

MERCOSUR: THE COMMON MARKET OF THE TWENTY-FIRST CENTURY?

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I. INTRODUCTION

MERCOSUR, the “Common Market of the Southern Cone,” was created in March 1990 by the Treaty of Asunción and was meant to create a common market among its four signatories (Argentina, Brazil, Paraguay, and Uruguay) by December 31, 1994.¹ This common market would include the graduated elimination of all customs duties among its signatories,² the creation of a common external tariff, the adoption of a common trade policy,³ and the harmonization of economic policies.⁴ The Treaty of Asunción, and its

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¹ Treaty of Asunción Establishing a Common Market among Argentina, Brazil, Paraguay, Uruguay, Mar. 26, 1991, 30 I.L.M. 1041 [hereinafter *Asunción*].

² *Id.* art. 5(a), Annex 1 (7).

³ *Id.* arts. 1, 5(c).

⁴ *Id.* arts. 2, 5(b).

supplementary Ouro Preto Protocol,⁵ created a number of institutions to assist in the implementation of these goals.⁶

Since its founding in 1990, MERCOSUR has generated many major achievements, more than its predecessor, the Latin American Free Trade Association (LAFTA)⁷ or any other economic integration organization in Latin America. It has formalized and expanded cooperation and trading relationships among Brazil, Argentina, Paraguay, and Uruguay, and has developed these relationships into a viable and vibrant economic integration organization. For a substantial period of time, its members enjoyed unprecedented expanded trade and greater prosperity. Trade and exports among its member states have increased exponentially.⁸ It became the third-largest trading block in the world, after the North American Free Trade Agreement (NAFTA) and the European Union (EU).⁹

In 1996, the international press described MERCOSUR as a powerhouse and a potential future competitor to the EU and NAFTA.¹⁰ MERCOSUR seemed to be on its way to becoming "the Common Market of the Twenty-First Century."

Institutionally, MERCOSUR agreed on a common external tariff covering eighty-five percent of imports currently being traded by its members¹¹ and on a substantial number of trade matters. It has adopted many directives and resolutions seeking to eliminate barriers to free trade and to harmonize the legal and regulatory systems of the member states, as well as to form the basis of a system of community law.¹² It generated a substantial amount of

⁵ Argentina-Brasil-Paraguay-Uruguay: Additional Protocol to the Treaty of Asunción on the Institutional Structure of Mercosur ("Protocol of Ouro Preto"), Dec. 17, 1994, 34 I.L.M. 1244 [hereinafter *Ouro Preto*].

⁶ See *supra* notes 1, 5 and accompanying text.

⁷ Treaty Establishing a Free-Trade Area and Instituting the Latin American Free Trade Association, Feb. 18, 1960, 1484 U.N.T.S. 223 [hereinafter 1960 Treaty].

⁸ Michael S. Serrill, *Keep it in the Neighborhood Forget NAFTA—South America is Busy Building its own Powerful Trading Bloc, Called MERCOSUR*, TIME INT'L, Aug. 26, 1996, at 26 [hereinafter *Keep it in the Neighborhood*].

⁹ Matt Moffett & Craig Torres, *Brazil and Argentina, Long Rivals, Move Closer*, WALL ST. J., Nov. 12, 1998, at A25 [hereinafter *Rivals*].

¹⁰ See *Keep it in the Neighborhood*, *supra* note 8.

¹¹ Antoni Esteveordal & Ekaterina Krivonos, *Negotiating Market Access Between the European Union and MERCOSUR: Issues and Prospects*, Institute for Integration of Latin America and the Caribbean (INTAL) and the Integration, Trade and Hemispheric Issues Division (ITD) Occasional Paper 7 (2000), available at http://www.iadb.org/intal/publicaciones/Estevadeordal-Krivonos_OP7.pdf [hereinafter *Negotiating Market Access*].

¹² See <http://www.mercosur.org.uy/espanol/snor/normativa/lisdir.htm> (last visited Dec. 7,

excitement among the elites of its members states, who now seem to view the idea of economic integration as both feasible and desirable. It acquired two additional members, Bolivia and Chile, in 1996,¹³ and entered into an extensive and substantial cooperative relationship with the EU, as well as with a number of other organizations and countries.¹⁴ It has an agenda for the future and is working towards its implementation.¹⁵ Commentators in the member states had been talking about more integration, macroeconomic policy harmonization, and even a single currency.¹⁶

This optimistic environment has changed since 1999. Severe economic difficulties since 1999, first in Brazil, then in Argentina and the other member states, have had a dramatic effect on MERCOSUR and its development. Argentina felt the need to become protectionist in its trade relations with Brazil, and immediately imposed import quotas for textiles and extensive technical requirements for imported electrical appliances, and asserted that it was considering the imposition of "safeguards" against imported shoes and paper.¹⁷ Brazil started negotiations and reached a trade agreement with the

2003).

¹³ The agreement with Chile was executed on June 26, 1996, at San Luis, Argentina. Acuerdo de Complementación Económica Mercosur-Chile, ACE No. 35 (6/25/96), available at <http://www.sice.oas.org/trade/msch/Acuerdo.asp> [hereinafter Chile Agreement]; Acuerdo de Complementación Económica No. 36, Dec. 17, 1996, available at http://www.sice.oas.org/trade/mrcsbo/MERBO1_S.asp [hereinafter Bolivia Agreement].

¹⁴ See *infra* notes 261-313, 455-69.

¹⁵ See Comunicado del 15 de Diciembre de 2000, *Florianópolis*, available at <http://www.mercosur.org.uy/espanol/snor/varios/com0200.htm>, at para. 9 [hereinafter Florianópolis]; Comunicado del 30 de Junio de 2000, Buenos Aires, available at <http://www.mercosur.org.uy/espanol/snor/verios/com0100.htm> [hereinafter Buenos Aires]; Comunicado del 8 de Diciembre de 1999, Montevideo, available at <http://www.mercosur.org.uy/espanol/snor/varios/com0299.htm>, at para. 11 [hereinafter Montevideo].

¹⁶ See Florianópolis, *supra* note 15, at para. 7.

¹⁷ Peter Fritsch, *Brazil Tie to Argentina at Breaking Point*, WALL ST. J., July 28, 1999, at A20 [hereinafter *Breaking Point*]; *Sour Mercosur*, ECONOMIST, Aug. 14, 1999, at 13. A commentator noted, however, that this crisis should actually strengthen MERCOSUR in the long run because: a) this crisis had happened before; b) this crisis has made Argentina and Brazil understand how important it is to coordinate macroeconomic policy and to strengthen and create a formal liaison mechanism between them (with MERCOSUR being the perfect candidate for such a mechanism) and c) the way the crisis was handled shows that centuries of political distrust and hostility have been substantially eroded. Thomas Andrew O'Keefe, *Crisis to Solidify MERCOSUR*, J. COM., Mar. 9, 1999, at 5A.

Andean countries.¹⁸ By the end of the year, relations between Argentina and Brazil were said to be “at a breaking point.”¹⁹

The poor relationship between MERCOSUR's major partners continued throughout 2000 and 2001. Argentina viewed MERCOSUR as detrimental to its economy, and its government became uncooperative in MERCOSUR matters.²⁰ A number of disputes among the member states surfaced in the Mercosur Common Market Group²¹ caused by an energy crisis, fears of a debt default, and political squabbles, creating a similar situation in Argentina. In the meantime, Chile suspended talks on full membership in MERCOSUR and announced that it was entering into free trade negotiations with the United States, and subsequently entering into a free trade agreement.²² With the Argentine “meltdown” of 2001-2002, the picture for MERCOSUR looked much grimmer. To make matters worse, it faces a hemispheric competitor, the United States-sponsored Free Trade Area of the Americas (FTAA), a multilateral, comprehensive free trade agreement treaty to be entered into among the thirty-four nations that attended the First Summit of the Americas in 1994.²³ Negotiations on a draft FTAA agreement started in June 1998²⁴ and are meant to be concluded no later than January 2005, with the treaty coming into effect no later than December 2005.²⁵ MERCOSUR might not be the

¹⁸ *Breaking Point*, *supra* note 17.

¹⁹ *Id.*

²⁰ Craig Torres & Matt Moffett, *Neighbor-Bashing: Argentina Cries Foul as Choice Employers Beat a Path Next Door*, WALL ST. J., May 2, 2000, at A1 [hereinafter *Neighbor-Bashing*].

²¹ See INFORME DEL GRUPO MERCADO COMÚN AL CONSEJO MERCADO COMÚN-PRESIDENCIA PRO TEMPORE DEL URUGUAY SEGUNDO SEMESTRE DEL 2001 (Dec. 2001) [hereinafter *INFORME del Grupo Mercado Común*] (on file with author).

²² *Chopping Block: More troubles for Mercosur*, ECONOMIST, Dec. 16, 2000, at 40 [hereinafter *Chopping Block*]; Jonathan Karp & Pamela Druckerman, *Big Latin Customs Union Mercosur Reaches a Crossroads*, WALL ST. J., Dec. 15, 2000, at A15 [hereinafter *Crossroads*]. U.S., *Chile sign Free Trade Agreement in Miami*, ASSOCIATED PRESS, Jun. 6, 2003 [hereinafter *U.S., Chile*], available at <http://www.ajc.com/news/content/news/0603/07uschile.html>.

²³ Summit of the Americas, Fourth Trade Ministerial, Joint Declaration, San Jose, Costa Rica (Mar. 19, 1998) [hereinafter *San José Declaration*], available at http://www.alca-ftaa.org/ministerials/costa_e.asp, ¶¶ 1-2.

²⁴ Second Summit of the Americas, Plan of Action [hereinafter *Second Plan of Action*], available at http://www.sice.oas.org/FTAA/santiago/sapoa_e1.asp, ¶ III.A.1.

²⁵ Free Trade Area of the Americas, Sixth Meeting of Ministers of Trade of the Hemisphere, Ministerial Declaration, Buenos Aires, Argentina (Apr. 7, 2001), available at http://www.alca-ftaa.org/ministerials/BAMin_e.asp, ¶ 3 [hereinafter *Buenos Aires Declaration*].

“Common Market of the Twenty-First Century.” In fact, it might not have a future at all.²⁶

The question remains whether either of the assessments of MERCOSUR described above is accurate. In order to evaluate MERCOSUR, we must first examine its goals and structure, evaluate the institutions through which it seeks to implement its goals, and consider the effectiveness of the norms which the organization has created in order to do so. Accordingly, Part II of this work generally describes the Treaty of Asunción and describes and evaluates MERCOSUR’s institutions and its dispute resolution procedures. Part III evaluates MERCOSUR’s associate member relationships with Bolivia and Chile, and its relationship with the EU. Part IV will then describe and use a theoretical framework to evaluate the effectiveness and success of MERCOSUR and provide a realistic assessment thereof.

II. MERCOSUR’S ORIGINS AND INSTITUTIONS

A. *The MERCOSUR Four: An Inevitable Marriage?*

The idea that the nations of Latin America should undertake political and economic integration is not recent. As early as 1797, immediately after the independence of most Latin American nations from Spain, and throughout the nineteenth century, a number of conferences and negotiations undertook several attempts to create confederations or similar arrangements among the various states of Central and South America.²⁷

For a number of reasons, these efforts have tended to be unsuccessful in the past.²⁸ Many Latin American countries who have attempted economic or political integration have had little in common with each other.²⁹ Argentina,

²⁶ *A Decline without Parallel*, ECONOMIST, Mar. 2, 2002, at 26. Although the economic situation in both Argentina and Brazil has slightly improved since then, neither country has come out of their economic doldrums. See *infra* notes 375-77 and accompanying text.

²⁷ *Id.* One of the most interesting of these proposals is found in an 1826 document written by Simon Bolivar. In it, he proposes that the nine newly independent nations of South America enter into a political and economic union with the British empire. This proposal was not seriously considered. JUAN LANUS, INTEGRACIÓN ECONÓMICA DE AMÉRICA LATINA 21 (1973).

²⁸ LANUS, *supra* note 27, at 24-25; EDWARD S. MILENKY, THE POLITICS OF REGIONAL INTEGRATION IN LATIN AMERICA: THE LAFTA 11-12 (1973); JOHN MATHIS, ECONOMIC INTEGRATION IN LATIN AMERICA, THE PROGRESS AND PROBLEMS OF LAFTA 9-10 (1969); JUAN PABLO VACCHINO, INTEGRACIÓN LATINOAMERICANA: DE LA ALALC A LA ALADI 27 (1983).

²⁹ MATHIS, *supra* note 28, at 17-18; VACCHINO, *supra* note 28, at 59, 72-79, 86; MILENKY, *supra* note 28, at 70-74, 79.

Brazil, Chile and Uruguay, on the other hand, seem unusually complementary to each other, politically, economically and historically. They have many things in common, starting with geography: three out of the four (Paraguay, Argentina and Brazil) share extensive common borders,³⁰ as do Brazil and Uruguay.³¹ Uruguay and Argentina were actually once politically united.³² The political systems of all four countries had undergone recent substantial democratization³³ and had taken part in the process of economic liberalization that took place in the region in the 1970s and 1980s.³⁴ All four countries actually traded with each other, and had a history of economic cooperation, including joint administration of transnational infrastructure projects.³⁵

In spite of prior cooperation between them in the construction of the Corpus and Ytaipu dams in the late 1970s, relations in the early 1980s between Brazil and Argentina were difficult. Argentine military governments tended to foster rivalry with Brazil and their foreign policy towards that country tended to stress competition rather than cooperation.³⁶ Brazilian governments, on the other hand, retorted with strong protectionist measures aimed at Argentine exports, whose quantity and value had fallen greatly since 1980.³⁷

This situation changed after the military regimes of Argentina and Brazil were replaced by democratic governments in the mid-1980s. Both the Brazilian and Argentine governments began to see the advantages of further cooperation and integration and a series of agreements between them were signed in quick succession.³⁸

It can be argued that this turn of events was unavoidable. The relationship between Argentina and Brazil has been described as similar to that of France

³⁰ See UNITED STATES CENTRAL INTELLIGENCE AGENCY, *WORLD FACT BOOK 2002*, available at <http://www.umsl.edu/services/govdocs/wofact2002> [hereinafter CIA FACTBOOK].

³¹ *Id.*

³² Argentina and Uruguay were part of the United Provinces of the River Plate from the time of independence in 1815 through 1828. ERNESTO PALACID, *HISTORIA DE LA ARGENTINA*, 1515-1983, 200-06, 255-59 (1986).

³³ See PETER COFFEY, *LATIN AMERICA-MERCOSUR* 257-59 (1998).

³⁴ *Id.* See also PAZ MILLET ET AL., *CHILE-MERCOSUR: UNA ALIAZA ESTRATEGICA* 135 (1997) [hereinafter CHILE-MERCOSUR].

³⁵ COFFEY, *supra* note 33, at 21-23, 29-33.

³⁶ *Id.* at 29-30.

³⁷ Atilio Anibal Alterini & Maia Critina Boldorini, *EL SISTEMA JURIDICO EN EL MERCOSUR*; I, *ESTRUCTURA GENERAL-INSTRUMENTOS FUNDACIONALES Y COMPLEMENTARIOS* (1995) [hereinafter ALTERINI]. In this time period, however, trade between both countries was significant. In 1983, for example, trade between Argentina and Brazil totaled \$358 million in exports from Argentina to Brazil and \$654 million in imports. COFFEY, *supra* note 33, at 38.

³⁸ COFFEY, *supra* note 33, at 4, 6, 30-34, 122-25.

and Germany at the time of the creation of the European Economic Community: both countries had a long history of (sometimes hostile) interrelationships, and the exports of one (France, or in this case, Argentina) tended to be primarily agricultural, while those of the other (Germany, or in this case, Brazil) tended to be primarily industrial.³⁹

This complementarity becomes striking upon examination of certain economic characteristics. To begin with, Brazil and Argentina are the largest countries, in territory and population, in South America⁴⁰ and each has large and highly developed consumer markets.⁴¹ Argentina is rich in natural resources, and has a highly developed export-oriented agricultural sector, which produces a variety of products.⁴² Argentina's industrial sector also produces a variety of products.⁴³ Argentina also has a very large service sector, which accounted for sixty-six percent of GDP in 2001.⁴⁴ Its exports, which were estimated at \$26.5 billion in 2000, included edible oils, fuels and energy, cereals, feed, and motor vehicles.⁴⁵ Its imports, which totaled \$23.8 billion in 2000, chiefly included machinery and equipment, motor vehicles, chemicals, metal manufactures, and plastics. Argentina's principal trading partners in 2000, for both exports and imports, included Brazil, the United States, Chile, Spain, China, and Germany, with Brazil being both its principal import and export partner.⁴⁶ Argentina also exported 3.7 billion kWh and imported 7.5 billion kWh of electricity in 2000.⁴⁷

Brazil, on the other hand, has a much larger economy than Argentina does,⁴⁸ and has large and well-developed agricultural, mining, manufacturing,

³⁹ *Id.* at 122; ALTERINI, *supra* note 37, at 168.

⁴⁰ CIA FACTBOOK, *supra* note 30.

⁴¹ *Id.*

⁴² *Id.* These products include sunflower seeds, soybeans, lemons, grapes, corn, tobacco, peanuts, tea, wheat and livestock. This sector was estimated to compose about six percent of GDP in 2001. *Id.*

⁴³ *Id.* These products include processed foods, motor vehicles, consumer durables, textiles, chemicals and petrochemicals, and steel. This sector was estimated to compose about twenty-eight percent of GDP in 2001. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* Argentina's principal export trading partners in 2000 were Brazil (26.5%), the United States (11.8%), Chile (10.6%), and Spain (3.5%). *Id.*

⁴⁶ *Id.*

⁴⁷ *See id.* (noting that imported electricity chiefly came from Paraguay).

