant to the objectives of the Montevideo Treaty signed in 1980,

Being convinced of the need to promote the scientific and technological development of the States Parties and to modernise their economies in order to increase the supply and improve the quality of available goods and services, in order to enhance the living conditions of their populations,

Affirming their political will to lay the foundation for increasingly closer ties between their peoples, with a view to achieving the above-mentioned objectives;

Have agreed as follows:

CHAPTER I
Purposes, Principles and Instruments

Article I

The States Parties hereby decide to create a common market, which shall be in place by 31 December 1994 and shall be called the "Southern Common Market" (MERCOSUR).

This Common Market comprises:

The free movement of goods and services and other factors of production between the countries by means of, among others, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other measures of equivalent effect;

The establishment of a common external tariff and the adoption of a common trade policy concerning third-party States or groups of States, and the co-ordination of positions in regional and international economic and commercial jurisdictions;

The co-ordination of macroeconomic and sector policies between the States Parties in the fields of: foreign trade, agriculture, industry, tax and monetary matters, foreign exchange and capital, services, customs, transportation and communications, and any other areas that may be agreed upon, in order to ensure adequate competition conditions between the States Parties; and

The commitment of States Parties to harmonise their legislation in the relevant areas to achieve a strong integration process.

Article 2

The Common Market shall be based on reciprocity of rights and obligations between the States Parties.

Article 3

During the transition period, starting from the entry into force of this Treaty to 31 December 1994, and in order to facilitate the formation of the Common Market, the States Parties agree to adopt the General Rules of Origin, a System for the Settlement of Disputes and Safeguard Clauses, as referenced in Annexes II, III and IV, respectively, attached hereto.

Article 4

The States Parties shall ensure equitable trade terms in their relations with third countries. To that end, the States Parties shall apply their domestic legislation to restrict imports whose prices are influenced by subsidies, dumping or any other unfair practice. At the same time, States Parties shall co-ordinate their respective domestic policies aiming at drafting common norms to regulate competition.

Article 5

During the transition period, the main instruments for building the Common Market shall be:

a) A Trade Liberalisation Programme, which shall consist of progressive, linear and automatic tariff reductions accompanied by the elimination of non-tariff restrictions or measures of equivalent effect, in addition to cuts on any other restrictions on trade between the States Parties, aiming at arriving at zero tariff and no non-tariff restrictions for the entire universe of tariffs by 31 December 1994 (Annex I);
b) The co-ordination of macroeconomic policies to be carried out gradually and in parallel with the programmes for reducing tariffs and eliminating non-tariff restrictions, referred to in letter (a) above;
c) A common external tariff which encourages the States Parties competitiveness in foreign markets;
d) The adoption of agreements within sectors of the economy in order to optimise the use and mobility of production factors and to achieve efficient scales of operation.

Article 6

The States Parties hereby acknowledge certain individual differences in the rate at which the Republic of Paraguay and the Eastern Republic of Uruguay will carry out the transition period. These differentials are indicated in the Trade Liberalization Programme (Annex 1).

Article 7

In the field of taxes, charges and other country-imposed duties, products originated in the territory of one State Party shall enjoy, in the other States Parties, the same treatment given to domestic products.

Article 8

The States Parties undertake to abide by commitments entered into prior to the date of execution of this Treaty, including Agreements signed within the framework of the Latin American Integration Association (ALADI), and to co-ordinate their standing in any foreign trade negotiations the States Parties may undertake during the transition period. To this end:

a) States Parties shall avoid affecting the interests of the States Parties in the trade negotiations they may conduct among themselves up to 31 December 1994;
b) States Parties shall avoid affecting the interests of the other States Parties or the aims of the Common Market in any Agreements they enter into with other Latin American Integration Association member countries during the transition period;
c) States Parties shall hold consultations among themselves whenever negotiating comprehensive tariff reduction plans aiming at forming free trade areas with other Latin American Integration Association member countries;
d) States Parties shall automatically extend to the other States Parties any advantage,

favour, exemption, immunity or privilege granted to a product originating in or destined for third countries not members of the Latin American Integration Association.

CHAPTER II
Organisational Structure

Article 9

The management and implementation of this Treaty, and of any specific Agreements or decisions adopted that are adopted within the legal framework the Treaty establishes during the transition period, shall be entrusted to the following bodies:

a) The Common Market Council
b) The Common Market Group

Article 10

The Council is the highest body of the Common Market, and is responsible for the Common Market's political leadership and for decision-making aimed at ensuring compliance with the goals of and time limits set for the full implementation of the Common Market.

Article 11

The Council shall consist of the Ministers for Foreign Affairs and the Ministers for the Economy of the States Parties.

The Council shall meet whenever its members deem appropriate, and at least once a year with the participation of the Presidents of the States Parties.

Article 12

The office of President of the Council shall be held by each State Party in turn and in alphabetical order, for a term of six months.

The Meetings of the Council shall be co-ordinated by the Ministries for Foreign Affairs, and other Ministers or Ministerial authorities may be invited to take part in them.

Article 13

The Common Market Group is the executive body of the Common Market and shall be co-ordinated by the Ministries of Foreign Affairs.

The Common Market Group shall have powers of initiative. Its duties shall be the following:

– to monitor compliance with the Treaty;
– to take the necessary steps to enforce decisions adopted by the Council;

– to propose specific measures for: applying the Trade Liberalization programme, co-ordinating macroeconomic policies and negotiating Agreements with third parties;
– to create programmes of work to ensure progress towards establishing the Common Market.

The Common Market Group, to attain its goals, may create any Working Group deemed necessary. Initially, the Working Groups shall be the ones listed in Annex V. The Common Market Group shall establish its own rules of procedure within 60 days of the creation of the Common Market.

Article 14

The Common Market Group shall consist of four members and four alternates for each country, representing the following government bodies:

– the Ministry of Foreign Affairs;
– the Ministry of the Economy or its equivalent (areas of industry, foreign trade and/or economy co-ordination);
– Central Bank.

In the drafting and proposing of specific measures in the course of its activities, the Common Market Group, until 31 December 1994, may, whenever it deems appropriate, call upon representatives of other Government agencies and the private sector.

Article 15

The Common Market Group shall have an Administrative Secretariat whose main functions shall be to keep Group documents and to report on Group activities. It shall be based in the city of Montevideo.

Article 16

During the transition period, the decisions of the Common Market Council and of the Common Market Group shall be taken by consensus and in the presence of all States Parties.

Article 17

The official languages of the Common Market shall be Spanish and Portuguese, and the official version of the working documents shall be the version in the language of the host country.

Article 18

Prior to the establishment of the Common Market on 31 December 1994, the States Parties shall convene an extraordinary meeting to determine the final organisational structure of the administrative bodies of the Common Market, as well as the specific powers of each body and its decision-making system.

CHAPTER III
Period of Application

Article 19

This Treaty is concluded for an unlimited period and shall enter into force 30 days after the date of deposit of the third instrument of ratification. The instruments of ratification shall be deposited with the Government of the Republic of Paraguay, which shall notify the Governments of the other States Parties of the date of deposit.

The Government of the Republic of Paraguay shall notify the Governments of each of the other States Parties of the date of entry into force of this Treaty.

CHAPTER IV
Accession

Article 20

This Treaty shall be open to accession, through negotiation, by other countries members of the Latin American Integration Association; whose applications may be considered by the States Parties five years after the entry into force of this Treaty.

Notwithstanding the above, applications made by countries members of the Latin American Integration Association who do not belong to sub-regional integration schemes or to extra-regional associations may be considered before the said date.

Approval of applications shall require unanimous agreement of the States Parties.

CHAPTER V
Denunciation

Article 21

Any State Party wishing to withdraw from this Treaty shall expressly and formally notify the other States Parties of its intention, and shall submit the document of denunciation, within sixty (60) days, to the Ministry of Foreign Affairs of the Republic of Paraguay, which shall forward it to the other States Parties

Article 22

After formal denunciation, the denouncing State's rights and obligations that derive from its status as a State Party shall cease; whereas the rights and obligations that refer to the liberalization programme under this Treaty and to any other aspect to which the States Parties, together with the denouncing State, may agree to during the sixty (60) days following formal denouncement, shall continue. The latter rights and obligations of the denouncing Party shall remain in force for a period of two years as of the date of the said formal denunciation.

CHAPTER VI
General Provisions

Article 23

This Treaty shall be called the "Treaty of Asunción".

Article 24

In order to facilitate the implementation of a Common Market, a Joint Parliamentary Commission of the MERCOSUR shall be established. The Executive Branches of the States Parties shall keep their respective Legislative Branches informed of the progress of the Common Market established by this Treaty.

Done at the city of Asuncion, this twenty-sixth day of March in the year of one thousand nine hundred and ninety-one, in one original copy in Spanish and Portuguese, both texts being equally authentic. The Government of the Republic of Paraguay shall be the depositary of this Treaty and shall send a duly authenticated copy thereof to the Governments of signatory and acceding States Parties.

