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MERCOSUR, ITS INSTITUTIONS AND JURIDICAL STRUCTURE

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TITLE II

MERCOSUR, AN INTERNATIONAL ORGANIZATION

With entry into force of the Protocol of Ouro Preto, the transitional phase came to an end, and what we may call the definitive stage began. That stage, which had been sketched out during the preparatory work for MERCOSUR, remained on the same path, consolidating the tendencies that were by then clear from the Protocol of Brasilia and from the countless Decisions and Resolutions issued during the intervening period of time.

Thus, the institutions of MERCOSUR took on a stable shape, and MERCOSUR became an international organization, with new functions. Its juridical nature changed, its governing bodies were consolidated, amended and improved within a structure similar to the original one.

CHAPTER I

NATURE AND STRUCTURE

MERCOSUR, in the wake of the Ouro Preto agreements, is moving into its final phase. Its nature has changed, and its structures have been consolidated, resulting in a framework that presents a number of original institutional aspects that deserve a comparative examination.

A. NATURE

With entry into force of the Protocol of Ouro Preto, MERCOSUR has taken on a new legal and juridical nature, different from its original one. In effect, in its provisional stage MERCOSUR was based on a Treaty that called for the immediate creation of a free trade area and the implementation of a kind of *sui generis* common market.¹

Meanwhile it had no legal personality of international law of its own. Yet there is no doubt that its nature as an economic agreement, focused on questions relating to customs, led its authors to propose solutions that bore a good deal of resemblance to the structure of what was then the GATT.

Indeed we find many points in parallel between the role played by the Commission and that of the GATT Council. As well, the Administrative Secretariat of MERCOSUR, in the provisional phase, had many similarities to the one in Geneva, and the dispute settlement systems had much in common.

The shift to this new phase involved the creation of international organization.

1) The legal personality of international law of MERCOSUR

Article 34 of the Protocol of Ouro Preto provides as follows:

MERCOSUR shall have a legal personality of international law.

As a result, it became both possible and necessary for MERCOSUR to have its own governing bodies, in light of which the legal nature of its structures was changed, while remaining consistent with its original form.

Thus, there has been no change to the essential functions of the Council, but they have been added to, and one of its new roles, pursuant to article 8, is the *representative function*:

III. To exercise legal personality of international law of MERCOSUR.

IV. To negotiate and sign agreements in the name of MERCOSUR with third countries, groups of countries and international organizations. These functions may be delegated to the Common Market Group by express mandate, under the conditions stipulated in clause VII of article 14.

The Council has thereby become the representative body of MERCOSUR, to which end it may “exercise legal personality of international law of MERCOSUR”, allowing it to “negotiate and sign agreements”, including “headquarters agreements”. But its powers as the organ of the new international organization do not stop there: it also has internal administrative functions, such as approving the budget for the Administrative Secretariat (which is also an organ of MERCOSUR), and

appointing its Director, without prejudice to other powers which, also expressly defined, flow from the nature of MERCOSUR and from its role, as we shall see below.

In this way, by taking on the juridical nature of an international organization, MERCOSUR is now in a position to enter into agreements with other juridical persons under international public law.

Article 35 of the Protocol of Ouro Preto provides that:

MERCOSUR may, in exercise of its powers, perform all acts necessary for the realization of its objectives, and in particular may contract, acquire or dispose of property and goods, take action before the courts, keep funds and make transfers.

According to article 36 of the same Treaty,

MERCOSUR shall sign headquarters agreements.

Such agreements are the prerogative of any international organization, and allow it to establish itself in a given country. The agreement authorizes the organization to operate within that country's territory and establishes the rules governing its relations with the host country. In general, these agreements provide for privileges and immunities similar to those accorded to embassies and their officials.²

Since the bodies of MERCOSUR, with the exception of the Administrative Secretariat, have rotational headquarters, it is only with respect to the Secretariat itself that there is a need to sign any bilateral headquarters agreement. However, in light of the immunities of its officials, referred to above, there will be a need for agreements with other countries, perhaps an agreement by MERCOSUR with all Member States, to settle such issues as privileges and immunities, including those of officials and their families, the transit of persons and goods, passports or *laissez-passer*, exemption or immunity before the courts, their scope, the communications system, etc.

An examination of MERCOSUR's structures, however, shows that in granting it a legal personality of international law, the Member States were careful not to attribute to it any supranational characteristics. This is clear, for example, in the provisions relating to international agreements, which

MERCOSUR may sign but which will depend for their negotiation on decisions by the Common Market Commission, which as is well known are taken by consensus.

Another important aspect of any international organization is that it should have its own resources and its own budget and that, in recognition of the principle of equality among the partners (typical of any consensus-based system) each party will share equally in covering the organization's expenses. This is usually arranged by establishing quotas in different amounts, as happens in the United Nations.

In the case of MERCOSUR, article 45 of the Protocol of Ouro Preto provides:

The Administrative Secretariat of MERCOSUR shall have a budget to cover its operating expenses and those determined by the Common Market Group. That budget shall be financed, in equal shares, by contributions from the States Parties.

That budget is prepared by the Administrative Secretariat, as part of its responsibilities pursuant to Article 32 (VII), and must be approved by the GMC [Common Market Group], pursuant to article 14 (VII) of the Protocol of Ouro Preto.

As provided in the Treaty, this budget must cover the expenses of the Administrative Secretariat and those that are determined by the GMC. The rules require that the GMC must submit its expenditure estimates under generic headings, for approval by the Council, and that strict limits be set on expenses. Clearly it is impossible to know in advance, in detail, how much will be spent, how and when, but there is no doubt that the overall expenditure framework, setting out purposes and limits, must be set out in a proper budget. It is possible that, in practice, as more experience is gained with the budgeting process over the years, estimates will become more precise and unpredictability will be reduced.

The Member States, as noted earlier, contribute to funding in equal shares, which means in practice that the budget is limited to the capacity of the financially weakest member, and it also highlights the equality of Member States and the absence of any pretension to supranationality.

Another question to be examined is international recognition of MERCOSUR's legal personality of international law.³

As the creature of a group of states, any international organization has a derived personality – derived from the will of its members.

Yet, under international law, it takes more than the will of a few states to establish a rule. The same goes for international organizations. There are no mechanisms for recording or granting formal and specific acceptance of the existence of an international organization. Recognition of its existence can be accorded in many different ways, and also by omission.

Thus, by producing a study of MERCOSUR and its effects on international trade, the World Trade Organization and its members are recognizing the existence of MERCOSUR. We may say, in this respect, that recognition of an international organization by third parties, or by non-Member States, occurs not through the way in which it relates to them, but through the relationship that will occur.

As we shall see in the following section, under “International Effects”, the treaties constituting MERCOSUR produce international effects.

Among these are provisions relating to non-signatories, for example, stipulations in favor of third parties that may be mentioned therein. But these effects do not stop there – they extend to the issue of legal personality of international law and the effects we are examining here.

Flowing from the responsibility for representation and for dealing with non-Member States are certain privileges, as J.F. Rezek has noted:

“An organization does not only enjoy privileges at the location of its headquarters. It has the right to represent itself both in the territory of Member States and in that of states that are not party to it, but with which it expects to maintain relations of some kind. Its external representatives, in both cases, must be members of its secretariat – i.e., they must be neutral officials – and they must enjoy privileges similar to those accorded the diplomatic corps. As well, its facilities and goods must enjoy the inviolability customary under diplomatic practice”.⁴

A further relevant aspect of international organizations, including MERCOSUR, is the possibility of accession by new members. This takes place through the rule for setting limits on accession in the instituting Treaty. These take the form of conditions of accession, one of which will be the concurrence of a majority of members, in some cases, or unanimous concurrence in other cases, such as that of MERCOSUR. The second condition may vary from one organization to the next, but there is always a geopolitical criterion, as was adopted by MERCOSUR. In article 50, the Protocol of Ouro Preto provides that:

With respect to accession or denunciation, the rules established in the Treaty of Asuncion shall apply to this Protocol. Accession to or denunciation of the Treaty of Asuncion or to or of this Protocol shall signify, by law, accession to or denunciation of this Protocol and the Treaty of Asuncion.

The latter Treaty provides, in chapter IV, Accession, article 20:

This Treaty shall be open to accession, through negotiation, by other member countries of the Latin American Integration Association [ALADI], applications from which shall be examined by the States Parties after five years have elapsed from entry into force of this Treaty.

Notwithstanding, applications submitted by member countries of the Latin American Integration Association that are not party to subregional integration schemes or to an extra-regional association may be considered before the expiry of that period.

Approval of applications shall be subject to unanimous decision of the States Parties.

There was no provision for exclusion as a form of sanction in the Treaty of Asuncion, nor in the Protocol of Ouro Preto, although such a measure is common in other organizations.

Withdrawal was however provided for, through denunciation of the respective treaties. The Treaty of Asuncion states, in Chapter V, Renunciation:

Article 21. A State Party wishing to release itself from this Treaty must communicate this intention to the other States Parties in an express and formal way, and must within 60 days deliver its document of denunciation to the Minister of External Relations of the Republic of Paraguay, which shall distribute it to the other States Parties.

Article 22. Once the denunciation has been formally entered, all rights and obligations pertaining to the denouncing state in its condition as a State Party shall cease to have effect, *but those relating to the liberalization program of this Treaty shall remain in effect, as well as those relating to such other aspects as the States Parties, together with the denouncing state, may agree within the time limit of 60 days following formalization of the denunciation.* These rights and obligations of the denouncing state shall remain in effect for a period of two years after the date of formalization (my italics).

It should be noted that, although obligations and rights may cease, those relating to the liberalization program, and on which an agreement has been reached, will persist.

The Liberalization Program has been carried almost to completion, and only a few listed products remain outside the program⁵. These exceptions to the general regime will disappear by the year 2006. This means that, despite any denunciation, goods will circulate freely, unless customs tariffs are imposed during the time period referred to. Meanwhile, the fact that it no longer belongs to a regional integration system would mean that that state would have to extend such advantages to the other members of the WTO, in accordance with the most-favored-nation clause. Thus, a state withdrawing from the organization will either have to renounce such advantages, or renegotiate them, at the risk of finding itself in a disadvantaged position vis-à-vis all the other states.

2. Effects of the Treaty

The effects of treaties are classified by doctrine, traditionally, into effects between the parties and effects vis-à-vis third parties. Note that the relative importance of the treaty grows in direct relation to the number of contracting parties and the scope of its objectives.

But it should also be noted that the effects of the Treaty of Asuncion make themselves felt both at the international level and within the internal workings of the signatory states. This, then, is the classification that we shall adopt, because it is of greater practical interest.

a. International effects

The international effects of the Treaty of Asuncion are of both a global and a regional nature. In both cases, they may or may not affect third parties. The issue of the effects with respect to third parties is specific to treaties of law (multilateral), and only exceptionally to contractual or bilateral treaties, as Professor Vicente Marotta Rangel has reminded us in his lectures.

The Treaty is subject to the general rule of compliance in good faith, which is applicable to all treaties, and which was established by the convergence of wills among sovereign states.

This manifestation of will was intended to create rules that would be binding upon signatories in their relations with each other, in terms of certain rules of conduct. The term "Treaty" is synonymous with agreement, protocol, convention, pact, declaratory act, statute, charter, exchange of notes etc.⁶

The Vienna Convention on the Law of Treaties, in article 26, provides to this end that every treaty in force is binding upon the parties to it and must be performed by them in good faith. This is the principal of *pacta sunt servanda*. Treaties come into force after certain formalities or procedures have been fulfilled, including those of ratification. But the obligations created by them are binding as soon as they enter into force: international law imposes on the signatory the duty, in good faith, not to oppose or obstruct measures that would give effect to the treaty. The contractual nature of the obligations arising from international agreements means that they are binding only upon the signatories. In effect, article 34 of the Vienna Convention on the Law of Treaties establishes as a general rule that "a treaty does not create either obligations or rights for a third State without its consent".

Thus, as noted earlier,

“The general rule of which we are speaking transforms the value of the obligations unilaterally assumed by any state that has agreed to

observe, in its relations with another state or states, the rules enshrined in the text of the Treaty; it objectifies those rules, so to speak, turning them into a legally binding set of rules....”⁷

Some writers, however, have questioned whether so-called non-binding agreements are subject to the principle of *pacta sunt servanda*.⁸

This issue will be of interest with respect to certain rules with an “integrationist” thrust, as we shall see.

In any case, while treaties, like contracts, produce effects only between their parties, and do not create obligations or rights with respect to a third state without its consent, article 35 of the Convention provides that, with such consent, such obligations may indeed arise:

“An obligation arises for a third State from a provision of a Treaty if the parties to the Treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.”

“Third party”, for these purposes, refers to any state or legal person under public international law that is not party to the Treaty.

Paul Reuter⁹ has said that an international organization created by a treaty, although it is not party to that treaty, cannot be considered as a third party in relation to that convention.

The most common method by which a treaty produces effects for third parties is through the device, also found in the law of contracts, of a provision in favor of others, in this case in favor of third parties.

This is a question of doctrinal interpretation, and it has both its defenders and its detractors. But the fact is that in practice there are many treaties that contain this formula, as has been pointed out by Eduardo Jiménez de Arechaga¹⁰:

“We may say, in light of extensive international practice, that the provision in favor of third parties has been transformed into one of the most effective procedures for giving general scope to rules that can only be enforced through the agreement of a limited number of states,

and for conferring upon these rules a sphere of application that extends beyond the group of contracting parties who agreed to its establishment.”¹¹

In article 20, the Treaty of Asuncion opens the possibility of accession by third parties, members of ALADI, and article 50 of the Protocol of Ouro Preto confirms this rule. This has to do with the provision in the 1980 Treaty of Montevideo, article 44, which created an exception to the most-favored-nation clause.

Yet accession is subject to conditions. In fact, it is possible to establish conditions for the exercise of a right flowing from a provision in favor of third parties, pursuant to article 36(2) of the Vienna Convention on the Law of Treaties:

“A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.”

The Treaty of Asuncion and the Protocol of Ouro Preto provide for the accession of other countries of the region, but they oblige them to accept those texts, and any supplements to them, in their entirety.

In accordance with the most-favored-nation clause¹², a treaty may have effects on third states benefiting from that clause. This clause is found in ALADI and in the WTO agreements, to which MERCOSUR members are parties, and hence there is the possibility of extension, barring reservations.

These are the principal effects that conventions for cooperation and integration¹³, such as those instituting MERCOSUR, may produce.

i) Effects of regional scope

The Treaty of Asuncion, as we have seen, is part of the broader framework of ALADI, and is hence considered as one more economic complementarity agreement¹⁴, in ALADI terminology. This fact thus allows for its extension to all countries of the region. On the other hand, its direct effects extend only to the signatories. Indirectly, however, it embraces the other parties protected by the clauses of the Treaty of Montevideo, in particular the most-favored-nation clause.

Yet, we must ask, are the citizens of states signatories to the Treaty not third parties with respect to this juridical act?

It would seem logical to say that, where a treaty establishes rights or duties for the subjects of a state, those persons cannot be regarded as third parties with respect to that treaty (although they may suffer its effects, since these are given force through the will of the signatory states). This is why the Federal Constitution provides that treaties must be approved by Congress¹⁵ in order to become part of Brazilian law.

In the case of treaties that establish free trade zones, common customs zones or other forms of economic cooperation or integration, there are immediate, albeit indirect, effects on the citizens of the countries that have signed such agreements. This is the case with MERCOSUR, and in its system for dispute settlement this fact is fully recognized by the access it offers to private parties.

ii) Effects of global scope

At the international level, MERCOSUR is subject to the parameters set forth in the context of the Charter of San Francisco, the UN and its component institutions.

No less important, these contain rules relating to the permanent validity of the Vienna Convention on the Law of Treaties, which has had international force since January 27, 1980.¹⁶

As is well known, among the sources of Public International Law, rules arising from treaties are preponderant in quantitative terms. These may be either bilateral or multilateral, depending on the number of contracting parties. Their structure and their effects are however very similar, although their objectives may differ widely.

b) The effects of treaties in Brazilian domestic law

The interaction of international with domestic law goes beyond the procedure for incorporating treaties. It also involves establishing a relationship of hierarchy between treaties and domestic law, and the possibilities for revocation or mutual modification.

A treaty, like any contract, is a juridical act, but it also has a prescriptive character.

Where an agreement prescribes rules of conduct for the subjects of signatory states, those states have two ways for ensuring that such rules are obeyed, and thus for fulfilling their obligations, once they become part of domestic law.

One way is simply to promulgate the treaty, as such, whereupon it becomes a part of domestic law. This is the case with treaties whose clauses are “self executing”. It should be noted that a treaty may have some clauses that are of this kind, and others that are not.

The alternative way is to issue rules (in the form of a law, decree, regulation, etc.), after promulgation, to produce compliance with the international obligation so created, thereby incorporating the imperatives of the convention into law. This formula is used when the treaty obliges the signatory state to ”make efforts” or to ”take the steps necessary” to achieve a certain result¹⁷ (in this case its clauses are not self-executing), or when, although the clauses are self-executing, it is intended to consolidate the new rule with other, pre-existing ones.

In the Brazilian system, we find an example in the case of the Geneva Convention on Checks¹⁸, the provisions of which were at first incorporated directly, and which was supplemented by domestic legislation, to the extent that the latter was not revoked by the convention. Subsequently, it was decided to consolidate the rules of both in the Checking Law.¹⁹

The difference in content – prescriptive-contractual or purely contractual – means that the subjective right of demanding fulfillment of a treaty lies solely with other signatories, or their citizens.

In Brazil, since the 1988 Constitution came into effect, we have certain rules of international law which, once introduced into Brazilian law, can no longer be revoked, because they fall under the category of clauses that are, so to speak, “written in stone”. These arise from treaties which deal with individual rights and guarantees, and which as such produce subjective rights of the citizenry. Thus, the rights flowing therefrom (rather than the treaties themselves) can no longer be abolished or revoked.²⁰

Other rules of international law, except for those of a taxation nature, have the same hierarchy as laws, and thus are subject to the same rules governing their validity.

It is also necessary to understand to whom the command emanating from the accord is addressed, in order to determine whether subjective rights flow from it, and for whom.

When the command is addressed to the Executive, and the latter commits itself to take certain steps that create rights for residents of Brazil, those residents may have the right to demand fulfillment, once the treaty has been inserted into domestic legislation. In this case, the provisions of Article 5 (XXXV) of the Federal Constitution come into play.

On the other hand, if the Executive Power commits itself to a certain act – for example, to respect a MERCOSUR rule requiring Member States to create multinational teams at their respective borders – citizens may not bring action to enforce that provision; this may only be done by a member state, or by MERCOSUR as an international organization. A good example in this regard was the Treaty that established the International Coffee Organization, which one year after its approval had not been promulgated by the Brazilian President, and had therefore not yet come into force. The Treaty has a provision whereby the members must make efforts to prevent the sale and advertising, under the name of coffee, of products containing less than the equivalent of 90 percent green coffee as its basic raw material. This rule establishes an obligation of means, and not of results, for Member States, and does not create subjective rights for the citizens of those states, who are for purposes of that clause deemed to be third parties.

The command, in this case, is addressed to the States alone, and it is they who are responsible for issuing rules or taking steps necessary to give effect to it. Only other signatory states have the right to demand compliance with the agreement, and this right is limited by the juridical (and, I should say, the political) possibilities of the State.

There are also treaties that are addressed both to States and to their citizens, creating duties for one and rights for the other. This is the case of the Caracas Convention on Territorial Asylum²¹, wherein the parties undertake to respect certain rules relating to asylum, which redound to the benefit of

asylum seekers. The latter will have the right to invoke the Convention directly in relation to those rules.

Finally, as an example of a Treaty that governs the conduct of persons residing in the territory of States Parties (and thus creates subjective rights), we have the old Bustamante Code²², the provisions of which are addressed directly to the individuals whose conduct it governs, and who may therefore demand its enforcement.

Indeed, as Minister J.F. Rezek has written,²³

It is difficult to understand, then, the oft-repeated doubts as to whether or not treaties produce effects on individuals and on corporations under private law.

All that is needed, in effect, is to examine the purport of the treaty, as introduced into domestic law, and identify to whom its contents are addressed, in order to determine whether it is directed at individuals or at the State alone. Treaties, then, have various functions as part of domestic law. It is important to determine whether they have the same hierarchy as laws.

i) The hierarchy of laws and treaties

Treaties, once they are inserted in Brazilian law, are deemed to be laws and to produce the effects of law on other laws²⁴. It is clear that, in the Brazilian system, as is well known, and as Prof. Rangel has explained²⁵, they have a hierarchical ranking below that of the Constitution, and hence they are subject to the test of constitutionality.²⁶

In fact, if a rule of international law were introduced into domestic law and operated there as if it were law, there would be no need to give it hierarchical superiority. The hierarchy among laws is the same, except in the special case of supplementary [*complementares*] laws. In the Brazilian system, there is a distinction between the latter – which depend on a special quorum for their approval – and ordinary laws. The former take precedence over the latter. For that reason, as was said in the case of ILO Convention 158²⁷, a treaty that deals with matters typical of supplementary law has no higher ranking than ordinary law, because its approval does not require the quorum stipulated for the approval of constitutional laws²⁸. For it to have

effect, then, even after promulgation, a supplementary law must be issued²⁹, incorporating its precepts into Brazilian law.

ii) Norms derived from MERCOSUR

The advent of legislation flowing from the international commitments assumed by Brazil under the Treaty of Asuncion and the Protocol of Ouro Preto, which instituted MERCOSUR, has the effect of creating a new regime governing the production and marketing of goods, which is essential for any common customs area.

These treaties established the international organization that we are examining here, MERCOSUR. The free trade area formed by the four signatory countries was made subject to the *free circulation of goods*³⁰, and a *common external tariff* was instituted for goods from beyond the region.

This insertion is to be done, however, in a cooperative manner, with no supranational aspect.

The reciprocity³¹ flowing from the Treaty of Asuncion must be applied in domestic law, in the course of implementing integrationist measures. As the Protocol of Ouro Preto wisely provides, these are to come into force simultaneously in all countries of MERCOSUR. This saves companies from having to spend money before there is legal certainty about what the rules will be.

Cooperative integration institutions have their own mechanisms for requiring states to adapt their conduct to common objectives. In the present case, that mechanism is the creation of MERCOSUR³².

This integration process means that certain domestic rules in each country will have to be set aside in favor of common norms of integration law, relating to the free circulation of goods. Thus, a common customs zone implies the free circulation of goods and the absence of tariff and non-tariff barriers, and this requires legislative harmonization.³³

In fact, there would be no free trade zone nor any common customs zone if there were impediments to the free circulation of goods, or if there were distinctions between the nationals of one state and those of another, since for purposes of the market – or of trade in goods – the region is a single unit.

The treaties that created MERCOSUR in this sense revoked, implicitly or expressly, all domestic rules that were in conflict with them.

B. STRUCTURES OF MERCOSUR

The MERCOSUR bodies are primarily of a deliberative nature. *Vis-à-vis* the member countries, their administrative and prescriptive powers are limited, in general, to the organization itself. But although those bodies have little effective power over member countries, in contrast to the situation with the EEC or Benelux, this does not mean that they are ineffective or inadequate. It is enough to measure the speed with which the integration process has progressed to gain an accurate idea of how effective and efficient they are in comparison with others. Comparisons with ideal models are merely intellectual exercises: legal models must be tested against the reality in which they operate. If we are to compare them, we must do so with other models within the same sphere, taking due account of anthropological, sociological, economic differences, etc., or of the type of culture and society in which they are to be inserted.

The fact that MERCOSUR is an international organization also adds a new function, that of representation, in addition to those that predated the Protocol of Ouro Preto. Thus, MERCOSUR today has bodies with representative, administrative, standards-setting and dispute-settlement functions, in addition to its economic institutions.