⁴⁸ Brazil had an estimated GDP (purchasing power parity) of \$1.34 trillion in 2001. *Id.* Argentina, on the other hand, had an estimated GDP (purchasing power parity) of \$453 billion in that year. *Id.*

and service sectors.⁴⁹ Its principal agricultural products include coffee, soybeans, wheat, rice, corn, sugarcane, cocoa, citrus, and beef.⁵⁰ Principal industrial products include textiles, shoes, chemicals, cement, lumber, iron ore, tin, steel, aircraft, motor vehicles, and other machinery and equipment.⁵¹ Its exports, which totaled \$57.8 billion in 2001, are principally manufactured goods, iron ore, soybeans, footwear, coffee, and autos.⁵² Its imports, which totaled \$57.7 billion in 2001, include machinery and equipment, chemical products, oil, electricity, autos, and auto parts. Brazil's principal trading partners in 2001, for both exports and imports, included the United States, Argentina, Germany, Japan, Italy, and the Netherlands.⁵³ The United States and Argentina were Brazil's principal trading partners.⁵⁴ Brazil also imported 42.3 billion kWh of electricity from Paraguay in 2000.⁵⁵

Uruguay, with a much smaller land mass⁵⁶ and population⁵⁷ than either Brazil or Argentina, has as the largest sector of its economy a well-developed services industry.⁵⁸ Its agricultural sector, which principally produces rice, wheat, corn, barley, livestock, and fish, is extensive and export-oriented.⁵⁹ Uruguay's industrial sector involves food processing, electrical machinery, transportation equipment, petroleum products, textiles, chemicals, and beverages.⁶⁰ Its exports, which totaled \$2.24 billion in 2001, included meat,

⁴⁹ In 2001, the agricultural sector composed 9% of GDP, the industrial sector 32% and the services sector 59%. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Brazil's principal export trading partners in 2001 included the United States (24.4%), Argentina (11.2%), Germany (8.7%), Japan (5.5%) and Italy (3.9%). *Id.*

⁵³ *Id.*

⁵⁴ *Id.* The United States accounted for approximately 24% of Brazil's exports and 23% of its imports in 2001. *Id.* Argentina accounted for approximately 11% of Brazil's imports and exports during 2001. *Id.*

⁵⁵ *Id.*

⁵⁶ Uruguay has a total area of approximately 176,000 square kilometers, compared with a total area of approximately 8,500,000 square kilometers for Brazil and approximately 2,766,000 square kilometers for Argentina. *Id.*

⁵⁷ Uruguay had an approximate total population of 3,386,000 in 2002, compared with an approximate total population of 176,000,000 for Brazil and approximately 37,800,000 for Argentina. *Id.*

⁵⁸ This sector represented 65% of Uruguay's GDP (purchasing power parity) of \$31 billion in 2001. Seventy percent of the Uruguayan labor force was employed in this sector. *Id.*

⁵⁹ *Id.* This agricultural sector composed 29% of Uruguay's GDP for 2001 and employed 14% of its labor force. *Id.*

⁶⁰ *Id.* Uruguay also produced 7.5 billion kWh in 2000. Of this production, approximately 950 million kWh were exported, and the importation of approximately 1.3 billion kWh was

rice, leather products, wool, vehicles, and dairy products.⁶¹ Its imports, which totaled \$2.9 billion in 2001, chiefly included machinery, chemicals, road vehicles, and crude petroleum.⁶² Its principal trading partners in 2001, for both exports and imports, were the MERCOSUR countries, the EU, and the United States, with the MERCOSUR countries representing Uruguay's primary trading partners.⁶³

Paraguay, on the other hand, has a very different economy from the others. Its informal sector, which includes both re-export of imported consumer goods to neighboring countries and the activities of thousands of micro-enterprises and urban street vendors, is extremely large and important.⁶⁴ A large percentage of the population derives their living from agricultural activity, often on a subsistence basis.⁶⁵ Paraguay grows cotton, sugarcane, soy beans, corn, wheat, tobacco, tapioca, fruits, vegetables, beef, pork, eggs, milk, and timber.⁶⁶ It has an industrial sector which produces cement, textiles, beverages, and wood products.⁶⁷ A principal export industry is that of electricity generation, which accounted for substantial exports in 2000.⁶⁸ Its principal exports, which totaled \$2.2 billion in 2001, include electricity, soybeans, feed, cotton, meat, and edible oils.⁶⁹ Its principal imports included road vehicles, consumer goods, tobacco, petroleum products, and electrical machinery.⁷⁰ Paraguay's principal trading partners included Argentina, Brazil, and Uruguay.⁷¹

Although there are a few areas of competition among them (such as the automotive industry),⁷² a number of natural economic connections among them

necessary in order to meet local demand. *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* The MERCOSUR countries accounted for approximately 40% of Uruguay's exports and 44% of its imports. *Id.*

⁶⁴ *Id.* These activities take part informally, with their participants not reporting their activities or their profits to any authorities. For this reason, accurate economic data on Paraguay is very difficult to obtain. *Id.*

⁶⁵ *Id.* The estimate is that approximately 45% of the labor force is employed in agriculture. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ In that year, the Paraguayan electrical generation industry generated approximately 56 billion kWh of electricity, of which approximately 47.3 billion kWh were exported. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See Stephen P. Sorensen, *Open Regionalism or Old Fashioned Protectionism? A Look at*

surface from the brief descriptions set forth above. Thus, Brazil's extensive manufacturing sector has a natural market among Argentina's, Uruguay's, and Paraguay's populations.⁷³ Argentina's (and to a lesser degree Paraguay's) extensive natural resources and agricultural sectors also have ready made markets in Brazil. Uruguay has had extensive economic connections with Argentina for many years. Its services industry (especially its financial services sector) also has many potential customers across the Rio de la Plata in Argentina. Lastly, Paraguay's electrical generation industry very profitably supplements Argentina's and Brazil's massive energy needs.

These economic connections and long history of interaction among Brazil, Argentina, Uruguay, and Paraguay make successful integration efforts among them more likely to happen. Thus, MERCOSUR is a consummation of a likely, if not inevitable, economic marriage.

B. Formalizing the Relationship

The first step on the path of greater cooperation between Brazil and Argentina was taken in the Iguazu Declaration, signed by Presidents Alfonsín of Argentina and Sarney of Brazil, on November 29, 1985.⁷⁴ In this declaration, both presidents indicated joint positions on a number of economic and foreign policy issues.⁷⁵ The most important parts of this Declaration, however, were the agreement that cooperation, harmonization, and integration of a number of sectors of the economy were desirable and the creation of an implementation mechanism.⁷⁶ The presidents then announced the creation of a Joint Commission that would explore and make recommendations for bilateral cooperation and integration.⁷⁷

the Performance of MERCOSUR's Auto Industry, 30 U. MIAMI INTER-AM. L. REV. 371 (1998).

⁷³ Indeed, a point of contention between Brazil and Argentina during the recent economic crisis was that Brazil was flooding Argentina's market with cheap imports. See *infra* notes 367-81 and accompanying text.

⁷⁴ Iguazu Declaration, reprinted in *TODO EL MERCOSUR: DESDE SUS PRIMEROS ANTECEDENTES A LA UNION ADUANERA* 51-57 (1995) [hereinafter IRI].

⁷⁵ See *id.* § 9 (foreign debt), § 12 (support for the Contadora Group), § 13 (cooperation on issues relating to the Plate River basin), § 14 (joint position on the Falklands Islands dispute), and § 15 (drug policy).

⁷⁶ *Id.* Some of these sections included: energy, transport, and communications (§§ 22-27), scientific and technical cooperation (§§ 28-29), and general economic and commercial cooperation (§ 30).

⁷⁷ *Id.* §§ 18-20.

Eight months later, the negotiations started by the Iguazu Declaration resulted in an Agreement on Argentine-Brazilian Integration.⁷⁸ The Integration Agreement created an Integration and Economic Cooperation Program between Brazil and Argentina. This program would involve a number of economic sectors and would seek to achieve economic cooperation and integration in a flexible and gradual fashion.⁷⁹ Specific guidelines for individual economic areas were set forth in twelve protocols. Between 1986 and 1988, Argentina and Brazil signed twelve more protocols covering other economic sectors.⁸⁰ This program was to be established and implemented by an Implementation Commission which would meet every six months and whose membership would consist of senior cabinet ministers from both countries.⁸¹

During this time period, Uruguay was also involved with economic integration efforts with Brazil and Argentina. It had signed economic cooperation agreements with Argentina (known as CAUCE agreements, for their Spanish acronym) in 1974 and 1985,⁸² and commercial expansion treaties (known as PEC agreements for their Spanish acronym) in 1975 and 1986.⁸³ These bilateral agreements gave Uruguay substantial tariff concessions for exports to Argentina and Brazil, effectively granting it preferential access to their markets. Not surprisingly, trade between Uruguay and Brazil and Argentina increased substantially.⁸⁴

Further negotiations between Argentina and Brazil resulted in the Act of Buenos Aires, where both countries agreed in principle to establish a common market between them. This common market would be implemented by December 31, 1994.⁸⁵

⁷⁸ Agreement on Argentine-Brazilian Integration, July 29, 1986, 27 I.L.M. 901 [hereinafter Integration Agreement].

⁷⁹ *Id.* arts. 1-2.

⁸⁰ See COFFEY, *supra* note 33, at 34. The first twelve protocols covered, capital goods, wheat, complementarity of the food supply, expansion of trade, joint companies, financial matters, investment funds, energy, biotechnology, economic studies, nuclear accidents and radiological emergencies, and aeronautical cooperation. Integration Agreement, *supra* note 78, at 902-04.

⁸¹ Integration Agreement, *supra* note 78, arts. 3-5.

⁸² ALTERINI, *supra* note 37, at 166.

⁸³ *Id.* at 168.

⁸⁴ COFFEY, *supra* note 33, at 166-70.

⁸⁵ Act of Buenos Aires, *reprinted in* IRI, *supra* note 74, at 63-64.

C. Creating a Common Market: Partial Scope Agreement 14

This agreement in principle was fleshed out in Partial Scope Agreement 14 (PSA 14) signed in Montevideo on December 20, 1990.⁸⁶

PSA 14 set forth a number of concepts that would later be incorporated in the Treaty of Asunción, which created MERCOSUR. First, the parties agreed to eliminate all customs duties, tariffs and restrictions between them by December 31, 1994.⁸⁷ During the transition period before this date, all previously agreed tariff preferences between both countries would be maintained.⁸⁸ This elimination of customs duties applied to all products, with the exception of those excepted by the parties in Annexes III and IV to the Agreement. Tariffs on these products were to be eliminated at the rate of twenty percent a year.⁸⁹ Second, the parties agreed, as a necessary adjunct to the elimination of all tariffs, on the harmonization of all macroeconomic policies, especially those linked to the flow of commerce.⁹⁰ The parties also agreed on rules of origin for products originating in their territory. These rules of origin were also included in the treaty as an Annex.⁹¹

During the transition period (until December 31, 1994), each country could request the application of safeguard clauses against the importation of goods from the other.⁹² When an importing nation felt that the increase in imports of a particular good would cause great damage to its markets, it could solicit consultations on how to minimize this damage.⁹³ These consultations could result in agreement on the imposition of a "safeguard clause," which would limit or otherwise place restrictions on imports of that good into the other country for a period of up to one year.⁹⁴ The parties also agreed to promote and adopt more measures to integrate their economies and correct any temporary distortions in their markets caused by increased trade.⁹⁵ The

⁸⁶ Acuerdo de Complementación Económica, *reprinted in* IRI, *supra* note 74, at 65-73. This agreement was filed with the Latin American Integration Association [hereinafter ALADI]. Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672 (1981), arts. 7-14 [hereinafter ALADI Treaty].

⁸⁷ PSA 14, *supra* note 86, § 3.

⁸⁸ *Id.* arts. 5, 6, 13-14.

⁸⁹ *Id.* art. 8.

⁹⁰ *Id.* art. 10.

⁹¹ *Id.* art. 15.

⁹² *Id.* art. 16.

⁹³ *Id.* arts. 17-18.

⁹⁴ *Id.* arts. 18-20.

⁹⁵ *Id.* art. 22.

agreement would be administered and implemented by the Argentina-Brazil Common Market Group, which had been created by the Act of Buenos Aires.⁹⁶

After the signature of the Act of Buenos Aires, Paraguay and Uruguay expressed a strong interest in joining the Argentina-Brazil common market and negotiations began on an agreement to create a common market among all four countries.⁹⁷ For Uruguay, this represented a natural “next step” from its prior negotiations and agreements with Brazil and Argentina.⁹⁸ For Paraguay, which saw itself as a supplier of energy to its large neighbors,⁹⁹ this too represented a natural progression from its prior cooperation on hydroelectric matters with Argentina and Brazil.

Three months after the signature of PSA 14, on March 20, 1990, the negotiations among Argentina, Brazil, Paraguay, and Uruguay resulted in the signing of the Treaty of Asunción, which created MERCOSUR. As shall be seen below, a whole new era of Latin American integration had begun.

D. The Treaty of Asunción, Its Protocols, and the Common Market

An analysis of MERCOSUR’s legal and institutional foundation must begin with four key documents: the Treaty of Asunción and its five Annexes, Ouro Preto, the Brasilia Protocol on the Resolution of Controversies, and the Olivos Protocol for the Resolution of Controversies.¹⁰⁰ These documents form the backbone of the MERCOSUR legal system. The Treaty of Asunción borrows a large number of concepts from PSA 14 and looks very similar to that agreement.¹⁰¹ Its purpose is to create a common market among its four signatories (Argentina, Brazil, Paraguay, and Uruguay) by December 31, 1994.¹⁰² This is the same date that PSA 14 sets for the elimination of all tariff barriers among its signatories.¹⁰³ Like PSA 14, the Treaty of Asunción calls for the graduated elimination of customs duties among its signatories at the rate of twenty percent a year (with certain exceptions for Paraguay and

⁹⁶ *Id.* arts. 23-24; Act of Buenos Aires, *supra* note 85, art. 2.

⁹⁷ ALTERINI, *supra* note 37, at 73-75.

⁹⁸ *Id.*

⁹⁹ COFFEY, *supra* note 33, at 9.

¹⁰⁰ Protocol of Brasilia for the Solution of Controversies, MERCOSUR/CMC/Dec No. 1/91(I), available at <http://www.mercosur.org.uy> [hereinafter Brasilia]; Protocolo de Olivos Para La Solucion de Controversias en el MERCOSUR. MERCOSUR/GANPSSC/Acta No. 5/01 (Feb. 18, 2002), available at <http://www.mercosur.org.uy> [hereinafter Olivos].

¹⁰¹ See *supra* notes 86-96 and accompanying text.

¹⁰² Asunción, *supra* note 1, art. 1.

¹⁰³ See *supra* note 92 and accompanying text.

Uruguay),¹⁰⁴ the exception of certain mutually agreed-upon areas from these tariff reductions,¹⁰⁵ the harmonization of economic policies,¹⁰⁶ the creation of rules of origin very similar to those of PSA 14,¹⁰⁷ and the continuation of the safeguard clause system.¹⁰⁸ Unlike PSA 14, the Treaty of Asunción calls for a common external tariff and for the adoption of a common trade policy.¹⁰⁹ Ouro Preto creates a number of additional MERCOSUR institutions and further enumerates and expands the roles of all of these institutions. Brasilia and Olivos augment the perfunctory provisions set forth in the Treaty of Asunción and Ouro Preto¹¹⁰ for the resolution of disputes among member states and individuals. The major provisions of the latter documents will be discussed in some detail below.

E. The MERCOSUR Institutions

Under the Treaty, Ouro Preto, and Olivos, seven institutions are charged with implementing MERCOSUR's principles and purposes. They include the Council of the Common Market (Council), the Common Market Group (Group), the MERCOSUR Commerce Commission (MCC), the Joint Parliamentary Commission, the Economic and Social Consultative Forum (Forum), the Administrative Secretariat (Secretariat), and the Permanent Appellate Tribunal (Tribunal).

The Council consists of the Foreign Relations and Economics Ministers of the four member states.¹¹¹ Its presidency rotates among the member states, in alphabetical order, every six months.¹¹² The Council is responsible for the political leadership of the integration process and for making decisions to ensure the implementation of the objectives of the Treaty of Asunción.¹¹³ In addition, the Council is the legal representative of MERCOSUR, entitled to sign agreements with third-party countries, groups of countries, or international organizations.¹¹⁴ It supervises the other MERCOSUR institutions, and

¹⁰⁴ Asunción, *supra* note 1, art. 5(a); Annex I, art. 7.

¹⁰⁵ *Id.* at Annex I, art. 7(b).

¹⁰⁶ *Id.* arts. 2, 5(b).

¹⁰⁷ *Id.* at Annex II.

¹⁰⁸ *Id.* See *supra* notes 92-95 and accompanying text.

¹⁰⁹ Asunción, *supra* note 1, arts. 1, 5(c).

¹¹⁰ *Id.* at Annex III; Ouro Preto, *supra* note 5, arts. 43-44.

¹¹¹ Asunción, *supra* note 1, art. 11; Ouro Preto, *supra* note 5, art. 4.

¹¹² Asunción, *supra* note 1, art. 12; Ouro Preto, *supra* note 5, art. 5.

¹¹³ Ouro Preto, *supra* note 5, art. 3.

¹¹⁴ *Id.* art. 8(III-V).

can modify or eliminate them.¹¹⁵ It also acts on policy proposals sent to it by the Group¹¹⁶ and has the power to designate the Director of the Secretariat.¹¹⁷ The Council acts by means of “Decisions,” which, according to Ouro Preto, are “obligatory for the member states.”¹¹⁸ The Council is the most important and powerful MERCOSUR institution.

The Group has four alternate representatives from each member state designated by their governments.¹¹⁹ Representatives from the economics and foreign ministries and central bank must be included in each member state’s delegation. Each member state’s delegates are coordinated by its minister of foreign relations.¹²⁰ The Group’s principal responsibilities include monitoring compliance with the Treaty of Asunción, proposing policy for consideration by the Council and ensuring compliance with Council decisions.¹²¹ Analysis and recommendations on proposals or recommendations submitted by other MERCOSUR institutions are also part of the Group’s responsibilities.¹²² It may, if authorized by the Council, become MERCOSUR’s representative in negotiating agreements with non-member countries, groups of countries, or international organizations.¹²³ Administratively, the Group approves the MERCOSUR budget, the Secretariat’s annual expenditures, and supervises the Secretariat staff and Council meetings.¹²⁴ The Group has its own internal

¹¹⁵ *Id.* art. 8(VII).