For the Government of the Argentine Republic:

Carlos Saul Menem

Guido di Tella

For the Government of the Federative Republic of Brazil:

Fernando Collor

Francisco Rezek

For the Government of the Republic of Paraguay:

Andres Rodriguez

Alexis Frutos Vaesken

For the Government of the Eastern Republic of Uruguay:

Luis Alberto Lacalle Herrera

Hector Gros Espiell

LAS LEÑAS PROTOCOL

Protocol on Judicial Cooperation and Assistance in Civil, Commercial, Labour and Administrative Matters

The Governments of the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay,

Considering that the Southern Common Market (MERCOSUR), created by the Treaty of Asunción signed on 26 March 1991, expresses the commitment of the States Parties to harmonise their legislation in the relevant areas, in order to strengthen the integration process,

> Desiring to promote and intensify judicial cooperation in civil, commercial, labour and administrative matters, to thus contribute to developing their relations towards integration based on the principles of respect to national sovereignty and equal and reciprocal rights and advantages,

Convinced that this Protocol will contribute to the equitable treatment of the citizens and permanent residents of the States Parties to the Treaty of Asunción and will facilitate their free access to the jurisdiction of said States to enable them to protect their rights and interests,

Aware of the importance to the integration process that the States Parties adopt common instruments that strengthen legal certainty and aim at achieving the objectives of the Treaty of Asunción,

CHAPTER I
Cooperation and Judicial Assistance

Article 1

The States Parties undertake to provide each other with full judicial assistance and cooperation in civil, commercial, labour and administrative matters. Judicial assistance shall be extended to administrative procedures for which recourse to the courts is permitted.

CHAPTER II
Central Authorities

Article 2

For the purpose of this Protocol, each State Party shall appoint a Central Authority to receive and process requests for judicial assistance in civil, commercial, labour and

administrative matters. To this end, the Central Authorities shall directly communicate with each other and will allow the intervention of other competent authorities when necessary.

On depositing the instrument of ratification of this Protocol, the States Parties shall notify the depositary Government of said appointment, and the depositary Government shall inform the other States Parties.

The Central Authority can be replaced at any time, and the State Party shall communicate the replacement, as soon as possible, to the depositary government of this Protocol, so that it may inform the other States Parties of said replacement.

CHAPTER III
Equal Procedural Treatment

Article 3

Citizens and permanent residents of any of the States Parties shall have free access to the courts of the other States Parties on the same basis as nationals and permanent residents in order to protect their rights and interests.

The preceding paragraph shall apply to bodies corporate constituted, authorised or registered in accordance with the laws of any of the States Parties.

Article 4

No requirement of security or deposit of any kind may be imposed on the nationals or permanent residents of another State Party by reason of their status as nationals or permanent residents of another State Party.

The preceding paragraph shall apply to bodies corporate constituted, authorised or registered in accordance with the laws of any of the States Parties.

CHAPTER IV
Cooperation in Proceedings and Discovery

Article 5

Each State Party shall transmit, in the manner set out in article 2, to the judicial authorities of another State Party, letters rogatory on civil, commercial, labour or administrative matters, that have as their purpose:

a) Procedural measures, such as service of process, intimations, summonses, notifications and the like;
b) Taking and producing evidence.

Article 6

Letters rogatory shall contain:

a) The title and address of the requesting judicial body;
b) A description of the case, specifying the subject matter and nature of the proceeding and names and addresses of the parties;
c) A copy of the complaint and the text of the decision requiring the letter rogatory to be issued;
d) The name and address of the attorney of the requesting party in the requested State, if any;
e) A description of the purpose of the letter rogatory, specifying the name and address of the addressee;
f) Information on the time limit for compliance by the addressee;
g) A description of any special means or procedures by which the request is to be executed;
h) Any additional information that may facilitate the task of the requested body.

Article 7

If the taking of evidence is requested, the letter rogatory shall also contain:

a) A description of the case in order to facilitate the discovery proceeding;
b) The name and address of witnesses or other persons or institutions that shall take part in the proceedings;
c) The text of the questions and the documents necessary.

Article 8

Letters rogatory shall be immediately executed by the competent judicial authority of the requested State, and may only be refused if it violates the principles of public policy (*ordre public*) in the requested State.

The execution of a letter rogatory shall not imply any recognition of jurisdiction of the requesting foreign court authority.

Article 9

The requested judicial authority is competent to take cognizance of any issue arising out of the execution of the letter rogatory.

In the event the requested judicial authority find it lacks jurisdiction to execute the letter rogatory, it shall, without notice or demand, forward the documents and information on the case to the competent judicial authority in that State.

Article 10

Letters rogatory and appended documentation shall be written in the language of the requesting authority and shall be accompanied by a translation into the language of the requested authority.

Article 11

The requesting authority may ask the requested authority to provide information on the place and date of execution of the measure requested in order to enable the requesting

authority, the interested parties or their respective attorneys to appear and to exercise their rights pursuant to the laws of the requested Party.

Reasonable advance notice of request for information shall be given through the Central Authorities of the States Parties.

Article 12

The judicial authority responsible for the execution of a letter rogatory shall apply its domestic law with regard to the court procedure to be followed.

Notwithstanding, the requesting authority may request that a special procedure be adopted or that additional formalities be completed in the execution of the letter rogatory, provided that doing so is not a violation public policy principles in the requested State.

The letter rogatory shall be executed promptly.

Article 13

In executing a letter rogatory, the requested authority shall apply the applicable procedural restraints pursuant to its domestic law in the cases and to the extent to which the requested authority is obliged to do so in order to ensure the execution of a letter rogatory originating in its own State or one requested by an interested party.

Article 14

The documents establishing the execution of a letter rogatory shall be transmitted through the Central Authorities.

In the event a letter rogatory is not executed in whole or in part, the requesting authority shall be informed immediately and advised of the reasons through the authority indicated in the preceding paragraph.

Article 15

The execution of a letter rogatory shall not give rise to reimbursement of any cost, except when special expenses are incurred during discovery, or when experts are appointed during the execution of the letter rogatory. In such cases, the letter rogatory should include information on the person who, in the requested State, will undertake the payment of said the expenses and fees.

Article 16

When the information on the address of the person named in the document or of the person being summoned to appear is incomplete or incorrect, the requested authority shall exhaust all measures to satisfy the request. To this end, the requested authority may also ask the requesting State for additional information to help identify and locate the person concerned.

Article 17

The letter rogatory execution proceedings shall not necessarily require the intervention of the interested party, since the competent judicial authority of the requested State performs shall *ex officio* perform such proceedings.

CHAPTER V
Recognition and Enforcement of Judicial Decisions and Arbitral Awards

Article 18

The provisions of this chapter shall apply to the recognition and enforcement of judicial decisions and arbitral awards issued by the courts of the States Parties in civil, commercial, labour and administrative matters. They shall also apply to decisions rendered by the criminal courts concerning reparation for damages and restitution of property.

Article 19

The request for recognition and enforcement of judicial decisions and arbitral awards by the judicial authorities shall be carried out by means of letters rogatory through the Central Authority.

Article 20

The judicial decisions and arbitral awards referred to in the preceding article shall be valid in the States Parties, provided that:

(a) they fulfil the formal requirements of an authentic document in the originating State;
(b) together with the appended documentation, they have been duly translated into the official language of the State where their recognition and execution are sought;
(c) they emanate from a competent court of law or arbitral body in accordance to the laws governing international jurisdiction of the requested State;
(d) the party against which the judicial decision or arbitral award is made has been duly served and may exercise his/her right of defence;
(e) the decision or award is effective as *res judicata* and/or is enforceable in the State where it was rendered;
(f) they are not manifestly contrary to the principles of public policy (*ordre public*) in the State where recognition and/or execution are sought.

The certified copy of the judicial decision or arbitral award must contain the requirements set out in letters (a), (c), (d), (e), and (f).

Article 21

A party who, in court, invokes the authority of a judicial decision or arbitral award from any of the States Parties must submit a certified copy of the judicial decision or arbitral award meeting the requirements set out in the preceding article.

Article 22

Where the judicial decision or the arbitral award is between the same parties, based on the same facts, and having the same object as another court or arbitration proceeding in the requested State, the judicial decision or arbitral award shall be recognised and enforced provided that the decision or award is not incompatible with any other decision or award rendered earlier or at the same time in such proceedings in the requested State.

Likewise, the judicial decision or arbitration award shall not be recognised or enforced in the event proceedings have already been initiated between the same parties, based on the same facts and having the same object, before any judicial authority in the jurisdiction of the requested Party prior to the filing of the complaint before the judicial authority which had handed down the decision whose recognition is requested.

Article 23

If a court decision or arbitral award cannot be executed in its entirety, the competent judicial authority in the requested State may agree to its partial execution at the request of an interested party.

Article 24

Procedures for ensuring recognition and enforcement of judicial decisions and arbitral awards, including the jurisdiction of the respective judicial bodies, shall be governed by the laws of the State where recognition and execution is sought.

CHAPTER VI
Official Documents and Other Documents

Article 25

The official documents produced by the government authorities of one State Party shall have the same probative force as official documents of the same kind produced by local government authorities.

Article 26

Documents drawn up by the judicial or other authorities of one of the States Parties, as well as deeds and documents certifying the validity, date and authenticity of a signature or the document's conformity with the original, which are processed by the Central Authority, shall not require authentication, certification or similar formalities when are submitted in the territory of another State Party.