1) Characteristics of the MERCOSUR bodies

The subsystems created within MERCOSUR reflect its dynamic nature, as well as the deliberate choice to institute a cooperative system among the Member States.

Since they do not exercise directly any supranational activities, but only international ones, their characteristics are a direct reflection of their functions.

These may be divided into three categories: those that serve for the representation and administration of MERCOSUR, those that function as a channel for creating the rules that will govern its internal relations, and finally those for resolving disputes among participants. The first two are grouped into one subsystem, and the third into another.

a) Prescriptive, administrative and internal control subsystem

The basic feature of the prescriptive, administrative and internal control subsystem created by the Treaty of Asuncion and retained, with only slight modifications, by the Protocol of Ouro Preto is the rule of unanimity.

In fact, since the States Parties did not wish to create a supranational but rather an international institution, the rule of unanimity allows them to express a common will. This is the same as the national will, because the norms have to be introduced in the Member States by means of ratification and legislative approval, and hence their respective parliaments have the opportunity to declare themselves on behalf of the citizens they represent.³⁴

The fact is that the existing disparities among the members did not permit the immediate adoption of a system of weighted voting, and some of the participants were bound to feel themselves disadvantaged under either a weighted or an equal voting system.

MERCOSUR involves no devolution of powers to an international body. What was created was yet another administrative responsibility of ministers, originating in domestic law, but exercised at the same time in international law, in a deliberative process that can create obligations, within the areas of their domestic competence and of that which the constituting treaties assign to them.

The principal organs are the Common Market Council and the Common Market Group. These are assisted in their work by the MERCOSUR Trade Commission and by the MERCOSUR Administrative Secretariat.

Specifically, Article 9 of the Treaty of Asuncion provides as follows:

The administration and execution of this Treaty and of such specific accords and decisions as may be adopted within the juridical framework established during the transition period is the responsibility of the following organs:

- a) The Common Market Council
- b) The Common Market Group

The Protocol of Ouro Preto, in turn, says in article 2:

The Common Market Council, the Common Market Group and the MERCOSUR Trade Commission are intergovernmental bodies with decision-making powers.

This latter provision, by adding the Trade Commission to those cited in the Treaty of Asuncion, has underlined the intergovernmental character of those organs, and reaffirmed the initial choice made by the members of MERCOSUR.

1) The Council and the Group

A reading of the Treaty of Asuncion shows that the functions of the Council and of the Group are limited, essentially, to administration and to serving as a negotiating forum for MERCOSUR.

The Common Market Council (CMC)

The Protocol of Ouro Preto confirmed those provisions in Section 1, articles 3 to 9, but added the following:

To negotiate and sign agreements on behalf of MERCOSUR with third countries, groups of countries and international organizations” (Article 8 (IV)).

With respect to the Common Market, for which it is the “senior body”, the function of the Council is “to conduct policy and to take decisions to ensure compliance with the objectives and time limits established for constituting the common market” (Article 10, TA). This was amended by the Protocol of Ouro Preto, which added “objectives established by the Treaty of Asuncion and to achieve the final constitution of the common market” (Article 3).

It is clear that the Council has been given a political and diplomatic function with respect to MERCOSUR policy and representation, and that it has been confirmed in the functions it formerly had, as specified in article 8 of the Protocol of Ouro Preto.

Neither these functions nor the manner of decision making give rise to any administrative relationship between the Council and the residents of MERCOSUR countries.

Decisions of the Council, although they obligate the contracting parties, do so indirectly, since they must be executed by the respective competent national bodies, as provided in article 38 of the Protocol of Ouro Preto:

The States Parties³⁵ commit themselves to take all measures necessary to ensure, within their respective territories, the observance of the norms emanating from the bodies of MERCOSUR, pursuant to article 2 of this Protocol.

Single paragraph. The States Parties shall inform the Administrative Secretariat of MERCOSUR of the measures they have taken to this end.

This means that decisions will be incorporated into the legal systems of each country in accordance with its own domestic procedures. In short, they will be treated at times as if they were new international accords, and at times as executive acts, and they will be implanted through administrative measures (if they are of a regulatory nature, they will not conflict with domestic law, and they will fall within the Executive Power's area of jurisdiction).

Finally, with respect to the manner of decision making, the rule of unanimity applies (Article 16, TA).

The Common Market Group (GMC)

The GMC, according to the wording of the Treaty, is "the executive organ of the Common Market, and shall be coordinated by the Foreign Ministers" (Article 13). This coordination function was eliminated by article 10 of the Protocol of Ouro Preto.

Its functions are now to be those stipulated in article 14 of the Protocol of Ouro Preto, and include: ensuring compliance with the Treaty; proposing draft decisions to the CMC; taking the steps necessary to carry out decisions taken by the Council; deciding work programs for moving towards establishment of the common market; creating, amending or abolishing organs, such as working subgroups and specialized meetings; negotiating

agreements on behalf of MERCOSUR, by delegation from the CMC ; and administering the international organization and supervising its activities.

The observations made with respect to the functioning of the Council also apply to the GMC, which performs activities in support of the Council. It is important to note that the GMC may, upon express delegation (Article 8 (IV)), represent MERCOSUR, since it may act as the agent of the Council in negotiating treaties, pursuant to article 14 (VII) of the Protocol of Ouro Preto:

To negotiate, with the participation of representatives of all States Parties, by express delegation of the Common Market Council and within the limits set forth in specific mandates granted to it for this purpose, agreements in the name of MERCOSUR with third countries, groups of countries and international organizations. The Common Market Group, when it has a mandate to do so, shall proceed to sign those agreements. The Common Market Group, when so authorized by the Common Market Council, may delegate these powers to the Trade Commission of MERCOSUR;

Once again, the rule of consensus appears in the reference to “participation of representatives of all States Parties”.

The MERCOSUR Trade Commission

The MERCOSUR Trade Commission (CCM) has broader powers (Article 19 of the Protocol of Ouro Preto). Its composition, as in the case of the other MERCOSUR bodies, is quadripartite. The CCM was created by Decision 9/94, and was consolidated by articles 16 to 21 of the Protocol of Ouro Preto.

It is interesting to note that, apart from its administrative functions, it also has representative functions which, as with the GMC, are of a delegated nature.

The CCM was defined by the Protocol of Ouro Preto as an intergovernmental decision making body. This is common to all the bodies of MERCOSUR, and is of the essence of this international organization and of the intentions of the four member countries, as we have seen.

The decision-making power is limited to matters within the jurisdiction of the CCM, i.e. those relating to the exercise of its functions and attributes. These are found in article 19 of the Protocol of Ouro Preto.

The first function – which is equivalent to an attribute – is to be responsible for the instruments of trade policy. Hence it must monitor their application and decide on inquiries from Member States about compliance with such instruments.

Because it is hierarchically subordinate to the GMC, it reports to the latter on all questions for which it is responsible. It must also perform any functions that the senior body may assign to it. The CCM also has the power of initiative, and is empowered to propose customs and commercial rules, or amendments thereof, to the GMC. The Protocol of Ouro Preto does not make clear whether these initiatives relate to the rules of MERCOSUR or to the internal rules of the Member States. In the latter case, they will merely constitute suggestions to be routed through the GMC to the senior authorities.

Another function-attribute of the CCM is to take measures with respect to application of the single external tariff, with a view to its uniform administration and application. In this case as well, its power is limited by the intergovernmental nature of MERCOSUR.

Finally, the CCM can draw up its own internal regulations (which must be approved by the GMC), and it may establish technical committees as it sees fit to carry out its functions-attributes.

It also has a judicial function, as will be examined when we turn to the dispute settlement mechanism.

ii) Auxiliary organ

The Administrative Secretariat of MERCOSUR (SAM) can be compared with the GATT Secretariat, prior to the Uruguay Round, as to its functions and activities. Independent of this comparison, we see that the purpose of the Secretariat, initially, was to maintain records and documents and to communicate GMC activities, as well as to provide logistic support for meetings of the Council and the GMC.

The Secretariat did not enjoy powers of initiative, given the limitation on its functions and its subordination to the GMC (see Internal Regulations of the GMC, articles 32 and 33), and hence it could not be thought of as a true international organization. This, of course, was subsequently created by the Protocol of Ouro Preto, which did not otherwise substantially alter the functions of the Secretariat.

The Protocol of Ouro Preto makes clear that the SAM is an operational support body that is to provide services to the other bodies of MERCOSUR. The current functions of the Secretariat include those of file-keeping, recording, dissemination, and providing logistic support for meetings of the CMC, GMC, and CCM (article 32 of the Protocol of Ouro Preto).

These functions also reflect the quadripartite character of MERCOSUR, which is typified by the rotation of its presidency and by the egalitarian manner in which its budget is funded. The Director is replaced every two years, on a rotating basis

If we look into the history of the process of integration that led to MERCOSUR, we find that the political conditions that led to the choice of institutions of a diplomatic nature have apparently not changed, a point that can also be seen in the development of the Secretariat. Meanwhile, there has been great progress in the drive towards integration, and certain sectors are pressing for further change and a greater degree of supranationality. Is it time for a change in the nature of these institutions?

Before examining this question, we shall look at the dispute settlement mechanism.

b) Dispute settlement subsystem

The choice of a dispute settlement mechanism implies, first, a decision on two aspects: the scope of the system, and its functions. Every situation, public or private, requires its own system. Yet, as I have said on another occasion, there is a sociological pattern that we may say is almost³⁶ universal.

Whenever a conflict of interests arises, the parties will attempt to negotiate it. They may turn to a third party to serve as a facilitator, through mediation, conciliation, good offices, acting as intermediary, etc. And if these efforts

fail, the dispute can be submitted to a third party for resolution as an arbitrator, judge or expert. The alternative is conflict.

In the international area, such structures always provided for negotiation, facilitation and arbitration, as an alternative to armed conflict. Only at the beginning of this century did tribunals³⁷ come into existence - in this case the Permanent International Court of Justice, today the International Court of Justice (The Hague), which served as a model for others with regional or specialized jurisdiction. It should be noted, however, that international tribunals have for the most part been of optional jurisdiction, and those of compulsory jurisdiction have appeared only in the second half of this century.³⁸

In the case of dispute settlement mechanisms within systems of cooperation and integration, these will clearly depend on the degree and type of integration desired.³⁹

Political systems (and integration mechanisms are political as well as economic in nature) have found themselves forced to create subsystems in order to meet the need (essential to their continued existence) for settling their inevitable disputes, through concrete application of the rules that those political systems have adopted for themselves, either as an expression of social consensus or as something imposed on society.

The judicial subsystem, which is responsible for settling disputes in modern societies, is a complex set of rules, structures, procedures and functions, the keystone of which is no doubt the ability to place adjudication powers in the hands of a third party, removed from the dispute, impartial and neutral, and subsequently to use the power of the state to ensure that the third party's decisions are complied with.

However, there are societies, some of them quite sophisticated, that as in the most primitive societies make no provision for the state to resolve conflicts among their members, and that rely instead on mediation, conciliation and negotiation.⁴⁰

What is of interest at this point, we must stress, is what distinguishes the action of the disputants from that of the third parties that intervene in the processes. The function of the disputants may be passive (subject to the decision), or it may be active (resolving the dispute).

The act of submitting a dispute to the adjudication of a third party implies according the latter a power greater than that of the disputants (provided they cannot escape its jurisdiction) which is the case with a judicial system, or to delegate to it powers emanating from the disputants, where they themselves elect or appoint the third party to decide the question, which is the case in a system of arbitration, conciliation or mediation, or of voluntary acceptance of the jurisdiction of a tribunal.

We find this distinction also in the sphere of domestic law, where the state submits itself to “its” judges, as in the case of countries that have administrative or specialized justice systems.

This system too is hierarchical.

That is why, in the system of international relations, where all states are equal (and attempt as far as possible to preserve their sovereignty by recognizing and insisting upon their equality), negotiation is the favored method, followed by conciliation and mediation, next by arbitration, and finally (if rarely) by recourse to the "judicial" formula.

These two last methods of resolving disputes appear in international law only on a voluntary basis, through an act of will, a treaty, in which submission is not always mandatory, as in the case of the ICJ, the PCIJ, or the ICSID.

However, once the economic integration process has made progress in building a structured political system, this will require the existence of a judicial subsystem of its own⁴¹. This phenomenon has been clear throughout the history of the European Union and of Benelux.

Brazil has a long tradition in the peaceful settlement of disputes. It adhered to the Hague Convention for the Pacific Settlement of International Disputes of 29 July 1899.⁴² This long-standing Treaty deals with mechanisms for resolving international disputes: good offices and mediation (Title II), international commissions of inquiry (Title III), and international arbitration (Title IV). It led to creation of a Permanent Court of Arbitration “accessible at any time and which shall function, unless there are stipulations by the parties to the contrary, in conformity with the rules set down in this Convention” (article 20).

The Hague system has been applied in South America for many years. The last dispute that occurred was with the United Kingdom, a country outside the region which nevertheless still has colonial territories, and one that has refused to seek a peaceful settlement for the dispute over the Malvinas Islands, which Argentina claims as an integral part of its territory. The long period of peace demonstrates the effectiveness and usefulness of these mechanisms. Despite this, these formulas are not applicable or effective in all situations.

For this reason, they have had to be adapted to the peculiarities of economic cooperation mechanisms. The GATT was the first effort at adaptation, through provisions for consultation mechanisms (corresponding to negotiations), technical panels and recommendations by the contracting parties. Here again there was an element of autonomy, since countries had the right to refuse to participate in consultations. Meanwhile, sanctions had to be modified to give them greater specificity⁴³. It is only now, with the WTO, that the disputes settlement system has been made compulsory, and sanctions have become more effective.⁴⁴

In integration systems, where the application and interpretation of supranational rules can lead to disputes, it has been found necessary to create a specialized subsystem for resolving or adjudicating such disputes, which requires a greater degree of specificity than is found in traditional public international law.

This shows, on one hand, that the mechanisms adopted by MERCOSUR are based on precedents,⁴⁵ and on the other hand that by its very nature it was essential to create a specific formula adapted to its political and economic reality.

In fact, we may say that the disputes can be settled within MERCOSUR both on the basis of the mechanisms of public international law referred to above, and those of private international law.

We may confirm as well that in addition to these mechanisms, which persist except where they have been excluded by decision of the parties, use is also made of the mechanism provided by the Protocol of Brasilia, as modified by the Protocol of Ouro Preto.

We shall now turn to examine this mechanism.

The Treaty of Asuncion, which laid the basis for this subsystem in its annex III, provides that disputes between states must be addressed, first, through direct negotiations between the litigants, and subsequently, in successive stages, through action by the Common Market Group or the Common Market Council.

The Treaty says nothing about disputes that may arise between private persons and one of the States. Yet these do occur, and they are dealt with in the Protocol of Brasilia.

This flows from an express provision in the annex referred to, paragraph 2, addressed to the contracting parties, who were given 120 days to establish a “Dispute Settlement System to remain valid during the transition period”, providing furthermore that

“by 31 December 1994, the States Parties shall adopt a permanent system of dispute settlement for the common market”.

The Member States of MERCOSUR are subject to the dispute settlement system, in the capacity of litigants. By means of article 8 of the Protocol of Brasilia, Member States expressly recognized

“as mandatory, *ipso facto* and without the need for any special agreement, the jurisdiction of the arbitration tribunal which in each case is established to hear and resolve all disputes referred to” by the Protocol.

Although article 1 of the Protocol of Brasilia says that controversies refer to those between the States Parties, in fact private persons also have access to the system, thanks to the provisions of Chapter V, which deals with claims brought by private parties.

In this case, since a private claim must be channeled through the National Section, it is understood that, if the claim is accepted, it is the State Party involved that must appear as litigant.

What distinguishes the MERCOSUR dispute settlement system from the traditional one under international law is precisely its specificity – and that

ratione personae lies in the exclusive access of Members of the Organization⁴⁶, while the *ratione materiae*, as we shall now see, lies in the sources of law.

The scope of application of any dispute settlement system during the implementation phase of MERCOSUR was necessarily limited by its transitory nature. But in fact the limitations were not only time-related. There was another, which flowed from the fact that opting for an integration process via the consensual route limited the possibility of disputes to those that might arise between states, since private parties had no standing in the organs of MERCOSUR (although as we have seen they are subject to the effects of its deliberations).

The short time period allowed under the Treaty of Asuncion for implementing MERCOSUR meant that “disputes that may arise between States Parties as a result of application of this Treaty” would represent the initial area of jurisdiction of the dispute settlement system. Thus, from the subject-matter viewpoint, jurisdiction would be interpretive of the text of the Treaty, since application would depend upon its reading.

Yet the Protocol of Brasilia, in article 1, broadens this jurisdiction, to include:

“Interpretation, application or noncompliance with the provisions of the Treaty of Asuncion, the agreements signed thereunder, as well as decisions by the Common Market Council and Resolutions of the Common Market Group”.

The Protocol of Ouro Preto, which governs the new but permanent (the definitive word is not “adequate”⁴⁷) phase of MERCOSUR, establishes in chapter V – Juridical Sources of MERCOSUR -- as follows:

Article 41

1. The Treaty of Asuncion, its protocols and additional or supplementary instruments;

II. Agreements signed within the framework of the Treaty of Asuncion and its protocols;

III. Decisions of the Common Market Council, Resolutions of the Common Market Group and Directives of the Trade Commission of MERCOSUR, adopted since entry into force of the Treaty of Asuncion.

Article 42

Norms issued by the organs of MERCOSUR, referred to in article 2 of this Protocol, will be binding and must as necessary be incorporated into domestic legislation in accordance with the legal procedures of each country.

In this way, the *ratione materiae* jurisdiction of the dispute settlement system was expanded to include Directives issued by the Trade Commission, and by the expression "its protocols and additional or supplementary instruments", meaning not only protocols already signed but also those that might be negotiated in the future.

These jurisdictions have specific purposes in light of the function that the dispute settlement system was specifically intended to serve.

The consensus rule also flowed from the choice of cooperation as a means of achieving integration, thereby avoiding the creation of supranational bodies.

The other characteristic is its transitory nature: the intent was to establish rules for the period leading up to the existence of a customs zone. This was to be the common market platform at the end of the fixed five-year period. The objective of the customs zone has been only partially achieved, since there are still steps to be taken and restrictions to eliminate, with respect to national lists. Its transitory nature therefore remains, although its institutional bases are better defined. The desired common market is not yet at hand.

In the initial transitional phase, the main functions of the dispute settlement solution as adopted were two: to overcome roadblocks in the case of specific situations that, under the rule of consensus, could pose an obstacle to pursuit of the integration objective and, on the other hand, to support implementation of the Treaty, by ensuring that its terms were correctly interpreted, imposing its application in case of omission, monitoring

application of the measures called for under the Treaty, both by the parties and by the Council and the Common Market Group.

In addition - this was not expressly mentioned, but flows from the logic of the system - there were the fact-finding functions as found in GATT panels.

Now, in this latest phase, the objectives remain valid, although the sources, and hence the scope of *ratione materiae* jurisdiction, of the system have been expanded.

2) Institutions with economic and fiscal functions

In addition to those of a political nature, with prescriptive and internal control functions, including dispute settlement, MERCOSUR has institutions with functions of an economic and fiscal character.

Among the most important institutions in this area are: the process of linear, gradual and automatic reduction of tariffs; the single common tariff; coordinated macroeconomic policies; and the principles of gradualism and reciprocity.

These may be divided into two categories, transitory and permanent.

a) Transitory economic institutions

The transitory economic institutions are aimed at establishing a common customs zone, and their functions will cease once this has been achieved. The first and most important of these institutions relates to customs tariffs; the other two deal with the process of integration in the general sense.

i) Linear, gradual and automatic reduction of tariffs

The trade liberalization program, as provided in the annexes to the Treaty of Asuncion,

“Will consist of progressive, linear and automatic tariff reductions, accompanied by the elimination of non-tariff restrictions or measures of equivalent effect”⁴⁸.

This provision represents the essential framework for eliminating tariffs and achieving the free-trade zone.

This was another innovative and important aspect in the structure of the Treaty of Asuncion, where the method selected for eliminating tariffs in the internal transactions of MERCOSUR was to remove them gradually. Coordinated macroeconomic policies were to accompany and supplement this process.

The process of linear, gradual and automatic reduction of tariffs constituted what one noted author has called "customs shock treatment"⁴⁹. This process represents a break with the tradition of grand integration projects for Latin America⁵⁰, and has as its ultimate objective the creation of a customs zone with a single common tariff. The negative effects of this process are compensated by the exception lists, which are themselves subject to the process of linear, gradual and automatic reduction.

ii) The exception lists

Once again, the model established in the Agreement on Economic Complementarity No. 14 was followed. Products considered most vulnerable or sensitive in each of the countries were to be protected for a longer time, by means of exception lists that were to be reduced each year by 20 percent, so that they would no longer exist as of January 1, 1995.

These lists reflected the diversity of the Member States and the need to protect the two economically weaker partners, Paraguay and Uruguay. Thus, these two countries would still have 88 and 192 protected items, respectively, in 1995 when the common market was to be inaugurated.

Now, with the modifications instituted upon implementation of the Common External Tariff, the number of products on the exception lists was 300 per country, increased in the case of Paraguay by 99 additional items, and the time limit was extended to the year 2000.

The adoption of this formula made it possible to arrive at the Common External Tariff (although with some exceptions) within a short space of four years, and to move from a free trade zone to a customs zone, although an imperfect one.

It will only be with the elimination of exceptions, scheduled for 2006, that we will have a full-fledged common customs zone. The procedure for eliminating exceptions will again be applied gradually and progressively.

The simple fact that, upon achieving its objectives, the procedure of constant and linear reductions in tariffs will be exhausted casts it in the role of a transitory institution, destined to disappear when the integration goals of the Treaty of Asuncion are achieved.

The exception lists are a safety valve against pressures arising from the tariff reduction process, offering protection to certain sectors or economic activities that would be threatened by the elimination of tariffs. But even this exception is temporary and transitory.

This is part of what has come to be called the gradualist approach to integration. It refers to application of the so-called principle of gradualism, which according to José Angelo Estrella Faria, “translates the desire of the governments involved to promote integration step-by-step, so as to allow time for the productive sectors in the two countries to adjust to the contingencies created by the partial and selective opening of markets”⁵¹.

Application of this principle resulted in creation of a series of adjustable stages, in which specific objectives were to be achieved before moving on to the next step.

Without any doubt, the principle of gradualism is associated with that of flexibility, to which the preamble to the Treaty of Asuncion refers. Because of its positioning it is, as Estrella Faria has pointed out, "a procedural directive for taking the necessary decisions as well as constituting one of the primary elements of interpretation".⁵²

b) Permanent economic institutions

i) Reciprocity

Article 2 of the Treaty of Asuncion contains another basic rule of MERCOSUR: reciprocity. It reads as follows:

"The common market shall be based on reciprocity of rights and obligations among States Parties".

The principal of reciprocity has always been a part of Brazilian international law, but for a long time its importance was obscured by the fierce opposition that Harold Valadão mounted against it, based on his radical adherence to an ideological position that prevented the illustrious professor from seeing the practical importance of the principle.

Celso Lafer, in a major and groundbreaking work⁵³, restored theoretical validity to this principal of international law, and provided an excellent synthesis of it. A reference in this text to the work of Levi Strauss encapsulates the principle nicely in the context of integration in the Southern Cone. In it, he recalls that for an anthropologist, reciprocity is "the process whereby we pass from hostility to alliance, from anxiety to confidence, from fear to friendship". Further, he argues, "reciprocity may be seen as a 'search protocol' in the process of consolidating social, economic and political interactions".⁵⁴

And what are the institutions of MERCOSUR, if not a search protocol [?] in the area of integration?

The reciprocity referred to in the Treaty of Asuncion fits the classical definition, of course⁵⁵. But reciprocity in the economic field has a very special nature, one that lies in the subjective and objective evaluation of concessions, and the content of obligations is always affected by the passage of time.