¹¹⁶ *Id.* art. 8(V).

¹¹⁷ *Id.* art. 8(IX).

¹¹⁸ *Id.* art. 9.

¹¹⁹ *Id.* art. 11.

¹²⁰ *Id.*

¹²¹ *Id.* art. 14(II-III).

¹²² *Id.* art. 14(VI).

¹²³ *Id.* art. 14(VII).

¹²⁴ *Id.* art. 14 (VIII-XIV).

regulations¹²⁵ and can create "working subgroups" to assist it in its work.¹²⁶ The Group's "Resolutions" are "binding on the member states."¹²⁷

The Council and the Group bear a superficial resemblance to the EU's Council and Commission. In both organizations, the Council is controlled by the member states and has the power to create policy or "community law,"¹²⁸ while the other institutions, the Commission in the EU and the Group in MERCOSUR, represent the proposer and implementer of policy.¹²⁹ The European Commission and the Group are, however, very different institutions. The former is a supranational institution whose members are independent of the member states and which controls a substantial permanent staff. It has a substantial independent power base.¹³⁰ The latter is controlled by the member states, whose senior civil servants serve as its members. It has no staff and no independent power base. Its role seems to be primarily administrative, rather than that of a planning and policy-making entity.¹³¹

The MCC, a creature of Ouro Preto, has four representatives and four alternates from each member state.¹³² It implements the common commercial policy agreed to by the member states and monitors its application. Decisions regarding the administration and application of the common external tariff, as well as proposals relating to changes to the common external tariff and the common commercial policy, are also part of its responsibilities. The MCC also provides information to the Group on the evolution and application of the

¹²⁵ Reglamento Interno del Grupo Mercado Común, MERCOSUR/CMC/DEC No. 04/1991, available at <http://www.mercosur.org.uy/pagina1esp.htm>.

¹²⁶ The Group currently has twelve working groups (Communications, Mines, Technical Regulations and Evaluation, Financial Affairs, Transport and Infrastructure, Environment, Industry, Agriculture, Energy, Labor, Employment and Social Security, and Health and Investments), seven ad hoc groups (Institutional Aspects, Sugar, External Relations, Administrative Secretariat Budget, Treatment of Public Policies that Distort Competition, Public Contracts, and Followup of Economic and Commercial Linkages) five Specialized Meetings (Science and Technology, Tourism, Social Communication, Women, and Drugs and Drug Addicts), a Service Group, and three Commissions (Sociolaboral, Administrative/Mercosur-Bolivia, and Administrative/Mercosur-Chile), available at <http://www.mercosur.org.uy/espanol/sinfi/variog/gmc.htm>.

¹²⁷ Ouro Preto, *supra* note 5, art. 15.

¹²⁸ Malcom Rowat et al., *Competition Policy and MERCOSUR*, WORLD BANK TECHNICAL PAPER NO. 385 at 14, 15 (Oct. 1997) [hereinafter RL+P]. See, e.g., TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, art. 189, Mar. 25, 1957, 298 U.N.T.S. 11, as amended by subsequent treaties, available at <http://europa.eu.int>. [hereinafter Treaty of Rome].

¹²⁹ See, e.g., Treaty of Rome, *supra* note 128, art. 211.

¹³⁰ See e.g., *id.* arts. 156-159.

¹³¹ See Ouro Preto, *supra* note 5.

¹³² *Id.* art. 17.

common commercial policy.¹³³ It considers and decides applications submitted to it by the member states regarding the administration of MERCOSUR's common external tariff and common commercial policies. It monitors matters dealing with common commercial policies, intra-MERCOSUR trade, and trade relations between MERCOSUR and non-member states.¹³⁴ It has internal regulations which regulate its proceedings.¹³⁵ Furthermore, it also has the power to create Sub-Working Groups to examine and make proposals regarding different specific areas related to the common external tariff and the common commercial policy.¹³⁶ It also has, under Olivos, the power to consider claims by individuals relating to member state violations of the Treaty and community law.¹³⁷ The MCC issues either "Directives" or "Proposals," with the former being "binding on the member states."¹³⁸ The MCC, with its specialized personnel, is a technical body whose principal task involves the analysis of areas of policy and the preparation of proposals relating thereto.

The Joint Parliamentary Commission, another Ouro Preto creation, serves as a representative of the legislatures of the member states.¹³⁹ Each member state has an equal number of delegates who are designated by their parliaments.¹⁴⁰ Its principal missions include planning and setting the stage for the creation of a future MERCOSUR parliament.¹⁴¹ It is also meant to be an institution to assist MERCOSUR in the implementation of its policies and in the harmonization of national legislation therewith.¹⁴² It has an advisory function at this point.

¹³³ *Id.* art. 19.

¹³⁴ Treaty of Asunción, *supra* note 1, art. 16; Ouro Preto, *supra* note 5, art. 19.

¹³⁵ Reglamento Interno de la Comisión de Comercio del Mercosur, MERCOSUR/GMC/Res 61/96 (1996), available at <http://www.mercosur.org.uy/espanol/snor/normativa/resoluciones/1996/RES9661.htm> [hereinafter Internal Regulations].

¹³⁶ Ouro Preto, *supra* note 5, art 19(IX); Internal Regulations, *supra* note 135, art. 6(IX). The MCC currently has several Technical Committees: Tariffs, Nomenclature, and Classification of Goods; Customs Matters; Commercial Disciplines and Norms; Competition; Consumer Protection; and Public Policies Distorting Competitiveness. It also has a Commercial Defense and Safeguard Measures Committee, available at <http://www.mercosur.org.uy/espanol/snor/estructura/CCM.HTM>.

¹³⁷ Olivos, *supra* note 100, arts. 39-43.

¹³⁸ Ouro Preto, *supra* note 5, art. 20.

¹³⁹ *Id.* art. 22.

¹⁴⁰ *Id.* arts. 23-24.

¹⁴¹ Reglamento de la Comisión Parlamentaria Conjunta del MERCOSUR, MERCOSUR/CPC/Res. No. 2/97 (1997), art. 3, available at <http://www.mercosur.org.uy/espanol/sinf/varioc/CPCREG.HTM>.

¹⁴² Ouro Preto, *supra* note 5, art. 25.

Under Ouro Preto, the Forum's members represent the various sectors of economic and social life, such as merchants, consumers and workers.¹⁴³ Its functions are purely advisory and this advice takes the form of "Recommendations" to the Group and other MERCOSUR institutions.¹⁴⁴ It is meant to "cooperate actively" to promote economic and social progress within MERCOSUR, analyze and evaluate the social and economic impact of the various integration policies and their implementation, recommend economic and social norms and policies relating to integration, and perform studies and research on economic and social matters relevant to MERCOSUR.¹⁴⁵

The Secretariat is the only institution within MERCOSUR to have a permanent staff. It is permanently headquartered in Montevideo, Uruguay,¹⁴⁶ and, at present, its staff consists of approximately twenty-seven persons.¹⁴⁷ Its proposed 2002 budget was approximately \$980,000.¹⁴⁸ The Secretariat's responsibilities include translation of documents, logistical support for all of the other institutions, editing the MERCOSUR Official Gazette, gathering information for the other institutions, and handling communications with the member states.¹⁴⁹ The Secretariat also has the task of monitoring and reporting on the implementation of all the MERCOSUR norms by each of the member states into its national legal system.¹⁵⁰ Furthermore, the Secretariat manages the panel of arbitrators established by Brasilia and Olivos to resolve disputes arising out of the Treaty of Asunción and its implementation.¹⁵¹ The Secretariat appears to have no substantive decision-making power. Again, the member states of MERCOSUR have clearly sought to ensure that control over the integration process remains in the hands of the member states and not in a group of independent international civil servants. The Secretariat is headed

¹⁴³ *Id.* art. 28.

¹⁴⁴ *Id.* art. 29.

¹⁴⁵ Reglamento Interno del Foro Consultivo Económico-Social, MERCOSUR/GMC/Res. No. 68/96 art. 2 (I-VI) (1996), available at <http://www.mercosur.org.uy/espanol/snor/normativa/resoluciones/1996/RES9668.htm>.

¹⁴⁶ Ouro Preto, *supra* note 5, art. 31.

¹⁴⁷ Estructura y Manual de Cargos y Funciones de la Secretaría Administrativa del MERCOSUR, MERCOSUR/GMC/RES No. 15/02 (2002), available at <http://www.mercosur.org.uy/espanol/snor/normativa/resoluciones/2002/0215.htm> [hereinafter Res 15/02].

¹⁴⁸ Presupuesto de la SAM para el ejercicio 2002, MERCOSUR/GMC/Res No. 01/02 (2002), available at <http://www.mercosur.org.uy/espanol/snor/normative/resoluciones/2002/0201.htm> [hereinafter Res. 01/02].

¹⁴⁹ Ouro Preto, *supra* note 5, art. 32.

¹⁵⁰ *Id.* art. 32(IV).

¹⁵¹ *Id.* art. 32(V). See *infra* notes 191-93 and accompanying text.

by a director which is appointed by the Group.¹⁵² The MERCOSUR Secretariat is divided into four major sections: Documents and Communications, Norms, Administration, and Information Technology.¹⁵³

MERCOSUR's quasi-judicial institution, the Appellate Tribunal, is discussed in the next section.

F. Dispute Resolution Procedures and Institutions

MERCOSUR's dispute resolution procedures and institutions are set forth in Brasilia and Olivos.¹⁵⁴

1. Member State Disputes

Brasilia and Olivos provide that controversies between member states regarding the interpretation of, application of, or failure to comply with Asunción or any of its Protocols, Council Decisions and Group Resolutions ("controversy"),¹⁵⁵ are subject to the dispute resolution procedures set forth therein. Olivos allows a controversy to be submitted, either by the complainant or by mutual agreement of the parties, to the dispute resolution systems of the World Trade Organization (WTO), or to any other international economic organization (IEO) in which the individual may participate.¹⁵⁶ The parties to a controversy should first engage in direct negotiations to resolve the controversy and inform the Secretariat of their progress and the results thereof.¹⁵⁷ If the controversy is not resolved, or only partially resolved by these negotiations, any member state involved therein may submit it to the Group for resolution.¹⁵⁸ Each party to the controversy will then present its position to the Group, which will consult experts and analyze and evaluate

¹⁵² Ouro Preto, *supra* note 5, art. 33.

¹⁵³ Res No. 15/02, *supra* note 147, art. 3 (01).

¹⁵⁴ Brasilia, *supra* note 100. Olivos will enter into effect thirty days after the deposit of the fourth ratification thereto. Olivos, *supra* note 100, art. 52. At that point, its provisions expressly repeal Brasilia and its regulations. Olivos, *id.* art. 55. To date, no ratifications have been deposited. As shall be seen below, Olivos continues a substantial number of the provisions of Brasilia.

¹⁵⁵ Brasilia, *supra* note 100, art. 1; Olivos, *supra* note 100, art. 1.

¹⁵⁶ Olivos, *supra* note 100, art 1(2).

¹⁵⁷ Brasilia, *supra* note 100, arts. 2-3; Olivos, *supra* note 100, arts. 4-5. Under Olivos, these negotiations must be concluded within fifteen days. Olivos, *supra* note 100, arts. 4-5.

¹⁵⁸ Brasilia, *supra* note 100, art. 4(I). Olivos, *supra* note 100, art. 6.

each party's claim.¹⁵⁹ The Group will then present a recommended resolution of the controversy to the parties.¹⁶⁰

If the Group's recommendation is rejected by one of the parties, or, under *Olivos*, if the complainant chooses to at the conclusion of negotiations, then any party to the controversy is free to seek arbitration before an ad hoc panel of three arbitrators (from a list kept by the Secretariat).¹⁶¹ Under *Olivos*, the parties to a controversy which has not been resolved by negotiations may agree to submit the controversy to the Tribunal rather than to the Group or an ad hoc arbitration panel, for resolution. In such a situation, the Tribunal acts as an arbitration panel and its decision is final.¹⁶² Both the tribunal and arbitral panel are free to apply "community law" and "applicable principles of international law" to resolve the controversy and must render its decision within a maximum period of ninety days.¹⁶³ Member states refusing to comply with such an arbitral award may be subject to member states imposition of "temporary compensatory measures."¹⁶⁴

2. *Appealing the Award*

Olivos dramatically changes MERCOSUR's dispute resolution mechanism by making arbitration awards appealable to the Tribunal created therein.¹⁶⁵ The Tribunal is to be composed of five arbitrators, four of whom are appointed by each member state for two-year terms (renewable twice),¹⁶⁶ and one of whom shall be unanimously appointed by all the member states for a three-year nonrenewable term.¹⁶⁷ The appeal will be limited to legal issues dealt with in

¹⁵⁹ Brasilia, *supra* note 100, art. 4(2). *Olivos*, *supra* note 100, art. 6.

¹⁶⁰ Brasilia, *supra* note 100, art. 5. *Olivos*, *supra* note 100, art. 6. Under *Olivos*, the Group must do so within thirty days. *Olivos*, *supra* note 100, art. 8.

¹⁶¹ Brasilia, *supra* note 100, art. 9; *Olivos*, *supra* note 100, art. 10.

¹⁶² *Olivos*, *supra* note 100, art. 23.

¹⁶³ Brasilia, *supra* note 100, arts. 19-20. *Olivos*, *supra* note 100, arts. 16, 34.

¹⁶⁴ Brasilia, *supra* note 100, art. 23. *Olivos*, *supra* note 100, at 31-2. The *Olivos* Protocol expands the concept of "compensatory measures" a lot. They are described as measures such as "the suspension of concession or equivalent obligations." *Olivos*, *supra* note 100, art. 31(1). These compensatory measures should involve, to the highest degree possible, the suspension of concessions or obligations in the same economic sector or sectors as the controversy. *Id.* art. 31(2). Disputes regarding the question of whether compensatory measures in particular are necessary or appropriate may be submitted to an arbitration panel or the Tribunal. *Id.* art. 32.

¹⁶⁵ *Olivos*, *supra* note 100, art. 17(1).

¹⁶⁶ *Id.* art. 18(1)-(2).

¹⁶⁷ *Id.* art. 18(3). The member states may unanimously agree to extend the fifth arbitrator's term. *Id.*

the award or to legal interpretations of community law set forth in the award,¹⁶⁸ and will be considered, depending on the number of member states involved in the controversy, by three or five arbitrators.¹⁶⁹ The Tribunal must render an award within thirty days after the filing of a response to the appeal¹⁷⁰ and in its own award may confirm, modify, or revoke the legal reasoning and the decision of the award of the original arbitration panel.¹⁷¹ It shall prevail over the arbitration panel's award.¹⁷²

Awards of the Tribunal and arbitration panels are to be adopted by majority vote and signed by all of its members.¹⁷³ Awards of the Tribunal are firm, final, unappealable, and obligatory to all member states involved in the controversy.¹⁷⁴ Awards of arbitration panels are firm, final, and obligatory to the parties involved therein, unless they have been appealed to the Tribunal.¹⁷⁵ Awards must be complied with in accordance with their terms within the time period set forth therein.¹⁷⁶

Any of the parties to a controversy may request clarification of the award from the Tribunal or arbitration panel.¹⁷⁷ A beneficiary of an award who feels that the measures taken thereunder do not comply with its provisions may bring this matter to the Tribunal or arbitration panel, which will determine within thirty days whether the award has been complied with.¹⁷⁸

3. *Claims by Individuals*

Individuals with a claim against a member state based on the sanction or application by that state, in violation of the Treaty, its Protocols, Council Decisions or Group Resolution, of legal or administrative measures which have a restrictive, discriminatory, or disloyally competitive effect on that individual

¹⁶⁸ *Id.* art. 17(2).

¹⁶⁹ *Id.* art. 20. When the controversy involves two member states, the Tribunal will consist of three arbitrators, one from each member state and one chosen by the Administrative Secretariat. *Id.* art. 20(1). When the dispute involves more than two member states, the Tribunal will consist of five arbitrators. *Id.* art. 20(2).

¹⁷⁰ *Id.* art. 21.

¹⁷¹ *Id.* art. 22(1).

¹⁷² *Id.* art. 22(2).

¹⁷³ *Id.* art. 25.

¹⁷⁴ *Id.* art. 26(2).

¹⁷⁵ *Id.* art. 26(1).

¹⁷⁶ *Id.* art. 29(1).

¹⁷⁷ *Id.* art. 28.

¹⁷⁸ *Id.* art. 30.

("individual controversy")¹⁷⁹ may file a claim before the National Section of the Group where the claimant resides.¹⁸⁰ The National Section of the Group which receives the claim will either (a) negotiate with the National Section of the Group to which the member state against whom the claim has been brought to resolve it belongs, or (b) send the claim to the Group without any further proceeding or recommendation.¹⁸¹ The Group will then evaluate the claim and may dismiss it or convene a panel of experts on the subject matter of the controversy for an opinion on its merits.¹⁸² The panel of experts consists of at least three members appointed by the Group¹⁸³ and will render a decision regarding the individual controversy to the Group.¹⁸⁴ If the claimant agrees with the decision, then any member state may request from the defendant member state the annulment of the challenged actions or corrective measures. If the defendant member state refuses to provide such relief, then the member state requesting relief may commence an arbitration proceeding against the defendant member state under the process described above.¹⁸⁵

This MERCOSUR dispute resolution system, even as strengthened by the addition of the Tribunal in Olivos, is simply not adequate and leaves much to be desired. The system is chiefly designed to be used where two or more member states submit a dispute arising out of the MERCOSUR norms to an ad hoc panel of arbitrators appointed for that particular case. There is no effective mechanism to protect the rights under community law of individual entities or persons. Furthermore, there is no effective mechanism by means of which the institution itself can enforce compliance with its norms. It is cumbersome and complicated to use, and its three-part process is guaranteed to ensure a lengthy wait prior to any resolution of the dispute. Justice delayed is often justice denied, especially if one of the parties to the dispute feels that this lack of resolution is harmful to its interests.¹⁸⁶ Furthermore, this system is inadequate to deal with what is likely to be a major component of the majority of disputes: the interpretation of the meaning or intent of a particular MERCOSUR norm. There is no court that can issue interpretations of these norms in a consistent fashion to create a body of knowledge that parties in the future can rely upon in planning their actions. These arbitrators, depending on

¹⁷⁹ Brasilia, *supra* note 100, art. 25; Olivos, *supra* note 100, art. 39.