Article 27

Each State Party shall provide at its own cost and expense, through the Central Authority, upon the request of another State Party and solely for official purposes, affidavits or certificates of records contained in civil status registries.

CHAPTER VII
Information on Foreign Law

Article 28

The Central Authorities of the States Parties shall, at their own cost and expense, provide each other with, as a form of legal cooperation, information on matters of civil, commercial, labour, administrative law and international private law provided this not contrary to public policy (*ordre public*),

Article 29

The information referred to in the preceding article may also be brought before the courts of a State Party by means of documents provided by the diplomatic or consular authorities of the State Party whose law is involved.

Article 30

A State providing information on the meaning and legal scope of its law shall not be held responsible for the opinion expressed or obliged to enforce its law in accordance with the information provided.

A State receiving such information shall not be obliged to enforce or ensure the enforcement of the foreign law in accordance with the information received.

CHAPTER VIII
Consultations and Dispute Settlement

Article 31

The Central Authorities of the States Parties shall arrange consultations by mutual consent in order to facilitate the implementation of this Protocol.

Article 32

Any dispute arising between the States Parties concerning the interpretation, application or non-fulfilment of the provisions in this Protocol shall be settled through direct diplomatic negotiations.

In the event the States Parties are unable to reach an agreement, or if the dispute is only partially settled, the procedures provided for in the Brasilia Protocol for the Settlement of Disputes shall be applied when it enters into force and until a Permanent System for the Settlement of Disputes between members of the Southern Common Market is adopted.

CHAPTER IX
Final Provisions

Article 33

This Protocol is an integral part of the Treaty of Asunción and shall enter into force thirty (30) days after the date of deposit of the second instrument of ratification, and shall apply provisionally from the date of its signature.

Article 34

Accession by any State to the Treaty of Asunción shall imply automatic accession to this Protocol.

Article 35

This Protocol shall not limit the provisions of earlier conventions on the same subject signed between the States Parties, provided such provisions are not incompatible with the provisions in this Protocol.

Article 36

The Government of the Republic of Paraguay shall be the depositary of this Protocol and of the instruments of ratification, and shall send authenticated copies thereof to the Governments of the other States Parties.

In addition, the Government of the Republic of Paraguay shall notify the Governments of the other States Parties of the date of entry into force of this Protocol and of the date of deposit of the instruments of ratification.

Done at Valle de Las Leñas, Department of Malargüe, Province of Mendoza, Argentine Republic, this twenty-seventh day of June of the year one thousand nine hundred and ninety-two, in one original copy in Spanish and Portuguese, both texts being equally authentic.

For the Government of the Argentine Republic:

For the Government of the Federative Republic of Brazil:

For the Government of the Republic of Paraguay:

For the Government of the Eastern Republic of Uruguay:

OURO PRETO PROTOCOL

Additional Protocol to the Treaty of Asunción on the Organisational Structure of the MERCOSUR

The Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, hereinafter referred to as the "States Parties",

In compliance with the provisions of Article 18 of the Treaty of Asunción of 26 March 1991,

Aware of the importance of the progress made and of the importance of introducing a customs union as a stage in the establishment of a common market;

Reaffirming the principles and objectives of the Treaty of Asunción and mindful of the need to give special consideration to less developed countries and regions of the MERCOSUR.

Mindful of the underlying forces in the integration process and of need therefore to adapt the organisational structure of the MERCOSUR to the changes that have taken place.

Recognising the outstanding achievements of the existing bodies during the transition period,

Hereby agree as follows:

Chapter I
Structure of the MERCOSUR

Article 1

The organizational structure of the MERCOSUR shall comprise the following bodies:

I. The Common Market Council (CMC);
II. The Common Market Group (CMG);
III. The MERCOSUR Trade Commission (MTC);
IV. The Joint Parliamentary Commission (JPC);
V. The Economic and Social Consultative Forum (ESCF);
VI. The MERCOSUR Administrative Secretariat (MAS).

Sole paragraph – The States Parties may create, under the terms of this Protocol, auxiliary bodies necessary to attain the objectives of the integration process.

Article 2

The following are inter-governmental bodies with decision-making powers: the Common Market Council, the Common Market Group and the MERCOSUR Trade Commission.

Section I
Common Market Council

Article 3

The Common Market Council is the highest body of the MERCOSUR and is responsible for the political leadership of the integration process, and for the necessary decision-making to ensure the achievement of the objectives defined in the Treaty of Asunción and to achieve the establishment of the common market.

Article 4

The Common Market Council shall consist of the Ministers for Foreign Affairs and the Ministers for the Economy of the States Parties, or their equivalents.

Article 5

The Presidency of the Common Market Council shall be held by each States Parties in turn and in alphabetical order, for a term of six months.

Article 6

The Common Market Council shall meet whenever its members deem appropriate, and at least once every six months with the participation of the Presidents of the States Parties.

Article 7

The meetings of the Council shall be co-ordinated by the Ministries for Foreign Affairs, and other Ministers or Ministerial authorities may be invited to take part in them.

Article 8

The following are duties and powers of the Common Market Council:

I. To oversee the implementation of the Treaty of Asunción, its Protocols and of the agreements signed within its context;
II. To create policies and promote the measures necessary to build the common market;
III. To represent the MERCOSUR legal entity;
IV. To negotiate and sign agreements, on behalf of the MERCOSUR, with third countries, groups of countries and international organisations. This authority may be expressly delegated to the Common Market Group under the conditions laid down in paragraph VII of Article 14;
V. To rule on the proposals submitted to the Council by the Common Market Group;
VI. To arrange meetings of ministers and to rule on the agreements resulting from said meetings and submitted to the Council;
VII. To create the bodies it deems appropriate, and to modify or abolish them;
VIII. To clarify, when deemed necessary, the substance and scope of its decisions;
IX. To appoint the Director of the MERCOSUR Administrative Secretariat;
X. To adopt financial and budgetary decisions;
XI. To approve the rules of procedure of the Common Market Group.

Article 9

The rulings of the Common Market Council shall take the form of Decisions which shall be binding on the States Parties.

Section II
The Common Market Group

Article 10

The Common Market Group is the executive body of the MERCOSUR.

Article 11

The Common Market Group shall consist of four members and four alternates for each country. The members will be appointed by their respective governments, who must include representatives of their respective Ministry of Foreign Affairs, Ministry for the Economy (or their equivalents) and the Central Banks. The Common Market Group shall be co-ordinated by the Ministries of Foreign Affairs.

Article 12

When drafting and proposing specific measures in the course of doing its work, the Common Market Group may, whenever it deems appropriate, call on representatives of other Government entities or of the organisational structure of the MERCOSUR.

Article 13

The Common Market Group shall hold ordinary or extraordinary meetings, as often as necessary, in accordance with the terms of its Rules of Procedure.

Article 14

The following are duties and powers of the Common Market Group:

To oversee, within the limits of its authority, compliance with the Treaty of Asunción, its Protocols, and agreements signed within its framework;

To propose draft Decisions for consideration of the Common Market Council;

To take the measures necessary to enforce the Decisions adopted by the Common Market Council;

To create work programmes to ensure progress towards the establishment of the common market;

To establish, modify or abolish bodies such as working groups and special meetings for the purpose of achieving its objectives;

To express its views on any proposals or recommendations submitted to the Group by other MERCOSUR bodies within their scope of authority;

To negotiate, with the participation of representatives of all the States Parties, when expressly authorised by the Common Market Council and within the limits laid down in special mandates granted for that purpose, agreements, on behalf of the MERCOSUR, with third countries, groups of countries and international organisations. When so mandated, the Common Market Group shall sign the aforementioned agreements. When so authorised by the Common Market Council, the Common Market Group may delegate these powers to the MERCOSUR Trade Commission;

To approve the budget and the annual statement of accounts submitted by the MERCOSUR Administrative Secretariat;

To adopt financial and budgetary Resolutions based on the guidelines laid down by the Common Market Council;

To submit its Rules of Procedure to the Common Market Council;

To organise Common Market Council meetings and to prepare the reports and studies requested by the Council;

To choose the Director of the MERCOSUR Administrative Secretariat;

To oversee the activities of the MERCOSUR Administrative Secretariat;

To approve the Rules of Procedure of the Trade Commission and the Economic and Social Consultative Forum.

Article 15

The decisions of the Common Market Group shall expressed in Resolutions that shall be binding on the States Parties.

Section III
The MERCOSUR Trade Commission

Article 16

The MERCOSUR Trade Commission, a body responsible for assisting the Common Market Group, shall oversee the implementation of the common trade policy instruments agreed to by the States Parties aimed at the implementation of the customs union, and shall follow up on and review questions and issues related to common trade policies, intra-MERCOSUR trade and trade with third countries.

Article 17

The MERCOSUR Trade Commission shall consist of four members and four alternates for each State Party and shall be co-ordinated by the Ministries of Foreign Affairs.

Article 18

The MERCOSUR Trade Commission shall meet at least once a month or at any time upon request of the Common Market Group or any of the States Parties.