There is no doubt - given the fact that MERCOSUR is a mechanism for cooperation, and one that will extend and broaden over a long period of time, within the institutional framework that we are examining here - that the evaluation of reciprocal obligations will be increasingly more difficult, although reciprocity is an indispensable element of its institutions, as José Angelo Estrella Faria⁵⁶ has reminded us:

The rule of reciprocity is not intended to regulate the effects of the Treaty within the domestic law of the States Parties, but rather to govern relations among the parties in the context of the Treaty itself.

We are speaking here of formal reciprocity, of rights and obligations, as provided in the GATT⁵⁷, the purpose of which is to promote fulfillment of the Treaty and the achievement of its objectives. This is why it was inserted as a mechanism of control over execution of the Treaty of Asuncion.

But that insertion was done in a cooperative way, and for this reason reciprocity – under the Treaty of Asuncion - must be applied in domestic law, as the integration mechanisms are implemented domestically⁵⁸.

Thus we see that the institutions of integration, which are cooperative in nature, possess their own instruments for ensuring that states conduct themselves in accordance with the common objective that they and their partners espoused in the creation of MERCOSUR.

ii) Common external tariffs and free circulation

Another institution of MERCOSUR is the Common External Tariff (CET). It serves to cement the unity of the market and it is intimately linked with the free circulation of goods and the harmonization of policies and legislation among member states.

The CET is associated with the absence of tariffs within the integrated zone, pursuant to article 1 (1), combined with article 2 of annex I of the Treaty of Asuncion, which provides for the elimination of "customs duties and any other measures of equivalent effect that impact upon the external trade" of MERCOSUR.

Once internal tariffs are eliminated within MERCOSUR, it will be essential to its functioning that there be a CET, given the logic of the system that is being introduced.

It would be theoretically possible to have exceptions to the CET for a certain time, and indeed this is the case today in MERCOSUR. But these are temporary exceptions, reflecting the gradualism of the institutions created by the Treaty of Asuncion.

As we know, the elimination of tariffs, and their respective exceptions, are the result of a temporary institution, as discussed above.

In addition to tariffs, there are obstacles of various kinds, and it was agreed to place all of these in the same category of non-tariff barriers. These are to be eliminated, and in this respect the cooperation nature of the mechanism appears again. The elimination of non-tariff barriers is to be accomplished through measures taken internally by each country, either on its own initiative or as a result of deliberations within the GMC or one of its specialized subgroups.

iii) Harmonization

The institution of harmonization is another characteristic of MERCOSUR. I shall not deal here with the harmonization of macroeconomic policies, important though it may be, but shall focus on national legislation within MERCOSUR.

The States Parties have established for themselves the obligation:

“To harmonize their legislation in the relevant areas, in order to complete the integration process” (article 1).

We may therefore state with certainty that it is a goal of the customs union or the common market to harmonize legislation "in the relevant areas, in order to complete the integration process".

This leads us to ask what the authors of the Treaty of Asuncion had in mind when they established this goal of harmonized legislation.

According to Clovis Bevilacqua⁵⁹, Aristotle said that "law is not like fire, which burns in the same way in Persia and in Greece", in contrast to the diversity of the juridical systems that existed at that time.

Recalling the biblical story of the Tower of Babel, we may speculate that legislative differences must have arisen at the same time, given the inevitable association between law and language. At any rate, what is important is to recognize that juridical systems have long gone their separate ways, reflecting the different histories and circumstances of the people they served.

International trade brings countries closer together, particularly in the economic sphere, and gives rise to the need for legal security. The

coordinating function played by private international law, through the mechanism of conflict of laws, is insufficient or inadequate when large volumes of trade are involved.

The classic example is to be found in the United States, where differing state statutes have coexisted and continue to coexist, and are coordinated through a complex system of conflict of laws. Issues relating to trade and payments have led to the adoption of uniform laws such as the UCC and others. The need for legal security and simplicity lay behind the search for a single set of trading rules among the states of the American Federation.

Within the MERCOSUR economic space, we shall have to move beyond the phase of coordination through conflict of laws, and address the need for harmonization.

Traditionally, students of private and comparative international law have taken the route of “uniformizing” the law⁶⁰, calling for the adoption of uniform rules whether in the form of treaties and conventions on uniform laws, codified prescriptions, or regulations freely adopted by the parties, such as those proposed by the ICC and more recently by certain UN agencies.

In modern times, it is Pascoale Mancini who deserves credit for taking the initiative of proposing the standardization of laws through international treaties. He was followed by Ernst Zittelmann, the theoretician of *Weltsrecht*. In Brazil, the first to advocate legal uniformity was Professor João Monteiro⁶¹. When UNIDROIT was founded, Clovis Bevilacqua, in his opinion recommending Brazil's accession, affirmed

“the possibility of such unification, recognizing the different means employed by peoples to achieve this end, although we are far from achieving this objective in our time.”⁶²

At that time there was no distinction between unification and harmonization. Today, however, there are some who make a distinction between spontaneously uniform law and enforced uniformity.⁶³

The first refers to cases where there is a common legal genealogy, such as occurred as in newly independent countries where the law of the colonizing power was still applied. Examples are Australia, Canada, Nigeria and others

that have adopted the British system. At other times, as in the case of Japan or Turkey, legal codes have been adopted from other countries.

Yet this type of standardization, as Jacob Dolinger⁶⁴ has pointed out, addresses mainly the institutions of domestic law. The great interest in standardization, however, relates to legal institutions that "act wholly or partially at the international level, such as instruments of credit, transportation, communications, industrial and intellectual property, trade and all those human activities that are by their nature extraterritorial".⁶⁵

Josephus Jitta⁶⁶ maintained that private international law should be the instrument for harmonization, and that uniformity, flowing from uniform law, would be complementary.

In our view, private international law has aspects of harmonization, but it is above all a law for coordination.⁶⁷ This, then, is not what the Treaty of Asuncion refers to in the article cited above.

In fact, the notion of harmony lies in conciliation, in the well-ordered disposition of the parties, in agreement, in conformity. Just as in music, there can be no harmony when there is opposition and lack of concordance: there may be chords, but they will not be harmonious. Legal systems are no doubt harmonious if they have spontaneous or induced similarities, if there is parallelism in their material and essential aspects, even though they may be dissimilar in other respects, just as in music "do" differs from "mi" although the two together make for a harmonious chord.

In the case of harmonization what we have are laws, the principles of which are harmonious, i.e., consonant, although the nature of their rules may not be the same. In this manner, we might say that the laws of MERCOSUR countries are generally speaking harmonious, since they differ only in certain details, even though their norms are formally different.

In fact, the norms governing contracts, for example, are no doubt harmonious, and it is difficult to pinpoint any aspects that differ significantly, since they all flow from the same root stock, which was Roman law.

On the other hand, because of differences in the pace of historic and economic processes, and in the experience of each of these countries, we

find aspects in which their respective legislation is out of phase: this is the case, for example, with modern legislation on consumer protection, an area where Brazil has made more progress than other countries. Argentina has been catching up recently, while Paraguay and Uruguay still take the classical viewpoint of the pre-mass society days, where product responsibility is strictly *aquiliana*, or limited by contract.

With respect to business, corporations, bankruptcy, competition, metrology, taxes, etc., there is still much to be done to harmonize legislation within MERCOSUR. The list is long.

But what is clear is that harmonization is an integral part of the institutional framework of cooperation - if MERCOSUR had been designed and endowed with supranational institutions, these would certainly have had legislative powers and they would have set about unifying laws, rather than harmonizing them. Moreover, they would be exchanging what existed then for something entirely new and unique, such as has occurred in the EEC and, today, the European Union.

C. THE INSTITUTION RESULTING FROM THE TREATIES – COMPARATIVE ASPECTS

The institutionalization of MERCOSUR is no doubt an event⁶⁸ that has not yet reached its conclusion. Nor was it completed with the signing of the Protocol of Ouro Preto in December 1994.

There were provisional institutions, among them the Council and the Permanent Common Market Group (with its Administrative Secretariat in Montevideo), created by the Treaty of Asuncion, and to these were added the Trade Commission of MERCOSUR, which is also part of the dispute settlement mechanism.

Chapter II of the Treaty of Asuncion defined those organs, and their transitional nature. As we know, they were reformed but they were not substantially restructured or modified. Thus the organic structure born of the Treaty of Asuncion was given a certain life span, until the special conference which, it was said, must be held by December 31, 1994, in order to adopt the definitive design of the Common Market. That happened in Ouro Preto, and gave rise to the Protocol that took the name of that city.

We are still in a transition period, since the Common Market has not been constituted. It is not yet time to write the report of its creation, but rather to consider the present and future outlook with respect to the institutions of MERCOSUR. It is the political goals, no doubt, that will determine the necessary institutions. This paper is not the place to discuss them, although we shall keep them in mind as we develop our thinking.

First, however, we shall address a question of terminology - what we shall call "institutions" - since the concept we select may well influence our search for a conclusion as to whether those "institutions" exist or not. Once we have adopted a concept, we can move on to consider the function of what we have agreed to call the institutions (without quotation marks), present and future, of MERCOSUR, and to examine the form they have or should have.

In this analysis of the MERCOSUR project from an institutional perspective, we must examine the role and interrelationship of form and function in these institutions.

I do not think that an approach from a theoretical focus of this kind has yet been taken, although the design of the Treaty and its origin and application reflect the political and economic vision that embodied that thinking. It is indispensable, then, at this stage in MERCOSUR, that we attempt such an approach, since it will guide us in making critical choices during the future process of integration, and will allow us to adopt a forward-looking vision.

Yet if we are to discuss functions – which will determine the need for and the form of the institutions – we must have a point of departure.

We could thus begin by examining the founding treaties from a comparative optic.

This will be a question of *a posteriori* observation, reviewing the phases and separating and distinguishing them. If it is composed after the event, it begins at the end, selecting those facts and acts that initiated the process and that point to and bring it to its conclusion. It will seek elements of congruence and those of divergence. What is important is to know what we are going to compare.

Some would opt for speaking about the origins, the events prior to the Treaty of Asuncion, and comparing them with what we have today. Others might address isolated aspects, or focus on one or another aspect of the institutions, and perform a formal analysis such as we have seen presented on the dispute settlement system⁶⁹ - such solutions are easy and safe but, I fear, useless, and they are certain to annoy the “cognoscenti”.

Yet again, there are those – and they would seem to be in the majority – who will seek to examine the question from a comparative viewpoint, taking the European Union as their model. Yet they will be straying from logic, since they will be taking a perspective that is formal and divorced from time, in which they will recall the CEE as it was at some point or other in its previous evolution. In any case, we run the risk of mistaking the mist for Juno, not because of its material aspect – and our regional integration scheme is not so ethereal as that – but because of the difference of objectives and conception between the two schemes.

The MERCOSUR project has been totally different from the European Union since its inception.

Thus any comparison, if it is to be valid, must take into account the historical and economic frame of reference in which the event took place.⁷⁰

It is important to note that, in the political climate of Europe in the second half of this century, when the European Coal and Steel Community emerged immediately after the war, the Soviet threat was the dominant political factor. All decisions, even economic ones, were taken against that backdrop. Hence the need to pursue integration to the point of unification, and to prevent any of the member countries from straying from the general model. The nearby presence of a powerful common enemy influenced not only political but also economic decisions, and determined the basic features of institutions, even if this was not expressly stated.

There are many models for comparison: there is no doubt that, given their greater degree of institutional evolution (which does not mean, *a priori*, that they are more suitable or desirable), the Andean Pact and the European Union stand out, but they must be viewed in their proper perspective, i.e. bearing in mind both temporal and political reference points.

Other points of reference are ALADI, Benelux, and the WTO.

Each of those organizations or institutions has important features that deserve study. In the case of MERCOSUR, most attempts at comparison have focused on the dispute settlement system. We shall not do that here. Rather we shall attempt to identify the functions, and then see whether they exist, and what results they produce.

1. Specific features

Let us note that there is one substantial difference that because of its consequences makes it virtually impossible to draw comparisons: the EEC model is a supranational one, while those of ALADI, BENELUX and MERCOSUR are not. This implies essential functional differences that prevent any copying of the European models.

Nevertheless, there are functions that are common to both models. One of these is the implementation of the Treaty that gave rise to the integration mechanism.

a. The function of implementing the Treaty

In the most successful case of economic integration without supranationality – Benelux – an economic union was achieved with creating any supranational bodies.

The sharing of sovereignty was done in highly limited and specific ways, such as through the adoption of uniform laws or the harmonization of legislation, which the Treaty's signatories committed themselves to apply and respect. This also occurred in more definitive ways, such as through cooperative accords on the use of common resources, of which we find an example at home in Itaipu, and in Europe in various airport and tunnel projects.⁷¹

This function of implementing the Treaty has to be pursued at two levels: the first is the normative or prescriptive one, which takes place in the sphere of domestic regulation, or self-regulation of cooperation mechanisms, and in the adopting of transnational norms. These have the characteristic of depending on ratification by the Member States, and so they are treaties. In this respect they are different from the legal rules of the European Community.

The second level is that of executive activities, and boils down to a decision-making function, which we shall examine later on.

i) Prescriptive function of implementing the Treaty

In a major, pioneering study, Guido F. S. Soares⁷² provides a classification of the norms issued within MERCOSUR. Some of these, the author tells us, are aimed at creating new organs, others at implementing the legislative system as regards the sectoral agreements. He reviews the rules created to one and the other of these purposes, making it clear that there must be prescriptive activity in MERCOSUR. This classification not only complements existing ones, but sheds new light on the function of implementing the treaties in the mechanisms of integration.

In fact, in the future it will be necessary to create transnational rules that will broaden or modify MERCOSUR. If, as I propose (but leaving room for some exceptions), we maintain the idea of achieving integration by the route of cooperation, these rules will have to originate in a consensus among the parties – in other words, in treaties.

But if there are to be treaties, there will have to be an initiative and a forum to give them birth.

This is the first function of the CMC: to serve as a forum in which to negotiate treaties proposed by the Member States, by the GMC, and by the Inter-Parliamentary Commission and Meetings of Ministers. Within the GMC, there will be a derived power of initiative, which will allow the Subgroups to propose draft treaties for examination by the GMC. In this respect, the WTO would appear to be the closest model.

There are legislative reasons for this, as well as political ones. If we look at one fundamental difference between the political organization of the countries that make up the European Union and those in MERCOSUR, we shall see that in the former, with their parliamentary systems, foreign policy is either in the hands of parliament (which selects the cabinet ministers) or is shared between the parliament and the President of the Republic (but with executive authority always residing with the Cabinet).

In MERCOSUR, by contrast, foreign policy is the preserve of the Executive, and the regime is a presidential one.

Under a parliamentary system there is no clear tripartite separation of powers such as we find in presidential systems. To allow ministers to approve binding, supranational community rules under a presidential regime with separation of powers would be unconstitutional – at least in the case of Brazil, since ministers would be invading the proper sphere of the Legislative Power. In fact, there is a clause (article 68 (1)) that forbids the delegation of “acts within the exclusive competence of the National Congress”, of “matters reserved to complementary law”, and others.

For this reason, the creation of community rules in these matters cannot be delegated to the Executive, or to any body that would have the same functions, even an international one, unless the Constitution were amended.

The only way for creating community rules under the current Brazilian constitutional system would seem to be via treaties, which always depend upon approval by parliament. This would preserve the prescriptive role of the Legislative Power.

This is also a reason for preferring the cooperative route for achieving integration, since it is impossible by any other means.

The legislative function of the Council, like that of the GMC, is thus limited to matters internal to MERCOSUR, i.e. its organization.

ii) Decision-making function in implementing the Treaty

As established in article 10 of the Treaty of Asuncion, however, and reiterated in the Protocol of Ouro Preto, the Council has power not only to make Common Market policy, but to take decisions for implementing it. It thus has competence to administer and execute the Treaty and complementary acts during the transition period (article 9, TA)

The powers of the Council and of the GMC were envisioned as expiring at the end of the transition period, since they will thereafter have no reason to continue. In fact, as we progress further toward integration, joint action will

become increasingly necessary, and a new function will be required – that of coordination, as discussed below.

This has not occurred, and the Protocol of Ouro Preto merely makes some slight additions to the powers of the MERCOSUR bodies, while creating others with restricted competence. Acting jointly also means taking decisions, administering the Treaty and its complementary acts, and administering and coordinating the bodies of the Common Market. This is primarily a political function.

In the European case, the content is more administrative, as would be appropriate to the Executive Power in a confederation, from the beginning of the process. The treaties that created the Communities began as definitive treaties, with definitive institutions that have been maintained, with slight modifications, over the years. They represent a political project that goes beyond the economic sphere.

When the Commission of the EEC was created, it was assumed from the outset that it would be a supranational community organ. The Treaty of Rome, which established it, dates from 1957. It created the European Economic Community (EEC) and the European Atomic Energy Community. Earlier, in 1951, the European Coal and Steel Community (ECSC) had been created, and served as a model for the later ones.

The organs that were created – the Council, the Commission (called the High Authority in the ECSC), the Court of Justice, and the Parliament, were all born of these agreements and followed the proven model of the ECSC.

The same occurred in the Andean Community, where the first organs, the Commission and the Junta of 1969, were joined in 1979 by the Court of Justice and the Andean Parliament, which began to function in 1983 and 1984, respectively.

Here we see another feature that distinguishes these structures from that of MERCOSUR.

The dominant trait in the latter is pragmatism, together with flexibility, according to which structures are created as and when they are needed, and this explains the provisional nature of certain institutions. As a noted Uruguayan writer has pointed out,

“The most important, but not the only, criterion, was not to get ahead of ourselves, but rather to create institutions in pace with the stages of the integration process”⁷³.

In the EEC the Commission, which was given executive and representational functions, is composed of persons known as Commissioners, nominated by the individual States Parties and approved by the others, to carry out a mandate. They are not diplomatic representatives for their own countries, but act according to the mandate assigned to them by the organs of the European Union.

The independence of members of the Commission, who according to the Treaty of Rome of April 8, 1965, are supposed to be "selected on the basis of their general competence and must provide guarantees of their independence" (article 10, paragraph 1) was the central idea governing its structure, giving it a federative character, although this may be regarded as in its early stages, since many political functions, and all military and monetary ones, are still in the hands of national governments, something that will begin to change when the Maastricht accords are finally implemented.

Although the Treaties of Rome do not so stipulate, the practice has been that the larger countries appoint two Commissioners each, while the smaller countries name only one each.⁷⁴ The rule in the Treaty of Rome was that at least one member of the Commission, and no more than two, should come from each of the countries. This makes political representivity more apparent.

The Commission was originally given the power to draft proposals for the development of the Communities, and to ensure the functioning of the Common Market, while seeing to the exact application of the community treaties, in a manner that corresponds generically to the design and competence of the GMC of MERCOSUR. The European body, however, had different instruments that broadened its functions and included points not covered by the executive bodies of MERCOSUR.

It was also responsible for representing the Communities, either before the Member States, or before other countries, and thus came to monopolize a good portion of community foreign policy. In this respect again it was different from the functions assigned to the Common Market Group of MERCOSUR, since the latter cannot represent MERCOSUR except by

delegation from the Common Market Council, and the Council, I believe, can only act autonomously vis-à-vis members states for the purpose of signing headquarters agreements. Apart from that, it may act only with the consensus of the member countries.

Because it was supposed to propose measures for the development of the Community and to ensure the functioning of the European Common Market, the Commission was given the power of initiative, pursuant to article 155 of the EEC Treaty (1965). This provided that the Commission “has the power to take decisions and to participate in the formation of decisions of the Council and the Assembly”. This was limited by the EEC Treaty to certain aspects. The real and broader power was exercised by decisions of the Council of the Communities, which took precedence over those of the Assembly (the European Parliament).

Although in the EC the Council of the Communities may have had decisional power, its exercise depended on proposals by the Commission. Thus it was the Commission’s initiatives that played the decisive role in the process of community decision making.

This role was conditioned by the fact that, while decisions of the Council could be taken by majority vote (at times qualified), the rule, despite the weighting of votes, was that there must be unanimity in matters of vital interest for each state.

The executive activity of the Commission, then, has two aspects: one is to perform executive acts themselves, and the other is to exercise supervision or control over the treaties of Rome and their application by the states or citizens of the European Union.

In the first case, the Commission always acted under delegated authority from the Council, which it sought to interpret and expand. In this way it was able not only to issue such regulations as it deemed necessary for the execution of community norms, but also to add detail to the regulations issued by the Council.

In terms of its supervision over execution of the Treaties of Rome, the Commission acted – for example with respect to competition law – by prohibiting or authorizing certain practices, and even by imposing fines.⁷⁵

Finally, it must be recalled that the Commission exercises its supervisory power over the European Union, as it did over the Communities, in an indirect manner, by submitting issues to the Court of Justice of the Communities.

Here we have another substantial difference, since the organs of MERCOSUR have no recourse to the dispute settlement system.

This is explained, in the European case, by the supranational nature of the Communities, today the EU, and by the fact that the European project was always to create a federal entity that, placed above the States, would direct the process of integration. This is what a “United Europe” means.

In the MERCOSUR case, the idea is that the Member States will direct the process of integration at a pace imposed by reality, limiting themselves to the economic, cultural and social fields, and not attempting to create a confederation or federation of any kind. In short, political integration was not envisioned as the driving ideal or final goal.

As to representational activity, this flows from the founding Treaty of the EEC (1965), which recognized the public, international juridical capacity and personality of the Communities, and attributed the same to the Commission (article 211). By virtue of the same Treaty (article 229), the Commission was also to represent the EEC in its relations with the organs of the United Nations, its specialized agencies, and the GATT. This was entirely consistent with the perspective of the Cold War and the threat of Sovietization, and with the purpose of political integration.

From its very beginnings, what was at issue was a broad, supranational system, with legislative and administrative aspects that already suggested the federative structures that it was hoped one day to achieve. The heavy political content, of course, is consistent with the two most salient aspects of that institution: its diplomatic activity (essentially political and international), and its economic planning activity (essentially political, at the national and regional level), aimed initially at ensuring the reconstruction of Europe, which was supposed to be all-embracing and to eliminate the most glaring disparities in order to ensure overall stability in the face of the common enemy, and later to promote its development, once the reconstruction stage had been completed. The European Union was born,

then, as a project of unification, not only on the economic front, but also on the political front.

2. Benelux

Another modern paradigm of regional integration is that of Benelux, an extremely successful experiment that in many respects predated that of the European Union, which was later to absorb it.

The Benelux Treaty of Union, of February 3, 1958, was claimed to be

“a document characteristic of a method of integration based on the pragmatic and progressive elaboration of law. The international instrument that it constitutes could never have been drafted nor conceived in that form without the experience of ten years of customs union among the territories of the three kingdoms...”⁷⁶

Just as in MERCOSUR, the process was marked by gradualism and pragmatism, passing through the phases of a free trade zone and a customs union, for similar lengths of time.

The integration of Benelux had its beginnings in a convention on customs matters, signed on September 5, 1944. In it the three countries undertook to establish a “single customs territory” by eliminating all customs tariffs between themselves. Working groups or committees of officials were set up to carry out the necessary measures. One convention on monetary matters had already been signed shortly before, on October 21, 1943.

As the author recalls,⁷⁷

“The method of action adopted at London had some great virtues. Instead of worrying about the problems that fusion of their markets would undoubtedly engender in the realm of economic, social and financial policies, the three governments limited themselves to affirming their political will to constitute a unified market, and then left it to the intergovernmental institutions themselves to take the necessary measures, as and when experience showed them to be needed. There was no concern to resolve questions about a supranational or federal power, nor to choose the principles that might govern common policy”.

It was thus from a pragmatic, and not a dogmatic, perspective that the first European economic integration project of the 20th century was built, the experience of which was consolidated in the Benelux Treaty of 1958. It is this, rather than the first one, that holds the greatest interest for us, in light of the fact that it was signed during the customs union phase, a point at which MERCOSUR currently finds itself.