¹⁸⁰ Brasilia, *supra* note 100, art. 26; Olivos, *supra* note 100, art. 40.

¹⁸¹ Brasilia, *supra* note 100, arts. 27-28; Olivos, *supra* note 100, art. 41.

¹⁸² Brasilia, *supra* note 100, art. 29; Olivos, *supra* note 100, art. 42.

¹⁸³ Brasilia, *supra* note 100, art. 30; Olivos, *supra* note 100, art. 43.

¹⁸⁴ Brasilia, *supra* note 100, art. 32; Olivos, *supra* note 100, art. 44.

¹⁸⁵ Brasilia, *supra* note 100, art. 32; Olivos, *supra* note 100, art. 44.

¹⁸⁶ See, e.g., Brasilia, *supra* note 100, art. 19(1); Olivos, *supra* note 100, art. 34.

their identity or nationality, may not necessarily be objective. The arbitrators are selected from a list of arbitrators compiled and kept by MERCOSUR. They serve for the individual case, and there is no guarantee that they will be reappointed to another case.¹⁸⁷ They are not obligated to follow (or even take into account) any other arbitrator's reasoning or interpretations. They create their own rules of procedure and have great discretion about what law they will apply and how they will do so.¹⁸⁸ Although the arbitration awards entered into pursuant to this system are published, the process itself is private among the parties only. Participation by others, such as *amici curiae*, is not contemplated.

The addition of a "permanent" appellate arbitration panel to hear appeals under Olivos does not really solve this problem. The Tribunal is simply a "super arbitration panel" which operates as such, and which is empowered to resolve issues of law and policy interpretation dealt with by another, more ad hoc panel. Again, there is no procedure for intervention by other interested parties. It is true that its members, by virtue of their appointment for a period of years, will have the opportunity to develop a consistent set of interpretations of community law. This is not, however, the equivalent of a panel of permanently appointed, objective, professional judges, sitting in open court in transparent proceedings and issuing opinions that will be perceived as fair by virtue of this transparency and the opportunity to participate therein of all persons or entities who might have an interest in the controversy, whether they are a direct litigant or not. This perception of fairness ensures that its rulings will be followed (or at least acquiesced to) by all participants.¹⁸⁹ The process is not transparent even though the rulings are kept by the Secretariat in a publicly available compilation.¹⁹⁰

¹⁸⁷ There are only three arbitrators from the list who have served more than once. See *Lista de Arbitros*, available at http://www.mercosur.org.uy/espanol/snor/varios/lista_de_arbitros.htm (last visited Dec. 7, 2003) [hereinafter *Arbitros*].

¹⁸⁸ Even though Brasilia authorizes an arbitral tribunal to adopt provisional remedies to prevent "irreparable harm to one of the parties," the important question to ask is: who will enforce these provisional remedies? There is no real enforcement provision in Brasilia for these remedies. Who is to prevent the malefactor from simply ignoring the arbitral tribunal's order? See Brasilia, *supra* note 100, art. 18; Olivos, *supra* note 100, art. 15.

¹⁸⁹ Indeed, there are some European Court of Justice (ECJ) cases where the court has actually "created" new legal principles out of provisions of the Treaty of Rome. See, e.g., Case 26/62, *van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 3. The Court's high standing among the member states makes it certain that decisions such as this will be accepted.

¹⁹⁰ Ouro Preto, *supra* note 5, art. 32.

To date, the process has been used a limited number of times.¹⁹¹ These awards are not likely to form an intelligible body of jurisprudence providing parties with reliable and consistent interpretations of community norms.

Finally, and most important, the enforcement mechanism for these arbitral awards is extremely weak.¹⁹² Given the fact that all decisions by MERCOSUR institutions are required to be taken by consensus and in the presence of all the member states,¹⁹³ it is unlikely that a unanimous decision to sanction a member state will ever be made. Furthermore, a boycott of the proceedings by a member state would prevent the Council from making such a decision in the first place. This system is clearly not designed to be a mechanism which MERCOSUR itself can use to enforce compliance with the norms it enacts. Clearly, a better system is needed.

III. TO INFINITY AND BEYOND: CHILE, BOLIVIA, AND THE EU

A. Chile and Bolivia Join MERCOSUR

In 1996, after extensive (and often difficult) negotiations,¹⁹⁴ MERCOSUR entered into Economic Complementation Agreements, first with Chile¹⁹⁵ and

¹⁹¹ There have been nine *Laudos Arbitrales* (arbitration awards): (I) *Comunicados DECEX* (Arg./Bras.); (II) *Carne de cerdo* (Arg./Bras.); (III) *Productos textiles* (Bras./Arg.); (IV) *Pollos* (Bras./Arg.); (V) *Bicicletas* (Uru./Arg.); (VI) *Neumaticos* (Uru./Bras.); (VII) *Fitoanitarios* (Arg./Bras.) (VIII) *IMESI* (Para./Uru.) (IX) *Lana* (Arg/Uru.), available at <http://www.mercosur.org.uy/espanol/snor/normativa/laudos.htm> [hereinafter *Laudos*].

¹⁹² Article 23 of *Brasilia* and Articles 31 and 32 of *Olivos* provide for "temporary compensatory measures" (such as the suspension of concessions "or other equivalents") awarded by the other member states as the sole enforcement remedy for a successful party in a dispute. *Brasilia*, *supra* note 100, art. 23. *Olivos*, *supra* note 100, arts. 31, 32.

¹⁹³ *Ouro Preto*, *supra* note 5, art. 37.

¹⁹⁴ Negotiations with Chile took two years and were described in the press as "tough". See, e.g., Raúl Ronzoni, *Trade: Accord with Chile Expands Horizons of MERCOSUR*, Mar. 26, 1996, at LEXIS/Nexis, ALLNEWSPLUS Database. Negotiations with Bolivia were similarly described. See, e.g., Juan Carlos Rocha, *Integration: Mixed Feelings Mark Bolivian Entry into MERCOSUR*, Dec. 16, 1996, at LEXIS, ALLNEWSPLUS Database; Mario Osava, *Integration: MERCOSUR Takes on New Dimensions*, Dec. 17, 1996, at LEXIS, ALLNEWSPLUS database; Geoff Dyer, *Bolivia Link to MERCOSUR hit by last-minute Hitch*, Dec. 17, 1996, at LEXIS, ALLNEWSPLUS Database; Fabiana Frayssinet & Mario Osava, *Integration: MERCOSUR takes Two Steps Forward, One Step Back*, Dec. 18, 1996, available at LEXIS, ALLNEWSPLUS Database. For a detailed analysis of the negotiations between Chile and MERCOSUR, see Manuel Valencia, *Negociación de Chile con el MERCOSUR: Realidades y Oportunidades*, in CHILE-MERCOSUR, *supra* note 34.

¹⁹⁵ The agreement with Chile was executed on June 25, 1996, at San Luis, Argentina. Chile Agreement, *supra* note 13.

then with Bolivia.¹⁹⁶ Both agreements are highly similar in format and content, and establish a similar relationship.

MERCOSUR chose to incorporate Chile and Bolivia, not by making them full members and parties to its existing agreements, but by creating a separate relationship with them altogether. This relationship established by the Chile and Bolivia agreements has been described as one of “associate membership” in MERCOSUR.¹⁹⁷ This description is somewhat inaccurate. The agreements, entered into with MERCOSUR as Economic Complementation Agreements under the framework of ALADI,¹⁹⁸ are not intended to give either Chile or Bolivia any kind of membership status therein. Instead, the agreements establish relationships which have as primary goals the establishment of a free-trade area with Chile and Bolivia within a period of ten years, the creation of judicial institutional frameworks for economic integration and cooperation, the promotion of economic, scientific, technological and energy cooperation and complementation, the promotion of reciprocal investment, and the promotion of the development of physical infrastructure facilities.¹⁹⁹ These relationships are very carefully enumerated and described in the agreements, and are administered and implemented by a separate Administrative Committee for each, and not by any of the MERCOSUR institutions.²⁰⁰ Chile and Bolivia do not have, under the agreements, the right to attend or participate in the meetings or in the work of any of the MERCOSUR institutions. They also are not bound by MERCOSUR’s common external tariff.²⁰¹

¹⁹⁶ The agreement with Bolivia was executed on Dec. 17, 1996, at Fortaleza, Brazil. Bolivia Agreement, *supra* note 13.

¹⁹⁷ See, e.g., Thomas O’Keefe, *The Chile-MERCOSUR Free Trade Agreement Effects on Foreign Direct Investment in the Southern Cone*, AM. L. BUS. REP., Aug. 31, 1996, at 4; Dyer, *supra* note 194.

¹⁹⁸ See ALADI Treaty, *supra* note 86, at ch. 1, art. 2; ch. 2, art. 8; ch. 2, art. 11 and accompanying text.

¹⁹⁹ See Chile Agreement, *supra* note 13, art. 1; Bolivia Agreement, *supra* note 13, art. 1.

²⁰⁰ See Chile Agreement, *supra* note 13, art. 46; Bolivia Agreement, *supra* note 13, art. 39. It should be noted, however, that the MERCOSUR component of the Administrative Commission is the Group.

²⁰¹ A number of Council Decisions have, however, given Chile and Bolivia the right to participate in the meetings and work of the MERCOSUR institutions, to the degree that Chile and Bolivia are entitled to participate in many, if not most or all, such meetings or work. See, e.g., Participación de Chile en Reuniones del MERCOSUR, MERCOSUR/CMC/DEC No. 12/97, available at <http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/1997/9712.htm> (last visited Dec. 1, 2003); Acuerdo sobre Extradición entre el MERCOSUR, la República de Bolivia y la República de Chile, MERCOSUR/CMC/DEC No. 15/98, available at <http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/1998/9815.htm> (last visited Dec. 1, 2003).

1. *The Agreements*

a. *Trade Liberalization Program*

The Chile and Bolivia agreements are extremely similar. After describing very similar objectives,²⁰² they then assert that a free trade area will be established, by means of a trade liberation program, between MERCOSUR and the other contracting party within ten years. This trade liberation program will consist of a program of gradual and automatic tariff reductions over all tariffs²⁰³ on products originating in and proceeding from the territory of the contracting parties.²⁰⁴ This program of tariff reductions is different for each agreement. The Chile Agreement, for example, sets a general timetable of ten years, starting with the automatic reduction of all tariffs on products not otherwise noted in the agreement.²⁰⁵ Twelve annexes list categories of products to whom different rules will apply. Some of these products will have their tariffs reduced within ten years, but at a different rate,²⁰⁶ some within eight years,²⁰⁷ and others within fifteen to sixteen years.²⁰⁸ Similarly, the Bolivia Agreement contains a general tariff reduction timetable of ten years²⁰⁹ and special rules with timetables ranging from immediate elimination to fifteen years for seven different categories of products.²¹⁰ In both agreements, the parties also agree to not impose new tariffs, increase existing ones in a discriminatory manner, or maintain or apply new non-tariff restrictions on imports.²¹¹ Three other characteristics of the Agreements' trade liberalization

²⁰² Compare Chile Agreement, *supra* note 13, art. 1, with Bolivia Agreement, *supra* note 13, art. 1.

²⁰³ The term "tariff" is broadly defined. It includes customs tariffs and any other charge with equivalent effect, whether of a fiscal, monetary, exchange rate or other nature, that is set on imports. Chile Agreement, *supra* note 13, art. 5; Bolivia Agreement, *supra* note 13, art. 5.

²⁰⁴ Chile Agreement, *supra* note 13, art. 2; Bolivia Agreement, *supra* note 13, art. 2.

²⁰⁵ Chile Agreement, *supra* note 13, art. 2(a).

²⁰⁶ *Id.* arts. 2(c)-(e).

²⁰⁷ *Id.* art. 2(b).

²⁰⁸ *Id.* arts. 2(f)-(i).

²⁰⁹ Bolivia Agreement, *supra* note 13, art. 2(a).

²¹⁰ *Id.* arts. 2(b)-(h).

²¹¹ *Id.* arts. 6-8; Chile Agreement, *supra* note 13, arts. 6-8. Certain exceptions to these rules, specifically noted in each agreement's Complementary Notes, are permitted. Bolivia Agreement, *supra* note 13, arts. 6-8; Chile Agreement, *supra* note 13, arts. 6-8.

programs include the adoption of rules of origin,²¹² national treatment on internal taxation,²¹³ and the adoption of safeguard measures.²¹⁴

b. Economic Harmonization, Integration, and Cooperation

The Agreements describe in detail a number of initiatives that are meant to promote economic harmonization, integration, and cooperation between MERCOSUR and Chile and Bolivia. First, the signatories agree to base their policies in a number of areas on the agreements and standards set forth by the WTO.²¹⁵ The parties to both agreements also agree to promote scientific, industrial, commercial and technical cooperation;²¹⁶ the freeing, expanding, and progressive diversification of services within their territories;²¹⁷ physical integration, defined as the harmonization of land, sea and air routes;²¹⁸ and the promotion of reciprocal investments.²¹⁹ The Bolivia Agreement also provides

²¹² Chile Agreement, *supra* note 13, art. 13, Annex 13; Bolivia Agreement, *supra* note 13, art. 12 and Annex 9.

²¹³ Chile Agreement, *supra* note 13, art. 14, Bolivia Agreement, *supra* note 13, art. 13.

²¹⁴ The concept of safeguard clauses was created and applied in the Treaty of Asunción. See Asunción, *supra* note 1, art. 3, Annex 9 and accompanying text. Here both Agreements differ. The Chile Agreement provides that the parties will put a system of safeguard measures (not described) in effect by January 1, 1997. Chile Agreement, *supra* note 13, art. 21. The Bolivia Agreement contains a system of safeguard clauses. Bolivia Agreement, *supra* note 13, art. 20, Annex 10.

²¹⁵ These areas include dumping, countervailing duties, and competition (Chile Agreement, *supra* note 13, arts. 15-20; Bolivia Agreement, *supra* note 13, arts. 14-17); export incentives (Chile Agreement, *supra* note 13, arts. 30-31; Bolivia Agreement, *supra* note 13, arts. 18-19); customs valuation norms (Chile Agreement, *supra* note 13, arts. 23-24; Bolivia Agreement, *supra* note 13, art. 22); sanitary and phytosanitary measures and technical norms and regulations (Chile Agreement, *supra* note 13, arts. 25-29; Bolivia Agreement, *supra* note 13, arts. 23-25). The Chile Agreement also includes intellectual property. Chile Agreement, *supra* note 13, art. 43.

²¹⁶ Chile Agreement, *supra* note 13, arts. 44-45; Bolivia Agreement, *supra* note 13, art. 38.

²¹⁷ Chile Agreement, *supra* note 13, arts. 34-35; Bolivia Agreement, *supra* note 13, art. 33.

²¹⁸ Chile Agreement, *supra* note 13, arts. 33, 37-40; Bolivia Agreement, *supra* note 13, art. 34.

²¹⁹ Chile Agreement, *supra* note 13, arts. 30-31; Bolivia Agreement, *supra* note 13, arts. 35-36. The Bolivia Agreement specifically refers to the consideration of the execution of an agreement regarding the reciprocal promotion and protection of investment. This is the type of agreement described in the Protocol for the Promotion and Protection of Investments coming from Non-MERCOSUR Member States. See *Protocolos Sobre Promoción y Protección de Inversiones Provenientes de Estados no Partes del Mercosur*, MERCOSUR/CM/DEC No. 11/94 and 11/94 Annex, art. 2 [hereinafter Non Member States Protocol], available at <http://www.mercosur.org.uy/espanol/snot/normativa/decisiones/DEC1194.htm> (last visited Dec. 1, 2003).

for the exchange of commercial information, promotion of commercial relations,²²⁰ and promotion of industrial, commercial, and technological harmonization in both economies.²²¹

c. Management of the Relationship

The management and evaluation of the relationship between MERCOSUR and Chile and Bolivia is undertaken by an Administrative Commission composed of representatives of both MERCOSUR and the individual country involved.²²² The Agreements detail a grant to the Administrative Commission of very extensive responsibilities, both substantive and administrative, for the management and development of the relationship.²²³ Their decisions must be made by consensus.²²⁴

Both Agreements provide that any disputes arising between the contracting parties regarding the interpretation, application, or compliance with the Agreements shall be resolved through the dispute resolution procedures adopted therein.²²⁵ These procedures shall be applicable for a period of three years after the effective date of the Agreements, at the end of which the signatories are to negotiate a new dispute resolution process, which will include an arbitral process.²²⁶

²²⁰ Bolivia Agreement, *supra* note 13, arts. 30-32.

²²¹ *Id.* arts. 26-29. This process includes the promotion of joint business enterprises, joint ventures, and multinational enterprises, as well as the creation of managerial agreements for the production of goods and the rendering of services among public and private enterprises. *Id.* art. 27. The latter agreements are meant to create new businesses and harmonize, integrate and rationalize existing industrial enterprises. *Id.* art. 28.

²²² For the Chile relationship, the Administrative Commission is composed of MERCOSUR's Common Market Group and representatives of the Ministry of Foreign Relations of Chile. Chile Agreement, *supra* note 13, art. 46. The Administrative Commission for the Bolivia Agreement is composed of the MERCOSUR Common Market Group and the National Secretariat of International Economic Relations of the Bolivian Foreign Relations Ministry. *Id.* art. 39.

²²³ Chile Agreement, *supra* note 13, art. 47(a)(1); Bolivia Agreement, *supra* note 13, art. 40 (1-17).

²²⁴ Chile Agreement, *supra* note 13, art. 46; Bolivia Agreement, *supra* note 13, art. 39.