Article 19

The following are duties and powers of the MERCOSUR Trade Commission:

I. To oversee the implementation of the common trade policy instruments both within MERCOSUR and with respect to third countries, international organisations and trade agreements;
II. To consider and rule on the requests submitted by the States Parties in connection with the implementation of and compliance with the common external tariff and other instruments of common trade policy;
III. To follow up on the implementation of the common trade policy instruments in the States Parties;
IV. To analyse the development of the common trade policy instruments relating to the implementation of the customs union and to submit Proposals in this respect to the Common Market Group;
V. To make decisions in connection with managing and applying the common external tariff and the common trade policy instruments agreed to by the States Parties;
VI. To report to the Common Market Group on the development and implementation of the common trade policy instruments, on the status of requests received and on the decisions adopted with respect to such requests;
VII. To propose to the Common Market Group new trade and customs regulations or changes in existing MERCOSUR regulations;
VIII. To propose the revision of tariff rates for specific items in respect to the common external tariff, and, among other things, to deal with cases relating to new production activities within MERCOSUR;
IX. To set up technical committees needed to achieve the Commission's goals, and to direct and supervise their activities;
X. To perform tasks in connection with the common trade policy as requested by the Common Market Group;
XI. To adopt Rules of Procedure to be submitted to the Common Market Group for approval.

Article 20

The decisions of the MERCOSUR Trade Commission shall be expressed in Directives or Proposals. The Directives shall be binding upon the States Parties.

Article 21

In addition to the duties and powers described in Articles 16 and 19 of this Protocol, the MERCOSUR Trade Commission shall be receive complaints submitted by the National Sections of the MERCOSUR Trade Commission or by the States Parties or private entities, – whether individual or legal persons –, in connection with the situations provided for in Article 1 or 25 of the Brasilia Protocol, when they fall within the Trade Commission's jurisdiction.

Paragraph 1 – Submitting the aforesaid complaints to the MERCOSUR Trade Commission shall not prevent the State Party making the complaint from taking action under the Brasilia Protocol for the Settlement of Disputes.

Paragraph 2 – The complaints arising out of the circumstances described in this Article shall be treated in accordance with the procedure laid down in the Annex to this Protocol.

Section IV
The Joint Parliamentary Commission

Article 22

The Joint Parliamentary Commission is the body representing the Parliaments of the States Parties in the scope of the MERCOSUR.

Article 23

The Joint Parliamentary Commission shall consist of an equal number of members of parliament representing the States Parties.

Article 24

The members of the Joint Parliamentary Commission shall be appointed by the respective national Parliaments, in accordance with their internal procedures.

Article 25

The Joint Parliamentary Commission shall endeavour to speed up the respective internal procedures in the States Parties in order to ensure the prompt entry into force of the decisions taken by the MERCOSUR bodies listed under Article 2 of this Protocol. Similarly, the Commission shall assist with the harmonisation of States Parties legislation, as required to move the integration process forward. When necessary, the Common Market Council shall request the Joint Parliamentary Commission to examine priority issues.

Article 26

The Joint Parliamentary Commission shall submit Recommendations to the Common Market Council through the Common Market Group.

Article 27

The Joint Parliamentary Commission shall adopt its own Rules of Procedure.

Section V
The Economic and Social Consultative Forum

Article 28

The Economic and Social Consultative Forum is the body representing the economic and social sectors and shall consist of an equal number of representatives from each State Party.

Article 29

The Economic and Social Consultative Forum shall have a consultative role and shall express its opinion in the form of Recommendations to the Common Market Group.

Article 30

The Economic and Social Consultative Forum shall submit its Rules of Procedure to the Common Market Group for approval.

Section VI
The MERCOSUR Administrative Secretariat

Article 31

MERCOSUR shall have an Administrative Secretariat to provide operational support. The MERCOSUR Administrative Secretariat shall be responsible for providing services to the other MERCOSUR organs and shall be headquartered in the city of Montevideo.

Article 32

The MERCOSUR Administrative Secretariat shall carry out the following activities:

Maintain the official archive of MERCOSUR documentation;

Publish and circulate the decisions adopted within the MERCOSUR. In this context, it shall:

Carry out, in co-ordination with the States Parties, authentic translations in Spanish and Portuguese of all the decisions adopted by the bodies of the MERCOSUR organisational structure, in accordance with the provisions of Article 39;

Publish the Official Bulletin of the MERCOSUR.

Organise the logistics of the meetings of the Common Market Council, the Common Market Group and the MERCOSUR Trade Commission and, as far as possible, of the other MERCOSUR bodies, when those meetings are held at its headquarters. In the case of meetings held outside its headquarters, the MERCOSUR Administrative Secretariat shall provide support for the State in which the meeting is held;

Regularly inform the States Parties about the measures taken by each country to adopt within its respective legal framework the decisions of the MERCOSUR bodies listed under Article 2 of this Protocol;

Compile national lists of arbitrators and experts, and perform other tasks established in the Brasilia Protocol of 17 December 1991;

Perform tasks requested by the Common Market Council, the Common Market Group and the MERCOSUR Trade Commission;

Draft a budgetary plan and, upon approval of the Common Market Group, do everything to ensure its proper implementation;

Annually submit its statement of accounts, together with a report on its activities, to the Common Market Group.

Article 33

The MERCOSUR Administrative Secretariat shall be chaired by a Director who shall be a national of one of the States Parties. The Director shall be chosen by the Common Market Group, on a rotating basis, after consultation with the States Parties and shall be appointed by the Common Market Council for. The Director shall hold office for a non-renewable term of two years.

Chapter II
Legal Personality

Article 34

The MERCOSUR shall enjoy legal personality under international law.

Article 35

In the exercise of its role, the MERCOSUR may take whatever action deemed necessary to achieve its objectives, in particular sign agreements, buy and sell personal and real property, appear in court, hold funds and make transfers.

Article 36

The MERCOSUR shall make headquarters agreements.

Chapter III
Decision-Making System

Article 37

The decisions of the MERCOSUR organs shall be taken by consensus and in the presence of all the States Parties.

Chapter IV
Implementation of the Decisions Adopted by MERCOSUR Bodies

Article 38

The States Parties undertake to adopt all the necessary measures to ensure, in their respective territories, compliance with the decisions adopted by the MERCOSUR bodies listed under Article 2 of this Protocol.

Sole paragraph – The States Parties shall inform the MERCOSUR Administrative Secretariat of the measures adopted to this end.

Article 39

The Decisions of the Common Market Council, the Resolutions of the Common Market Group, the Directives of the MERCOSUR Trade Commission and the Dispute Settlement Arbitration Rulings shall be published in full, in Spanish and Portuguese, in the MERCOSUR Official Bulletin, together with any instrument which, in the view of the Common Market Council or the Common Market Group should be publicised.

Article 40

In order to ensure the simultaneous entry into force in the States Parties of the decisions adopted by the MERCOSUR bodies listed in Article 2 of this Protocol, the following procedure must be followed:

Once the decision has been adopted, the States Parties shall take the necessary measures to incorporate it in their domestic legal system and inform the MERCOSUR Administrative Secretariat;

When all the States Parties have reported adopting the decision in their respective domestic legal systems, the MERCOSUR Administrative Secretariat shall inform each State Party accordingly;

The decisions shall enter into force simultaneously in the States Parties 30 days after the date of the notice given by the MERCOSUR Administrative Secretariat, under the terms of the preceding subparagraph. To this end, within the time-limit mentioned above, the States Parties shall give notice of the entry into force of the decision in question in their respective official bulletins.

Chapter V
Sources of Law of the MERCOSUR

Article 41

The sources of law of the MERCOSUR are:

> The Treaty of Asunción, its protocols and any additional or supplementary instruments;

The agreements concluded within the framework of the Treaty of Asunción and its protocols;
The Decisions of the Common Market Council, the Resolutions of the Common Market Group and the Directives of the MERCOSUR Trade Commission adopted as of the entry into force of the Treaty of Asunción.

Article 42

The decisions adopted by the MERCOSUR bodies listed in Article 2 of this Protocol shall be binding and, when necessary, must be incorporated in the domestic legal systems in accordance with the procedures provided for in each country's legislation.

Chapter VI
Dispute Settlement System

Article 43

Disputes between the States Parties concerning the construction, implementation or non-fulfilment of the provisions of the Treaty of Asunción and the agreements concluded within its framework or of Decisions of the Common Market Council, Resolutions of the Common Market Group and Directives of the MERCOSUR Trade Commission shall be subject to the settlement procedures laid down in the Brasilia Protocol of 17 December 1991.

Sole paragraph – The Directives of the MERCOSUR Trade Commission are hereby incorporated in Articles 19 and 25 of the Brasilia Protocol.

Article 44

Before the Common External Tariff convergence process is complete, the States Parties shall review the present MERCOSUR dispute settlement system with a view to adopting the permanent system referred to in paragraph 3 of Annex III to the Treaty of Asunción and in Article 34 of the Brasilia Protocol.

Chapter VII
Budget

Article 45

The MERCOSUR Administrative Secretariat shall have a budget to cover its operating expenses and the expenses authorised by the Common Market Group. This budget shall be funded in equal parts by the States Parties.

Chapter VIII
Languages

Article 46

The official languages of the MERCOSUR shall be Spanish and Portuguese. The official version of the working documents shall be the version in the language of the host country.