As the above-quoted author noted⁷⁸, with respect to the Treaty at the beginning of 1961, in it we see:

“...the sign of an exceptionally valuable kind of political realism. Benelux has progressed step by step along the line of least resistance; if they had tried to follow a logical process and impose *a priori* views at all costs, it would never have been possible to move so far so fast, or to move at all...”

“ It was this wisdom that allowed them to succeed. It gives them today the right to present to Europe and to the world a common market – no doubt an imperfect one, but one that is further advanced and more solidly based than any other”.

Certain institutions guided the process following the Treaty of Benelux of February 3, 1958: the Council of Ministers, the Council of the Economic Union, which was responsible for coordinating the Commissions and the Special Commissions under the Committee of Ministers. The Commissions control all the activities of Benelux, and the Special Commissions perform specific tasks, much like the Subgroups of MERCOSUR. The Treaty also created and defined the powers of the Secretariat, the Arbitration College and the Economic and Social Advisory Council, and opened the way for creating common services.

What all these institutions have in common is their intergovernmental character, taking advantage of geographic proximity and the ease of communication among governments, and the small number of countries involved (only three).

The Committee of Ministers is the supreme body of Benelux, and is supposed to oversee application of the Treaty's norms. Its decisions, like

those of MERCOSUR's Common Market Council, are taken by consensus and unanimity, and are binding on governments.

The Council of the European Union, the body that is most similar to our GMC, was supposed (article 25 of the Benelux Treaty) to coordinate the work of the Commissions and Special Commissions (which correspond to our Subgroups), to ensure execution of decisions of the Committee of Ministers, to make proposals as it saw fit concerning the functioning of the Union, and to coordinate the activities of the Benelux institutions.

Where differences with MERCOSUR are most pronounced (despite the countless similarities) is in the functions and activities of the Inter-Parliamentary Advisory Council and the Economic and Social Advisory Council.

These have attributes and functions that are more ambitious than those of their MERCOSUR counterparts, and they are constantly rendering opinions on matters that will be the subject of deliberations. Nor should we forget that the three Benelux countries have parliamentary regimes, for which reason the Parliament makes its influence felt in the Committee of Ministers as well.

The "Common Commentary" (Chapter 3 of the annex to the Benelux Treaty) states that the principal function of the Council of the Economic Union is "to ensure coordination of the work of the Commissions and the Special Commissions"⁷⁹. It has, in addition, the right of initiative and may occasionally be charged with certain executive tasks".

But a careful reading shows that power is divided, in effect, among the various commissions: those on external economic affairs; financial and monetary affairs, industry and trade; agriculture; fisheries and food; customs and taxation; communications; social affairs. The special commissions - those for statistical coordination, for comparing direct and indirect administrative budgets, for procurement and bidding, for public health; and for the middle class - also have an important role.

These commissions, each in its own specific area, are responsible for executing decisions of the Council of Ministers, and they report to that Council through the Council of the European Union; for making, through the same intermediary, recommendations to the Council for Ministers for

ensuring the proper functioning of the Union; and finally, for monitoring execution by national administrations of the decisions so taken.

As we can see, the political content is much less, just as its effective power is more limited than in the case of the EEC. Finally, the major objective was and continues to be an economic one. And for this purpose there was no need for supranational mechanisms with a greater political content. In this respect, the role of the Council of the Economic Union is close to that of our GMC, which is also supposed to coordinate the Subgroups, meetings of ministers, and a series of other similar measures. Contrary to what occurs in the Commission of the European Communities, Benelux and MERCOSUR have made no provision for its components to be independent.

Having reviewed the paradigms of the administration bodies of these two integration models, we shall now move on to examine MERCOSUR in its international relations.

CHAPTER II

MERCOSUR AND INTERNATIONAL RELATIONS

Integration accords of the MERCOSUR type always have an impact on international relations.

Thus, article 4 of the Treaty deals with relations with other States, noting that the purpose of such relations is to secure equitable terms and conditions for trade. It specifies that

“They shall apply national legislation to prevent imports the prices of which are influenced by subsidies, dumping or any other form of unfair trade”

and also that

“The States Parties shall coordinate their respective domestic policies with a view to preparing common rules on commercial competition”

This directive contains the driving concept – one of those that inspired the Treaty – of competitive entry into world markets. That could not occur outside the legal frameworks already established, to which the countries of MERCOSUR are bound: the GATT and ALADI.

We shall now examine how the Treaty of Asuncion fits into the two great multilateral economic treaties, to which the members of MERCOSUR are parties: the GATT and ALADI.

A. GATT/WTO AND MERCOSUR

The keystone of the GATT, and of the WTO as well, is no doubt the most-favored-nation clause, which calls for non-discrimination in trading matters. The Generalized System of Preferences (GPS) and protection of the *status quo ante* serve however to temper the rigor of this rule.

The GATT, in its article XXIV (III), admitted as an exception to this rule the existence of customs unions or free trade zones, a device that the Marrakech agreements left intact.

MERCOSUR was constituted in full respect for these three basic principles. It safeguarded its members' obligations under the GATT. The most-favored-nation clause was to be applied in the same manner for all members, pursuant to the founding treaties, while creating a system of preferences for its less developed members. The *status quo ante*, specifically in relation to the ALADI accords, was duly protected.

In this way, the integration of MERCOSUR into the WTO was possible because it conformed to those rules of international law, and this would have to be verified before final approval was given. Thus, in the so-called "Rose Garden Agreement" or the "4+1 accord" between the USA and the countries of MERCOSUR, we find references to joint efforts by those countries in the GATT negotiations⁸⁰ (as well as MERCOSUR's eventual acquisition of a legal personality)⁸¹.

The Treat of Asuncion (article 8 (d)) provides that:

"The States Parties shall extend automatically to the other States Parties any advantage, favor, freedom, immunity or privilege relating to a product originating in or destined for countries not members of ALADI".

This provision, which was already contained in LAFTA and which also exists in ALADI, is consistent with the commitment assumed by Argentina, Brazil and Uruguay when they joined the GATT (Article 1 of the GATT), and later the WTO, in which all four participate today.

It is well to remember that the existence of that rule of public international law – which we may say is of universal application, given the very high number of states adhering to the WTO agreements – does not prevent the creation of customs unions or free trade areas in the broad sense, or the existence, within such, of special regimes for less-developed countries (Article XXIV (5) and (10) of the GATT).

The same compatibility can be seen with respect to MERCOSUR and ALADI.

B. ALADI AND MERCOSUR

One of the first studies on MERCOSUR⁸² claimed that subregional agreements of this kind would represent a progressive erosion of ALADI as an integration scheme. That opinion, respectable as it was, is certainly debatable in the sense that such agreements may have arisen precisely because of the gaps that ALADI would not or could not fill. The structure of ALADI provided not only for global multilateral action by its members, but also actions in which only some members would participate. These are, specifically, the economic complementarity agreements and the partial scope agreements, one of which, No. 18, referred to MERCOSUR.

Writers in Uruguay have pointed to certain aspects of the Treaty of Asuncion as posing obstacles to its integration into the ALADI Treaty. These critics base their argument essentially on an interpretation of article 44 of the 1980 Treaty of Montevideo.

The article in question provides that

“Advantages, favors, freedoms, immunities and privileges that the Member States apply to products originating from or destined to any other member country or non-member country, through decisions that are not foreseen in this Treaty or in the Treaty of Cartagena, shall be immediately and unconditionally extended to other member countries.”

The article thus exempts the partial scope agreements listed in ALADI.

Yet as we see in the Treaty of Asuncion, article 8(d) refers literally to the most-favored-nation clause, which applies automatically and unconditionally to non-member countries of ALADI, and which does not refer to signatory countries of the Treaty of Montevideo, since it already provided such a clause.

Thus, for MERCOSUR, application of the most-favored-nation clause is universal.

Moreover, article 8 of the Treaty of Asuncion seeks to provide for the preservation of commitments given prior to the signing of that Treaty (treatment equivalent to grandfather rights), thus absorbing, for example, the rules of the 1980 Treaty of Montevideo.

It is precisely the incorporation of the rules of the ALADI Treaty allowing partial scope agreements that makes it possible to refuse automatic extension of advantages granted under partial scope agreements among members of the ALADI countries.

A decision of the ALADI council of ministers (No. 2, article 4) stipulates what must be contained in treaties between members of the alliance in order for them to be considered as partial scope agreements. These are: the possibility for other members to adhere, through prior negotiation; differential treatment in favor of less-developed countries or those at an intermediate stage of development; a minimum duration of one-year; and finally, consistency of objectives with those of ALADI, i.e. that they should lead towards the integration of other countries of the alliance.

All of these texts were superceded by the Treaty of Asuncion. That Treaty is open to adherence by third countries of the region, through negotiations, after it has been in existence for five years (article 20); this is what one well-known author has called "the deferred convergence situation"⁸³, but which we prefer to call functional deferment. The Protocol of Ouro Preto made no change to this situation.

The time limit that was established flows from the fact that implementation of the new experiment represented by MERCOSUR, leading towards a special kind of common market, could not cope with the successive accession of other countries at the stage of definition and organization.

As the resolution of the Council of Ministers of ALADI said nothing about time limits, nor did the Treaty of Montevideo of 1980, the establishment of a deadline, which was considered indispensable in implementing the timetable called for under the Treaty of Asuncion, cannot be seen as an obstacle to classifying it as a partial school agreement. In fact, MERCOSUR allows the principles of convergence and freely negotiated accession, as was shown by the agreements signed with Bolivia and with Chile.

With respect to differential treatment, the Treaty of Asuncion provides for this in favor of Uruguay and Paraguay, for the life of the Treaty.

This is justified by the fact that it makes no sense to establish advantages or preferences on an indeterminate or permanent basis. In any case, this is the treatment applied with respect to the preferences granted under the GATT

system, which are to be amended or to disappear over time, and to the advantages accorded to less-developed states, in the case of the WTO.

Finally, the Treaty of Asuncion, once as it was signed, effectively dealt with the requirement for a duration of more than one-year, which meant that all of the requirements for being registered in ALADI as a partial scope agreement were fulfilled. The same can be said of the Protocol of Ouro Preto.

Concluding the examination of this aspect, we must recall that, through various references and mentions in the Treaty of Asuncion, the signatories to MERCOSUR have demonstrated their commitment to and integration in ALADI; in the preamble, clause 5, in articles 8 and 20, in annex 1, articles 3 and 10; and also in the first declaration of foreign ministers.

C. LEGAL PERSONALITY OF INTERNATIONAL LAW

MERCOSUR acquires its legal personality of international law from the Protocol of Ouro Preto. That personality has implications that are both domestic and international.

Chapter II of the Protocol of Ouro Preto contains three articles, the first of which (article 34) establishes the legal personality of MERCOSUR. The following article, 35, sets out the limits of that personality, and the final article (article 36) allows MERCOSUR to establish headquarters agreements.

MERCOSUR thus joins the ranks of legal persons under public international law. It is to be represented by the Common Market Council, according to article 8 (III) of the Protocol of Ouro Preto.

According to conventional doctrine, the subjects of public international law are states and international organizations. States have their own original personality, while that of organizations is derived, as J. F. Rezek reminds us:

“It is the exclusive product of a juridical development resulting from the joint will of a certain number of states. We may assert therefore that the Treaty constituting any international organization has, for that organization, an importance greater than that which the Constitution has for any sovereign state.... An international organization is merely a juridical reality: its existence is supported only by its constituting

Treaty, the principal virtue of which consists not in disciplining its functioning, but in giving it life, in the absence of any material element existing prior to the founding act.”⁸⁴

This expression covers an infinite variety of institutions, as was pointed out by Paul Reuter⁸⁵. But even so, it does not cover the full reality of international juridical creatures, as Rezek has explained⁸⁶.

Reuter’s theoretical elaboration⁸⁷, according to which the result is more important than the source of an organization’s competence, is of no interest in the case of MERCOSUR, since the Protocol of Ouro Preto specifically attributes to it a legal personality and, as in the case of the ILO, cited by Rezek⁸⁸, provides as follows:

Article 35

MERCOSUR may, in the use of its attributes, perform all acts necessary to the achievement of its objectives, and in particular may contract, acquire or dispose of goods and property, may appear as a party in legal proceedings, may keep funds and make transfers.

Article 36

MERCOSUR shall sign headquarters agreements.

Significantly, the power to sign treaties was divided: on one hand, article 36 empowers it to sign headquarters agreements, and on the other hand, article 8 (IV), dealing with the powers of the Common Market Council, provides that in addition to representing MERCOSUR, it may

IV. Negotiate and sign agreements in the name of MERCOSUR with third countries, groups of countries and international organizations. These functions may be delegated to the Common Market Group by express mandate, under the conditions stipulated in clause VII of article 14.

This opens the possibility for other types of agreement.

The delegation of powers provided for in article 8 (IV) must be express and limited.

This has led Jorge Pérez Otermin, with his usual perspicacity, to point to the fact that:

“As it emerges from the drafting of the texts quoted, the delegation of representation both in the negotiating and the signature phases was highly precise and limited, denoting a very specific intent”⁸⁹.

Thus, the participation of all member countries of MERCOSUR, through their representatives, is indispensable in negotiating and signing treaties. This formula also flows from the absence of supranationality, and from the international character of the mechanism.

This means that agreements signed by MERCOSUR, as happens with those signed within it, are subject to the approval procedures called for in the domestic legislation of each of the countries.

Finally, it must be remembered that the Council's power of representation can be delegated, which means that it can designate one of its members to perform certain acts other than the negotiation of treaties.

PART II
THE JURIDICAL STRUCTURE OF MERCOSUR

CHAPTER I

SOURCES OF MERCOSUR LAW

The sources of MERCOSUR law, according to article 41 of the Protocol of Ouro Preto, are:

- I. The Treaty of Asuncion, its protocols and the additional or complementary instruments thereto;
- II. Agreements signed pursuant to the Treaty of Asuncion and its protocols;
- III. Decisions of the Common Market Council, Resolutions of the Common Market Group and Directives of the Trade Commission of MERCOSUR that have been adopted since the Treaty of Asuncion entered into force.

The references above relate only to those norms arising within MERCOSUR, which we shall call internal sources.

They do not refer to the rules of public international law in general, nor to the domestic laws of member countries, which are also applicable to situations that may arise within MERCOSUR, and which we shall call external sources.

A. INTERNAL SOURCES

Under this heading we shall classify those rules of law that have their origin within MERCOSUR, by act of will of its members. Since MERCOSUR law is international, and not supranational as some erroneously maintain, the form of elaboration of its law will be that by which the norms of international law are created, and which are listed in article 41 of the Protocol of Ouro Preto, quoted above.

1. Constitutive treaties

There are three treaties constituting MERCOSUR: the Treaty of Asuncion, the Protocol of Brasilia and the Protocol of Ouro Preto. These are the original sources of MERCOSUR law, and they not only represent its international juridical rationale (for which reason they are associated with the rules of public international law, where this pertains) but are also an integral part of the domestic law of member countries.

2. Derived law

Derived law consists of the norms issued by the bodies of MERCOSUR. These are unilateral and are addressed to the organization and to the Member States. They have an indirect effect on the subjects of those states.

In contrast to what occurred in the European Union, we have no general principles of community law or of community jurisprudence, for the very good reason that there is still no community. Once there were a community, such principles could arise, however, if the route selected were that of supranationality. The arbitration systems could also lead to a body of jurisprudence⁹⁰, but this again can only happen in the future.

The norms flowing from the Protocol of Ouro Preto, as stated therein, are binding, thus removing any doubts that might have existed before they came into force.

This subject is dealt with in two chapters of the Protocol of Ouro Preto, IV and V. The first relates to the internal application of MERCOSUR norms, while the second deals with their juridical sources.

Let us look now at the two most complex aspects: the applicability of the norms of international law and their relationship with domestic law.

B. INTERNATIONAL LAW

Neither the Treaty of Asuncion nor the Protocol of Ouro Preto makes any reference to the norms of international law. Yet it would appear that these are applicable to it.

The United Nations Charter, the founding document of the UN, is the basis of the contemporary international legal system, and establishes the principles

governing the international action of states in that sphere, and in certain other areas of general human interest.

Various treaties have been negotiated within this framework, including those of greatest interest to us, such as the Bretton Woods agreements, and those of the WTO and ALADI, or those relating to diplomatic activity and treaties, such as the Vienna conventions.

RELATIONSHIP TO DOMESTIC LAW

The Protocol of Ouro Preto gave binding effect to Decisions of the CMC⁹¹, Resolutions of the CMC and Directives of the CCM, within the limits of their respective competence. Among these, Decisions have the highest hierarchical ranking.

Legislative decree 188, which approved the Protocol of Ouro Preto, contains an express restriction on the manner by which it is to be introduced into Brazilian law:

“Single paragraph: Approval by the National Congress is required for all acts that may result in revisions to the Protocol of Ouro Preto, as well as those complementary acts that, pursuant to article 49 of the Federal Constitution, imply significant burdens or commitments for the national treasury”.

From this it is clear that any norms emanating from MERCOSUR that represent financial burdens or obligations for the national treasury are subject to legislative approval. Norms that reinterpret or expand powers or that alter the structures of MERCOSUR (resulting in revision) also fall within this category.

This restriction⁹² might appear useless or redundant. The creation of norms within an intergovernmental scheme such as that resulting from the Treaty of Asuncion or from the Protocol of Ouro Preto is in fact done through treaties, as we have seen.

And yet, as the classical texts teach us, the Legislature never speaks unnecessarily, and so the inclusion of that provision deserves to be analyzed. Upon reflection, we find that the National Congress wished to stress the fact

that, despite the rule contained in article 42 of the Protocol of Ouro Preto, constitutional procedures are and will remain applicable as usual.

Or, as Pedro Dallari has written,

“In the current structure of MERCOSUR, the deliberations of its bodies do not in themselves create juridical norms in the strict sense, but rather political determinations that oblige the States Parties to undertake the appropriate adjustments in their domestic legislation.”

Those MERCOSUR norms of a subordinate character, i.e. Decisions and Resolutions, are issued by bodies of the international organization itself, and although they are binding on the signatories they are not introduced directly into their legislation.

What does this mean? It means that these norms are part of the structure of MERCOSUR, and are supported by an international Treaty.

These assertions must however be accepted with a grain of salt. There are two viewpoints about how to give positive effect to these decisions and resolutions, and they depend on the division of powers within the constitutional regimes of each country. Both interpretations are valid and would be acceptable in the Brazilian legal system.

The first viewpoint considers the purely prescriptive nature of Decisions of the Council of MERCOSUR. They may be regarded as similar to the protocols of the ILO, as regards their manner of production, their effects, their manner of approval and promulgation. To introduce norms of this nature into our legal system will always require their approval by the National Congress. The need for approval is highlighted and fully protected in Legislative Decree 188. In short, any rule issuing from the international organization of MERCOSUR will have to be approved in the same manner as a Treaty.

From the other viewpoint, which appears to me more pragmatic and correct, decisions are classified into two categories.

Those that deal with prescriptive matters and are of a hierarchical nature, and that are therefore, according to the Constitution, matters of federal law (or treaty) and that under domestic law will require joint acts of the

Legislature and the Executive for their insertion into the system, may only be introduced through the procedures called for in domestic law with respect to treaties. Others, of a merely regulatory nature, which are included in the sphere of powers and competence exclusive to the Executive Power, will be introduced into Brazilian law by decree, in fulfillment of a freely assumed international obligation, which is thus incorporated in our law. In this respect we can appreciate the wisdom of Pedro Dallari's assertion, quoted above, that these rules are "political determinations".

The Protocol of Ouro Preto gives a binding character to Decisions, Resolutions and Directives, but it also establishes that their implementation must be done in accordance with the legislation of the Member States. Their binding nature on Member States depends on their implementation.

This is an obligation of means: if there are pre-existing legislative instruments to permit this, and if they are within the sphere of the Executive's constitutional powers, application is immediate, since the Executive Power has the duty, both legal⁹³ and contractual⁹⁴, under the Treaty, to implement them immediately by decree.

We may even speak of a new phenomenon, that of the "collective or harmonized regulatory act".

What happens here is simply the harmonizing of administrative procedures within the competence of the Executive Power. If on the other hand their hierarchy is that of law, they will have to be submitted to approval by the National Congress. With respect to these rules, we should recall the thinking of Deisy de Freitas Lima Ventura:

"Any type of direct applicability of community rules was discarded, as was any primacy for them over domestic rules. There can be no doubt that it was the Brazilian position that prevailed, since the final institutional framework reflects the form and substance of its proposals.

"Derived law within MERCOSUR comes thus to be blended with domestic legal systems, to the extent that states intend to incorporate the decisions of the common bodies."⁹⁵

Nevertheless, we will find cases of norms emanating from MERCOSUR bodies that are flawed in their origin because they exceed the limits of the constituting treaties. This is the case, for example, of Decision 9/94, which created the MERCOSUR Trade Commission. According to the Treaty of Asuncion, this body could not be created by Decision of the MERCOSUR Council. Consequent objections⁹⁶ as to its validity led to its incorporation into the Protocol of Ouro Preto⁹⁷, and it is now integrated into our legislation.

CHAPTER II

THE ORGANS OF MERCOSUR

In Part 1, we had the opportunity to review briefly the structure of MERCOSUR. We may note that, by its intergovernmental nature, MERCOSUR does not have the conventional tripartite division of functions such as we find in modern democratic states, and in many international organizations. The model of Montesquieu and Locke⁹⁸ does not apply here.

The organization indeed has several organs, but their functions are guided by two essential goals, that of building and administering institutions (prescriptive, operational and coordination activities) and that of dispute settlement.

In examining these organs we do not need to review the purposes of MERCOSUR as an international organization, since this was already done. We shall instead focus on the way they function in pursuit of their objectives.

We shall examine successively the prescriptive and operational activities, and then those of coordination.

A. MERCOSUR BODIES WITH PRESCRIPTIVE AND OPERATIONAL ACTIVITIES

In order for any human organization to survive and function, it must exercise a prescriptive activity, establishing norms on the basis of which operational activities can be carried out.

The prescriptive activity within international organizations may be “conventional”, i.e. contractual, or unilateral.

Conventional activity, as we have seen, may take place among members of the organization, and affect only them, or between the organization and its members or third parties, in which case other types of effects are produced. In the first case, we may mention instituting acts and those intended to strengthen the organization, which in the case of MERCOSUR would include decisions of the CMC.

Unilateral prescriptive activity takes place within the organization itself, and includes the issuing of declarations, interpretations, standards, rulings etc. This variety of expressions may be grouped together under what is referred to in the jargon of international organizations as resolutions, which relate either to the internal legal structure of the organization, establishing rules and administrative procedures, or to its members, creating for them duties or obligations, and sometimes a combination of both.

Supervisory activities are intended to further the application of the agreements signed by the parties, and of the norms of the organization. As Sergio Sur has⁹⁹ explained, international supervision or *surveillance internationale*

“constitutes an independent guarantee that obligations accepted will be respected, one that seeks by dissuasion to prevent violations of the law. It is at the same time a measure of the sincerity of the commitments undertaken, to the extent that the parties provide for procedures to verify that the rules are being properly applied.”

This supervisory activity applies both to administrative control and to the dispute settlement system.

1. The MERCOSUR Council

The Common Market Council was created at the beginning of MERCOSUR as

“the highest organ of the Common Market, responsible for conducting its policy and for taking decisions to ensure fulfillment of the objectives and timetables established for constituting the common market (article 9, TA).”

Its composition and functions are set out in articles 10 to 12 of the same Treaty, and these are virtually repeated in articles 3 to 7 of the Protocol of Ouro Preto, with one difference that serves to increase the Council's importance: the requirement that presidential meetings must be held every six months instead of once a year.