²²⁵ Chile Agreement, art. 22; Bolivia Agreement, art. 21. These procedures require that any dispute first be resolved by reciprocal consultation and direct negotiations. Chile Agreement, *supra* note 13, at Annex 14, art. 2-4; Bolivia Agreement, *supra* note 13, at Annex 14, arts. 2-4. If the dispute is not resolved within thirty days, it can be submitted to the Administrative Commission for resolution. *Id.* arts. 5-6. If the Administrative Commission cannot readily resolve the dispute, it will appoint a Panel of Experts to consider it. The Panel of Experts, once convened, will then consider the matter and report its conclusions to the Administrative Commission, which will then make recommendations to the parties. *Id.* arts. 7-13.

²²⁶ *Id.* art. 14. If the parties cannot come to an agreement regarding such a replacement

2. *The Relationship Continues*

As noted above, the parameters of the relationships between MERCOSUR and Bolivia were reached only after extended and contentious negotiations.

The Bolivian negotiations were apparently especially difficult. The Bolivian government appeared especially enthusiastic about the relationship,²²⁷ apparently because it felt both that a MERCOSUR relationship would be the best way to attract investment and technology and that it would strengthen its relationship with Brazil, especially in the energy sector.²²⁸ The private sector appeared to be much less enthusiastic, since it apparently feared competition from the much stronger economies of Argentina and Brazil and was concerned that the Bolivian government had made too many concessions in negotiating the agreement.²²⁹ The negotiations were quite contentious, with disagreements regarding preferences over agricultural products, competition policy, and protection for struggling industries.²³⁰ Indeed, negotiations were so delayed that the execution of the Bolivia Agreement, scheduled at the same time as the Chile agreement in June 1996, had to be postponed for six months.²³¹ The agreement was finally signed in December 1996, even after last-minute delays,²³² and came into effect on January 1, 1997.²³³

The success of the Bolivia-MERCOSUR relationship is difficult to evaluate. Clearly, trade between Bolivia and MERCOSUR has substantially increased.²³⁴ Unlike the case of Chile, there seems to be little, if any, discussion to date about transforming the Bolivian relationship into full

process within a year, the arbitration procedure set forth in Chapter IV of Brasilia will apply. *Id.*

²²⁷ Indeed, the President of Bolivia, referred to the new relationship as a "re-encounter," since "Bolivia was once part of the [United Provinces of the] Rio de la Plata, the Amazon and the Pacific." Marcela Valente, *MERCOSUR: Historic Accords with Chile and Bolivia*, Inter Press Serv., June 26, 1996, at LEXIS, ALLNEWSPLUS Database.

²²⁸ Dyer, *supra* note 194; Rocha, *supra* note 194.

²²⁹ Dyer, *supra* note 194; Rocha, *supra* note 194.

²³⁰ Dyer, *supra* note 194; Osava, *supra* note 194.

²³¹ Comunicado Conjunto de los Presidentes de Los Estados Partes del MERCOSUR, Potrero de los Funes, Argentina (June 25, 1996), para. 7 [hereinafter Comunicado]; Frayssinet and Osava, *supra* note 194.

²³² Rocha, *supra* note 194; Dyer, *supra* note 194.

²³³ Bolivia Agreement, *supra* note 13, art. 47.

²³⁴ Sarath Rajapatirana, "Evaluating Bolivia's Choices for Trade Integration," World Bank Working Paper No. 1632 (1996), available at http://econ.worldbank.org/files/641_wps1632.pdf; *Preliminary Overview of the Economy of Latin America and the Caribbean*, U.N. Economic Commission for Latin America, U.N. Doc. LC/G1984, U.N. Sales No. E.97.II.G.13 (1997) [hereinafter Preliminary Overview].

membership in MERCOSUR.²³⁵ The relationship is still in its early years, and its development should be watched carefully. The Bolivian negotiations were so difficult because Bolivia's economy and industrial infrastructure was much less developed than those of Chile or the MERCOSUR states.²³⁶ The success or failure of the integration of Bolivia into the MERCOSUR economic system is extremely important because it will show whether MERCOSUR can successfully integrate other less-developed economies into its economic system and expand beyond its initial members.²³⁷

The Chilean situation was very different. Chile had a very highly developed economy with substantial exports to the MERCOSUR countries. These exports tended to be manufactured products, such as computer software and furniture.²³⁸ Chile saw a MERCOSUR relationship as one which would substantially increase its export markets and establish it as an attractive investment venue.²³⁹ Furthermore, a relationship with MERCOSUR would be an indication of Chile's "reinsertion" into Latin America from isolation during its military regime.²⁴⁰ Chile was also highly attractive to MERCOSUR as a link to Asian and Pacific markets.²⁴¹ The comment has also been made that Chile's interest in MERCOSUR was also stimulated by the failure of the United States to grant Chile accession to NAFTA.²⁴² The negotiations between Chile and MERCOSUR were extended over two years, with disagreements regarding rules of origin, tariff protection of agricultural products, different tariff rates, and the automobile industry.²⁴³

Purely in terms of trade, the MERCOSUR-Chile relationship appears to have been quite successful. Trade (including Chilean foreign investment) between Chile and the MERCOSUR countries increased exponentially

²³⁵ Compare *infra* notes 244-46 and accompanying text.

²³⁶ See, e.g., Andrew Enever, *Open Economy Hits Bolivia's Industry*, BBC NEWS, Apr. 2, 2002, available at <http://news.bbc.co.uk/2/hi/business/1896407.stm>; Francisco Bollini Roca, "Bolivia Logra Salvar el Negocio de la Soya," available at <http://www.bolivianet.com/articulos/asoya.htm>; Information on Bolivia's economy, available at <http://www.boliviabiz.com/business/stats.htm>.

²³⁷ At the time of the Chilean and Bolivian negotiations, negotiations with other ALADI member states and relationships with the Central American and Caribbean states were being contemplated. Comunicado, *supra* note 231, para. 8-9.

²³⁸ These exports grew from \$1.8 billion in 1990 to \$4.5 billion in 1995. O'Keefe, *supra* note 197, at 3.

²³⁹ CHILE-MERCOSUR, *supra* note 34, at 40-41.

²⁴⁰ *Id.* at 14, 119, 184.

²⁴¹ *Id.* at 107; O'Keefe, *supra* note 197, at 18-19.

²⁴² O'Keefe, *supra* note 197, at 3.

²⁴³ CHILE-MERCOSUR, *supra* note 34, at 77-80.

between 1990 and 1996²⁴⁴ and has continued to increase since then.²⁴⁵ Both Chile and MERCOSUR seemed to be quite satisfied with the MERCOSUR relationship and were discussing Chile's full accession to the community.²⁴⁶ In 2001, however, Chile suspended talks on full membership in MERCOSUR and announced that it was entering into free-trade negotiations with the United States.²⁴⁷ In spite of this suspension, the Presidential Declaration made after the February 18, 2002, meeting of the Council stressed the desire of all parties to continue negotiations between MERCOSUR, Chile, and Bolivia to "strengthen the agreements of the integration process."²⁴⁸ Possible reasons behind Chile's withdrawal included an unwillingness by Chile to increase its already low tariff base to meet the MERCOSUR Common External Tariff, or a calculation that greater gains would be available from membership in a United States-led free trade zone, such as the Free Trade Area of the Americas (FTAA).

The latter reason seems to be supported by Chile's signature on June 6, 2003, of a free trade agreement with the United States.²⁴⁹ The Chile Free Trade Agreement constitutes a massive document, with twenty-four chapters, three Annexes and four Side Letters covering a number of topics.²⁵⁰ The

²⁴⁴ *Id.* at 79-80.

²⁴⁵ Thomas O'Keefe, *The Evolution of Chilean Trade Policy in the Americas: from Lone Ranger to Team Player*, 5 SW. J. L. & TRADE AM. 251, 254 (1998) ("Since 1990, total bilateral Chilean trade with the MERCOSUR countries had expanded from U.S. \$1.8 billion to almost U.S. \$4.5 billion by 1995 (in 1997 the figure stood at just under U.S. \$5 billion.)"). See also Preliminary Overview, *supra* note 234.

²⁴⁶ The presidents of Argentina and Chile, in a 2000 joint statement, stressed the opportunity to begin negotiations aimed at intensifying the process of Chile's full integration into MERCOSUR. *Chile Mucho Más Cerca del MERCOSUR*, LA NACIÓN, May 20, 2000, available at <http://www.lanacion.com.ar> [hereinafter "Chile Mucho Más Cerca"]. Similarly, in an interview with the Argentine press in May 2000, the Chilean Foreign Minister described the Chile-MERCOSUR relationship as one of stages. The first step, she claimed, was economic, and its goals were achieved. The next stage would be more extensive, and would include many other areas, including labor, education, and justice. She seemed to feel that the relationship was broadening, that both parties were extremely interested in having Chile become a full member of MERCOSUR, and that there were no insurmountable problems to achieving this goal. *Debemos Definir como Enfrentar la Globalización* LA NACIÓN May 20, 2000, available at <http://www.lanacion.com.ar>.

²⁴⁷ *Chopping Block*, *supra* note 22; *Crossroads*, *supra* note 22.

²⁴⁸ Comunicado Conjunto de los Presidentes del MERCOSUR, Bolivia y Chile (Feb. 18, 2002), para. 11 [hereinafter Comunicado Conjunto 2002].

²⁴⁹ *U.S., Chile*, *supra* note 22.

²⁵⁰ Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, Final Text, available at http://www.sice.oas.org/Trade/chiusa_e/chiusaand_e.asp (last visited Dec. 7, 2003) [hereinafter Chile Free Trade Agreement].

principal provisions of this agreement eliminate about eighty-five percent of all tariffs on consumer and industrial products traded between both countries, with most remaining tariffs being eliminated in four years.²⁵¹ Furthermore, tariffs on about three-quarters of farm goods traded between both countries will be eliminated within four years, with all such tariffs and quotas phased out within twelve years.²⁵² Other provisions cover according bilateral free access to government procurement,²⁵³ the telecommunications industry,²⁵⁴ financial institutions,²⁵⁵ and cross-border trade in services.²⁵⁶ Chile now shares preferential access to United States markets with Canada, Mexico, Israel, and Jordan, the only other countries with whom the United States has free trade agreements.²⁵⁷ It now has the best of all possible worlds. As a MERCOSUR associate member, Chile's goods have preferential (and eventually tariff-free) access to the MERCOSUR market, without having to be bound by its common external tariff.²⁵⁸ On the other hand, it also has preferential access to the United States market, its largest trading partner.²⁵⁹ Neither relationship appears to be inconsistent with the other.²⁶⁰

These topics include national treatment and market access for goods, rules of origin, customs administration, sanitary and phytosanitary measures, technical barriers to trade, trade remedies, government procurement, investment, cross-border trade in services, financial services, telecommunications, temporary entry for business persons, electronic commerce, competition policy, intellectual property rights, labor, environment, transparency, administration, dispute settlement, and exceptions. *Id.*

²⁵¹ *U.S. and Chile Conclude Historic Free Trade Agreement*, Press Release, Office of the United States Trade Representative (Dec. 11, 2002) [hereinafter Press Release 12/11/02], at 2, available at <http://www.ustr.gov/releases/2002/12/02-114.htm>.

²⁵² *Id.*

²⁵³ Chile Free Trade Agreement, *supra* note 250, § 9.2.

²⁵⁴ *Id.* § 13.2.

²⁵⁵ *Id.* § 12.2.

²⁵⁶ *Id.* § 11.2.

²⁵⁷ Press Release 12/11/02, *supra* note 251, at 1.

²⁵⁸ See *supra* note 201 and accompanying text.

²⁵⁹ CIA FACTBOOK, *supra* note 30.

²⁶⁰ Chile did bear one risk in this situation, since the Chile Free Trade Agreement required ratification by the United States Congress in order to become effective. *Chile, U.S.*, *supra* note 22. However, the House of Representatives approved the agreement on July 25, 2003, *Chile, Singapore Free-Trade Pacts Pass House*, WALL ST. J., July 25, 2003 at A12, and the Senate approved the agreement on July 31, 2003. Helen Dewar, *Senate Approves Chile, Singapore Trade Pacts*, WASH. POST, Aug. 2, 2003, at E2.

B. MERCOSUR and the EU

1. Introduction

MERCOSUR has had some relationship with the European Community/EU almost since the beginning of its existence. An Interinstitutional Cooperation Agreement was entered into between MERCOSUR and the EU in May 1992 and the EU has provided substantial economic and technical assistance to MERCOSUR since then.²⁶¹ This relationship was substantially formalized and expanded by an Interregional Framework Agreement on Cooperation, which was signed in December 1995.²⁶²

2. The Framework Agreement

The Framework Agreement is a very extensive and ambitious document. Its objectives are to strengthen existing relations between the Parties and to prepare the conditions enabling an interregional association to be created.²⁶³ These objectives will apparently be achieved through three routes: political dialogue,²⁶⁴ cooperation in trade and economic matters,²⁶⁵ and the encouragement of the process of integration.²⁶⁶ This process clearly constitutes a major undertaking; a Cooperation Council composed of representatives of MERCOSUR and the EU is charged by the Framework Agreement with implementing this process.²⁶⁷

²⁶¹ Commission Opinion on Framework Cooperation Agreements between the European Economic Community and the Republics of Argentina, Chile, Uruguay, Paraguay and Brazil, 1992 O.J. (C 67) 193. Agreement of Interinstitutional Cooperation between the European Community and MERCOSUR, May 22, 1992. This agreement appears to have basically covered funds for technical assistance, instructional seminars, and other similar informal contacts. See MERCOSUR/GMC/Res 09/93, available at http://www.sice.oas.org/trade/mrcsr/merco_eu/M_EU_e1.asp; THE EU'S RELATIONS WITH MERCOSUR—OVERVIEW, available at http://www.europa.eu.int/comm/external_relations/mercosur/intro [hereinafter EU OVERVIEW 2001].

²⁶² Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part, Dec. 15, 1995, available at http://europa.eu.int/comm/external_relations/mercosur/background_doc/fca96.htm (last visited Dec. 7, 2003) [hereinafter Framework Agreement].

²⁶³ *Id.* art. 2(1). These seem to include trade and economic matters, cooperation regarding integration, and other fields of mutual interest. See *id.* art. 2(2).

²⁶⁴ *Id.* art. 3.

²⁶⁵ *Id.* arts. 4-17.

²⁶⁶ *Id.* art. 18.

²⁶⁷ *Id.* arts. 25-30.

The political dialogue described by the Framework Agreement is based on a number of basic political principles which the parties jointly support.²⁶⁸ MERCOSUR and the EU are to conduct this political dialogue by means of contacts, information exchanges and consultation, including regular meetings between the MERCOSUR heads of state and the highest authorities in the EU, yearly meetings of the ministers of foreign affairs of MERCOSUR, the EU member states and the European Commission, and other periodic meetings of ministerial and other senior officials.²⁶⁹

Cooperation on trade matters seems, however, to be the principal purpose of the Framework Agreement. The objective is to have the parties engage in a process of crafting closer relations with each other, with the purpose of encouraging the increase and diversification of trade. This process is to lead to the "subsequent gradual and reciprocal liberalization of trade" and will promote "conditions which are conducive to the establishment of the Interregional Association."²⁷⁰ There is no indication in the Framework Agreement itself of what the characteristics of the "Interregional Association" are going to be, or when it is to be completed.²⁷¹ This process is clearly going

²⁶⁸ These include such principles as "political and economic freedoms are fundamental to society," "reaffirming human dignity and the promotion of human rights as cornerstones of a democratic society," "reaffirming the essential role of the principles and democratic institutions based on the rule of law," "desiring to strengthen international peace and security in accordance with the principles of the United Nations Charter," and "sharing an interest in regional integration as a means of enabling their citizens to achieve sustainable and harmonious development predicated upon social progress and solidarity between their members." *Id.* at Joint Declaration on Political Dialogue between the European Union and MERCOSUR [hereinafter Joint Declaration].

²⁶⁹ *Id.* art. 3; Joint Declaration, Mechanisms of the Dialogue. There have been three EU-MERCOSUR ministerial meetings regarding political dialogue: Panama, February 1998; Vilamoura, Portugal, February 2000; Santiago, Chile, March 2001. EU OVERVIEW 2001, *supra* note 261, at 3. In the February 2000 meeting, for example, the ministers presented a "Declaration and Action Programme for Political Cooperation," which identified the main areas of political dialogue to include, *inter alia*, peace and security prevention of conflicts, confidence and security-building measures, promotion and protection of human rights, and democracy and the rule of law. Joint Press Release, Ministerial Meeting between the European Union, the MERCOSUR, Chile and Bolivia (Feb. 23, 2000), at para. 4, *available at* http://europa.eu.int/comm/external_relations/mercosur/ass-neg/text/press-rel_vila.htm. Mostly, the ministers agreed to continue their dialogue and reinforce the coordination among themselves. Draft Joint Declaration, *supra* note 268, arts. 5-8.

²⁷⁰ Framework Agreement, *supra* note 262, art. 4.

²⁷¹ The then-President of Argentina, Carlos Menem, declared in 1996 that all trade barriers between MERCOSUR and the EU should be dismantled by the year 2005. *EU/ARGENTINA/MERCOSUR: Free Trade Agreement by the Year 2005*, European Report, June 12, 1996, *available at* LEXIS, ALLNEWSPLUS Database. As shall be seen below, given the pace of the negotiations to date, this timetable may be premature.

to cover almost every economic sector, including agri-food and industrial standards and certification,²⁷² customs matters,²⁷³ statistical matters,²⁷⁴ intellectual property,²⁷⁵ economic cooperation,²⁷⁶ business cooperation,²⁷⁷ investment promotion,²⁷⁸ energy cooperation,²⁷⁹ transport cooperation,²⁸⁰ science and technology cooperation,²⁸¹ telecommunications and information technology,²⁸² and environmental protection.²⁸³ The examination of each of these topics is clearly going to be quite extensive and exhaustive and is to be the subject of very involved negotiations.²⁸⁴

Encouraging the process of integration is to occur through cooperation between all parties in all of the areas of the Framework Agreement.²⁸⁵ This cooperation is apparently envisioned to occur through four venues: information exchange,²⁸⁶ training and institutional backing,²⁸⁷ studies and joint projects,²⁸⁸ and technical assistance.²⁸⁹

The negotiations and consultations envisioned in the Framework Agreement are to be undertaken under the direction of a Cooperation Council, composed of members of the EU Council and Commission and members of the

²⁷² Framework Agreement, *supra* note 262, art. 6.