Chapter IX
Review

Article 47

According to their convenience, the States Parties may hold a diplomatic conference for the purpose of reviewing the MERCOSUR organisational structure established by this Protocol and the roles of each of its bodies.

Chapter X
Entry Into Force

Article 48

This Protocol is an integral part of the Treaty of Asunción, is concluded for an unlimited period, and shall enter into force 30 days after the date of deposit of the third instrument of ratification. The Protocol and its instruments of ratification shall be deposited with the Government of the Republic of Paraguay.

Article 49

The Government of the Republic of Paraguay shall notify the Governments of the other States Parties of the date of deposit of the instruments of ratification and of the entry into force of this Protocol.

Article 50

Accession to and denunciation of this Protocol shall be governed by the rules established in the Treaty of Asunción. Accession to or denunciation of the Treaty of Asunción or this Protocol shall imply automatic accession to or denunciation of this Protocol and the Treaty of Asunción.

Chapter XI
Transitional Provision

Article 51

The organizational structure provided for in the Treaty of Asunción of 26 March 1991 and the bodies it created shall be maintained until this Protocol enters into force.

Chapter XII
General Provisions

Article 52

This Protocol shall be called the "Ouro Preto Protocol".

Article 53

All the provisions under the Treaty of Asunción of 26 March 1991 that conflict with the terms of this Protocol or with the content of the Decisions adopted by the Common Market Council during the transition period are hereby repealed.

Done at the city of Ouro Preto, Federative Republic of Brazil, on the seventeenth day of December of the year one thousand nine hundred and ninety-four, in one original copy in Portuguese and Spanish, both texts being equally authentic. The Government of Paraguay shall send an authenticated copy of this Protocol to the Governments of the other States Parties.

Argentine Republic
Carlos Saúl Menem / Guido Di Tella

Federative Republic of Brazil
Itamar Franco / Celso L. N. Amorim

Republic of Paraguay
Juan Carlos Wasmosy / Luis María Ramirez Boettner

Eastern Republic of Uruguay
Luis Alberto Lacalle Herrera / Sergio Abreu

ANNEX TO THE OURO PRETO PROTOCOL
GENERAL PROCEDURE FOR COMPLAINTS TO THE MERCOSUR TRADE COMMISSION

Article 1

Complaints submitted by the National Sections of the MERCOSUR Trade Commission and originated by States Parties or individuals, whether natural or legal persons, in accordance with the provisions of Article 21 of the Ouro Preto Protocol shall be governed by the procedure laid down in this Annex.

Article 2

The State Party shall submit its complaint to the Rotating Chairman of the MERCOSUR Trade Commission who, with advance notice of at least one week, shall take the necessary steps to include the issue on the Agenda of the next MERCOSUR Trade Commission meeting. If no decision is taken at that meeting, the MERCOSUR Trade Commission shall, without taking further action, forward the complaint to a Technical Committee.

Article 3

Within a maximum thirty (30)-calendar-day period, the Technical Committee shall prepare and submit to the MERCOSUR Trade Commission a joint opinion on the question. This joint opinion or the conclusions of the experts in the Technical Committee, in the event of no joint opinion having been reached, shall be taken into consideration by the MERCOSUR Trade Commission when it rules on the complaint.

Article 4

The MERCOSUR Trade Commission shall rule on the complaint during its first ordinary meeting following the receipt of the joint opinion or, should there be none, the conclusions of the experts. If necessary, an extraordinary meeting may also be convened for this purpose.

Article 5

If a consensus cannot be reached during the first meeting mentioned in Article 4, the MERCOSUR Trade Commission shall submit to the Common Market Group proposals for settling the complaint, together with the joint opinion or the conclusions of the experts on the Technical Committee, so an appropriate decision may be taken. The Common Market Group shall give a ruling within thirty (30) calendar days of the receipt by the Rotating Chairman of the proposals submitted by the MERCOSUR Trade Commission.

Article 6

If the complaint is accepted, the State Party against which it is made shall adopt the measures approved by the MERCOSUR Trade Commission or the Common Market Group. In each case, the MERCOSUR Trade Commission or, subsequently, the Common Market Group shall establish a reasonable period for the implementation of these measures. If this period expires without the State against which the complaint is made having complied with the provisions of the decision adopted, whether by the MERCOSUR Trade Commission or the Common Market Group, the complainant State may resort directly to the procedure under Chapter IV of the Brasilia Protocol.

Article 7

If a consensus cannot be reached in the MERCOSUR Trade Commission, or subsequently, in the Common Market Group or if the State against which the complaint is made does not comply with the provisions of the decision adopted within the period established in Article 6, the State making the complaint may resort directly to the procedure established in Chapter IV of the Brasilia Protocol and shall inform the MERCOSUR Administrative Secretariat accordingly.

Before giving a Ruling, the Arbitration Tribunal, within fifteen (15) days of being formed, must announce the interim measures it considers appropriate under Article 18 of the Brasília Protocol.

OLIVOS PROTOCOL

The Olivos Protocol for the Settlement of Disputes in MERCOSUR

The Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, hereinafter the "States Parties",

BEARING IN MIND the Treaty of Asunción, the Protocol of Brasília and the Ouro Preto Protocol;

AWARE that the progress made in the MERCOSUR integration process requires further development of the system for the settlement of disputes;

CONSIDERING the need to ensure the correct interpretation, implementation and enforcement of the fundamental instruments of the integration process and of the regulations of the MERCOSUR consistently and authoritatively;

CONVINCED that it is convenient to make specific modifications to the system for the settlement of disputes in order to strengthen legal security within the MERCOSUR;

HAVE AGREED as follows:

CHAPTER I
DISPUTES BETWEEN STATE PARTIES

Article 1
Scope of Application

1. Any dispute arising between the States Parties regarding the interpretation, application or breach of the Treaty of Asunción, the Ouro Preto Protocol, the protocols and agreements executed within the framework of the Treaty of Asunción, the Decisions of the Common Market Council, the Resolutions of the Common Market Group and the Instructions of the MERCOSUR Trade Commission will be subject to the procedures established in this Protocol.
2. Disputes falling within the scope of application of this Protocol that may also be referred to the dispute settlement system of the World Trade Organization or of other preferred trade systems that the MERCOSUR States Parties may have entered into, may be submitted to one forum or the other, as decided by the requesting party. Notwithstanding, the parties to a dispute may jointly agree on the forum.

Once a dispute settlement procedure pursuant to the preceding paragraph has begun, the parties shall not have the right to resort to other dispute settlement mechanisms adopted by any other forum as stated under Article 14 of this Protocol.

Notwithstanding, in connection with the same cause of action and in the framework of what has been established in this section, the Common Market Council shall regulate on the choice of forum.

CHAPTER II
MECHANISMS RELATED TO TECHNICAL ISSUES

Article 2
Creating Mechanisms

1. When deemed necessary, expedited mechanisms may be established to settle disputes between States Parties on disputes concerning the technical aspects regulated in common trade policy instruments.
2. The rules of procedure, scope of mechanisms, and the nature of the decisions resulting from these dispute-settlement mechanisms shall be defined and approved in a Decision of the Common Market Council.

CHAPTER III
CONSULTATIVE OPINIONS

Article 3
Request System

The Common Market Council may establish mechanisms to process applications for consultative opinions submitted to the Permanent Court of Review and define their respective scope and procedures.

CHAPTER IV
DIRECT NEGOTIATIONS

Article 4
Negotiations

The States involved in a dispute shall first endeavour to achieve settlement through direct negotiations.

Article 5
Procedure and Term of Negotiations

1. Direct negotiations may not exceed, unless otherwise agreed to by the parties to the dispute, fifteen (15) days as of the date a party communicated to the other the decision of lodging a dispute.
2. The States parties to a dispute shall inform the Common Market Group, through the MERCOSUR Administrative Secretariat, of the steps taken during the negotiations and the results obtained.

CHAPTER V
INVOLVEMENT OF THE COMMON MARKET GROUP

Article 6
Alternative Procedure before the Common Market Group

1. If no settlement is achieved through direct negotiations or if the dispute is only settled in part, any of the States to the dispute may directly initiate the arbitration proceedings established in Chapter VI.
2. In addition to the provision contained in the preceding paragraph, the States to a dispute may, agree to submit it to the Common Market Group for consideration.
   i) In this case, the Common Market Group will assess the situation, giving the parties to the dispute an opportunity to present their arguments, requesting, when considered necessary, the opinion of experts selected from the list under article 43 of this Protocol.
   ii) Any costs incurred in connection with expert opinions shall be borne equally by the States to the dispute or proportionally as determined by the Common Market Group.
3. The dispute may also be referred to the Common Market Group if a third-party State justifiably requests such procedure at the end of the direct negotiations. In this case, the arbitration procedure initiated by the requesting State Party will not be interrupted, unless the States parties to the dispute otherwise agree.

Article 7
Role of the Common Market Group

1. If a dispute is referred to the Common Market Group by the States parties to the disputed, the Group will provide recommendations that, whenever possible, will be specific and detailed with a view to solving the dispute.
2. If the dispute is referred to the Common Market Group at the request of a third-party State, the Common Market Group may make comments or recommendations on the dispute.