It should also be noted that there was initially no such detailed reference to its functions and attributes as we find in the Protocol of Ouro Preto, where

they are set out in 11 separate clauses of article 8. In this case, according to Jorge Pérez Otermin, "while the listing is definitive, many of them are of such generality that in practice it will be regarded as illustrative".¹⁰⁰

i) Nature and composition

With the approval of the Protocol of Ouro Preto, the Common Market Council, CMC, has taken on a nature different from that which it had under the Treaty of Asuncion.

Under the Treaty, this was the name given to a permanent conference of ministers, the generic mandate of which it was always the building of MERCOSUR. In fact, a reading of articles 9 and 10 of the Treaty of Asuncion shows:

Article 9. *The administration and execution of this Treaty and of any specific agreements and decisions that may be adopted within the legal framework established hereby during the transition period shall be the responsibility of the following organs:*

Common Market Council;
Common Market Group.

Article 10. The Council is the highest organ of the Common Market, responsible for *conducting its policy* and for *taking decisions* to ensure fulfillment of the objectives and timetables *established for the definitive constitution of the common market.* (Italics added)

The expressions in italics set out the functions, expressly political, of diplomatic meetings at the ministerial level, and indicate their objectives.

Upon signing of the Protocol of Ouro Preto, however, an international organization was created. These functions changed, and others were added to them, thereby altering the juridical nature of the Council.

a) Juridical nature

Today, the CMC is the highest executive body of what is now an international organization, but it retains its character as a ministerial conference, as we see in article 3 of the Protocol of Ouro Preto. The drafting

of that article, although very close to that of article 10 of the Treaty of Asuncion, takes on new significance because it is inserted in a different context.

The Protocol of Ouro Preto says:

“Article 3. The Common Market Council, *the highest organ of MERCOSUR*, which is responsible for *conducting the policy* of the integration process and for taking decisions to ensure compliance with the objectives set forth in the Treaty of Asuncion and for achieving the final constitution of the common market" (italics added).

These objectives imply supervisory and prescriptive activities.

As noted, the Council is the body that represents MERCOSUR, a function that unites that of the supreme prescriptive organ with that of a negotiating forum. As established in article 2 of the Protocol of Ouro Preto, it is of an intergovernmental nature, but it has no supranational aspect.

Supranational agencies are distinguished from intergovernmental ones by the powers of their organs and by the ways in which they act.

In the case of intergovernmental bodies, in the prescriptive area the issuing of norms depends on the joint will of the participating states, expressed according to the rules of the Treaty instituting the organization.

In supranational bodies, on the other hand, the will expressed is that of the organization itself, issued however on the basis of its instituting Treaty.

As Heber Arbuét Vignali has pointed out, in the case of intergovernmental bodies, "Member States will rarely give up any of their decision-making powers"¹⁰¹, while in the case of organizations of a supranational kind, they "have independent decision-making bodies and can execute their resolutions directly in the territory of the Member States".

The Council stands at the pinnacle of the MERCOSUR¹⁰² organizational hierarchy. It is a collective body (composed of various persons) and "empowered" (in the sense that Jellinek uses this term), and its members occupy their seats by virtue of their official positions.

Since other authorities are allowed to participate (article 7, Protocol of Ouro Preto), it may also be considered to be "open" as to its composition.

Functions

The functions of the Council, as defined in the Protocol of Ouro Preto, serve to delimit its competence. The differences between it and the GMC are more clearly stated than under the Treaty of Asuncion, in particular with respect to its prescriptive activity. In addition, it is clear that the GMC is subordinate to the Council.

Article 8 describes its functions, together with its attributes:

“The functions and attributes of the Common Market Council shall be:

- I. To oversee fulfillment of the Treaty of Asuncion, of its protocols and of the agreements pursuant thereto;
- II. To formulate policies and to take such action as necessary to establish the common market;
- III. To exercise the legal personality of MERCOSUR;
- IV. To negotiate and sign agreements in the name of MERCOSUR with third countries, groups of countries and international organizations. These functions may be delegated to the Common Market Group by express mandate, under the conditions stipulated in clause VII of article 14;
- V. To express itself on proposals submitted to it by Common Market Group;
- VI. To establish meetings of ministers and to express itself on agreements submitted to it by such meetings;
- VII. To create such bodies as it deems necessary, and to modify or abolish them;

VIII. To clarify, as it deems necessary, the scope or content of its Decisions;

IX. To appoint the Director of the Administrative Secretariat of MERCOSUR;

X. To adopt Decisions relating to financial and budgetary matters;

XI. To approve the International Regulations of the Common Market Group.”

We may say that clauses V, VI, VII, IX, X AND XI refer to attributes, and the rest to functions.

Representation body

Article 8 (III and IV) of the Protocol of Ouro Preto attributes to it the functions of representation, as we have seen. Its nature is intergovernmental, and the CMC conducts itself in a collegial manner. It may also delegate these functions to the GMC, within certain limits.

Prescriptive body

The prescriptive function is designated under the Protocol of Ouro Preto as “decisional capacity”, and belongs to the CMC, which is senior in the hierarchy to either the GMC or the CCM.

As we have seen, the prescriptive function of the CMC operates at two levels: it issues regulations internal to the organization, and rules directed at the behavior of Member States.

Decisions of the deliberative bodies of international organizations such as those of MERCOSUR are taken by vote. Decisions may be taken by a majority vote, as occurs for example in the General Assembly of United Nations, or according to a mixed system, as in the case of the Security Council (where a positive vote requires both a majority of members and the absence of veto by its permanent members), or by unanimous vote or consensus.

The CMC falls under this last category.

Consensus means "the willingness to arrive at an agreement consequent upon there being no opposition"¹⁰³, or in words of the great international jurist Guy Ladreit de Lacharrière, "a procedure for taking decisions without a vote, consisting in confirming the absence of any objection presented as an obstacle to adopting the decision in question"¹⁰⁴. It therefore has a positive character, in terms of expressing the will of the parties.

Unanimity can occur only if a vote is taken, and if no negative vote is cast during the process.

b) Deliberations

The Council may engage in deliberations only when all of its members are present, failing which such deliberations will be without effect, and conclusions must be adopted by consensus and unanimity.

This manner of deliberation was the subject of intense negotiations. The solution adopted in the end was not perhaps ideal, but it was the best that could be achieved in light of the claims of the two smaller members, who refused to accept a weighted voting system that would allow the two larger countries to dominate proceedings.

In any case, the transitional system allowed the four participants, working under conditions of equality, to lay the foundations of MERCOSUR, and this no doubt encouraged the decision to maintain the formula following Ouro Preto.

There may be modifications to this system in the future, in particular if there is a tendency to follow the European model. Any institutions created on the pattern of the EEC would have to adopt the methods used there (i.e. weighted voting).

Be that as it may, the system now in effect ensures equality for the four participants, and this represents a great advantage for the smaller countries.

ii) Composition

The council is to be composed of ministers of foreign relations and of economics (article 10 of the Treaty of Asuncion and article 5 of the Protocol

of Ouro Preto). Other authorities at the ministerial level, for example planning ministers or secretaries, may participate at the invitation of the Council's coordinators, who are the ministers of foreign affairs (article 7 of the Protocol of Ouro Preto).

The question arises as to whether other authorities invited in this way will have the right to vote when they appear. There are some who think not, such as Durán Martínez¹⁰⁵, who unfortunately has not explained his objection. It may possibly have to do with a restrictive interpretation of article 4 of the Protocol of Ouro Preto:

“The Common Market Council shall be composed of Ministers of Foreign Affairs; and of Ministers of Economy, or their counterparts, of the Member States”.

It meets as often as necessary, and at least twice a year, in the presence of the national presidents of the four countries. Chairmanship of the council is rotational, for six-month periods, following the alphabetical order of the States Parties (article 6 of the Protocol of Ouro Preto).

2. The Common Market Group

This is the permanent executive body, created during the transition. It is governed by section II, art. 10 of the Protocol of Ouro Preto, and is subordinate to the CMC. It has the power to delegate, in part, to subgroups, as we shall see below, and it is assisted by the Administrative Secretariat of MERCOSUR. We shall begin by examining its juridical nature and its composition.

i) Nature and competence

The juridical nature of any organ is associated with its competence, and that is true in the present case.

a) Nature

The Group has an intergovernmental nature and is subordinate to the CMC, as was the case under the Treaty of Asuncion. Formally speaking, it is “pluripersonal”, but as opposed to the CMC, it is not “empowered”, since its

members are appointed in their own right and not as the incumbents of a particular position.

It has hierarchical seniority to the CCM and to SAM.

b) Competence of the GMC

Decisions within the Common Market Group, as with those of the Council, are to be taken by consensus and in the presence of representatives of all the States Parties (article 16, Treaty of Asuncion, which remains in force because it was not revoked by the Protocol of Ouro Preto). They are issued in the form of resolutions, which are binding on the members of MERCOSUR (article 15, Protocol of Ouro Preto).

According to article 13 of the Treaty of Asuncion, the GMC was to oversee compliance with the Treaty; to take the necessary steps to enforce decisions adopted by the Council; to propose concrete measures relating to application of the Trade Liberalization Program, the coordination of macroeconomic policies, and the negotiation of agreements with third parties; and to establish work programs to carry forward the process of establishing the common market.

The Protocol of Ouro Preto, in articles 8 and 14, was careful to spell out these powers, and to distinguish them from those of the CMC.

Those powers are both original and delegated

Original powers

Administration of the international organization is one of the original responsibilities of the GMC, in light of its role as the executive organ of MERCOSUR. This includes organizing the meetings of the CMC, electing the director of the SAM, approving its budgets, and issuing resolutions authorizing the internal regulations of the Trade Commission and the Economic and Social Advisory Forum.

The GMC also has a further competence, that of self-regulation, although this is subordinate in one case to the CMC.¹⁰⁶

Another aspect of the GMC's competence, combining both executive and self-regulatory features, is to create, amend or abolish organs such as the working subgroups and the specialized meetings (article 14 (V)).

Powers delegated by the CMC

The CMC may delegate to the GMC its competence to negotiate and sign treaties within the limits of articles 8 (IV) and 14 (VII) of the Protocol of Ouro Preto. This competence of the GMC is therefore a delegated one, and it may moreover be delegated further to the CCM.

Other powers, not specified by the Protocol of Ouro Preto, arise from clause III of article 14.

ii) Composition

Its composition is once again quadripartite, and each country has eight representatives. The Protocol of Ouro Preto, article 11, provides as follows:

“The Common Market Group shall be composed of 4 members and 4 alternate members per country, appointed by the respective governments, among whom must be included representatives of the Ministries of Foreign Affairs, Ministries of Economy (or their equivalent) and Central Banks. The Common Market Group shall be coordinated by the Ministries of Foreign Affairs.”

As in the case of the CMC, the structure is an open one, with functions that are expanded, in the words of Ekmedjian¹⁰⁷, when other representatives of the public administration and institutional structure of MERCOSUR are convened, in special cases, as provided in article 12 of the Protocol of Ouro Preto:

“When preparing and proposing concrete measures in the course of its work, the Common Market Group may, as it deems appropriate, convene representatives of other organs of the public administration or institutional structure of MERCOSUR”.

With respect to inviting private individuals, the text of the Treaty of Asuncion provided as follows:

“When preparing and proposing concrete measures in the course of its work, *until 31 December 1994*, the Common Market Group may, as it deems appropriate, convene representatives of other organs of the public administration *and of the private sector*” (my italics).

In this case, and no doubt because of the creation of the Economic and Social Council, the reference to private persons was eliminated and replaced with “representatives of the institutional structure of MERCOSUR”.

There are two possible interpretations of this expression: one would limit it solely to officials of the organization, while the other (preferable in my view) would include not only officials but also members of the subgroups, the Economic and Social Council, and even those of the Joint Parliamentary Commission. This would better reflect the institutional structure of MERCOSUR, which is open rather than closed, given its intergovernmental nature, and the democratic and representative character of the governments of the member countries.

Formalizing the latter interpretation would require merely a formal rather than a substantive amendment to the text.

a) Activities and functions of the GMC

The activities performed by the GMC flow directly from its functions, and include the management of MERCOSUR, and participation in preparing its external policy, the latter by delegation.

Its competencies are listed, together with its attributes and its functions, in article 14:

"The Common Market Group shall have the following functions and attributes:

- I. To oversee fulfillment of the Treaty of Asuncion, its protocols and agreements signed pursuant thereto, within the limits of its competence;
- II. To propose draft decisions to the Common Market Council;

III. To take the necessary steps to enforce to Decisions adopted by the Common Market Council;

IV. To draw up work programs in furtherance of the establishment of the common market;

V. To create, modify or abolish bodies such as working subgroups and specialized meetings, in pursuit of its objectives;

VI. To express itself on proposals or recommendations submitted to it by other bodies of MERCOSUR, within the area of its competence;

VII. To negotiate, with the participation of representatives of all Member States, and upon express delegation from the Common Market Council and within the limits established in the specific mandates granted for this purpose, agreements in the name of MERCOSUR with third countries, groups of countries and international agencies. The Common Market Group, when giving a mandate to this purpose, shall sign the agreements referred to. The Common Market Group, when so authorized by the Common Market Council, may delegate these powers to the Trade Commission of MERCOSUR;

VIII. To approve the budget and annual financial statements submitted by the Administrative Secretariat of MERCOSUR;

IX. To adopt resolutions relating to financial and budgetary matters, on the basis of guidelines issued by the Common Market Council;

X. To submit its internal bylaws to the Common Market Council;

XI. To organize meetings of the Common Market Council and prepare such reports and studies as the latter may request;

XII. To elect the Director of the Administrative Secretariat of MERCOSUR;

XIII. To supervise the activities of the Administrative Secretariat of MERCOSUR;

XIV. To approve the internal bylaws of the Trade Commission and the Economic and Social Advisory Forum.”

The Treaty speaks of attributes, which are, according to the dictionary, "rights, prerogatives, powers; jurisdiction pertaining to an authority"¹⁰⁸ and, in particular, of or pertaining to "the act or effect of attributing; prerogative, endowment, privilege; the faculty inherent to a position".

The concept is thus similar to that of competence, and involves two other concepts, functions and activities, which in practice provide a better description.

Having decided for sake of clarity to reclassify “attributes” as competencies, activities and functions, and having examined the first of these, which shall now address the last which, in practice, can be reduced to that of prescription and that of execution.

b) Prescriptive and executory functions

Prescriptive functions (which the MERCOSUR agreements refer to as "decisional" functions) and functions of execution manifest themselves in the activity of issuing norms, known as Resolutions, and in the power of initiative to propose them.

The GMC's powers of prescription and initiative

The prescriptive power of the GMC appears in the rules relating to "determining work programs to assure progress in establishment of the common market", as referred to in clause IV of article 14, and in the power to "adopt resolutions on financial and budgetary matters, on the basis of guidelines issued by the Common Market Council, pursuant to No. IX of the same article.

The power of initiative appears in item II of article 14, "to propose draft decisions to the Common Market Counsel".

Supervisory power

The supervisory power allows the GMC, once it has determined work programs (article 14, IV), to monitor their implementation; to take the

necessary measures for the enforcement of decisions by the CMC (article 14, III), to approve the budget and annual financial statements of the SAM (article 14, VIII) and to supervise its activities (article 14, XIII).

3. The subgroups

In the exercise of its functions, the Common Market Group was able to constitute specialized subgroups, pursuant to article 13 of the Treaty of Asuncion, some of which were ready designated in Annex V of the Treaty.

In fact, the Brazil-Argentina working groups pre-dated entry into force of the Treaty of Asuncion, and swiftly produced a great number of studies and documents that were useful in the implementation of MERCOSUR.

The Protocol of Ouro Preto, in attributing functions to the GMC in article 14, included the creation, modification and abolition of subsidiary organs. Among such organs are the specialized subgroups.

The provisions of Annex V of the Treaty of Asuncion, and those created under derived MERCOSUR law, continue to exist, because the GMC has recognized them as useful. It may however be argued¹⁰⁹ that

“Pursuant to the provisions of article 51 of the Protocol of Ouro Preto, upon its entry into force, this entire structure is revoked”.

But even after entry into force of the Protocol of Ouro Preto, the subgroups have continued to function, thus disproving that viewpoint.

4. The MERCOSUR Trade Commission

The MERCOSUR Trade Commission was created by decisions No. 13/91 and No. 9/94, the latter approved at the sixth meeting of the Council in Buenos Aires on Aug. 5, 1994. The latter decision was denounced by some¹¹⁰ as a regular, on the grounds that the Council had no power to create organs during the initial phase of MERCOSUR.

According to Otermin¹¹¹,

“The creation of the Trade Commission is based on arts. 1 to 10 of the Treaty of Asuncion, the “having seen” and “considering” paragraphs of which provide:

That the beginning of operations of the Customs Union implies the adoption of a set of instruments of common commercial policy on matters relating to reciprocal trade among the States Parties and to trade with third countries;

That for this reason a body is necessary to oversee the application of those common commercial policy instruments;

That the Common Market Council is empowered to take decisions to ensure fulfillment of the objectives of the Treaty of Asuncion”.

That writer criticized the creation of the organ by the decisions referred to above, on the basis that the CMC had no power to do so, because the Treaty of Asuncion had established a structure without stating that it could be modified or expanded, except by means a new Treaty (article 18) and, finally, because the Annex to Decision 4/94, arts. 3(B), 4(A) and 5, gave the CCM the power to issue decisions that were binding on the States Parties, whereas such delegation of powers had not been authorized by the Treaty.

This question has lost its importance, because the Protocol of Ouro Preto not only created the CCM, but authorized the creation of new organs and the definition of their respective competencies, except for those of a prescriptive character, a power that was reserved to the CMC, the GMC and the CCM.

The record shows that the CCM began its activities in 1994, holding its first meeting on October 6 and 7 of that year in Rio de Janeiro. Its first prescriptive act was to issue its own internal bylaws or rules of procedure (Directive 1/94).

i) Nature and composition

The CCM, like the other organs of MERCOSUR, is intergovernmental in nature, quadripartite in composition, and like the GMC is composed of National Sections.

Its hierarchical ranking is lower than that of the GMC. Article 17 provides that it is to be composed of four members and four alternate members from each member state.

ii) Competence and activities

The competence and activities of the CCM are established by articles 16, 19 and 21 of the Protocol of Ouro Preto.

According to article 16 of the Protocol of Ouro Preto,

“The MERCOSUR Trade Commission, the body responsible for assisting the Common Market Group, is competent *to oversee application of the common commercial policy instruments* agreed between the States Parties for the functioning of the Customs Union, and *to monitor and review issues and matters relating to common commercial policies*, to trade within MERCOSUR, and to trade with third parties (my italics).”

The activity of the CCM in the exercise of its first competence, "overseeing application", presupposes the existence of common commercial policies among the members of MERCOSUR, and implies actions of a prescriptive and executory nature. These common policies have yet to be established, except for those relating to the common external tariff, the lists of exceptions, and the customs regime.

There is every indication that further common policies will be developed, as is now happening in the area of economic protection, where one decision deals with abuses of economic power and of economic protectionism.

The second competence, "to monitor and review", is of an advisory nature, representing an activity of consultation and examination.

The formal acts of the CCM are referred to as Directives and Proposals (the first must not be confused with the "directives" of the European Union¹¹²), and relate directly to those two competencies; each one of these manifestations corresponds, respectively, to the two activities assigned to it:

Article 20. The MERCOSUR Trade Commission shall express itself through Directives or Proposals. Directives are binding on the States Parties.

The binding nature of directives is similar to that of Resolutions and Decisions.

In the exercise of these powers, the CCM engages in various activities, which are listed in articles 19 and 20 of the Protocol of Ouro Preto.

a) Prescriptive and advisory activities

The CCM's prescriptive and advisory activities, as formalized in the Directives and Proposals, are described in article 19:

The MERCOSUR Trade Commission shall have the following functions and attributes:

- I. To oversee the application of common instruments of commercial policy within MERCOSUR, and as they pertain to third countries, international agencies and trade agreements;
- II. To consider and express itself on requests submitted by the States Parties with respect to application and enforcement of the common external tariff and of other instruments of common commercial policy;
- III. To monitor the application of the instruments of common commercial policy in the States Parties;
- IV. To analyze the evolution of the instruments of common commercial policy for the functioning of the Customs Union and to formulate Proposals to the Common Market Group;
- V. To take decisions relating to the administration and application of the common external tariff and other instruments of common commercial policy as agreed by the States Parties;
- VI. To report to the Common Market Group on the evolution of application of the instruments of common commercial policy, on the

processing of requests received and on the decisions taken with respect to them;

VII. To propose to the Common Market Group new norms or amendments to existing norms relating to trade and customs matters within MERCOSUR;

VIII. To propose the revision of specific tariff items in the common customs tariff, and to consider cases that relate to new productive activities within MERCOSUR;

IX. To establish technical committees as necessary for the proper performance of its functions, and to direct and supervise the activities of those committees;

X. To perform tasks relating to the common commercial policy as requested by the Common Market Group;

XI. To adopt its internal bylaws, which it shall submit to the Common Market Group for approval.

Of these activities, which need no further discussion, we may note in particular No. XI, which implies the creation of new specialized organs within MERCOSUR. The text leaves open two possibilities: the specialized committees might draw their members from among those of the CCM; or, as appears more probable, committees may be created with new participants, whose professional qualifications will allow them to carry out the tasks assigned to them. In this case, the model would be that of the specialized subgroups, which have already demonstrated their effectiveness. This would also have the advantage of allowing the presence of non-participants from the national administrations of MERCOSUR members, when the public interest so dictates.

Activities under items I, III, V and X may lead to the issuing of Directives, while the remaining items may generate Proposals.

Another activity deriving from the competencies of the CCM relates to dispute settlement.

b) Dispute settlement activity

This activity is discussed in greater detail in the following chapter, but it deserves mention here in light of its specialized character. This can be appreciated from article 21 of the Protocol of Ouro Preto:

In addition to the functions and attributes established in arts. 16 and 19 of the Protocol of Ouro Preto, the MERCOSUR Trade Commission shall consider claims submitted by the National Sections of the MERCOSUR Trade Commission, or originating with the States Parties or in complaints brought by private persons, individuals or corporations, relating to the situations envisaged in articles 1 or 25 of the Protocol of Brasilia, where these fall within its area of competence.

Single paragraph. Examination of these claims within the MERCOSUR Trade Commission is without prejudice to the right of the state party bringing the claim pursuant to the Protocol of Brasilia to have recourse to the dispute settlement procedure.

Second paragraph. Claims originating in the cases established in this article shall be dealt with in accordance with the procedures envisaged in the Annex to this Protocol.

The reading of this text reveals another characteristic of the CCM: like the GMC, it has National Sections, which serve as an interface with individuals and institutions in the member countries.

5. Conclusions

This examination of the structure of MERCOSUR organs allows us to assert the following points: the institutions are continuing to revolve; this is happening in a gradual and pragmatic fashion; its intergovernmental nature persists; and decisions are taken on the basis of unanimity and consensus.

Another, albeit formal, aspect is the symmetry of its organs, which in addition to their composition as stipulated in the treaties have involved the creation of national sections, the composition and organization of which is the responsibility of each country.

Some of these same features may also be seen in the auxiliary organs.

B. AUXILIARY ORGANS

For want of a better term, we use the phrase "auxiliary organs" both for those performing support and advisory activities for the construction of MERCOSUR and those that perform specialized functions, such as the subgroups and the technical committees.

The first group, which are active in the economic and social areas, should be treated separately, because they are positioned differently in the organization's structural chart.

1. Organs with specialized attributes

The organs with specialized attributes are the Administrative Secretariat of MERCOSUR and the Technical Committees.

i) The Administrative Secretariat of MERCOSUR

The Administrative Secretariat of MERCOSUR, as originally conceived in the Treaty of Asuncion, consisted of a documents registry and an instrument to facilitate the activities of its institutions.