²⁷³ *Id.* art. 7.

²⁷⁴ *Id.* art. 8.

²⁷⁵ *Id.* art. 9.

²⁷⁶ *Id.* arts. 10-17.

²⁷⁷ *Id.* art. 11.

²⁷⁸ *Id.* art. 12.

²⁷⁹ *Id.* art. 13.

²⁸⁰ *Id.* art. 14.

²⁸¹ *Id.* art. 15.

²⁸² *Id.* art. 16.

²⁸³ *Id.* art. 17.

²⁸⁴ In the area of "business cooperation," for example, the areas to be focused upon include, *inter alia*, "increasing the flow of trade, investment"; "industrial cooperation projects and technology transfer"; "encouraging modernization and diversification in industry"; identifying and eliminating barriers to industrial cooperation; "promoting industrial innovation"; and stimulating cooperation between economic operators, especially small- and medium-sized enterprises. *Id.* art. 11(2). A tall order indeed.

²⁸⁵ *Id.* art. 18.

²⁸⁶ *Id.* arts. 18(3)(a), 19, 21.

²⁸⁷ *Id.* arts. 18(3)(b), 20.

²⁸⁸ *Id.* arts. 18(3)(c).

²⁸⁹ *Id.* arts. 18(3)(d), 24. An example of this "technical cooperation" is the Financing Agreement between the European Union and the Mercosur Countries (Statistical Cooperation with the Mercosur Countries) MERCOSUR/CMC/DEC No. 23/97, *available at* <http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/1997/9723.htm>. This agreement provides for an EU contribution of 4,135,000 ECUs for statistical cooperation with the MERCOSUR countries. *Id.* art. 2.

MERCOSUR Council and Common Market Group. It is chaired, in turn, by a representative of the EU and a representative of MERCOSUR and creates its own rules of procedure.²⁹⁰ The Cooperation Council is to be assisted by a Joint Cooperation Committee composed of representatives of the member states of the EU and MERCOSUR. They are to meet at least on a yearly basis and are to assist the Cooperation Council in the performance of its duties. The Council may delegate "all or part of its powers" to the Committee, with the thought that the Committee "shall provide continuity between meetings of the Cooperation Council."²⁹¹ The Framework Agreement also creates a Joint Subcommittee on Trade, composed of representatives of the EU and MERCOSUR, which is meant to "conduct the preparatory work for the subsequent liberalization of trade" envisioned therein.²⁹² In short, three major organizations are expected to negotiate this relationship.

3. *The EU-MERCOSUR Negotiations*

The negotiations between the EU and MERCOSUR contemplated by the Framework Agreement have been quite extensive. The Cooperation Council first met in Brussels in November 1999.²⁹³ Its principal action was to create a Biregional Negotiations Committee (BNC) (whose membership was unspecified), which was to be responsible for the "general oversight and management of the negotiations on trade matters and cooperation"²⁹⁴ between the parties. The meeting also created a Subcommittee on Cooperation, which was to "conduct negotiations on co-operation"²⁹⁵ and report directly to the BNC. The BNC was also given the power to create Technical Groups, also directly responsible to it, to examine particular topics forming part of the trade

²⁹⁰ Framework Agreement, *supra* note 262, art. 25-26. The Council "may decide to set up any other body to assist it in the performance of its duties." *Id.* art. 28. Several such bodies have been created, including a Biregional Negotiations Committee, three subgroups on specific cooperation areas, and three technical groups dealing with trade matters. *See infra* note 402 and accompanying text.

²⁹¹ Framework Agreement, *supra* note 262, art. 27. In particular, the Committee is to make proposals to the Council "with the aim of stimulating preparations for the liberalization of trade and of intensifying cooperation," and making "proposals which contribute to achieving the ultimate aim of [the] EU-MERCOSUR Interregional Association." *Id.* arts. 27(5)(c),(d).

²⁹² *Id.* art. 29.

²⁹³ Joint Press Release, EU-MERCOSUR, First Cooperation Council (Nov. 1999), available at http://europa.eu.int/comm/external_relations/mercotur/ass_neg_text/press_rel_coop.htm [hereinafter JPR-FCC].

²⁹⁴ *Id.* at Annex 2, § 1.

²⁹⁵ *Id.*

negotiations.²⁹⁶ The BNC, which had the authority to decide its calendar and agenda, would plan to meet at least three times a year.²⁹⁷ It would also report to the Cooperation Council (who apparently still had the ultimate power to make actual recommendations to the parties under the Framework Agreement) on a regular basis.²⁹⁸

The BNC first met in Argentina in April 2000.²⁹⁹ There, the parties created and generally described the charge of three different subgroups on cooperation³⁰⁰ and three different technical groups.³⁰¹ The parties also agreed on an extensive program of information exchange between MERCOSUR and EU officials, and agreed on the agenda for their next meeting.³⁰² The next meeting of the BNC chiefly resulted in the exchange of information among the parties and in beginning discussions on a number of topics.³⁰³ This process continued through the third meeting of the BNC, with the parties considering that enough progress had been made to enable the exchange of draft negotiating texts on a number of issues to occur in the near future.³⁰⁴

²⁹⁶ *Id.*

²⁹⁷ *Id.* at Annex 2, § 3.

²⁹⁸ *Id.* at Annex 2, § 2.

²⁹⁹ First Meeting of the EU-MERCOSUR Biregional Negotiations Committee (Apr. 6-7, 2000, Buenos Aires, Argentina), available at http://europa.eu.int/comm/external_relations/mercosur/ass_neg_text/concl/bncl.htm [hereinafter First BNC].

³⁰⁰ These were the Subgroup on Economic Cooperation (charged with, *inter alia*, industrial cooperation, cooperation in the field of services, and investment promotion), the Subgroup on Social and Cultural Cooperation (charged, with, *inter alia*, social cooperation, cultural cooperation, social dialogue, and drugs and related organized crime), and the Subgroup on Financial and Technical Cooperation (charged with, *inter alia*, public administration modernization and inter institutional cooperation. *Id.* at §§ 3.2-3.3.

³⁰¹ Technical Group 1 includes, *inter alia*, trade in goods (both tariff and non-tariff measures), antidumping and countervailing duties, and safeguards and rules of origin. Technical Group 2 includes, *inter alia*, trade in services and intellectual property rights. Technical Group 3 includes government procurement, competition and dispute settlement. *Id.* § 4.2.1.

³⁰² *Id.* §§ 4.2.2-4.2.3. They also agreed that, at the end of each meeting, they would set the specific agenda of the next meeting. *Id.*

³⁰³ Second Meeting of the EU-MERCOSUR Biregional Negotiations Committee (June 13-16, 2000, Brussels, Belgium) §§ 2-5, available at http://europa.eu.int/comm/external_relations/mercosur/ass_neg_text/concl_bnc2.htm [hereinafter Second BNC].

³⁰⁴ This meeting was held at Brasilia, Brasil, on Nov. 7-10, 2000. THIRD MEETING OF THE EU-MERCOSUR BIREGIONAL NEGOTIATIONS COMMITTEE (NOVEMBER 7-10, 2000, BRASILIA, BRASIL) [hereinafter Third BNC], available at http://europa.eu.int/comm/external_relations/mercosur/ass_neg_text/concl_bnc3.htm. At this meeting, for example, enough consensus was found to have the parties prepare a joint text on the preamble, the legal framework of the political dialogue, and various paragraphs of the institutional structure of the future Association Agreement. *Id.* § 2. See also EU set to Make Progress with MERCOSUR in Fourth Round of Association Negotiations, Memo 01/91 (Mar. 16, 2001, Brussels, Belgium), available at <http://>

The fifth meeting of the BNC was held in July 2001. In that meeting, MERCOSUR, in response to an EC proposal, presented tariff offers and negotiating texts for goods, services, and government procurement.³⁰⁵ Negotiations on political dialogue and cooperation continued³⁰⁶ and seven draft texts in a number of areas were agreed to. This process of discussions, review of drafts, and further negotiation has continued in the most recent meetings of the BNC.³⁰⁷

A meeting of the heads of state of MERCOSUR and the EU was held in May 2002, and a ministerial meeting was held in March 2003.³⁰⁸ At those meetings, the participants lauded that substantial progress had been made in political, institutional and economic trade matter by the BNC³⁰⁹ and vowed to

europa.eu.int/comm/external_relations/mercosur/intro/mem_01_91.htm.

³⁰⁵ Fifth Meeting of the EU-MERCOSUR Biregional Negotiations Committee (July 2-6, 2001, Montevideo, Uruguay), *available at* http://europa.eu.int/comm/external_relations/mercosur/ass_neg_text/bnc5/conclusions.htm. By the next meeting, the parties were discussing a draft text on the institutional framework of the future agreement and presented and discussed text proposals on a number of areas related to economic cooperation and social and cultural cooperation. At the meeting, the EU presented to MERCOSUR an extensive offer dealing with both tariff and non-tariff matters, including negotiating texts dealing with goods, services and government procurement. The purpose of this offer, according to the EU, was to substantially and progressively liberalize substantially, all trade, without excluding any sector, during a period of ten years. The MERCOSUR representatives indicated that they would be presenting their own negotiating proposals covering these areas in the near future. Proposals were also exchanged in the areas of cooperation in the agricultural and rural sector, which will be analyzed in the next BNC meeting. On the other hand, the three different Subgroups agreed on joint draft texts in a number of areas. Conclusions of the Sixth EU-MERCOSUR Biregional Negotiations Committee (Brussels, Oct. 29-31, 2001), para. 1, *available at* http://europa.eu.int/comm/external_relations/mercosur/ass_neg_text/bnc6.htm.

³⁰⁶ *Id.* para. 2-3. Another round of meetings were held in Buenos Aires, Argentina (April 2002), Brussels, Belgium (November 2002) and again in Buenos Aires, Argentina (March 2003). *See* Seventh Meeting of the EU-MERCOSUR Biregional Negotiations Committee (Buenos Aires, Apr. 8-11, 2002), *available at* http://europa.eu.int/comm/external_relations/mercosur/ass_neg_text/bnc7.htm; Eighth Meeting of the EU-MERCOSUR Biregional Negotiations Committee (Nov. 15, 2002), *available at* http://europa.eu.int/comm/external_relations/mercosur/ass_neg_text/ip02_1684.htm; Meeting of the Ninth EU-MERCOSUR Biregional Negotiations Committee (Brussels, Mar. 17-21, 2003), *available at* http://europa.eu.int/comm/external_relations/mercosur/ass_neg_text/bnc9.htm.

³⁰⁷ *Id.* The areas included scientific and technological cooperation, energy, transport, telecommunication, information technology and information society. *Id.*

³⁰⁸ Joint Communiqué, Second Meeting of Heads of State and of Government of the EU and of MERCOSUR, *available at* http://europa.eu.int/comm/external_relations/mercosur/ass_neg_text/ma05_02.htm (May 17, 2002 Madrid, Spain) [hereinafter Madrid Communiqué]; Joint Communiqué, Bolivia-Chile Ministerial Meeting (Mar. 27, 2003, Athens, Greece), *available at* http://europa.eu.int/comm/external_relations/mercosur/intro/mm27_03_03.htm.

³⁰⁹ Madrid Communiqué, *supra* note 308, para. 2-7.

continue negotiations towards the ultimate objective of the “achievement of further effective access to their respective markets, on the basis of progressive and reciprocal trade liberalization in accordance with GATT/WTO rules.”³¹⁰ They also welcomed a new plan of action on business facilitation³¹¹ and announced the commencement of negotiations on wine and spirits.³¹² This meeting was similarly lauded by the MERCOSUR presidents.³¹³

These negotiations appear thus far headed to a mutually agreeable conclusion. As noted above, as part of its relationship with the EU, MERCOSUR has thus far received substantial amounts of financial assistance meant to be used for the development of its institutions. This financing, and the substantial “technical assistance” provided by the EU and its institutions to date, could substantially change the organization and operation of MERCOSUR’s institutions in the future. Furthermore, a successful completion of these negotiations could mean a highly advantageous entry for MERCOSUR goods into the European market, a state of affairs that could make MERCOSUR far more attractive to other potential members and which could result in more potential applications for membership. This situation could place MERCOSUR in a similar dilemma to that faced by the EU until recently: how to substantially increase the size and membership of the organization without sacrificing its effectiveness and efficiency.

IV. SUCCESS, PROBLEMS, AND THE FUTURE OF MERCOSUR

At the end of this detailed examination of MERCOSUR’s history, structure, and legal system, a basic question remains to be considered. That question is whether MERCOSUR is successful, or likely to be successful, in the future, perhaps to the degree that it rivals, or even competes with, the EU, presently the preeminent IEO in the world. Stated differently, is MERCOSUR (or is it likely to be) the “Common Market of the Twenty-First Century?”

³¹⁰ *Id.* para. 8.

³¹¹ EU-MERCOSUR Action Plan on Business Facilitation (May. 16, 2002), available at http://europa.eu.int/comm/trade/bilateral/mercosur/eum_apbf.htm. This Plan was to intentionally focus on questions of customs, standards, regulations and conformity assessment, sanitary and phytosanitary measures and had the aim of increasing trade flows and facilitating or eliminating potential barriers to trade. Madrid Communiqué, *supra* note 308, para. 12.

³¹² Madrid Communiqué, *supra* note 308, para. 12.

³¹³ Comunicado Conjunto de los Presidentes de los Estados Partes del MERCOSUR, July 5, 2002 [hereinafter Comunicado July 2002], at para. 25-27, available at <http://www.mercosur.org.04/pagina1esp.htm>.

Determining what constitutes "success" in an IEO like MERCOSUR involves a complex analysis. We must first understand why a nation would form part of (and remain in) an IEO like MERCOSUR instead of remaining an independent trader or entering into more ad hoc and temporary trading arrangements with other individual nations, groups of nations, or other IEOs. Once we have some basic understanding of this concept, we must then understand something of the nature of the IEO itself, in order to enumerate and examine other criteria that might serve as indicia of "success."

A. An Analytical Framework for IEOs

This analysis is considerably aided by the work of Professor Joel Trachtman, who has designed an analytical framework and theory regarding the IEO.³¹⁴ Professor Trachtman starts from the assumption that individuals and states acting in the international arena generally act in their own self-interest,³¹⁵ and that these international interactions operate in the form of a market.³¹⁶ This market can, in fact, be described as a continuum, ranging from "spot market transactions" through many types of contracts and informal arrangements to formal organizations such as IEOs.³¹⁷ The assets traded in this market are not goods or services, but components of power.³¹⁸ These transactions can range from informal, occasional "spot" transactions between one or two individual states to more formalized, permanent agreements

³¹⁴ Joel P. Trachtman, *The Theory of the Firm and the Theory of International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470 (1996-1997) [hereinafter *Theory of the Firm*].

³¹⁵ *Id.* at 482.

³¹⁶ *Id.* at 487.

³¹⁷ Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 17-18.

³¹⁸ *Theory of the Firm*, *supra* note 314, at 498. Trachtman describes three types of goods that may be traded: private goods, domestic public goods and international public goods. Economists define public goods as those which have two characteristics, non-exclusivity and non-rivalry. Non-exclusivity describes goods where the cost of preventing their use by persons other than the owner are too great to be worthwhile. Non-rivalry describes goods whose consumption by one person does not diminish their availability to others. At the domestic level, these goods include infrastructure services, police services, national security services and all manner of law and regulation, including trade regulation. International public goods can include international law, regulation, or international organizations. *Id.* at 490-01. In the legal context, Trachtman more narrowly describes this power as jurisdiction, including jurisdiction to prescribe, adjudicate and enforce. He also adds that, in international society, the equivalent of the market is simply the place where states interact to cooperate on particular issues in order to maximize their interests and preferences. *Id.* at 498.

involving multiple interactions over a lengthy period of time.³¹⁹ States enter this market because they seek to obtain benefits (such as favorable trade terms) that they cannot obtain otherwise and enter into these exchanges in order to obtain gains therefrom. Indeed, states will “trade” in this market as long as their net gains from this trade exceed their related losses and transaction costs.³²⁰ If these exchanges result in no gains, then there is no incentive to participate, and thus, no incentive for trade, cooperation, or integration.³²¹

In this analysis, an IEO represents an attempt to “institutionalize” this “market” by negotiating and creating a “template” through which states can agree in advance to permit certain types of transactions, thereby minimizing the costs of negotiating and implementing individual trade transactions and maximizing their gains therefrom.³²² An implied precondition of this “institutionalization” is that there must already be some “market” (that is, some existing trade relationship) to “institutionalize.” In an IEO, states are contracting with each other to establish rules for the benefit of the private economic actors that engage in trading. These rules significantly reduce the risk of arbitrary and unpredictable government action in trading and enable states participating in an IEO and trading actors to have some degree of regulatory predictability in trade.³²³

These entities exist in a competitive environment. They compete against other IEOs, non-governmental organizations (NGOs), multinational firms, or states themselves. The business firm prevails against its competition by making more profits. IEOs compete for responsibility. The more responsibility over transactions, economic sectors, areas of regulation, territory, and nation-states, the more funding and rulemaking authority they will require to adequately implement their responsibility, and the more successful they will be.³²⁴ They are vehicles of state collusion. States engage in a competition for

³¹⁹ *Id.* at 499-500.

³²⁰ Trachtman describes this relationship in the formula $NG = TG - (TL + TC)$. *Id.* at 553.

³²¹ *Id.* at 489, 553. Determining these gains requires an understanding and analysis of the principal gains and costs inherent in these transactions, which Trachtman describes in detail. *See id.* at 499-510, 515-32.

³²² *Id.* at 496-99. Trachtman notes that, the more institutionalized these arrangements become, the more the arrangement resembles the workings of a firm, rather than the workings of a market, especially when these arrangements have longer terms, cover more transactions, are more complex, or provide for decision-making in the future other than by unanimous consent. Trachtman then asserts that the theory of the firm is useful and appropriate in analyzing the workings of the IEO. *Id.* at 499.

³²³ Jose E. Alvarez & Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 42 (2002).