Article 8
Time Limit for Participation and Decision of the Common Market Group

The procedure described in this Chapter will not last more than thirty (30) days as of the date of the meeting during which the dispute was submitted to the Common Market Group for consideration.

CHAPTER VI
AD HOC ARBITRATION PROCEEDINGS

Article 9
Commencement of Arbitration

1. When it was not possible to solve a dispute according to the procedure detailed in

Chapters IV and V, any of the States party to the dispute may communicate to the MERCOSUR Administrative Secretariat its decision to resort to the arbitration procedure provided for in this Chapter.

2. The MERCOSUR Administrative Secretariat will immediately notify the other State(s) involved in the dispute and the Common Market Group.
3. The MERCOSUR Administrative Secretariat will undertake the administrative steps in the proceedings.

Article 10
Composition of the Ad Hoc Arbitration Court

1. The arbitration procedure will be held before an Ad Hoc Court formed by three (3) arbitrators.
2. The arbitrators will be appointed as follows:
   i) Each State party to the dispute shall appoint one (1) arbitrator from the list provided in Article 11.1 within fifteen (15) days of the communication of the MERCOSUR Administrative Secretariat to the States parties to the dispute of the decision taken by one of them to resort to arbitration.

   At the same time and from the same list, one (1) alternate will be appointed to replace an arbitrator in the event of his inability to act or of excusing himself during any stage of the arbitration procedure.

   ii) If a State party to the dispute fails to appoint the arbitrators within the period specified in section 2 i) the arbitrators will be appointed by the MERCOSUR Administrative Secretariat and selected by random drawing, within two (2) days after such period expired, from among the respective State's arbitrator list pursuant to Article 11.1.
3. The Presiding Arbitrator will be chosen as follows:
   i) The States involved in the dispute will agree on a third arbitrator from the list included in Article 11.2 iii) within fifteen days as from the date on which the MERCOSUR Administrative Secretariat has communicated to the States involved in the dispute the decision taken by one of them to submit to arbitration. The third arbitrator will preside over the Ad Hoc Arbitration Court.

The States will simultaneously appoint, from the same list, an alternate to replace an arbitrator in case of his inability to act or of his excluding himself during any stage of the arbitration proceedings.

The Presiding Arbitrator and the alternate shall not be nationals of the States parties to the dispute.

   ii) If the States parties to a dispute are unable to reach an agreement on appointing a third arbitrator within the specified period, the MERCOSUR Administrative Secretariat, at the request of any of them, will appoint such arbitrator by random drawing of the names on the list included in Article 11.2 iii), excluding all nationals of the States parties to the dispute.

   iii) The individuals appointed to act as third arbitrators shall answer within three (3) days from the date of notification of their appointment whether they accept to act as such in the dispute.

4. The MERCOSUR Administrative Secretariat shall notify the arbitrators of their appointment.

Article 11
Arbitrator Lists

1. Each State Party shall nominate twelve (12) arbitrators to be included in a list filed with the MERCOSUR Administrative Secretariat. The nomination of the arbitrators, together with a detailed curriculum vitae of each one, shall be notified simultaneously to the other States Parties and to the MERCOSUR Administrative Secretariat.
   i) Within thirty (30) days of the notice, each of the States Parties may request additional information on the individuals appointed to the above-mentioned list by the other States Parties.
   ii) The MERCOSUR Administrative Secretariat shall notify the States Parties of the consolidated list of MERCOSUR arbitrators, as well as of any subsequent modification thereof.
2. Each State Party shall further indicate four (4) candidates for the list of third arbitrators. At least one of the arbitrators nominated by each State Party for the list shall not be a national of any of the MERCOSUR States Parties.
   i) The list shall be notified to the other States parties through the Rotating Presidency, together with the curriculum vitae of each of the candidates.
   ii) Within thirty (30) days from the notification, each of the States Parties may ask for additional information on the individuals nominated by each of the other States Parties or make provide grounds for objecting the candidates in accordance with the criteria established in Article 35.

The objections shall be communicated through the Rotating Presidency to the nominating State Party. If no solution is found within thirty (30) days as of the notice of objection, objection shall prevail.

   iii) The consolidated list of third arbitrators and any subsequent modifications, together with the curriculum vitae of the arbitrators, shall be communicated by the Rotating Presidency to the MERCOSUR Administrative Secretariat. The Secretariat shall be the depositary of the list and shall notify the States Parties.

Article 12
Representatives and Advisors

The States parties to a dispute shall appoint their representatives before the Ad Hoc Arbitration Court and may appoint advisors for the defence of their rights.

Article 13
Joint Representation

If two or more of the States Parties hold the same position in a dispute, they may make a joint complaint before the Ad Hoc Arbitration Court and jointly appoint an arbitration judge, within the time period established in article 10.2.i).

Article 14
Subject Matter of the Dispute

1. The subject matter of the dispute shall be defined in the written texts of presentation and answer submitted to the Ad Hoc Arbitration Court. No additional filings shall be accepted to extend the scope of these documents.
2. The matters raised by the parties in the written documents mentioned in the previous paragraph shall be based on the matters that were considered during the prior stages, considered in this Protocol and in the Annex to the Ouro Preto Protocol.
3. The States to the dispute shall inform the Ad Hoc Arbitration Court in the written documents mentioned in paragraph 1 of this article of the steps taken before the arbitration procedure and shall make presentations on the factual and legal grounds on which they support their respective positions.

Article 15
Provisional Measures

1. The Ad Hoc Arbitration Court may, at the request of an interested party and whenever well-grounded reasons exist that the continuation of a given situation may cause severe and irreparable damage to one of the parties to the dispute, determine appropriate provisional measures be taken to prevent that damage.
2. The Court may, at any time, discontinue the application of such measures.
3. In the event of request for review of the arbitration award, the provisional measures that have not been discontinued prior to the award being issued shall remain in effect until the request for review is discussed during the first following meeting of the Permanent Court of Review, which shall decide on continuing or lifting such measures.

Article 16
Arbitration Award

The Ad Hoc Arbitration Court shall issue an award within a sixty (60)-day period, – which may be extended by the Court for a maximum additional period of thirty (30) days –, from the date of the communication made by the MERCOSUR Administrative Secretariat to the parties and the other arbitrators of the Presiding Arbitrator's acceptance of appointment.

CHAPTER VII
REVIEW PROCEDURE

Article 17
Request for Review

1. Any of the parties to the dispute may file a request for review with the Permanent Court of Review, against the award issued by the Ad Hoc Arbitration Court, within fifteen (15) days from the notice of award.

2. The request for review shall be limited to the legal issues addressed during the dispute and to the legal interpretation set out in the award given by the Ad Hoc Arbitration Court.
3. The awards of the Ad Hoc Courts based on *ex aequo et bono* principles shall not be the subject to review.
4. The MERCOSUR Administrative Secretariat is responsible for taking the administrative steps required during the procedures and keeping the States parties to the dispute and the Common Market Group informed.

Article 18
Composition of the Permanent Court of Review

1. The Permanent Court of Review shall be made up of five (5) arbitrators.
2. Each of the MERCOSUR States Parties shall appoint one (1) arbitrator and an alternate for a term of two (2) years, renewable for a maximum of two consecutive terms.
3. The fifth arbitrator shall be appointed for a non-renewable three (3)-year term, unless otherwise agreed to by the States Parties, and shall be chosen unanimously by the States Parties, from the list mentioned in this paragraph, at least three (3) months before the end of the term of the previous fifth arbitrator in office. Such arbitrator shall be a national of one of the States Parties of MERCOSUR notwithstanding the provisions of item 4 of this Article.

If the States do not arrive at a unanimous decision, the MERCOSUR Administrative Secretariat through random drawing of one of the names on the respective list shall appoint the fifth arbitrator within two (2) days after the expiration of such term.

The list from which the fifth arbitrator will be chosen will contain eight (8) names. Each of the States Parties shall provide two (2) names of nationals of one of the MERCOSUR countries.

4. The States Parties may agree to establish other criteria for appointing the fifth arbitrator.
5. At least three (3) months before the end of the arbitrators' term, the States Parties shall decide on whether to renew their term or propose new candidates.
6. If the term of office of an arbitrator expires in the course of a dispute, the arbitrator shall remain in office until the end of the dispute.
7. As to the procedures described in this article, the provisions of article 11.2 shall apply.

Article 19
Full Availability

Upon acceptance of their appointment, the members of the Permanent Court of Review shall be fully available to act when called upon.

Article 20
Operation of the Court

1. Where the dispute involves two States Parties, the Court shall be formed by three (3) arbitrators. Two (2) arbitrators shall be nationals of each of the States to the dispute

and the third shall act as Presiding Arbitrator and shall be chosen by the Director of the MERCOSUR Administrative Secretariat by random drawing among the remaining arbitrators that are not nationals of the States parties to the dispute. The Presiding Arbitrator shall be appointed on the day following the filing of the request for review, after which date the Court will be deemed composed to all intents and purposes.

2. In the event the dispute involves more than two of the States Parties, the Permanent Court of Review shall be composed of the five (5) arbitrators.
3. The States Parties may agree to establish other criteria for the operation of the Court as established under this Article.