Its initial model was no doubt that of the GATT Secretariat, which still existed at the time of the Treaty of Asuncion.

The Secretariat proved itself useful from the beginning, and the creation of MERCOSUR as an international organization implied transforming it into a permanent organ.

We shall find that the management and organization of the Administrative Secretariat of MERCOSUR follows the same principles as those governing all other organs of MERCOSUR.

An internal structure was created, headed by its own Director, with a governing board where all Member States had equal representation, and positions were filled on a rotating basis.

The Director is elected by the Common Market Group and appointed by the Council. It is interesting to note that the election and appointment of the director are separated. As far as we know, this separation was at the insistence of Uruguay during the negotiations. That country wished to enhance the standing of the Director and the Secretariat, by having the former designated by the Council. Other delegations, on the other hand, insisted that since the administrative body of MERCOSUR was the Common Market Group, it should be responsible for naming the Director. The solution adopted represented a consensus, and appears to have satisfied all parties.

Re-election was prohibited, and the Director's term of office was set at two years. There are some, like Jorge Pérez Otermin¹¹³, who are critical of this mandate as being too short, and as inducing a lack of continuity in the organization's work.

The headquarters of the Secretariat was established in the city of Montevideo, taking advantage of the fact that the Secretariat of ALADI was already located there, and also reflecting no doubt the diplomatic efforts made by Uruguay. As the reader will recall, the other organs of MERCOSUR have no headquarters (although arbitration proceedings are held in Asuncion).

The budget of MERCOSUR must make provision to cover the expenses of the Secretariat, which are to be divided equally among the four states.

The Secretariat's functions are purely administrative and technical, and it was defined by article 31 of the Protocol of Ouro Preto as an organ of operational support, responsible for providing services to the other bodies of MERCOSUR.

ii) Technical committees

Article 19 (9) of the Protocol of Ouro Preto empowers the CCM to create technical committees. This possibility is further elaborated in its regulations, articles 6 (d) and 15 to 17. They are created via Directives, in which the CCM must establish the operating conditions of the Technical Committees, which may not be of a decisional nature. Their purpose is to provide advice and support for activities within the competence of the MERCOSUR Trade Commission.

They report to the CCM, and are to keep it informed of their activities through the president *pro tempore*.

All Technical Committees have a framework within which they perform their advisory functions: they gather data for preparing their reports on application of common instruments and policies, and they issue technical opinions, of a non-binding nature, as requested by the CCM.

The internal bylaws of the CCM were careful to set clear limits on the functions of the Committees, to ensure that the Commission did not inadvertently exceed the powers attributed to it by MERCOSUR in this regard.

The Committees are to be composed of members appointed by each of the States Parties, through their respective National Sections, pursuant to article 16 of the CCM's internal bylaws.

The Technical Committees may draw upon the services of advisors and specialists, and may consult the private sector on specific issues.

As in MERCOSUR generally, their decisions are taken by consensus. If consensus cannot be achieved, however, their (non-binding) reports, recommendations and opinions are sent to the CCM together with any dissenting votes, fully substantiated. The decision in that case will be taken by the CCM.

2. Support and advisory bodies with attributes in the economic and social field

There are two such bodies: the Joint Parliamentary Commission and the Economic and Social Forum.

i) The Joint Parliamentary Commission (CPC)

The Joint Parliamentary Commission was created by article 24 of the Treaty of Asuncion. The Protocol of Ouro Preto included reference to the commission as an organ of MERCOSUR.

It has the character of an advisory body, and it is not in a position of subordination to the Common Market Commission.

a) Juridical Nature

The definition contained in articles 1 and 2 of the Protocol of Ouro Preto refer to it as "the representative body of the parliaments of the States Parties of MERCOSUR". Its nature as a liaison body between MERCOSUR and the parliaments of Member States is clearly established.

According to the MERCOSUR organization chart, the Joint Parliamentary Commission is not strictly speaking a part of the MERCOSUR institutional structure. It is, rather, a collaborative partner, and has no hierarchical link to the organs of MERCOSUR.

It serves in effect as an instrument for liaison between MERCOSUR and the parliaments of the Member States.

The reason behind the commission's creation was to facilitate progress with the legislative measures necessary for implementing the integration mechanisms.

The Treaty of Asuncion and the Protocol of Ouro Preto both say little about the CPC. Parliamentarians of the Member States met for the first time under the auspices of MERCOSUR on December 6, 1991, in Montevideo, at which time the Joint Parliamentary Commission was formally established and approved its rules of procedure. Article 3 of those rules states that the commission is of an advisory and deliberative nature and may formulate proposals.

b) Functioning

The commission may function officially only in the presence of parliamentary delegations from all Member States. The absence of one of the Member States will not prevent a meeting from being held, but it may not take decisions. Each state's delegation casts its vote on the basis of the wish of the majority of its members. These members are appointed by the their respective parliaments, as established in articles 8 and 13 of the CPC rules of procedure.

Article 3 of those rules also defines the functions of the commission, as follows:

- a) To monitor the progress of regional integration as expressed in the formation of MERCOSUR, and to report to national Congresses on this progress;
- b) To take such actions as are necessary to facilitate the future establishment of the MERCOSUR Parliament;
- c) To request the institutional organs of MERCOSUR to provide information on the progress of integration, particularly as refers to plans and programs of a political, economic, social and cultural nature;
- d) To establish subcommittees to examine issues relating to the process of integration;
- e) To issue recommendations on the conduct of the integration process and on the formation of the common market, which may be addressed to the institutional organs of MERCOSUR.
- f) To carry out the necessary studies for harmonizing the legislation of States Parties, to propose roles of community law relating to the integration process, and to submit its conclusions to national parliaments.
- g) To establish relations with private entities at the national and local level, with international entities and agencies, and to seek such information and advice as it deems necessary on matters of interest to it;
- h) To establish cooperative relationships with the parliaments of third countries and with other entities established under different schemes of regional integration;
- i) To sign agreements of cooperation and technical assistance with public and private agencies at the national, regional, supranational and international level;

- j) To approve the budget of the commission and to make representations to the States Parties with respect to its functioning;
- k) Without prejudice to the foregoing items, the commission may establish other attributes within the framework of the Treaty of Asuncion.

Pursuant to its rules of procedure, the commission is composed of up to 64 Parliamentarians, 16 from each country, with membership divided between the lower house and the Senate, as each country sees fit.

As with the other organs of MERCOSUR, the presidency is rotational. Each country elects a president for its own section, and each of these four presidents, by turn, will preside over the commission, for a term of six months, in accordance with the alphabetical order of the member countries.

The Vice Presidents are selected and serve according to the same criteria. This scheme applies as well to the General Secretariat, with the provision that the President and the Secretary-General shall always be from the same country.

The commission is to hold regular meetings twice a year, and may hold special sessions with the agreement of its four presidents. The commission has held successive meetings since December 6, 1991, and has issued a number of resolutions and recommendations.

Article 26 of the Protocol of Ouro Preto provides that the CPC is to communicate by means of recommendations, addressed to the Common Market Council, through the intermediary of the Common Market Group.

In this way, the GMC may either retransmit the recommendations as it receives them or add its own observations, information and recommendations before transmitting them. Transmittal, however, is mandatory. The Group does not have the right to withhold a recommendation received from the CPC.

c) Competence

The basic competence of the Joint Parliamentary Commission is to speed up internal procedures for giving effect to the norms issued by the organs of MERCOSUR. This is consistent with its mission as a liaison body.

In addition, it is supposed to assist with the harmonization of legislation, to the extent that the integration process so demands, bearing in mind that it is up to the parliaments to make the necessary legislative amendments. Nevertheless, as we know, the initiative for legislative harmonization measures will often come from the Common Market Commission. This is the case, for example, with the Protocol of Colonia on judicial cooperation, where harmonized rules of procedure were adopted in order to simplify judicial proceedings. This can also occur in other cases.

Pursuant to article 25 of the Protocol of Ouro Preto, the council may also request the Joint Parliamentary Commission to examine priority issues.

The commission is self-organizing, and adopts its own rules of procedure, which do not have to be approved by any other body of MERCOSUR. This is because, as we have seen, it is an autonomous organ and functions merely as a liaison and advisory body for MERCOSUR. It should be recalled, however, that the CPC's rules of procedure may not attribute to it any powers other than those established by the Protocol of Ouro Preto which, because it represents an international undertaking, may only be amended at the initiative of the Executive Power.

ii) Economic and Social Advisory Forum

The Economic and Social Advisory Forum is another innovation. As established by article 28 of the Protocol of Ouro Preto, it is a body representing the economic and social sectors. Its form was probably inspired by that of the similar body in Benelux, and at the instigation of the labor unions [*sindicatos*] in subgroup 11.

Its advisory functions make it an innovation within the organic structure of MERCOSUR. The idea of its founders was to open up channels of communication through which society at large could address its aspirations to MERCOSUR. This is a valuable initiative in terms of making the activities of MERCOSUR more democratic and transparent.

The Protocol of Ouro Preto makes only general references as to the constitution of the Economic and Social Advisory Forum. It refers to the Forum's advisory functions, and indicates that it is to conduct its deliberations by consensus, with equal numbers of representatives from each member state.

Its functioning is to be subject to rules of procedure, which must be approved by the Common Market Group, as is the case with other organs of MERCOSUR, for example the Trade Commission.

CHAPTER III

DISPUTE SETTLEMENT

Having looked at the institutional aspects of dispute settlement in Part One, it is now time to examine the attributes and functioning of the system within MERCOSUR.

ATTRIBUTES OF THE DISPUTE SETTLEMENT SYSTEM

Dispute settlement mechanisms have acquired growing importance within the international community over the course of the past century¹¹⁴. This has been particularly true in the case of common markets and other forms of intensive integration, because of the greater degree of penetration of this branch of international law that deals with certain mechanisms of regional integration.

As one author has noted, somewhat optimistically,¹¹⁵

"Since the initiative -- still not totally consolidated, but already largely positive -- within the Andean Group to develop a specifically Latin American form of community law, the Southern Cone is beginning to enter that 'age of reason' of community construction. It is surely gratifying that one of the first examples of community construction in MERCOSUR relates precisely to the juridical area, even if much remains to be done before we will have a supranational jurisdiction of the kind that characterizes the current stage of community law on the European continent."

The Treaty of Asuncion provided a formula for dispute settlement (as was absolutely necessary), in its article 3 and annex III.

It established that any disputes between the contracting parties arising from application of the Treaty of Asuncion should be resolved in the first place by direct negotiation, and only afterwards by intervention of the Common Market Group or the Common Market Council (which is the senior of the two bodies), and finally that within 120 days after entry into force of the Treaty, the parties should define a permanent system for dispute settlement.

Nowhere in the institutional aspects of MERCOSUR is its political and diplomatic character so evident as in the system for dispute settlement. Beginning with the Treaty of Asuncion, through the Protocol of Brasilia and on to implementation of the definitive phase by the Protocol of Ouro Preto, we see diplomatic activity taking precedence over all other activity.

The mechanism that was finally approved, in fulfillment of the provisions of the Treaty of Asuncion and its annex III, was the result of studies conducted by an ad hoc group created by the Common Market Group in October 1991, which drafted the text that was finally adopted.

Even before the Treaty came into force, the ad hoc group had already submitted its draft to the Common Market Group. With minor modifications it was approved by the Council of Ministers and signed on December 17, 1991, by the national presidents, whereupon it became known as the "Protocol of Brasilia on the Settlement of Disputes". This system has an important function within MERCOSUR, and it is of very broad scope, as we shall see.

1. How the system functions

The system adopted by the States Parties in the Treaty of Asuncion has certain features that influenced the creation of its institutional mechanisms.

One of these is that the Treaty originated as a bilateral agreement between Brazil and Argentina, which was subsequently amended to admit two other partners. The admission of Uruguay and Paraguay, given the disparities between these countries and the original partners, was not enough to cause the initial scheme to be amended.

Thus we still find the rule of consensus as a point of departure, since there was no way to impose a weighted-voting rule in a bilateral agreement. Upon incorporation of the new partners by means of the Treaty of Asuncion, this feature remained intact. The consensus rule also flowed from the choice of cooperation as the *modus operandi* towards integration, since that precluded the creation of supranational bodies. Another characteristic is that it is transitional: the intent was to establish rules to cover the period leading up to the establishment of a Customs Zone, which was to be the foundation on which the common market would be installed at the end of five years.

These features meant that during the transitional phase, the dispute settlement system had two primary functions: overcoming obstacles in specific situations that, under the rule of consensus, might block progress towards integration and, on the other hand, supporting implementation of the Treaty, by ensuring the correct interpretation of its terms, enforcing its application in cases of omission, monitoring application of the measures called for under the Treaty, both by the parties and by the Council and the Common Market Group.

In addition - this was not expressly mentioned, but flows from the logic of the system – the system took on fact-finding functions (such as those found in GATT panels) in order to help Member States to seek solutions to their problems through dialogue.

i) Overcoming obstacles

It should be recalled, as this book has stressed, that the most relevant characteristic of the Treaty of Asuncion is its transitory nature, in the proper etymological sense of that term.

In fact, it delineates the transition from the current regime to that of the common market, and in due course it will come to be replaced by the acts constituting the latter scheme, once the objectives set forth by the signatories of the agreement have been achieved. This temporary or transitory nature is highlighted by the expression that it is a Treaty "*for the constitution of*", rather than "*constituting* a common market", and by the fact that, once the stages of the Trade Liberalization Program are completed, it will expire¹¹⁶; and also by the fact that the institutions it creates are provisional and will be replaced by others, yet to be defined, as we have seen with article 18 of the Treaty of Asuncion, which provides:

"By 31 December 1994, the States Parties shall convene a special meeting with a view to determining the definitive institutional structure of the administrative organs of the common market, and the specific attributes and decision-making system of each of them".

Its transitory nature is underlined by several clauses, including those dealing with relations with other states (article 8) which have a specific time limit, or (of particular interest to use here) the dispute settlement systems (Annex III)

as determined by article 3 of the Treaty. These mechanisms, as well as the Trade Liberalization Program (Annex I) and the creation of subgroups (Annex V), are limited in their validity to the transition period.

One of the authors of the Treaty¹¹⁷, in an address given in Santiago, Chile, stressed this transitory nature by recalling that the annexes and the preamble are part of the Treaty (consistent with the express provisions of the Vienna Convention on The Law of Treaties, Article 31.2). Speaking of the date of 31 December 1994, he said:

“It is clear that the entire structure and functioning of the Treaty of Asuncion will have to be assessed at that time, in light of experience and the results obtained to date, and that new international instruments will be adopted as necessary”.

He concluded by stating that, in this strict sense, the Treaty of Asuncion is provisional, or as we prefer to say, transitory.

This transitory nature is associated, in a dialectic way, with the decision, which will be of virtually irreversible effect, to reduce tariffs automatically, thus leading to creation of the common market.

In reality, the practical effects, economic and political, of applying the Treaty will create linkages of various kinds and will give rise to commercial and economic relationships that will be difficult to dissolve without serious consequences.

Over the course of this journey doubts – and indeed, conflicts - are bound to arise, leading to international disputes, which Charles de Vischer¹¹⁸ has defined as:

“...a disagreement between states with respect to an object that is sufficiently circumscribed as to lend itself to a clear statement of claim, susceptible of rational examination”.

Disputes of this kind will vary in their degree of political content, and as the above-quoted author notes, the relative intensity in each case will determine the procedures for resolving it. Legal and political aspects are frequently mingled, and can be separated only in the course of proceedings.

It was precisely to allow such difficulties to be overcome that the dispute settlement mechanism was established by the Protocol of Brasilia.

The dispute settlement mechanism finally approved in compliance with the Treaty of Asuncion and its Annex III was the result of studies conducted by an ad hoc group¹¹⁹ created by the Common Market Group in October 1991.

Even before the Treaty came into force, the ad hoc group had already submitted its draft¹²⁰ to the Common Market Group. With minor modifications it was approved by the Council of Ministers and signed on December 17, 1991, by the national presidents, whereupon it became known as the "Protocol of Brasilia on the Settlement of Disputes"¹²¹.

By making innovations to the model typical of public international law, and allowing private parties (according to its terminology) to have access to a procedure that was traditionally reserved to states (although private persons act under the umbrella of their home state) the function as finally adopted was broadened and improved.

This means that even political obstacles can be overcome, by seeking the solution most favorable to the economic and juridical interests involved.

In this respect, the mechanism's design is predominantly political, like those of the United States of America federation to which we referred earlier. Only at the end of the procedure envisioned by the system, i.e. the arbitration settlement, does it become depoliticized.

But it was not enough to overcome obstacles. It was also essential to provide support for the full and effective implementation of the objectives of the Treaty of Asuncion.

ii) Support for implementation of the Treaty

The idea of a steady, linear schedule of tariff reductions that would establish a fixed and inescapable timetable for arriving at implementation of a free-trade zone, and the forging of bonds on the basis of mutual economic interests – which when necessary could be assuaged by the dispute settlement mechanisms - represented an element of permanence in contrast to the transitory character of the Treaty, and reflected the political will of the participants to see that MERCOSUR would indeed become a reality.

The combination of these two aspects, the one permanent and decisive, the other transitory and provisional, was typical of the concept that inspired the authors of the Treaty.

With this dialectical formula, they were seeking to make only so much in the way of binding commitments as was necessary to achieve their objectives.

They were determined moreover, it would appear, that any administrative structures that the common market might have should be based on concrete and practical experience. This meant that the Treaty and the measures taken by the GMC and the CMC would have to be interpreted in ways that reinforce the idea of MERCOSUR. That interpretation reflects political positions and the realities of international power.

For this reason, also, the dispute settlement system relies much more on diplomatic than on juridical activity.

The process of consolidating the European common market, which is frequently¹²² cited as an example, was as we have seen divided into two phases: a cooperative phase, which implied coordinated action, while maintaining all the aspects of national sovereignty, and an integration phase, with a supranational overlay that required the reformulation of many aspects of sovereignty.

This implied, not the renunciation of any aspects of sovereignty, but rather the negotiation of a new social contract. In it, certain aspects of legislation, those of a basic or (as I would say) constitutional nature with the greatest political content, would have to be the subject of international agreements.

For handling matters of a more administrative or financial nature, community decisions and resolutions would be used, which despite different norms as to their nature (hierarchical, juridical, and practical effects) and their origin, were the common source of the rules for achieving integration and, subsequently, for building the community.

But the burden of construction, despite everything, fell to the Court¹²³. It was the court, in Europe, that played the key role in cementing Community rules and national rules into a single framework, and broadening powers

through its interpretations, the guiding force of which was the will to build a united Europe.

It is true that the Court could not have played this role if had not had a normative function of its own that served to depoliticize the process. There is no point, however, in pursuing this oft -rehearsed and debated argument, which in any case has no practical application to the MERCOSUR of today.

In expanding the jurisdiction of the dispute settlement system, and in stressing its predominantly political nature, the States Parties to the Treaty of Asuncion sought to make clear that the second function envisioned for this system was to support the implementation of the common market.

In fact, a proper reading of the competencies of the system established by the Treaty of Brasilia shows that the intent is to establish a mechanism that can produce decisions, although on a more modest and limited scale, in line with the ambitions of the signatories, and without straying into supranationality in the conduct of the integration process.

The Protocol of Brasilia, as we have seen, in keeping with the blueprint set out in the Treaty of Asuncion, provided that dispute settlement should take place at the diplomatic level, by means of direct negotiations, intervention of the GMC, and finally, but only after these routes have been exhausted, by arbitration.¹²⁴

The Protocol of Ouro Preto confirmed this thrust, but gave the CCM a role as part of the dispute settlement system.

Both direct negotiations and intervention by the GMC are procedures that are typical of the cooperative or diplomatic approach.

Once the provisional phase was over, the Protocol of Ouro Preto created the MERCOSUR Trade Commission (CCM). It was given jurisdiction to examine complaints brought by Member States. The president of the CCM places the complaint on the agenda for the next meeting, with at least one week's prior notice.

The CCM may decide the issue itself, or strike a technical committee that will have 30 days to issue an opinion. That report will serve as a guide for the decision, which is to be taken at the first meeting of the CCM thereafter.

The member state cited in the complaint must comply with the CCM's decision within the time limit established. If there is no consensus, the CCM will refer the issue to the GMC.

The GMC has jurisdiction when:

- a) the negotiation phase has been unsuccessful; or
- b) the dispute has been only partially resolved and, the states having submitted it to the CCM, the latter has failed to reach a consensus on it.

In this way, since the Protocol of Ouro Preto, the GMC has become the organ of recourse for the CCM.

It is important to note that the power of both the CCM and the GMC is limited to issuing recommendations. Only the arbitration tribunal has the power to decide.

A few points concerning this mechanism deserve attention: its scope of application, which is limited, and the fact that there are two phases, negotiation and arbitration.

The Protocol of Brasilia, in keeping with the blueprint set out in the Treaty of Asuncion, provided that dispute settlement should take place at the diplomatic level, by means of direct negotiations, intervention of the GMC, and finally, but only after these routes have been exhausted, by arbitration. The Protocol of Ouro Preto confirmed this thrust, and supplemented it by giving dispute settlement attributes to the GMC and the CCM.

Both direct negotiations and intervention by the GMC are procedures that are typical of the cooperative or diplomatic approach.

Intervention by the GMC as envisaged in the Protocol of Ouro Preto consisted in making recommendations, as occurs with the GATT panels. There is no reference either to the traditional notion of good offices or to conciliation or mediation. If these proceedings should fail, the issue will be submitted to arbitration.

In a system such as the European one, the solution adopted was necessarily different. There, the European Union has its own jurisdiction, as does the Court, within the sphere of its judicial functions.

The supranational nature of the European Union and its organs allows us to speak of competencies and jurisdiction, which is not the case in a cooperative institution such as MERCOSUR.

Another important consequence of the institutional model selected for MERCOSUR relates to the access that private citizens have to the dispute settlement mechanism. As we know, citizens enjoy direct access to the European Court.

In the case of MERCOSUR, because there is no direct contact between the public and the organization's institutions, direct access by the citizenry to the dispute settlement mechanism could not be justified in theory. And yet, thanks to an ingenious device, MERCOSUR citizens do have such access, but indirectly. This is done via the government of each country, within the traditional framework of diplomatic protection. In this case, however, action is no longer discretionary, but takes on a legal character, when certain conditions are fulfilled.

This certainly represents progress, and at the same time a reaffirmation of the cooperative nature of the system, which eschews supranationality for its permanent institutions.

Finally, the ad hoc nature of the arbitration mechanism completes the picture.

2. Scope of the system

A political organization will generally only develop a true judicial system once there is a clear differentiation of social roles and once society has resources of its own to maintain what is essentially a non-wealth-producing function.

i) Field of application of the dispute settlement mechanism

A comment was once made about the Benelux Treaty that could apply to MERCOSUR as well:

“In the absence of any direct contact between the Union’s institutions and the people of the three countries, the only matters of international dispute that will arise in practice are those between States”¹²⁵.

As was the case of Benelux, the entire MERCOSUR structure has been built around inter-governmental relations, with no provision for direct contact between that structure and the citizenry. Thus, the structure put in place by the Protocol of Brasilia does not allow for direct private access to the dispute settlement mechanism. This must be done indirectly, as we shall see.

That mechanism, approved by the Common Market Council on December 17, 1991, refers to “Disputes among States Parties” – indicating its subjects – the object of which relates to “the interpretation, application or non-observance of provisions contained in the Treaty of Asuncion, agreements signed thereunder, and resolutions of the Common Market Council and the Common Market Group” (thus defining its field of application).

Thus, it is clear that access is limited to the States Parties.

Chapter V of the Protocol of Brasilia, however, makes reference to complaints brought by private parties, a point that might lead us to the (mistaken) conclusion that private parties have direct access as parties to the dispute settlement mechanism. The fact is, however, that they do not, except through the intermediary of their National Section of the Common Market Group, which is the body that must actually lay the complaint, while the private party who initiated it is limited to providing assistance in the process.