³²⁴ *Theory of the Firm*, *supra* note 314, at 519.

the provision of public goods. When they collude, they may make "spot" transactions for power, enter into longer-term agreements to transact in power in the future, or form IEOs, without knowing in advance what transactions will be made by these institutions that they are creating.³²⁵ Once states enter into an IEO and make the structural changes required to implement its mandate, then it is very hard for them to return to their prior state.

The relationship between member states and an IEO is similar to that of a shareholder and his or her firm.³²⁶ In order to further the purposes of the organization, the state delegates to the organization some of its rights to control some of its affairs. It generally retains, however, the right to residual control over those of its affairs that have remained unassigned to the IEO. This takes two forms: retained domestic sovereignty and the right to consent to any new rule or norm that might emanate from the IEO.³²⁷ Depending on the organization, it may also retain the right to leave, and the ease of exit from the organization may make it more attractive to potential members and induce them to delegate more powers to the organization.³²⁸ As is the case with shareholders investing in corporations, states joining and participating in an IEO do so because they believe that they will gain more from participation than from non-participation.³²⁹

The question of what responsibilities over what subject matters the members of the IEO will delegate or allocate to the organization itself is, of course, critical. Its answer depends on whether the "allocation" itself is more valuable in the hands of the IEO or in the hands of the member state.³³⁰ This allocation issue generally manifests itself in the distribution of powers and responsibilities between the institutions of the IEO and its members. The assumption is that, while the IEO has been delegated some plenary powers (generally with limitations) by its members, the latter retain all remaining plenary powers. The questions of what those delegated powers will be and how

³²⁵ *Id.*

³²⁶ *Id.* at 509. In a corporation, Trachtman asserts, shareholders retain two types of residual rights: the right to residual value upon liquidation of the firm and the right to residual control. The latter is, to the degree that the rights to control have not been contracted away by either the shareholders or the corporation, the shareholders retain the authority and power to act as they determine. *Id.*

³²⁷ *Id.*

³²⁸ *Id.* at 512.

³²⁹ *Id.* at 498-503, 510-21.

³³⁰ *Id.* at 530. Trachtman notes that "value" must be understood in this context as "the ability to satisfy state preferences at the lowest cost." In other words, the "option" will be bought by the participant (the IEO or the states) that can "make most efficient use of the responsibilities to satisfy the preferences expressed at that level of government." *Id.*

(and by whom) they are exercised, as well as the existence of any residual powers and location, are critical design issues on which the effectiveness of the organization may depend.³³¹ This makes the existence of an adequate and effective dispute resolution mechanism an essential component of an IEO. States are more likely to join an IEO and delegate it more plenary powers, especially the power to formulate and implement policy without requiring unanimous member-state consent for each decision, if the organization has a dispute resolution mechanism that is viewed as prompt, effective, and fair. In Trachtman's words, an inadequate dispute resolution system in an IEO increases its participants' transaction costs and reduces their transaction gains, therefore making participation less desirable.³³²

The bottom line is therefore twofold. First, from the point of view of the state actors in the international arena, membership and participation in an IEO is desirable as long as their gains from participation (taking into account all transaction costs and losses, of course) exceed their gains from nonparticipation.³³³ Second, from the point of view of the organization itself, there appear to be two critical measures of success: the growth in the organization's responsibility³³⁴ and its pareto efficiency.³³⁵

B. Is MERCOSUR a Success?

As was clearly shown above, this analysis of an IEO is extremely hard to quantify. Indeed, Trachtman's formula seems to be best applied to the evaluation of specific IEO policies or characteristics, rather than to the IEO in general.³³⁶ However, this analysis gives us an important theoretical framework

³³¹ *Id.* at 534-35. In the case of the EU, Trachtman believes that the location of this residual authority is somewhat blurred because of "the tension between the limited purposes of the European Union and the rather unlimited legislative authority needed to achieve those purposes." *Id.* Further complicating the issue is the concept of subsidiarity, enshrined in Article 3b of the Treaty on European Union, which states that, in areas not falling within its exclusive competence, the EU shall take action only "and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore . . . be better achieved by the Community." TREATY ON EUROPEAN UNION, Feb. 7, 1992, art. 3b, O.J.C. 224/1 (1992).

³³² See *Theory of the Firm*, *supra* note 314, at 527-29, 549-52.

³³³ See *supra* note 320 and accompanying text. See also Jose E. Alvarez & Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and . . ."*, 96 AM. J. INT'L L. 77, 85 (2002).

³³⁴ *Theory of the Firm*, *supra* note 314.

³³⁵ An IEO is pareto efficient if the members unanimously accept and abide by the general rules under which it operates. *Id.* at 516. This state is, however, not easily quantifiable. *Id.* at 518.

³³⁶ See *supra* note 318 and accompanying text.

and a number of frames of reference for evaluating MERCOSUR. Specifically, let us look at some of the indicia of growth, increasing responsibility, and pareto efficiency. These include:

- Why does MERCOSUR appear to be more successful in setting and creating norms than its predecessors?
- What are the feelings of public and private actors within the member states toward the organization?
- Has there been an increase in the number of states that have wished to join MERCOSUR? Were their applications welcome? Were they successful? Are more applications forthcoming?
- Has there been any increase in trade among its members, or among its members and other trading parties?
- Have the members and MERCOSUR been able to agree on norms to be applied by the organization?
- Has the existence of MERCOSUR increased the number of trade disputes avoided or resolved among its members?
- Do the members generally comply with the organization's norms?
- Does MERCOSUR have clear plans for the future and the ability to implement them?
- Does it appear to the member states that they are better off remaining in MERCOSUR than leaving it?

Let us now consider some of these factors.

1. Formalizing Existing Relations

To begin with, there is a very clear distinction between MERCOSUR and its predecessors. As we have seen earlier, a principal disadvantage of MERCOSUR's predecessor, LAFTA, is that the majority of its members had little or no trading relationships with each other, which made tariff-reduction agreements more of a theoretical and aspirational exercise.³³⁷ This made agreement and cooperation among the LAFTA members (many of whom had vastly different economies and little or no trading relationships with other Latin American countries), required to create an institutionalized free-trade area or common market, virtually impossible. An IEO cannot successfully

³³⁷ See *supra* note 29 and accompanying text.

“institutionalize” a “market” of trading relationships where there are no trading relationships in existence. MERCOSUR is an organization that was built on existing transactions and relationships among traders in its members. It was created to institutionalize a series of already existing “spot transactions” among the states who were to become its members. Furthermore, the states with the two largest economies in the group, Argentina and Brazil, had already started a very successful process of institutionalizing joint economic and trading relationships with each other,³³⁸ thus creating momentum for greater integration. The economies of Uruguay and Paraguay, the other two original participants in MERCOSUR, were already closely tied to those of Argentina and Brazil.³³⁹ At its founding, MERCOSUR was thus somewhat more advanced in Trachtman’s and Dunoff’s international trade continuum³⁴⁰ than its predecessors.

2. *Elite Support of the Venture*

The increased trade, economic prosperity, and apparently successful economic integration efforts between Argentina and Brazil between 1985 and 1990 were, of course, part of the worldwide globalization phenomenon, through which economic protectionism and isolationism were giving way to free trade and global economic integration.³⁴¹ These events resulted in significant economic prosperity for Argentina and Brazil³⁴² and, according to a survey, were perceived very favorably by the economic, political, and cultural elites of Brazil and Argentina.³⁴³ These elite actors, leaders of the

³³⁸ See *supra* notes 74-81 and accompanying text. These joint Argentine-Brazilian integrations had already increased trading relationships and exports between these two countries. See COFFEY, *supra* note 33, at 33-38. See also Antoni Estevadeordal et al., *The New Regionalism in the Americas: The Case of MERCOSUR*, INTAL Working Papers (Apr. 2000), available at <http://www.iadb.org/intal> [hereinafter THE NEW REGIONALISM].

³³⁹ Forty percent of total exports from Paraguay and Uruguay total exports go to MERCOSUR markets. Periodic Note on Integration, Division of Integration, Trade and Hemisphere Issues, Inter-American Development Bank, available at <http://www.iadb.org/int/pub/nota/nota-en.pdf> (last visited Dec. 7, 2003).

³⁴⁰ See *Theory of the Firm*, *supra* note 314 and accompanying text.

³⁴¹ “The world is undergoing a second wave of regionalism . . . we have witnessed many successful attempts to form integrated trading areas all over the world since the mid-80s . . .,” including: Europe-EC92; Asia and Pacific-Asian Pacific Economic Cooperation (APEC); North America-NAFTA; Latin America—MERCOSUR and FTAA. THE NEW REGIONALISM, *supra* note 338.

³⁴² COFFEY, *supra* note 33, at 33-38.

³⁴³ Diego Achard et al., *Las Elites Argentinas y Brasileiras frente al Mercosur*, Banco Interamericano de Desarrollo, Instituto para la Integración de América Latina (BID/INTAL) Pub.

public and private sectors in their countries, greatly influence public opinion and government policy. Indeed, a substantial majority of these actors felt very positive towards Latin American integration because it was perceived as bringing economic benefits and being the first step towards political integration.³⁴⁴ In spite of the fact that only one-third of the elites who participated in the study were consulted directly or indirectly in the process that resulted in MERCOSUR,³⁴⁵ sentiment towards MERCOSUR among the Brazilian and Argentine elites was overwhelmingly positive.³⁴⁶ Strong support for MERCOSUR among these elites makes it easier for their states to accept, enact, and implement the organization's agenda and norms.

The same individuals interviewed felt that MERCOSUR had a high probability of success³⁴⁷ and felt that this success would help make the Southern Cone region more competitive globally.³⁴⁸ The perception was that MERCOSUR's major advantages would be economic (increased trade with fewer barriers and economic complementarity), and that the impact of these changes would be positive, both short-term and long-term.³⁴⁹ It would result in a larger, more protected market for the area's products.³⁵⁰ These changes would also bring technological advances, which would make their products more competitive.³⁵¹ The increasing and substantial prosperity in the MERCOSUR economies validated and reinforced these positive perceptions and feelings. An important question to consider (the answer to which might be impossible to ascertain) is whether these positive perceptions and feelings on the part of the respondents would have existed in the absence of this substantial prosperity. In order to achieve these advantages, the participants noted that they would tolerate some short-term economic changes, including short-term unemployment and the elimination of certain industrial sectors in their economies.³⁵²

The majority of the respondents, therefore, felt that participation in MERCOSUR would clearly make their countries better off economically. In order to achieve the organization's potential, they would support an organiza-

418, at 7, 16-27 (1994) [hereinafter *Elites*].

³⁴⁴ *Id.* at 83-84.

³⁴⁵ *Id.* at 91.

³⁴⁶ *Id.* at 81.

³⁴⁷ *Id.* at 89-90.

³⁴⁸ *Id.* at 97.

³⁴⁹ *Id.* at 83-84, 86-90.

³⁵⁰ *Id.* at 88.

³⁵¹ *Id.* at 89.

³⁵² *Id.* at 80, 89.

tion that had supranational aspects and characteristics and that served as the creator and manager of a free-trade zone or a common market.³⁵³ In other words, they would be willing to give up some state-specific advantages for the benefit of the MERCOSUR integration process. Furthermore, they would be willing to aggressively and enthusiastically work towards expeditiously furthering the MERCOSUR agenda.

The major obstacles to the success of MERCOSUR were thought to be the ability of the member states to engage in the coordination of macroeconomic policies and the possibility of a coup d'état in one of the member states. Interestingly, none of the respondents felt that there would be much of a problem in having the members agree on a common external tariff, which was the problem that doomed LAFTA.³⁵⁴

An overwhelming sentiment to be extracted from this study is that, with regard to the political and economic elites of Argentina and Brazil (and, to a lesser extent, to those of Paraguay and Uruguay), they (and by extrapolation, their countries) would be better off in participating in MERCOSUR than in not doing so. This was the case because a MERCOSUR whose norms and programs decreased trade barriers, and otherwise stimulated trade and economic integration, would bring forth economic prosperity.

A critical point to remember is that, although the majority of the participants felt that their countries would or could accept significant economic sacrifices in the name of integration, this acceptance of economic sacrifice has a limit.³⁵⁵ Indeed, the unspoken implication from these comments seemed to be that, if MERCOSUR's economic integration resulted in substantial economic difficulties for an extended period of time, then support for MERCOSUR would be substantially diminished.

If, for some reason, the economies of the MERCOSUR countries found themselves in an extended substantial economic downturn, crisis, or recession, these attitudes and actions of the respondents, and of the nations they lead, could change substantially. MERCOSUR, and its norms and programs, might not bring forth economic prosperity. Specifically, giving up state-specific trade advantages, in the form of barriers or otherwise, would become disadvantageous rather than advantageous. Since further implementation or expansion of the MERCOSUR agenda and norms would not bring forth economic benefits, there would be no incentive for aggressively working towards this end. Taking this position to its logical extreme, participating in

³⁵³ *Id.* at 84-85, 169-71.

³⁵⁴ *Id.* at 90. See also *supra* notes 28-39 and accompanying text.

³⁵⁵ *Elites*, *supra* note 343, at 81.

MERCOSUR might not bring any further economic gains. Indeed, there might be more losses than gains for the member state participating in MERCOSUR. That might have been the calculus that Chile engaged in when it decided not to seek full membership in MERCOSUR, but instead to seek a free-trade arrangement with the United States.³⁵⁶ As shall be seen below, given the recent and current economic difficulties in Argentina and Brazil, this scenario might be very feasible at the present time.

3. *Paradise Lost: Brazil's Economic Difficulties*

Between 1990 and 1997, trade among the MERCOSUR member states increased dramatically. In these seven years, MERCOSUR became the third largest trading bloc in the world, after the EU and NAFTA.³⁵⁷ Trade and investment between Argentina and Brazil had quadrupled, and a substantial interdependence between the economies of both countries had developed.³⁵⁸ Indeed, at this point, things were going so well that the idea of a monetary union was being discussed.³⁵⁹

In late 1998, things changed. A major recession in Brazil resulted in the devaluation of Brazil's currency, the Real, in January 1999. As a result, Argentine goods became more expensive and Brazilian goods less so. The cross-investments and interdependence between the Brazilian and Argentine economies spread the effects of this recession and devaluation to Argentina. The fear was that Argentine investors would increase their investment in Brazil and that Argentine consumers would flock to purchase Brazilian products, severely affecting the Argentine economy. This fear aroused the ire of the Argentine government and business sectors, and affected the Argentine economy.³⁶⁰

³⁵⁶ *MERCOSUR Chopping Block*, *supra* note 22, at 40; *Crossroads*, *supra* note 22, at A15.

³⁵⁷ *Rivals*, *supra* note 9.

³⁵⁸ *Keep it in the Neighborhood*, *supra* note 8.

³⁵⁹ *Rivals*, *supra* note 9; Sebastian Edwards, *How About a Single Currency for MERCOSUR?*, WALL ST. J., Aug. 28, 1998, at A11. As a matter of fact, one commentator was arguing that the new single currency should be based on the system of currency board and dollar parity then in use in Argentina. *Rivals*, *supra* note 9.

³⁶⁰ *Breaking Point*, *supra* note 17; *Devaluation Slows Trade with MERCOSUR Partners* (excerpted from *Gazeta Mercantil*, Mar. 28, 1999, BBC SUMMARY OF WORLD BROADCASTS, Apr. 6, 1999, available at <http://www.lexisnexis.com>); Tim McGirk, *MERCOSUR Blues: Cardoso's problems in Brazil are creating big trade troubles, especially for Argentina's Menem*, TIME INT'L, Mar. 8, 1999, at 26; *MERCOSUR Becalmed*, ECONOMIST, Dec. 11, 1999, at 34; *Sour MERCOSUR*, *supra* note 17. There is some evidence, however, that the effect on the Argentine economy of the Brazilian difficulties was much less severe than feared. See Arturo O'Connell,

This situation had an immediate effect on MERCOSUR. As noted above, Argentina felt the need to become protectionist in its trade relations with Brazil, and immediately imposed import quotas for textiles and extensive technical requirements for imported electrical appliances, and asserted that it was considering the imposition of "safeguards" against imported shoes and paper.³⁶¹ Subsequently, Brazil negotiated and completed a trade agreement with the Andean countries.³⁶² After personal conversations between both presidents, Argentina agreed to temporarily suspend the quotas. An emergency meeting of the MERCOSUR ministers in August 1999 was unable to defuse the dispute. By the end of the year, relations between Argentina and Brazil were "at a breaking point."³⁶³

This poor relationship between MERCOSUR's major partners continued through 2001. Argentina viewed MERCOSUR as detrimental to its economy, and it became uncooperative in MERCOSUR matters.³⁶⁴ A number of controversies were brought by several member states before the Group within a six-month period in 2001.³⁶⁵ An economic downturn in Brazil in 2001, caused by an energy crisis, fears of a debt default, and political squabbles, mirrored a similar situation in Argentina. In the meantime, Chile suspended talks on full membership in MERCOSUR and announced that it was entering into free-trade negotiations with the United States.³⁶⁶

4. *Paradise Lost: The Argentine Meltdown*

Argentina's economic situation also took a turn for the worse. By December 2001, forty-one months of a steadily shrinking economy had created deflation, with prices across the economy falling, corporate profits dwindling,

Los Desafíos de MERCOSUR ante la Devaluación de la Moneda Brasileña, UN ECLAC (Santiago de Chile, Feb. 2001) [hereinafter O'Connell]; Heymann, *infra* note 422.

³⁶¹ *Breaking Point*, *supra* note 17; *Sour MERCOSUR*, *supra* note 17 and accompanying text. A commentator noted, however, that this crisis should actually strengthen MERCOSUR in the long run because: (a) this crisis had happened before; (b) this crisis has made Argentina and Brazil understand how important it is to coordinate macroeconomic policy and to strengthen and create a formal liaison mechanism between them (with MERCOSUR being the perfect candidate for such a mechanism) and (c) the way the crisis was handled shows that centuries of political distrust and hostility have been substantially eroded. Thomas Andrew O'Keefe, *supra* note 17, at 5A.

³⁶² *Breaking Point*, *supra* note 17.

³⁶³ *Id.*

³⁶⁴ *Neighbor-Bashing*, *supra* note 20

³⁶⁵ INFORME DEL GRUPO MERCADO COMÚN, *supra* note 21, at 2-4.