Article 21

Reply to the Request for Review and Time Limit for Final Award

1. The requested party shall have fifteen (15) days from the notice of request of review to exercise its right to file a reply.
2. The Permanent Court of Review shall decide on the request for review within thirty (30) days of the date of filing of the reply mentioned in the previous paragraph or of the end of the reply period, as the case may be. The Court may decide to extend the thirty (30)-day period for an additional fifteen (15) days.

Article 22
Scope of the decision

1. The Permanent Court of Review may confirm, modify or revoke the legal grounds and the decisions of the Ad Hoc Arbitration Court.
2. The decision of the Permanent Court of Review shall be final and shall prevail over the decision of the Ad Hoc Arbitration Court.

Article 23

Direct Access to the Permanent Court of Review

1. The parties to a dispute, at the end of the procedure described in Articles 4 and 5 of this Protocol may expressly agree to appear directly before the Permanent Review Court as a sole-instance. In this case, the Court shall have the same jurisdiction as the Ad Hoc Arbitration Court and the provisions of Articles 9, 12, 13, 14, 15 and 16 of this Protocol shall apply.
2. In this case, the decisions of the Permanent Court of Review shall be binding on the States involved in the dispute as from the date of receipt of the respective notice of award, shall not be subject to review, and shall be effective, in regard to the parties, as *res judicata.*

Article 24
Exceptional and urgent measures

The Common Market Council may create exceptional procedures to deal with exceptional and urgent cases that may cause irreparable damage to the Parties.

CHAPTER VIII
ARBITRATION AWARDS

Article 25
Enforcement of Awards

The awards issued by the Ad Hoc Arbitration Court and the Permanent Court of Review will be reached by a majority vote, they shall provide the grounds of the decision, and shall be signed by the President and the arbitrators. The arbitrators shall not be allowed to provide the grounds of dissenting votes and shall maintain the confidentiality of the voting procedure. All deliberation shall also be confidential and shall be and forever remain confidential.

Article 26
Binding Nature of Awards

1. All awards of the Ad Hoc Arbitration Courts shall be binding on the States parties to the dispute from the date of notice of award and they shall be effective as *res judicata* when, after the expiration of the period for request for review specified in Article 17–1, no such request has been filed.
2. The awards of the Permanent Court of Review are not subject to appeal, are binding on the States parties to the dispute from the time of notice, and shall be effective between the parties as *res judicata.*

Article 27
Obligation to Enforce Award

The awards shall be enforced in the form and within the scope established therein. The adoption of compensatory measures pursuant to the terms of this Protocol shall not release a State Party from its obligations of enforcing the award.

Article 28
Request for Clarification

1. Any of the States party to the dispute may, within fifteen (15) of notification, request clarification on the award issued by the Ad Hoc Arbitration Court or the Permanent Court of Review and clarification on the way the award is to be enforced.
2. The competent Court shall decide on the request within fifteen (15) days of the filing of such request, and may extend the term established for enforcement of the award.

Article 29
Enforcement Period and Modality

1. The awards of the Ad Hoc Arbitration Courts or of the Permanent Court of Review, as the case may be, shall be enforced within the period established by the respective courts. If no period has been determined, the awards shall be enforced within thirty (30) days of the date of notification.
2. If a State Party files a request for review, the enforcement of the award of the Ad Hoc Arbitration Court shall be suspended while such a request is pending.

3. The State Party that has to enforce the award shall, within fifteen (15) days of notification, inform the other party to the dispute, as well as the Common Market Group, through the MERCOSUR Administrative Secretariat, of the measures it shall take to enforce the award.

Article 30
Divergence on Enforcement of Award

1. When the State benefiting from the award understands that the enforcement measures do not comply with the award, it will have thirty (30) days from the adoption of such measures to bring the situation for the consideration of the Ad Hoc Court or the Permanent Court of Review.
2. The competent Court shall have thirty days (30), from the date it was informed of the situation, to decide on the issues mentioned in the previous paragraph.
3. If the respective Ad Hoc Arbitration Court cannot be reconvened, another Court will be formed with the necessary replacement(s) as mentioned in Articles 10.2 and 10.3.

CHAPTER IX
COMPENSATORY MEASURES

Article 31

Right to Apply Compensatory Measures

1. If a State party to a dispute does not comply, in whole or in part, with an award issued by the Arbitration Court, the other party to the dispute may, at its discretion, within a one (1) year period starting on the day after the expiration of the term referred to in Article 29.1 and without prejudice of the application of the procedures established in Article 30, begin to apply temporary compensatory measures aimed at complying with the award, such as the interruption of concessions or other similar obligations.
2. The State Party that obtained the award in its favour shall, first, attempt to interrupt the concessions or similar obligations in the same sector or sectors affected.

When suspensions in the same sector are considered impracticable or ineffective, the winning State may interrupt concessions or obligations in another sector, but shall provide the reasons of its decision.

3. The compensatory measures to be taken shall be communicated formally, by the State Party that will apply them to the State Party that has to comply with the award, at least fifteen (15) days prior to enforcement.

Article 32
Challenging Compensatory Measures

1. In the event the winning State Party applies compensatory measures as a result of considering enforcement of the award insufficient, but in the event the State Party obliged to comply with the award considers the measures are satisfactory, the latter shall have fifteen (15) days, from the notice under Article 31.3, to submit the matter to

the Ad Hoc Arbitration Court or to the Permanent Court of Review for consideration, as the case may be. The competent court shall have thirty (30) days as of its date of formation to issue a decision on the matter.

2. In the event the State Party obliged to comply with the award considers that the compensatory measures applied are excessive, it may request, within fifteen (15) days of the enforcement of such measures, that the Ad Hoc Court or the Permanent Court of Review, as the case may be, issue a decision on the matter. The competent court shall have thirty (30) days as of its date of formation to issue a decision on the matter.
   i) The Court shall decide on the compensatory measures adopted. Depending on the case, the Court will assess the arguments justifying the measures being applied to a sector different from the sector affected, in addition to examining the proportionality of said measures compared to the consequences arising from failure to comply with the award.
   ii) In assessing proportionality, the Court shall take into account, among other things, the volume and/or value of trade in the sector concerned, as well as any other damage or factor that may have had an influence in determining the level or amount of compensatory measures.
3. The State Party that has adopted the compensatory measures shall adapt them to the decision made by the Court within ten (10) days, unless the Court establishes a different period of time.

CHAPTER X
COMMON PROVISIONS FOR CHAPTERS VI AND VII

Article 33
Jurisdiction of the Courts

The States Parties acknowledge the binding and automatic jurisdiction – and thus do not require a special agreement on the issue – of the Ad Hoc Arbitration Courts formed to hear and deal with the disputes referred to in this Protocol, as well as the jurisdiction of the Permanent

Court of Review to hear and deal with the disputes in accordance with the powers granted to it under this Protocol

Article 34
Applicable Law

1. The Ad Hoc Arbitration Courts and the Permanent Court of Review shall settle disputes based on the Treaty of Asunción, the Ouro Preto Protocol, the protocols and agreements executed within the framework of the Treaty of Asunción, the Decisions of the Common Market Council, the Resolutions of the Common Market Group, and the Instructions of the MERCOSUR Trade Committee, as well as the applicable principles and provisions of International Law.
2. This provision shall not limit the power of the Ad Hoc Arbitration Courts or of the

Permanent Court of Review when acting as a sole-instance court, as set forth in Article 23, to decide on the dispute based on *ex aequo et bono* principles when this is agreed to by the parties.

Article 35
Qualifications of Arbitrators

1. The arbitrators of the Ad Hoc Arbitration Courts and of the Permanent Court of Review shall be lawyers with recognised expertise in the fields that may be the subject matter of disputes, and shall be knowledgeable of the MERCOSUR legal framework.
2. The arbitrators shall be necessarily impartial and functionally independent from the Central Government or direct Government of the States Parties and shall not have any interests at stake in the dispute. They shall be appointed based on their objectiveness, reliability, and good judgment.

Article 36
Costs

1. Any expenses and fees incurred in connection with the activity of the arbitrators shall be borne by the country that appointed them and the expenses of the President of the Ad Hoc Arbitration Court shall be borne in equal parts by the States parties to the dispute, unless the Court decides that they are to be distributed in a different proportion.
2. Any expenses and fees incurred in connection with the activity of the arbitrators of the Permanent Court of Review shall be borne in equal parts by the States parties to the dispute, unless the Court decides that they are to be distributed in a different proportion.
3. The expenses referred to in the preceding paragraphs may be paid through the MERCOSUR Administrative Secretariat. Payments may be made through a Special Fund that the States Parties may create by depositing their contributions to the budget of the Administrative Secretariat, pursuant to Article 45 of the Ouro Preto Protocol, or when the procedures provided for in Chapters VI or VII of this Protocol are started. The Fund shall be managed by the MERCOSUR Administrative Secretariat, which shall render accounts to the States Parties of the use made.

Article 37
Fees and Other Expenses

Fees, travel, accommodation, per diem and other expenses of incurred by arbitrators shall be determined by the Common Market Group.