In the case of the CCM, the Protocol of Ouro Preto gave greater autonomy to private parties: rather than “assisting” their home state, they are to “be assisted” by it, acting as *dominus* or principal in the action. This is a significant change, and reflects the many criticisms that were made about the mechanism’s effectiveness.

The process is essentially the same, whether the complaint originates directly with a state party, or is brought by a private party to the National Section of the Common Market Group, or of the CCM. It consists of two phases, starting with direct or mediated negotiations, followed by arbitration.

With respect to competence or jurisdiction, the system has a dual focus: on persons, and on the subject matter at stake.

II *Ratione personae*

From the viewpoint of persons, a system for adjudicating disputes, or more broadly for settling disputes, is intended to resolve differences that involve persons under private law (where the interest of the state lies in maintaining public order, and flows from its duty to guarantee the personal safety of its citizens), or that engage directly the interests of the state in its relations with its subjects, or with other states, or with their subjects.

The first matters derive from the state's domestic jurisdiction, and the second from its international jurisdiction.

Under a structure such as that of MERCOSUR, the only disputes are those that arise between states. At the same time, every state has the appropriate means for resolving differences with or between private persons.

These differences may be entirely private in nature, or they may involve the subjects of one state with the government of another country. The means for resolving disputes between states, and those that involve its subjects (under the cover of diplomatic protection) are those recognized in Public International Law. But these are not sufficient or effective in all situations.

For example, if disputes arise over the application and interpretation of supranational community rules, there will be an interest in creating a specialized subsystem for resolving or adjudicating them, one that will be more effective and specific than the traditional means available under Public International Law.

The traditional system, indeed, provides that differences over private affairs among private parties must be resolved by the courts of the states concerned, just as any other type of dispute.

For issues that involve a private person and a state there are two possible routes: the dispute may be submitted to the courts of the state in question, or, where this solution is not available, the traditional mechanisms of diplomatic protection may be invoked.

Brazil has a long tradition of peaceful dispute settlement. It adhered to the Hague Convention for the Pacific Settlement of International Disputes of 29

July 1899.¹²⁶ This long-standing Treaty deals with mechanisms for resolving international disputes: good offices and mediation (Title II), international commissions of inquiry (Title III), and international arbitration (Title IV). It led to creation of a Permanent Court of Arbitration “accessible at any time and which shall function, unless there are stipulations by the parties to the contrary, in conformity with the rules set down in this Convention” (article 20).

Thus, as is clear, the mechanisms adopted for MERCOSUR find precedents in Public International Law, which is not surprising, in light of its juridical nature. Nevertheless, it was necessary to adapt it specifically to the circumstances at hand.

While it is true that dispute settlement within MERCOSUR can of course be approached either through the mechanisms of public international law, referred to above, or through those of private international law, the mechanism of the Treaty of Asuncion and the Protocol of Brasilia was developed to suit the specific characteristics of the common market *in fieri*.

Let us now see how such matters are dealt with under the Treaty of Asuncion and the Protocol of Brasilia, and how it has evolved under the Protocol of Ouro Preto.

Annex III of the Treaty provides that disputes between states are to be dealt with, first, by direct negotiations between the litigants, and subsequently, in successive stages, by the Common Market Group or the Common Market Council.

Nothing is said about disputes that may arise between private persons and one of the states. These are the subject of regulations in Annex III of the Treaty of Asuncion, which in fact forms the basis of the Protocol of Brasilia. The latter derives from an express provision of that Annex (paragraph 2) addressed to the contracting parties, who were given a period of 120 days to establish a “dispute settlement system that will remain valid for the transition period”. It also provides that

“by 31 December 1994, the States Parties shall adopt a permanent system of dispute settlement for the common market”.

The Member States of MERCOSUR, then, are subject to the dispute settlement system, in the capacity of litigants. By means of article 8 of the Protocol of Brasilia, Member States expressly recognized

“as mandatory, *ipso facto* and without the need for any special agreement, the jurisdiction of the arbitration tribunal which in each case is established to hear and resolve all disputes referred to” (by the Protocol of Ouro Preto).

Although article 1 of the Protocol of Brasilia says that controversies refer to those between the States Parties, in fact private persons also have access to the system, thanks to the provisions of Chapter V, which deals with claims brought by private parties. In this case, since a private claim is channeled through the National Section, it is understood that, if it is accepted, it is the State Party involved that must appear as litigant.

Nor should we forget, however, as many do, that persons under private law have free access to the courts of the Member States to take action against their respective administrations for violations of MERCOSUR norms that cause them injury. This is clearly a similar route.

III. *Ratione materiae*

The field of application of a dispute settlement system during the implementation phase of MERCOSUR will of course be limited by its transitory nature. In addition, the selection of a process of integration through cooperation also limits the possibility of disputes to those that might arise between states, since private parties have no standing with the institutions of MERCOSUR.

We may imagine that the jurisdiction of MERCOSUR will have to grow, as the process of integration unfolds, since the number of cases in which resort is had to this mechanism is bound to increase.

In any case, the short time period allowed under the Treaty of Asuncion for implementing MERCOSUR meant that “disputes that may arise between States Parties as a result of application of this Treaty” would represent the initial area of jurisdiction of the dispute settlement system. Thus, from the subject-matter viewpoint, jurisdiction would be interpretive of the text of the Treaty, since application would depend upon how it is read.

Yet the Protocol of Brasilia, in article 1, broadens this jurisdiction, to include:

“Interpretation, application or noncompliance with the provisions of the Treaty of Asuncion, the agreements signed thereunder, as well as decisions by the Common Market Council and Resolutions of the Common Market Group”.

B. HOW THE SYSTEM FUNCTIONS

We must now look more closely at the function that will be played by the dispute adjudication system, to see whether it will be merely functional or whether it will have, as in the European case, an institutional character as an active participant in the integration process.

Today, as we have seen, the MERCOSUR dispute settlement system as set forth in Annex III of the Treaty of Asuncion, shaped by the Protocol of Brasilia and fully fleshed out in the Protocol of Ouro Preto, established a mechanism that would be primarily diplomatic, and divided the settlement process into two categories, each of which consisted of different stages, only the last of which called for arbitration.

1. Procedures

There are two procedures, depending on who initiates a complaint – a private party or a State Member.

i) Proceedings undertaken at private initiative – special characteristics

As noted earlier, the dispute settlement mechanism of the Protocol of Brasilia may be initiated either by states or by private individuals. In the latter case, there are a number of issues that must be addressed.

The first question is to determine to whom, and how, the complaint should be addressed, and whether the provisions of the Protocol of Brasilia are sufficient, or whether there are other aspects that must be regulated.

The second question involves identifying the object of the complaint: what may or may not be included in it?

The third question is to discover whether action by the state, at the behest of its citizen, is discretionary: in other words, is this a case of classic diplomatic protection?

Finally, we must examine the differences between this hypothesis and that where the State takes the initiative itself.

a) Subject, procedure and object of a private complaint

The Protocol of Brasilia states, in article 26, that:

1. the affected private parties shall submit their complaints to the National Section of the Common Market Group of the State Party where they have their customary residence or business headquarters;
2. Private parties must supply sufficient details for the national section to establish the truth of the violation and the existence of injury or threat of injury.

This rule establishes who may bring a complaint: persons under private law, whom the Treaty refers to as “private parties”, as well as the party to which the complaint is addressed, which is the National Section of the Common Market Group.

Persons under private law must be resident or have their “business headquarters” in the state party where the complaint is to be introduced. The authors of the Treaty chose not to rely on the notion of “domicile”¹²⁷, but preferred (perhaps for the sake of simplicity) that of residency. Nor do they speak of corporate headquarters, but rather of “business headquarters”, using a concept similar to that in French law.¹²⁸

The body to whom the complaint is addressed is the National Section of the Common Market Group of the country of residence.

It is interesting to note the use of the capitalized expression “National Section”, which suggests a certain institutionalizing thrust.

In fact, the Treaty of Asuncion defines the composition of the Group only in fairly vague terms, indicating that its components shall represent three administrative bodies of the country in question: the Ministry of Foreign Affairs, the Ministry of Economy (or its equivalent) and the Central Bank. These are all agents of the administration, and substitutable *ad nutum*, and they may be changed at each meeting of the GMC.

The Treaty makes no reference to any formal institutionalization or constitution of a national section.

The plaintiff must submit a substantiated petition, together with elements proving the truth of his allegations, both with respect to injury or threat of injury and the violation of some rule of law. Article 26 (2) speaks of the “truth of the violation”, but it means the violation of one of the rules of law applicable to MERCOSUR.

Article 25 provides that:

“the procedure established in this chapter shall apply to complaints brought by private parties (individuals or corporations) by reason of sanction or enforcement, by any of the States Parties, of legal or administrative measures involving restrictions, discrimination or unfair competition, in violation of the Treaty of Asuncion, of agreements signed pursuant thereto, of decisions of the Common Market Council or of Resolutions of the Common Market Group”.

The object, on the other hand, is broader, since it is not limited to implementation or violation with respect to MERCOSUR norms in the administrative area alone, but also to those measures taken in the legislative area (so-called “legal” measures, in the Protocol’s terms) for introducing such norms into the domestic law of each country.

Another expression deserves special attention: the reference to “sanction or application...of legal (sic) or administrative measures”. Now sanction can mean, among other things:

“Penalty or compensation intended to ensure the execution of a law”,¹²⁹.

The term thus could be taken as indicating an intention to include administrative decisions, and perhaps even judicial ones, that give erroneous application to the rules of the Treaty, or of agreements signed pursuant thereto, or of decisions of MERCOSUR bodies. This would appear at present, however, to be an exaggerated interpretation of doubtful usefulness, since there are constitutional obstacles to it in all four countries.

b) Discretionary or compulsory?

Another important aspect is to determine whether the MERCOSUR dispute settlement mechanism follows conventional practice in the area of diplomatic protection, or whether action by the administration is compulsory. The latter interpretation would seem to be the correct one.

Two factors have served to curtail political discretion in such cases.

The first is the fact that, if the conventional practice of diplomatic protection were sufficient, there would be no need for the inclusion of articles 25 to 27 in the Protocol of Brasilia. It is a basic principle of interpretation that the law does not express itself needlessly.

The second argument is that article 26(2) requires plaintiffs to submit evidence to the national section that will verify the truth of their allegations, and article 27 speaks of the National Section of the GMC “that has admitted the complaint in the form prescribed in article 26” – i.e., has determined it to be true, and for that reason has accepted it. In requiring proof, article 26(2) mentions that the evidence submitted must be sufficient “to allow the National Section to determine the truth of the violation and the existence or threat of injury”. It is clear, then, that with such proof the complaint will be acted upon, but otherwise it will not.

The evidence submitted must be incontrovertible. The scope of the National Section’s room for discretion, as we see it, is limited to assessing the reliability and sufficiency of the evidence. The Section must be satisfied that the evidence is enough in itself to demonstrate the existence of a clear and sure right (and it must therefore be documented), as happens in cases of court injunctions [*mandados de segurança*], or else the needed data will have to be collected through administrative procedures. Such procedures would seem to be called for, in Brazil, if the evidence is not clear and uncontested. In the case of administrative acts, they are subject to the

principle of legality, without prejudice to the right of defense (CF, art. 5(LV)).

A complaint may only be rejected, then, if the evidence is found to be untrustworthy or inadequate.

ii) Proceedings undertaken at State initiative

Disputes that arise among States Parties to the Treaty of Asuncion, with respect to the interpretation of application of its norms, or of agreements signed pursuant to it, are to be resolved through diplomatic channels or, if these are not successful, by arbitration.

a) The diplomatic phase

The diplomatic phase begins with direct negotiations. The parties must inform the GMC, through the Administrative Secretariat, of the progress of the negotiations and their results (article 3.1). The time limit for this phase is 15 days, but it may be extended by agreement of the parties (article 3.2).

If this phase produces no results, or only partial accord, any of the states may submit the issue to consideration by the GMC. It must hear the parties to the dispute, and in doing so may call upon specialists, selected in the manner stipulated in articles 30 and 4.2 of the Protocol of Brasilia. After hearing the parties and consulting such experts as it deems necessary, the GMC will submit its recommendations to the litigant states (article 5).

Proceedings within the GMC must not take more than 30 days, from the date the question is submitted to the Administrative Secretariat (article 6). If the states do not accept the recommendations, the issue will go on to the arbitration phase.

b) The arbitration phase

It is interesting to note that, although there are no express references to this effect, the Arbitration College of the Treaty of Benelux presents many points of similarity with that created for MERCOSUR.

For example, the mission of the College was to:

“settle disputes that may arise among the High Contracting Parties with respect to application of the Treaty and the contractual provisions relating to its purpose”¹³⁰.

This body was given the responsibility to interpret the Treaty, as regards its rules that are common to all parties, and to assess the legality of the application of those rules within each country, as occurred with the arbitration system established for MERCOSUR.

It is true that, in the latter case, the mechanism is more flexible and less structured, and that it comes into play only after a series of efforts to find a negotiated or consensus-based resolution. This reflects not only the long-standing Latin American diplomatic tradition of favoring rational and consensual solutions, but also a sociological trait among all four countries of attempting to avoid litigation – hence the popular saying, “better a poor settlement than a good lawsuit”.

The arbitration procedure called for in the Protocol of Brasilia begins when any of the parties advises the Administrative Secretariat of the Common Market Group of “its intention to resort to the arbitration procedure established in this Protocol” (article 7.1). The Secretariat communicates this to the other party or parties to the dispute, and to the Common Market Group, and then takes steps to conduct the proceedings (article 7.2).

Submission to arbitration is compulsory, without the need for any specific agreement, as provided in the Protocol of Brasilia (Article 8). The arbitration tribunal is established *ad hoc*.

Selection of arbitrators

Two of the arbitrators are to be selected by the parties from a list of national arbitrators that is deposited with the Administrative Secretariat. The third member of the tribunal must be a national of a country not party to the dispute, and will be appointed by common agreement of the States Parties; if this is not possible, the Administrative Secretariat will draw lots among the names on a list drawn up by the Common Market Group, pursuant to article 12.

There are to be two lists of arbitrators, then. There will be one with 10 names from each country (article 10). The Common Market Group will

draw up a second list (Article 12) with 16 names, one half of which are from MERCOSUR countries, and the other half from other countries, from among whom the third arbitrator is to be selected.

The arbitration process

The headquarters of the arbitration tribunal was established in Asuncion, where it was to meet and adopt its own rules of procedure, in compliance with the provisions of the Protocol of Brasilia. Its rules of procedure must guarantee to the parties the right to appear and to submit proof and arguments. They must ensure that proceedings are conducted expeditiously.

The process begins with the submission by the parties of information on the preceding phases, together with a “brief statement of the points of fact and of law on which their respective positions are based” (article 16, Protocol of Brasilia).

The parties may appoint representatives (attorneys) and advisors to act before the Arbitration Tribunal. They may demand provisional measures, and are obliged to observe these until a decision is handed down (article 18).

Decisions must take as their basis the provisions of the Treaty of Asuncion, agreements signed pursuant thereto, Decisions of the Common Market Council, Resolutions of the Common Market Group, Directives of the Trade Commission, and the provisions of international law applicable under the circumstances.

As is normal in the case of arbitration, a solution *ex equo et bono* is issued if this is previously agreed by the parties.

The time limit for a decision by the arbitration Tribunal is sixty days from the appointment of its President, and may be extended by 30 days, one time only.

Decisions are not issued with dissenting opinions. The votes of all the arbitrators are treated as confidential (article 20), so as to ensure their independence.

Decisions of the Arbitration tribunal are not subject to appeal, and the States Parties must fulfil them within 15 days after receipt of the respective

notification, except where the Tribunal sets some other deadline (article 21). However, during the fifteen days following the decision, the parties may seek clarifications as to omissions or doubts about its meaning or the manner in which it must be fulfilled.

If one of the States Parties to the dispute fails to fulfill the decision within 30 days, the other parties may impose temporary compensatory measures to secure observance of the decision. This provision, however, is of doubtful value, given the disparity in the economies of the MERCOSUR countries; indeed, GATT sanctions may be said to suffer from a similar weakness.

The negotiation phase

Article 2 of the Protocol of Brasilia provides that the States Parties shall seek to resolve their differences through direct negotiation, during “a period of 15 days following the date on which one of the States Parties raised the dispute”; thereafter, if it is not resolved, it is to be “submitted to consideration of the Common Market Group” (Article 4), which will study the matter, and may consult a panel of experts before making its recommendations to the Parties.

2. Dispute settlement since the Protocol of Ouro Preto

The Protocol of Ouro Preto made changes to the MERCOSUR dispute settlement procedure, subdividing it by assigning specific functions to the GMC and to the CCM.

i. The CCM dispute settlement function

The CCM was given a function in the MERCOSUR dispute settlement system under article 12 of the Protocol of Ouro Preto:

In addition to the functions and attributes established in articles 16 to 19 of this Protocol, the MERCOSUR Trade Commission is empowered to *consider complaints* submitted by the National Sections of the Trade Commission *originating with the States Parties or arising from action brought by private parties* – individuals or corporations – *relating to* the situations referred to in articles 1 or 25 of the Protocol of Brasilia, when it deems these to fall within its jurisdiction.

First paragraph – The *examination* of these complaints within the MERCOSUR Trade Commission shall not prevent the state party bringing the complaint from taking action pursuant to the Protocol of Brasilia on Dispute Settlement.

Second paragraph – Complaints originating in the cases contemplated in this article shall be subject to the procedures stipulated in the Annex to this Protocol (my italics).

The jurisdiction awarded is that of *considering complaints* in the pre-litigation phase, in the expression of Eduardo Grebler¹³¹, and not of judging them in the strict sense of that word¹³². The power to issue rulings, as we understand, is still reserved to the arbitration phase.

This explains the rule in the first paragraph of article 21, quoted above. The expression *examination*, italicized in the text, indicates that the CCM is to verify, to confirm, i.e. it has a fact-finding capacity of the kind that exists in the dispute settlement mechanisms of the WTO and the former GATT. This is also the case with NAFTA, which inspired the mechanisms adopted by MERCOSUR.

Nonetheless, we find in the Annex to the Protocol of Ouro Preto, articles 3 and 4, the expression “shall decide”, and article 6 clarifies this as follows:

If there is consensus that the complaint is justified, the defendant state party must take the measures approved by the MERCOSUR Trade Commission or by the Common Market Group. In each case, the MERCOSUR Trade Commission or, subsequently, the Common Market Group shall set a reasonable time limit for implementation of those measures. At the end of that period, if the defendant state has not observed the provisions of the Decision reached, either by the MERCOSUR Trade Commission or by the Common Market Group, the plaintiff state may resort directly to the procedures envisaged in Chapter IV of the Protocol of Brasilia.

The possibility of turning to arbitration does not in any way imply an appeal, since the pre-litigation body under the Protocol of Brasilia, even with the amendments made by the Protocol of Ouro Preto, has no coercive powers to enforce execution or to apply sanctions¹³³.

If it did have, the Annex would not have omitted reference to this possibility, nor would the basic texts of MERCOSUR, from which it emerges that the CCM may issue opinions and make recommendations, but it does not render judgments in the strict sense of that word.

The convening of expert groups is another feature of the CCM's activity that has been criticized for the manner by which those experts are selected.¹³⁴

CCM proceedings fall into two phases: written and oral. The latter involves a hearing of the parties to the dispute (including private parties, if the proceedings are being conducted at their initiative).

The fact that they have an active role during the oral phase of the proceedings, as well as in the active phase, would seem to contradict opinions to the effect that private parties are excluded from proceedings once their complaint is admitted. Not only is this inconsistent with procedural rules, but it is not what has happened in cases in which the procedure has been activated. In the first case where a private complaint reached the specialist group stage (the Fenapel case between Uruguay and Argentina), the plaintiff company played an active role, with support from the Uruguayan delegation. The same was true in cases in which the dispute was resolved during the negotiation phase or in the GMC. This can also be justified by the fact that most of the time the plaintiffs have a broader and deeper knowledge of the issue than any other person, for obvious reasons.

When the experts group renders its views, it does so as conclusions or opinions which, as one professor has said, have the power to turn the state into

“a passive subject that can be demanded by any other state party to take corrective measures or to annul those challenged, and if the demand is not satisfied within a period of 15 days, [it becomes] a passive subject within the arbitration system in the case where this is initiated directly (i.e. without consultations and intervention by the Common Market Group) by the plaintiff state”¹³⁵

ii) Problems with the system's evolution

It has been said that the history of European integration from the ECSC to the present day has been that of a “government of judges”, and indeed major studies have been undertaken to demonstrate the key role that the Court has played in the integration process.

The creation of a MERCOSUR Tribunal along the lines of the European Court or the Andean Tribunal runs into a constitutional obstacle in Brazil, as noted in a speech some years ago by Minister Moreira Alves. According to him, article 92 of the Federal Constitution stipulates what are the bodies of the Judiciary Power, and lists them expressly, which means that we are faced with *numerus clausus*.

On the other hand, one of the most traditional individual guarantees in our Constitutions, found in article 5 (XXXV) of the present one, is that:

The law shall not exclude the Judiciary Power from considering injury or threat of injury.

From this we may conclude that any question of injury to natural persons residing in Brazil, even relating to community affairs, must first pass through the tribunals, and that no tribunals other than those mentioned in the Constitution may be created. This provision would have to be reformed to allow inclusion of a community-level tribunal within the Judiciary Power, if a MERCOSUR Court of Justice were to be created.¹³⁶

This argument seems insurmountable as far as domestic legal matters are concerned. Yet the time limits that a conference [*lecture?*] inevitably imposes no doubt prevented the distinguished jurist from shedding further light on related aspects that are of great importance for our study. Indeed, Brazil is party to certain treaties, such as the Convention of San José, Puerto Rico and Montego Bay, or even the United Nations Charter, which have created tribunals, and to which our nationals have access. Does that mean that decisions of those courts are subject to review – and eventual reversal – by a Brazilian judge?

CONCLUSION*

Não se pode negar que o Mercosul, como a NAFTA, a Iniciativa para as Américas e a ALCA constituem uma nova realidade para o continente, que, sem dúvida, marcará os anos que virão.

Contrastam no seu movimento centrípeto, com o centrífugo que opera na Europa do Leste e em outros lugares do globo.

Isto foi influenciado, sem sombra de dúvida, pelas mudanças ocorridas no interior dos países latino americanos, em que as sociedades passam a se organizar de outro modo, rompendo com as barreiras antigas e de certa forma redescobrimo a América.

A América Latina em geral, e os países do Mercosul em particular, querem sociedades mais abertas e competitivas, permeáveis ao comércio mundial e aos investimentos internacionais. Isso por razões econômicas e políticas.

As razões econômicas - porque é preciso resolver os problemas das diferenças internas entre áreas de pobreza e de riqueza, da criação de empregos para as novas gerações, do pagamento das dívidas externas e da superação da inflação que os assolou cronicamente.

As razões políticas - porque o entrosamento na comunidade mundial é garantia de democracia e de respeito aos direitos dos indivíduos, como as campanhas em favor dos índios e dos direitos de pessoas presas mostram.

Como dizia Felix Peña¹³⁷:

“La “revolución silenciosa” en la América Latina y por su gravitación económica y política en la región, el solo hecho que se haya lanzado el MERCOSUR, solo pueden ser vistos como buena noticia en un mundo afectado por el espectro de la inestabilidad, de la

desintegración y del retroceso relativo al desarrollo económico relativo de varias regiones”

Com ele podemos lembrar que para nós prevalecerá, ou o cenário pessimista de Jean Christoffe Ruffin¹³⁸, ou aquele mais otimista de Ralph Dahrendorff¹³⁹, segundo consigamos implantar o projeto que o Mercosul encarna em matéria de democracia, comércio e investimentos.

Para isso certamente ocorrerá o apoio dos países do mundo industrializado, que tem todo o interesse no sucesso desse programa, pois o Mercosul, pelo que representa em termos de mercado e estratégicos, será uma das regiões mais importantes no próximo século para comerciantes e investidores.

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¹ See above for a discussion of whether it will or will not be a common market

² Cf. Seitenfuss, Ricardo A.S., “Handbook of International Organizations”, Porto Alegre, Livraria do Advogado Editora, 1997, pp 55 and ff. Note that there is an interest in regulating various matters concerning MERCOSUR and its organs, such as privileges, immunities of officials, taxes etc.

³ Cf. Seitenfuss, R.A.S., “Handbook of International Organizations”, op.cit, page 51 ff.

⁴ Op. Cit., Note 104.

⁵ See previous chapter, section (a) the Customs Union – a work in progress within MERCOSUR.

⁶ Cf. Consultative Opinion of the PCIJ in the case between Germany and Austria, 5.9.31.

⁷ Guliano, Mario; Scovazzi, Tulio; and Treves, Tullio, “Diritto Internazionale”, 2nd Ed., Milano Dott A. Giuffrè, 1983, vol. 1, pp 391-2

⁸ Cf. Picone, Paolo, “L’applicazione in via provvisoria degli accordi internazionali”, Naples, 1973, pp 112-126; Schachter, O., “The Twilight of Non-Binding International Agreements” in A.J. 1977, pp 269-304; Lauterpacht, E., “Gentleman Agreements”, in Internationales Rechts und Wirtschaftsordnung, Fescht, F.A.Mann, Munich, 1977, pp 381-398.

⁹ “Introduction au Droit des Traités”, Paris: Armand Colin, 1944, pp 121-122.

¹⁰ “Derecho Internacional Público”, Montevideo, Fundación de Cultura Universitaria, 1993, pp 216-217. The author cites the examples of articles 32, 35 and 50 of the United Nations Charter, and article 35(2) of the Statute of the International Court of Justice, among others.

¹¹ Idem, p. 217

¹² The most-favored-nation clause is a constant feature of any international agreement, whereby the signatories undertake to extend automatically to other co-signatories any advantages they may accord to third states.

¹³ These are normally regional accords.

¹⁴ Cf. Note 22.

¹⁵ Article 49.1.

¹⁶ Cf. Rangel, Vicente Marotta, “Direito e Relações Internacionais”, 3rd ed., S. Paulo, RT.

¹⁷ In this respect, see Rezek, “Direito dos Tratados”, page 398, where the author recalls the case of treaties dealing with criminal matters, in which a obligation is created for the state to legislate.

¹⁸ Geneva Convention, of June 7, 1930, dealing with a Uniform Law on Bills of Exchange and Promissory Notes, promulgated by Decree No. 57,663 of 24.1.1966, DOU of 31.1.1966.

¹⁹ Law no. 7,357 of 2.9.85.

²⁰ Cf. Manoel G. Ferreira Filho, “Comentários à Constituição Brasileira de 1988”, S. Paulo, Saraiva, vol 1, pp 87-88; José Afonso da Silva, “Curso de Direito Constitucional Positivo”, S. Paulo, Malheiros Ed., 1966, pp 184-191.

²¹ 10th Inter-American Conference, 28 March 1954, approved by Legislative Decree 34 of 12.8.64, ratified on 14.1.65, promulgated by Decree no. 55,929 of 14 April 1965.

²² Inter-American Code of Private Law, signed in Havana and promulgated by Decree no. 18,871 of 13 August 1929.

²³ “Direito dos Tratados”, op. Cit., page 394.

²⁴ There are other legal systems that give precedence to treaties, not only over laws but even over the Constitution.

²⁵ Cf. “Os conflitos entre o direito interno e os tratados internacionais”, in Boletim da Soc. Bras. de Direito Internacional, ns. 45/46, Jan/Dec. 1967, pp 29 ff, op.cit. p 30

²⁶ Cf. The author’s piece, “Inserção dos Tratados no Direito Brasileiro”, Revista de Informação Legislativa, Brasília, year 33, no. 132, Oct/Dec., 1966, pp 71-80.

²⁷ Cf. Maristela Basso and Luiz Olavo Baptista, Revista de Direito do Trabalho-Genesis, no. 44, Curitiba, August 1996, pp 217 ff.

²⁸ This concept corresponds to laws that regulate important aspects requiring, therefore, special quorum to be voted.

²⁹ The author makes this assertion, without any supporting judicial precedent.

³⁰ Treaty of Asuncion, art. 1.

³¹ Cf. Michel Virelly, “La Réciprocité en Droit International”, RCADI, 122, 1967/III, p. 28.

³² Cf. The author’s article, “O impacto do MERCOSUL sobre o sistema legislativo brasileiro”, Revista da Industria, FIESP/CIESP S. Paulo, vol 1., Jan/Mar. 1992, pp 144-157.

³³ “O impact do MERCOSUL”, pp 144 ff.

³⁴ Cf. Protocol of Ouro Preto, Chapter IV, article 38 and ff.

³⁵ This is in fact an error of linguistics, since when dealing with an international organization we should call them Member States

³⁶ I add “almost” as a point of caution, since I am not aware of any cases where the structure described is not to be found, with the variations and nuances appropriate to the situation, of course.

³⁷ The expression “tribunals”, like “courts”, is a broad one that embraces not only permanent institutions but *ad hoc* ones. They may be either arbitral and judicial bodies, including international ones, and they perform dispute settlement functions in which a third party is required to decide who is right or who has the law on his side. The distinction between a tribunal and a court must be made in context, as necessary.

³⁸ Cf. J.G. Merrills, “International Dispute Settlement”, 2nd edition, Cambridge: Grotius Publications, 1991, *passim*.

³⁹ Cf. Pierre Pescatore, “Derecho de la integración: nuevo fenómeno en las relaciones internacionales”, Buenos Aires, IDB INTAL, 1973, *passim*.

⁴⁰ The success of the Japanese system, which relies primarily on these mechanisms, and the obvious inability to obtain prompt and economical responses in the judicial sphere have led many states to attempt to revive these somewhat neglected but highly useful methods, giving rise to so-called “alternative dispute resolution” (ADR) procedures.

⁴¹ In the case of the WTO, where the idea of creating a political system appears remote, and is not even mentioned, we find nevertheless that parties are subject to the dispute settlement mechanism. This might lead us to ask if we are not at the threshold of a more solid political foundation for international law, under the auspices of the institutions of the United Nations system (UN, IMF, IBRD, WTO, etc.).

⁴² Brazil’s adherence was authorized by resolution of the National Congress of 29 December 1906, and was sanctioned by Decree no. 1,633 of 3 January 1907 (although Rubem de Mello mentions Decree no. 1,647 of 28 May 1907, page 66, note 1).

Argentina and Paraguay also ratified it.

⁴³ See Hermes Marcelo Huck, “Da guerra justa às sanções econômicas”, professorial thesis for the Faculty of Law of the University of São Paulo, 1995.

⁴⁴ Cf. Celso Lafer, “O sistema de solução de disputas da OMC”, S. Paulo, IRS, 1997.

⁴⁵ The precedents for MERCOSUR are, on one hand, the traditional Hague model, and on the other the GATT experience, the model of which bears similarities with that adopted in MERCOSUR. See the conference paper quoted in note 84, above.

⁴⁶ Note that in the treaty establishing a free trade zone with Chile, a special mechanism was created, without offering access to the MERCOSUR system.

⁴⁷ Note the provisions of the protocol of black gold on this point: "Article 44. Before the process of convergence to the common external tariff is completed, the States Parties shall undertake a review of the current system of dispute settlement within MERCOSUR, with a view to adopting the permanent system referred to in item 3 of annex III of the treaty of Asuncion and in article 34 of the protocol of Brasilia”.

⁴⁸ Coletanea de informações sobre MERCOSUR, DECLA/MRE, page 4

⁴⁹ Peña, Felix, “El MERCOSUR y sus perspectivas: una opción por la inserción competitiva mundial”, paper delivered at the seminar on the outlook for subregional integration processes in Latin America and South America, held in Brussels, November 4-5, 1991, mimeograph, unpublished.

⁵⁰ It does however repeat what was agreed in Economic Complementarity Agreement #14, between Brazil and Argentina.

⁵¹ O MERCOSUL: Principios, Finalidade e Alcance do Tratado de Asunção, Coleção Regional, IPRI, Brasília, page 4. The quote is from Ambassador Renato Marques, in the article “MERCOSUL: Orígens, evolução e desafios”, Boletim de Diplomacia Econômica, MRE, no. 8, page 3.

⁵² O MERCOSUL” Principios...”, op.cit., page 6.

⁵³ “Reciprocity in international economic law – the coffee agreement of 1976, doctoral thesis in international public law for the Department of International Law of the Faculty of Law of the University of São Paulo. The thinking of Celso Lafer has inspired my comments in this section.

⁵⁴ Op.cit., page 40

⁵⁵ Situation that presents itself when a State assures or promises another State, its agents, its nationals, its commerce, etc., treatment equal or equivalent to that which the latter State accords or promises to it” Union académique Internationale, “Dictionnaire de la Terminologie du Droit International”, Paris: Sirey, 1960, pp 504-505.

⁵⁶ O MERCOSUL: Principios..., op.cit., page 16.

⁵⁷ Art. II, para. 1 (a) – “treatment no less favorable than that provided for in the appropriate part of the appropriate schedule annexed to this Agreement”.

⁵⁸ Cf. Michel Virally, “La Réciprocité en Droit International”, RCADI, 122, 1967/III, page 28.

⁵⁹ “Principios Elementares de Direito Internacional Privado”, 3rd edition, Rio de Janeiro, Ed. F. Bustos, 1938, page 15, note 1.

⁶⁰ Cf. Dolinger, Jacob, “Direito Internacional Privado”, 2nd edition, updated, Rio de Janeiro, Renover, 1993, page 32 and ff.

⁶¹ Monteiro, João, “Uniformização do Direito – Cosmopolis do Direito – Unidade do

Direito”. He proposed “one language for all peoples, one law for all societies. This is the ideal: humanity confederated in the intelligent harmony, with the universal exchange of all manifestations of human life”.

⁶² *Principios elementares*, op.cit., page 16/17, note 4.

⁶³ See for example the study by Antonio Rodrigues de Freitas, Jr., *Globalização, MERCOSUL e a Crise do Estado Nação*, S. Paulo, LTr, 1997, page 32 and ff.

⁶⁴ *Direito Internacional Privado*, op.cit., pp 34/35.

⁶⁵ *Ibid.*

⁶⁶ “*Método de Derecho Internacional Privado*”, page 248 and ff.

⁶⁷ This, despite the existence of a uniform private international law, such as has been developed in the Hague Conferences or in a more restricted sense, the CIDIP

⁶⁸ An event is a process, with a beginning, a middle and an end. The subsequent account of the event repeats these phases, but separates them and distinguishes them. If it is composed after the event, it begins at the end, selecting those facts and acts that initiated the process and that point to and bring it to its conclusion.

⁶⁹ On this point, see the excellent analysis by Guido S. Soares, in his chapter of the collective work “*O Mercosul das Negociações à Implantação*”, Orgs. Luiz Olavo Baptista et al, 2nd ed., S. Paulo, LTr, 1997.

⁷⁰ Cf. Perre Pescatore, “*Derecho de la Integración*”, op. cit., Preface by INTAL, page VII.

⁷¹ Cf. Baptista, Luiz Olavo, “*Les Joint Ventures dans les Relations Internationales*”, Paris, 1980, mimeo thesis.

⁷² A atividade normativa do MERCOSUL nos primeiros dois anos de vigencia do Tratado de Assunção: um balanço positivo? *Boletim de Integração Latino-Americana* no. 12, MRE/SGIE/NAT.

⁷³ Otermin, op. loc. cit.

⁷⁴ Fausto Pocar, “*Lezioni di Diritto delle Comunità Europee*”, 2nd ed., Milan, Giuffrè Ed., 1979, page 90.

⁷⁵ Here, its functions were somewhat similar to those attributed, in another context (a point that is worth repeating) to the Trade Commission of MERCOSUR.

⁷⁶ Jacques Karelle and Fritz de Kammeter, “*Le Bénélux commenté*”, official texts, Brussels, Ets. E. Bruylant, 1961, Preface by Baron Snoy et d’Oppuers, page 3.

⁷⁷ Jacques Karelle and Fritz de Kammeter, “*Le Bénélux commenté*”, official texts, Brussels, Ets. E. Bruylant, 1961, Preface by Baron Snoy et d’Oppuers, pages 4 and 5.

⁷⁸ *Idem*, pages 6 and 7.

⁷⁹ These powers flow from article 25 (c) of the Treaty in question.

⁸⁰ The Uruguay Round negotiations, then underway.

⁸¹ Which occurred subsequently with entry into force of the Protocol of Ouro Preto.

⁸² Halperin, Marcelo, “*El Mercado Común del Sur y un nuevo sistema regional de relaciones económicas multilaterales*”, *Integración Americana*, no. 167, IDB-INTAL, May 1991, pages 41 and ff.

⁸³ Abreu Bonilla, Sérgio, “*MERCOSUR y Integración*”, Montevideo, Fundación de Cultura Universitaria, 1991, page 85.

⁸⁴ “*Direito Internacional Público*”, S. Paulo, Saraiva, 1995, pp 157=8.

⁸⁵ *Observations sur le Projet Dupuy*, *Annuaire de l’Institut de Droit International* (1973), vol. 65, page 66.

⁸⁶ Op cit., Note 123, page 252.

⁸⁷ Paul Reuter, "Droit International Public", Paris, PUF, 1963, pp 126-127.

⁸⁸ Op cit., Note 123, pp 252-253.

⁸⁹ "El Mercado Común del Sur desde Asunción a Ouro Preto", Montevideo, Fundación de Cultura Universitaria, 1995, page 77.

⁹⁰ Some would argue that arbitration tribunals do not create jurisprudence. Yet in theory at least there is nothing to prevent this. Moreover, in the specific case of MERCOSUR, there would be a tendency for this to happen because of the usefulness of precedents in interpreting the texts. To this we may add the fact that most of the arbitrators appointed by the governments of Member States are "internationalists" and are generally accustomed to international private arbitration proceedings in which precedent carries weight.

⁹¹ Cf. Articles 41(III) and 42.

⁹² See the lucid commentary and history of its origins in the above-quoted work of Antonio Paulo Cachapuz de Medeiros, "O poder de celebrar tratados", Porto Alegre: Sérgio Fabris Ed., 1995.

⁹³ As if pursuant to law, to which a promulgated treaty is equivalent, and under pain of liability.

⁹⁴ Because a treaty is also a contract.

⁹⁵ "A Ordem Jurídica do MERCOSUL", Porto Alegre, Livraria dos Advogados 1996, page 60.

⁹⁶ In addition to objections relating to its effects in domestic law, there were other criticisms such as that expressed by Jorge Pérez Otermin in "El Mercado Común del Sur, de Asunción a Ouro Preto", Montevideo, Fundación de Cultura Económica, 1995, pp 81 and ff.

⁹⁷ Furthermore, in an effort to forestall criticisms of this kind, it dealt with this matter in article 53 by revoking contrary provisions and ratifying the Decisions of the Council taken during the transition period.

⁹⁸ "De l'Esprit des Lois"; "Essay on Government".

⁹⁹ "Droit International Public", Paris, Ed. Montchrestien, 1993, page 20.

¹⁰⁰ "El Mercado Común del Sur, de Asunción a Ouro Preto", Montevideo, Fundación de Cultura Económica, 1995, page 80.

¹⁰¹ "Las Organizaciones Internacionales, in Derecho Internacional Público, work edited by Eduardo Jiménez de Arechaga, Montevideo, FCU, 1994, vol. IV, page 415.

¹⁰² A. Mendez, "La teoría del Organo" (final version), Montevideo, Amalio, Fernández Ed., 1971, page 154.

¹⁰³ Daniel Dormoy, "Les Organisations Internationales", Paris, Dalloz, 1995, page 77.

¹⁰⁴ Le Consensus, in Pouvoirs, n. 5, 1978, pp 34-35.

¹⁰⁵ Augusto Durán Martínez, "Estructura Orgánica del MERCOSUR", in El MERCOSUR después de Ouro Preto: Aspectos Jurídicos, Revista Uruguay de Derecho Constitucional y Político, Series Congresos y Conferencias, no. 11, pages 60-61.

¹⁰⁶ Pursuant to clause X of article 14, the GMC may draw up its internal bylaws, which are to be submitted to the senior body for approval.

¹⁰⁷ Miguel A. Ekmedjian, "Introducción al Derecho Comunitario Latinoamericano", Buenos Aires, Depalma, 1994, page 210.

¹⁰⁸ Aurélio Buarque de Holanda Ferreira, “Novo Dicionário da Língua Portuguesa”, S. Paulo, Nova Fronteira, 1994.

¹⁰⁹ Augusto Durán Martínez, “Estructura Orgánica del MERCOSUR”, in *El MERCOSUR después de Ouro Preto: Aspectos Jurídicos*, Revista Uruguaya de Derecho Constitucional y Político, Series Congresos y Conferencias, no. 11, pages 69-70.

¹¹⁰ Including Jorge Pérez Otermin, in “El Mercado Común del Sur, de Asunción a Ouro Preto”, Montevideo, Fundación de Cultura Económica, 1995, page 81, and Augusto Durán Martínez, “Estructura Orgánica del MERCOSUR”, in *El MERCOSUR después de Ouro Preto: Aspectos Jurídicos*, Revista Uruguaya de Derecho Constitucional y Político, Series Congresos y Conferencias, no. 11.

¹¹¹ Augusto Durán Martínez, “Estructura Orgánica del MERCOSUR”, in *El MERCOSUR después de Ouro Preto: Aspectos Jurídicos*, Revista Uruguaya de Derecho Constitucional y Político, Series Congresos y Conferencias, no. 11, page 81.

¹¹² Cf. Augusto Durán Martínez, “Estructura Orgánica del MERCOSUR”, in *El MERCOSUR después de Ouro Preto: Aspectos Jurídicos*, Revista Uruguaya de Derecho Constitucional y Político, Series Congresos y Conferencias, no. 11, page 63, “the term ‘directive’ is not meant in its technical sense. In effect, if it is binding it is not a directive, since it produces juridical effects. Proposals, of course, are not juridical acts, since they do not produce juridical effects”. This author cites a further work in support of his thesis, “El acto de directiva”, in *Anales del Foro*, Montevideo, 1988, no. 85, p. 226 and ff.

¹¹³ “El Mercado Común del Sur, de Asunción a Ouro Preto”, Montevideo, Fundación de Cultura Económica, 1995.

¹¹⁴ See Almeida, Paulo Roberto de, “Solução de Controvérsias no MERCOSUL – Comentários ao Protocolo de Brasília”, in *Boletim da Sociedade Brasileira de Direito Internacional Público*”.

¹¹⁵ *Idem*, page 4.

¹¹⁶ In the opinion of some writers, including Suzana Czar de Zalduendo in Argentina.

¹¹⁷ Gross Spiell, Hector. “Hacia nuevas formas de cooperación económica en el cono sur de América Latina: análisis del tratado constitutivo de MERCOSUR”. Address given to the Chilean Council for International Relations on June 5, 1991. Conference series, 1991, page 7.

¹¹⁸ “Théories et Réalités en Droit International Public”, 4th ed. Paris, Pedone, 1970, page 371.

¹¹⁹ See Almeida, Paulo Roberto de, “Solução de Controvérsias no MERCOSUL – Comentários ao Protocolo de Brasília”, in *Boletim da Sociedade Brasileira de Direito Internacional Público*”, page 4.

¹²⁰ See Garré Cioekki, Belter, “El Tratado de Asunción y el Mercado Común del Sur: Los megabloques económicos y América Austral”, Montevideo, Ed. Universidad, 1991, page 157 and ff.

¹²¹ For a more detailed historical account, see Almeida, *op.cit.* That author was one of the members of the “ad hoc” Group, which also included Minister Alberto Daverede (Argentina) and Ambassador Forge Pérez Otermin (Uruguay). The starting point for their study was an outline presented by Argentina, the Protocol was approved by Legislative Decree no. 88 of December 1, 1992, and promulgated by Decree 922 of September 10, 1993 (DOU of 13/9/93).

¹²² And sometimes inappropriately...

¹²³ Cf. Hjalte Rassmussen, "On Law and Policy in the European Court of Justice", Martinus Nijoff, 1986, *passim*.

¹²⁴ This has been the usual procedure under international law since the end of the 19th century, as consolidated by the Hague Convention (approved 1899, revised 1907) which created the Permanent Court of Arbitration. On this point see Jean Touscoz, "Droit International", PUF, Paris, 1993, page 362 and ff.

¹²⁵ Jacques Karelle and Fritz de Kemmeter, "Le Bénélux commenté", Textes officiels, Brussels, Etc. E. Bruylant, 1961, cited in note 116, above.

¹²⁶ Brazil's adherence was authorized by resolution of the National Congress of 29 December 1906, and was sanctioned by Decree no. 1,633 of 3 January 1907 (although Rubem de Mello mentions Decree no. 1,647 of 28 May 1907, page 66, note 1). Argentina and Paraguay also ratified it.

¹²⁷ See, with respect to the notion of residency, domicile and headquarters, L. O. Baptista, "Dos Contratos Internacionais", S. Paulo, Saraiva, 1994, *passim*, and also, with respect to the headquarters of businesses in MERCOSUR countries, Ana Maria M. de Aguinis, "Empresas e Inversiones en el MERCOSUR", Buenos Aires, Abelado Perrot, 1993, page 282 (Argentina), 330 (Brazil) and 397 (Uruguay).

¹²⁸ The idea of the "real head office" is that used in French law in issues relating to conflict of laws as connecting elements. See Pierre Mayer, "Droit International Privé", Paris, Monchrestien, 4th edition, 1991, page 609 and ff, especially page 613, no. 1,027, and Henri Batiffol and Paul Lagarde, "Droit International Privé", Paris, LGDJ, 1970, vol. 1, page 238 and ff, no. 193.

¹²⁹ Grande e Novíssimo Dicionário da Língua Portuguesa, Laudelino Freire, Rio de Janeiro, A Noite, vol. V, page 4,563

¹³⁰ Dumon, F., "La Cour de Justice Bénélux", Brussels, Bruylant, 1980, page 31.

¹³¹ "A solução de controvérsias no Tratado do MERCOSUL", in Contratos Internacionais e Direito Econômico no MERCOSUL", PB Casela et al. (orgs), S. Paulo, Ltr, 1996, page 360.

¹³² There are some who maintain the contrary: see for example Silvina Baron Knoll de Bertollotti, who in his work "Administración y gobierno del MERCOSUR", Buenos Aires, Depalma, 1987, page 127, argues that the CCM "represents a true 'Court of First Instance' ...".

¹³³ These are expressly referred to in article 23 of the Protocol of Brasilia.

¹³⁴ See for example Ricardo Alfonso García, "Tratado de Libre Comercio", MERCOSUR y Comunidad Europea, Madrid, McGraw-Hill, 1997, page 87.

¹³⁵ Ricardo Alfonso García, "Tratado de Libre Comercio", MERCOSUR y Comunidad Europea, Madrid, McGraw-Hill, 1997, page 85.

¹³⁶ See the author's article, "A solução de disputas no MERCOSUL", in Revista de Informação Legislativa, which addresses this issue in greater detail.

¹³⁷ Cf. citado, nota 47.

¹³⁸ "L'Empire et les Nouveaux Barbares" J.C.Lattes, Paris, 1991.

¹³⁹ Reflections on the Revolution in Europe, Random House, 1990.

¹⁴⁰ Os trabalhos citados no texto encontram-se assinalados por asteriscos.

* Available in Portuguese only.