Article 38
Venue

The seat of the Permanent Court of Review shall be the city of Asunción. However, when well-grounded reasons exist, the court may exceptionally meet in other cities of the MERCOSUR. The Ad Hoc Arbitration Courts may meet in any city of the MERCOSUR.

CHAPTER XI
PRIVATE PERSON COMPLAINT

Article 39
Scope of Application

The procedure established in this Chapter shall apply to claims filed by private persons (individuals or legal entities) in connection with the adoption or application, by any of the States Parties, of legal or administrative measures having a limiting, discriminatory or unfair-competition effect in violation of the Treaty of Asunción, the Ouro Preto Protocol, the protocols and agreements executed within the framework of the Treaty of Asunción, the Decisions of the Common Market Council, the Resolutions of the Common Market Group, and the Instructions of the MERCOSUR Trade Committee.

Article 40
Beginning of Procedure

1. The private persons concerned shall file their claims with the National Chapter of the Common Market Group of the State Party they reside in or have their place of business.
2. Such persons shall provide evidence of the existence of a violation and current or imminent damage, in order for the claim to be admitted by the National Chapter and be assessed by the Common Market Group and by the group of experts, if called upon.

Article 41
Procedure

1. Unless the claim refers to a matter leading to a Dispute Settlement procedure in accordance with Chapters IV to VII of this Protocol, the National Chapter of the Common Market Group that received the complaint pursuant to Article 40 of this Chapter shall engage in consultations with the National Chapter of the Common Market Group of the State Party charged with the violation, with the aim of finding an immediate solution for the matter raised. Such consultations will automatically be deemed concluded and with no further formal steps if the matter is not settled within fifteen (15) days of the notice of the complaint to the State Party charged with the violation, unless the parties agree on a different period of time.
2. If consultations end without reaching a solution, the National Chapter of the Common Market Group shall automatically forward the complaint to the Common Market Group.

Article 42
Intervention of the Common Market Group

1. Upon receiving the complaint, the Common Market Group, in the meeting immediately following receipt of complaint, shall assess the requirements set forth in Article 40.2, which provided the basis for the complaint being admitted by the National Chapter. In the event the Common Market Group does not find that the requirements

for accepting the complaint have been met, the complaint shall be automatically rejected. The decision shall be taken by consensus.

2. In the event the Common Market Group does not reject the complaint, the complaint will be deemed accepted. In this case, the Common Market Group shall immediately call upon a group of experts to provide an opinion on the issue within non-extendable thirty (30)-day period of their appointment.
3. Within the said period, the group of experts will give the claimant and the States involved in the claim the opportunity to be heard and to submit their arguments at a joint hearing.

Article 43
Group of Experts

1. The group of experts referred to in Article 42.2 shall be formed by three (3) members chosen by the Common Market Group or, upon failure to agree on one or more experts, they shall be appointed by vote of the States Parties based on the names in a list of twenty-four (24) experts. The MERCOSUR Administrative Secretariat shall notify the Common Market Group of the expert or experts with the largest number of votes.

   In the latter case, and unless otherwise decided by the Common Market Group, one (1) of the experts appointed shall not be a national of the State against which the complaint has been filed or a national of the State in which the private person filed the complaint, as provided for in Article 40.
2. In order to make the list of experts, each of the States Parties shall appoint six (6) persons with recognised expertise in the issues that may be the subject matter of the complaint. The list will be filed with the MERCOSUR Administrative Secretariat.
3. Any expenses arising from the involvement of the group of experts shall be borne as determined by the Common Market Group or, if no agreement is reached, shall be borne equally by the parties directly involved in the claim.

Article 44
Opinion of the Group of Experts

1. The group of experts shall submit its opinion to the Common Market Group.
   i) If a unanimous opinion finds there are grounds for the complaint filed against a State Party, any other State Party may request corrective measures be adopted or the challenged measures be annulled. If this request is not complied with within fifteen (15) days, the requesting State Party may directly resort to the arbitration procedure, as provided for in Chapter VI of this Protocol.
   ii) Upon receiving the unanimous opinion stating there are no grounds for the complaint, the Common Market Group shall terminate the proceedings in the scope of this Chapter.
   iii) Should the group of experts fail to reach unanimity in order to issue its opinion, the group shall submit its conclusions to the Common Market Group, which shall immediately terminate the proceedings in the scope of this Chapter.
2. Termination of the proceedings by the Common Market Group in accordance with paragraphs ii) and iii) of the preceding section shall not prevent the claimant State Party from starting the proceedings under Chapters IV to VI of this Protocol.

CHAPTER XII
GENERAL PROVISIONS

Article 45
Settlement and Abandonment of Claim

At any stage during the proceedings, the party that raised the matter in dispute or filed a complaint may abandon the claim or the parties involved may reach a settlement, which shall, in either case, put an end to the dispute or claim. Abandonment or settlement shall be notified through the MERCOSUR Administrative Secretariat to the Common Market Group or to the competent Court, as the case may be.

Article 46
Confidentiality

1. All the documents submitted in connection with the proceedings provided for in this Protocol shall only be disclosed to the parties to the dispute, except for the arbitration awards.
2. At the discretion of the National Chapter of the Common Market Group of each State Party and when necessary for preparing arguments and opinions to be submitted to the Court, such documents may be disclosed, solely, to the sectors with an interest in the matter.
3. Notwithstanding the provision contained in paragraph 1, the Common Market Council shall determine the manner in which written documents and presentations connected to former disputes will be disclosed.

Article 47
Regulation

The Common Market Group shall approve the regulation of this protocol within sixty (60) days of its entry into force.

Article 48
Terms

1. The time periods established in this Protocol are binding and shall be counted on a calendar day basis from the day following the fact or event to which they refer. Provided, however, that where the date for filing a document or complying with a formal step falls on a day that is not a business day at the MERCOSUR Administrative Secretariat, the document shall be filed or the formal step shall be complied with on the first business day following such date.
2. Notwithstanding the provision contained in the preceding paragraph, the time periods set in this Protocol may be modified by mutual agreement of the parties to the dispute.

The time limits for proceedings before the Ad Hoc Arbitration Courts and the Permanent Court of Review may be modified when competent Court grants a request made by the parties.

CHAPTER XIII
TEMPORARY PROVISIONS

Article 49
Initial Notifications

The States Parties shall make the initial appointments and notifications provided for in Articles 11, 18, and 43.2 within thirty (30) days from the entry into force of this Protocol.

Article 50
Pending Disputes

Disputes initiated pursuant to the system of the Protocol of Brasília shall continue to be governed by such Protocol until termination.

Article 51
Rules of Procedure

1. The Permanent Court of Review, within thirty (30) days as of its formation shall adopt its own Rules of Procedure, which shall be approved by the Common Market Council.
2. The Ad Hoc Arbitration Courts shall adopt their own rules of procedure, based on the Model Rules to be approved by the Common Market Council.
3. The rules referred to in the preceding sections of this article shall ensure that each of the parties to the dispute has the full opportunity to be heard and to submit arguments, and shall ensure that the proceedings are conducted expeditiously.

CHAPTER XIV
FINAL PROVISIONS

Article 52
Entry into Force and Deposit

1. This Protocol, which is an integral part of the Treaty of Asunción, shall become effective on the thirtieth day from the date of deposit of the fourth ratification instrument.
2. The Republic of Paraguay shall be the depository of this Protocol and of the ratification instruments, and shall notify the other States Parties of the date of deposit of such instruments, and send a duly authenticated copy of this Protocol to the other States Parties.

Article 53
System Review

Before the end of the common external tariff convergence process, the States Parties shall review the current dispute settlement system, in order to adopt the Permanent Dispute Settlement System for the Common Market as referred to in Annex III of the Treaty of Asunción.

Article 54
Automatic Accession and Denunciation

1. Accession to the Treaty of Asunción shall imply automatic accession to this Protocol.
2. Denunciation of this Protocol shall imply denunciation of the Treaty of Asunción.

Article 55
Substitution

1. As of its entry into force, this Protocol shall substitute the Protocol of Brasília on Dispute Settlement, which was signed on December 17, 1991, and shall substitute the Regulation of the Protocol of Brasília, CMC Decision 17/98.
2. However, the respective provisions of the Protocol of Brasília and of its Regulation shall continue to apply until the disputes initiated under the Protocol of Brasília have been terminated and until the proceedings provided for in Article 49 have been concluded.
3. Any references to the Protocol of Brasília in the Ouro Preto Protocol and its Annex shall be deemed to be references to this Protocol where applicable.

Article 56
Languages

In all the proceedings provided for in this Protocol, Spanish and Portuguese shall be the official languages.

Done at the city of Olivos, Province of Buenos Aires, Republic of Argentina, this eighteenth day of February of the year two thousand and two, in one original copy in Spanish and Portuguese, both texts being equally authentic

For the Republic of Argentina:

EDUARDO DUHALDE

CARLOS RUCKAUF

For the Federative Republic of Brazil:

FERNANDO HENRIQUE CARDOSO

CELSO LAFER

For the Republic of Paraguay:

LUIS GONZALES MACCHI

JOSE ANTONIO MORENO RUFFINELLI

For the Eastern Republic of Uruguay:

JORGE BATTLE IBANEZ

DIDIER OPERTTI

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