³⁶⁶ *Chopping Block*, *supra* note 17; *Crossroads*, *supra* note 17.

and government revenues shrinking. A substantial amount of foreign debt and a run on bank deposits further complicated the situation.³⁶⁷

This economic crisis and the substantial hardships it caused across the board to Argentine businesses and consumers created massive political turmoil, which included riots and demonstrations, the resignation of President de la Rúa in December 2001,³⁶⁸ the election and resignation of an interim president, Adolfo Rodríguez Saa, in December,³⁶⁹ and the election of a third president, Eduardo Duhalde, in February 2002.³⁷⁰

The Argentine government's reactions to this economic crisis were extreme. In December 2001, substantial limits on bank withdrawals and currency transfers out of the country were imposed.³⁷¹ On December 23, 2001, the Argentine government declared default on its \$132 billion debt to foreign and domestic creditors.³⁷² On January 13, 2002, Argentina abandoned its currency board, which pegged the peso at parity with the dollar, causing a substantial devaluation of the peso.³⁷³ Finally, on April 22, 2002, Argentina shut its banks and foreign exchange markets. This political and economic crisis continued into 2003.³⁷⁴

The close economic relations among the MERCOSUR members became a cause for concern. Commentators worried that "the Argentine meltdown," would extend to Brazil.³⁷⁵ The economies of Uruguay and Paraguay also seemed to be undergoing difficult conditions and there, too, the fear was that

³⁶⁷ David Luhnow & Pamela Druckerman, *Last Tango: Long Hailed as Hero, Reformer in Argentina Sees his Dream Sour*, WALL ST. J., Dec. 4, 2001, at A1 [hereinafter *Last Tango*]. See Manuel Pastor & Carol Wise, *From Poster Child to Basket Case*, FOREIGN AFF., Nov./Dec. 2001, at 60 (providing an excellent discussion and analysis of the causes for this economic crisis).

³⁶⁸ Clifford Krauss, *Argentine Leader Declares Default on Billions in Debt*, N.Y. TIMES, Dec. 24, 2001, at A1 [hereinafter *Leader Declares Default*].

³⁶⁹ Larry Rohter, *Within Hours, 2 Quit as Argentine Leader*, N.Y. TIMES, Dec. 31, 2001, at A6.

³⁷⁰ *A Decline without Parallel*, ECONOMIST, Mar. 2, 2002, at 26.

³⁷¹ *Last Tango*, supra note 367.

³⁷² *Leader Declares Default*, supra note 368.

³⁷³ Jennifer L. Rich, *Argentine Peso Sinks to New Lows as Crisis Continues*, N.Y. TIMES, Jan. 17, 2002, at W1.

³⁷⁴ See *Return to the Dark Ages*, ECONOMIST, Apr. 27, 2002, at 35. Although the economic situation has recently shown some improvements, it is still critical. See Larry Rohter, *Argentina Lifts Its Freeze on Most Bank Accounts*, N.Y. TIMES, Dec. 3, 2002; Larry Rohter, *Signs of Life in Argentina*, N.Y. TIMES, Feb. 25, 2003; *The IMF Climbs Aboard*, ECONOMIST, Jan. 25, 2003; *Storm Abated, Outlook Still Unsettled*, ECONOMIST, Jan. 11, 2003; Larry Rohter, *Argentina Looks to a New Leader*, N.Y. TIMES, May 25, 2003, at 14.

³⁷⁵ See Clifford Krauss, *Argentina's Malaise, Ever Worsening, Could Infect Others*, N.Y. TIMES, Dec. 17, 2001, at C16; *Spreading Risk*, ECONOMIST, June 29, 2002, at 68.

their economies would collapse as a result of their close relationship with Brazil and Argentina, the two largest economies in the region.³⁷⁶

Recent interactions between Brazil and Argentina in the context of the latter's devaluation of the peso indicate, however, that both countries are trying very hard to restore amicable and cooperative relations with each other and in the context of MERCOSUR. The president of Brazil's central bank called the Argentine devaluation "a necessary first step toward revitalizing MERCOSUR" and held open the possibility of an eventual common currency among MERCOSUR members.³⁷⁷ The MERCOSUR presidents in July 2002 reaffirmed their commitment to "the achievement of the objectives of The Treaty of Asunción" despite the member states' current economic difficulties.³⁷⁸ The severe economic downturn in the region still continues, however, and has had a highly detrimental impact on regional trade.³⁷⁹ In spite of these continuing difficulties, the new presidents of Argentina and Brazil, meeting in Brasilia on June 11, 2003, again reaffirmed their commitment to the revitalization and expansion of MERCOSUR and, as part of this process, pledged to create a MERCOSUR parliament and a joint monetary institute that would begin the process of achieving a common currency.³⁸⁰ They also pledged to not sign any individual free-trade area agreements with the United States and to participate as a group in the forthcoming FTAA negotiations.³⁸¹

³⁷⁶ See *A region prays it will not slide down Argentina's slope*, ECONOMIST, June 29, 2002, at 34; *Semi-divorced - Uruguay's battle not to be Argentina*, ECONOMIST, Apr. 6, 2002, at 33; *Argentina's woes have left a small neighbour reeling*, ECONOMIST, Jan. 19, 2002; *Don't watch my lips—Uruguay and Argentina*, ECONOMIST, June 8, 2002; Larry Rohter, *Uruguay Lifts Limits on Peso to Assist Economy*, N.Y. TIMES, June 21, 2002, at W1.

³⁷⁷ Louis Uchitelle, *Argentina's Woes may Strengthen its Ties to Brazil*, N.Y. TIMES, Jan. 10, 2002, at C1.

³⁷⁸ Comunicado July 2002, *supra* note 313, at para. 3.

³⁷⁹ See Larry Rohter, *Argentina in Scramble to Bolster Peso, Again*, N.Y. TIMES, July 10, 2002, at W1.

³⁸⁰ Kevin Hall, *Argentina, Brazil put U.S. Bid for Trade Zone on Back Burner*, PHILA. INQUIRER, June 12, 2003, at A24 [hereinafter *Back Burner*]; Terry Wade, *Latin Trade Bloc Flexes its Muscle*, WALL ST. J., June 16, 2003, at A13 [hereinafter *Trade Block*]; Eleonora Gosman, *Kirchner y Lula se Juraron Fidelidad para Negociar Juntos ante el ALCA*, CLARIN (Buenos Aires, Argentina), June 12, 2003, available at <http://old.clarin.com/diario/2003/06/12/p-00601.htm> [hereinafter *Fidelidad*]; *Lula y Kirchner Pretenden Ampliar el Bloque*, EL PAIS (Montevideo, Uruguay), June 11, 2003, available at http://www.diarioelpais.com/03/06/11/ultimo_44810.asp [hereinafter *Bloque*]; *Kirchner y Lula llamaron a 'la Integración Regional'*, CLARIN (Buenos Aires, Argentina), June 11, 2003, available at <http://impresion.clarin.com/imprimir.jsp?pagid=573133> [hereinafter *Integración*].

³⁸¹ *Back Burner*, *supra* note 380; *Trade Block*, *supra* note 380; *Fidelidad*, *supra* note 380; *Bloque*, *supra* note 380; *Integración*, *supra* note 380.

C. Success, Difficulties and the Future

1. The EU and MERCOSUR: Is it a Match?

The initial reaction that strikes an observer of the EU-MERCOSUR relationship is the magnitude of the undertaking that the parties have agreed to and the speed at which it has begun to develop. It aims at nothing less than the elimination of all barriers (tariff and non-tariff) and the establishment of free trade in all goods and services, as well as strengthened political dialogue between the EU, MERCOSUR and its associate members,³⁸² whose territory contains a population of 210 million and includes two of the largest and richest countries in Latin America. Should this goal be achieved, the EU and MERCOSUR would constitute the largest trading block in the world.³⁸³

The parties clearly seem to be quite serious about completing this undertaking successfully. Dozens of experts have exchanged reams of documents and have met and negotiated extensively. They have even gotten to the point of being able to agree on some joint texts and are clearly now exchanging written proposals.³⁸⁴ The stakes are enormous. Trade between MERCOSUR and the EU and Chile exceeded 49 billion Euros in 1998. Indeed, the EU is MERCOSUR and Chile's main trading partner after the United States and Japan.³⁸⁵ The EU also projected that, by the beginning of the twenty-first century, EU investments in the MERCOSUR countries and Chile would total \$83 billion and would encompass about fifty percent of the total foreign investment in the region.³⁸⁶ Financially, the MERCOSUR trade relationship is clearly very important to the EU.

For MERCOSUR, a free trade area relationship with the EU would grant its products preferential access to one of the largest markets in the world. This liberalized access would represent a massive benefit to the agricultural and industrial export markets of the member states. Furthermore, the relationship

³⁸² EU OVERVIEW 2001, *supra* note 261, at 4.

³⁸³ EUROPEAN UNION INTERESTS IN MERCOSUR AND CHILE, *available at* http://europa.eu.int/comm/external_relations/mercosur/background_doc/report_nov99.htm (last visited Dec. 7, 2003). See Lisa Anderson, *The Future of Hemisphere Free Trade: Towards a Unified Hemisphere?*, 20 HOUS. J. INT'L L. 635. See also <http://www.graphicmaps.com/webimage/countrys/sa.htm> (last visited Dec. 7, 2003).

³⁸⁴ See *supra* notes 293-313 and accompanying text.

³⁸⁵ EU Interests, *supra* note 383, at 2. The biggest individual customer appears to be Brazil, which received imports from the EU of 15 billion Euros in 1998 and is the EU's ninth largest customer. *Id.*

³⁸⁶ *Id.* at 6-7.

would provide a strong attraction and benefit for other Latin American nations who may want to consider entry to or association with MERCOSUR.

Time, however, is of the essence, because the EU has a competitor, the FTAA. The FTAA, which arose out of the 1994 Summit of the Americas in Miami (Miami Summit),³⁸⁷ is meant to be a multilateral, comprehensive regional economic integration treaty to be entered into among the thirty-four nations that attended the Miami Summit.³⁸⁸ Negotiations on a draft agreement started in June 1998³⁸⁹ and are meant to be concluded no later than January 2005, with the treaty coming into effect no later than December 2005.³⁹⁰

The negotiations process itself is rather extensive and comprehensive. The negotiations are to be guided by a Trade Negotiations Committee, which will manage the negotiation groups that will deal with specific subject matters.³⁹¹ Nine different negotiating groups will engage in actual detailed negotiations: market access; investment; services; government procurement; dispute settlement; agriculture; intellectual property rights; subsidies, antidumping and countervailing duties, and competition policy.³⁹² The negotiating groups operate subject to general guidelines and specific instructions from the trade ministers.³⁹³ A second draft agreement was produced by the Trade Negotiations Committee in November 2002 and negotiations continue.³⁹⁴

³⁸⁷ Summit of the Americas, Plan of Action, Section II (9), available at <http://www.sice.oas.org/FTAA/miami/sapoae.asp>. (last visited Dec. 7, 2003) [hereinafter Plan of Action]. The FTAA is only one of a number of initiatives arising out of this summit. Other initiatives include, *inter alia*, strengthening democracy, promoting and protecting human rights, promoting cultural values, combating corruption, eradicating poverty and discrimination, and guaranteeing sustainable development and conserving the natural environment. *Id.*

³⁸⁸ *Id.*; San José Declaration, *supra* note 23, para. 1-2.

³⁸⁹ Second Plan of Action, *supra* note 24, para. III.A.I.1.

³⁹⁰ Buenos Aires Declaration, *supra* note 25, para. 2. This deadline was last reiterated in Quito, Ecuador, in November 2002. Free Trade Area of the Americas, Seventh Meeting of Ministers of Trade of the Hemisphere, Quito, Ecuador (Nov. 1, 2001), available at http://www.alca-ftaa.org/ministerials/quito/minist_e.asp, para. 1 [hereinafter Quito Declaration].

³⁹¹ San José Declaration, *supra* note 23, para. 10.

³⁹² *Id.* para. 12.

³⁹³ See, e.g., FTAA-Trade Negotiations Committee, Methods and Modalities for Negotiations (Oct. 18, 2002) (FTAA.TNC/20/Rev. 1), available at http://www.sice.oas.org/FTAA/M&M_e.asp; FTAA-Trade Negotiations Committee, Guidelines or Directives for the Treatment of the Differences in the levels of Development and Size of Economies, available at http://www.sice.oas.org/FTAA/pautas_e.asp (last visited Dec. 7, 2003) [hereinafter Different Level Guidelines]; Quito Declaration, *supra* note 390, at Annex 1; Buenos Aires Declaration, *supra* note 25, at Annex 1.

³⁹⁴ FTAA-Free Trade Area of the Americas, Second Draft Agreement (Nov. 1, 2002) FTAA.TNC/w/133/Rev.2, available at http://www.alca-ftaa.org/ftaadraft02/eng/draft_e.asp.

The process described above seems to have some similarities with the ALADI tariff negotiations process, which required extensive negotiations among a large number of parties with different trade relationships and economic systems.³⁹⁵ Indeed, many observers seem to doubt that negotiations will be completed by the deadline.³⁹⁶ The United States seems to be primarily focusing on stronger protections for intellectual property, free trade in services, and access to foreign government contracts³⁹⁷ while other parties, like Brazil, seem to be chiefly interested in the United States ending agricultural subsidies and stopping antidumping measures.³⁹⁸ Agreement on these issues may be very difficult. As was the case with ALADI, the easy issues seem to have been agreed upon quickly, and the remaining issues may prove exceedingly difficult, time-consuming, and perhaps impossible to master.³⁹⁹ Furthermore, provisions in the draft agreement have been criticized, both in the United States and Latin America,⁴⁰⁰ and these criticisms may influence the finalization, ratification, or implementation of the FTAA. If the FTAA is not in place by 2005, then the EU and MERCOSUR will have a strong incentive to complete their negotiations and create their own free-trade area.

On the other hand, if the FTAA agreement has been negotiated and agreed upon by 2005, MERCOSUR has to consider its position within the context of an FTAA-United States dominated trade environment. MERCOSUR might wish to consider itself becoming a party to the FTAA agreement, or somehow co-existing with the FTAA organization.⁴⁰¹ The incentive for MERCOSUR to

³⁹⁵ See Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association (Feb. 18, 1960) 1484 U.N.T.S. 223, arts. 2-7, 14, 16-17, 23-24, 27; F. JOHN MATHIS, *ECONOMIC INTEGRATION IN LATIN AMERICA: THE PROGRESS AND PROBLEMS OF LAFTA* 17-18 (1969); JUAN MARIE VACCHINO, *INEGRACIÓN LATINO AMERICANA: DE LA ALALC A LA A CADI* 78, 86 (1983).

³⁹⁶ *Trade Wind: Talking up the FTAA and Mercosur*, *ECONOMIST*, June 28, 2003, at 34 [hereinafter *Trade Wind*].

³⁹⁷ See Press Release, Office of the United States Trade Representative, U.S. Advances Bold Proposals in FTAA Negotiations to Create World's Largest Free Market in 2005 (Feb. 11, 2003), available at <http://www.ustr.gov/releases/2003/02/03-08.htm>.

³⁹⁸ *Id.*

³⁹⁹ This does not mean that they cannot be overcome. One suggestion by Brazil appears to have been to move all sensitive topics off the FTAA negotiations and into more generalized WTO negotiations. This would result in a narrower agreement which can be more easily completed. The United States has apparently not been very receptive to this suggestion. *Id.*

⁴⁰⁰ See, e.g., Karen Hansen-Kuhn, *Latin Americans against the FTAA-Another Americas is Possible*, Alliance for Responsible Trade (Aug. 2001), available at <http://www.art-us.org>, Karen Hansen-Kuhn, *Free Trade Area of the Americas*, vol. 6 no. 12 (Apr. 2001), available at http://www.foreignpolicy-infocus.org/briefs/vol6/v6n12ftaa_body.html.

⁴⁰¹ The FTAA negotiators have indicated that the FTAA can co-exist with other existing

join an EU-dominated free-trade area in that environment would probably diminish substantially.

Concluding the Framework Agreement negotiations will not be easy. First, the Framework Agreement has created a complicated, bureaucratic and essentially consensus-driven process for the negotiations themselves. This process requires the Technical Groups and Subgroups to negotiate on their areas of interest and then report their recommendations to the BNC, which must approve them and apparently refer them to the Cooperation Council, which must in turn approve them. At the same time, the BNC is itself engaged in negotiations covering other topics. All Cooperation Council recommendations must then be submitted to the EU and MERCOSUR councils for approval.⁴⁰² The problem with this process is that, while it ensures that the final product will clearly be the product of a consensus of the parties, it is extremely time-consuming and dependent on such a consensus. If a consensus is not forthcoming on all or some of the major issues under discussion, the negotiations may break down or be delayed extensively.

Another obstacle to consider is the fact that, until now, the negotiations have been moving steadily apace without interruptions because the difficult issues (such as tariff barriers, especially tariff barriers for agricultural products) have not yet been considered. As the EU itself has noted, MERCOSUR has not been able to agree by itself (or with Chile) on a liberalization regime for certain industrial sectors.⁴⁰³ Since a substantial portion of the exports from MERCOSUR to the EU involve agricultural products, a major area of contention is likely to be the easing of restrictions on agricultural and food exports from MERCOSUR.⁴⁰⁴ MERCOSUR is likely to push for substantial liberalization, and the EU (with its highly complicated and contentious Common Agricultural Policy and agricultural sectors⁴⁰⁵) is more

regional integration agreements. It may, however, need to modify its agreements in order to do so. Summit of the Americas, Third Trade Ministerial Meeting, Belo Horizonte, Brazil (May 16, 1997), at par. 5(a)2, *available at* http://www.alca-ftaa.org/ministerials/belo_e.asp.

⁴⁰² See *supra* notes 290-92 and accompanying text. The EU appears to have obtained something akin to Congressional fast-track authority in the United States, which may enable it to speedily obtain approval of the final text. Under the MERCOSUR system, once the Council approves such an agreement, it must be ratified by the member states. See RL&P, *supra* note 128, at 16-19.

⁴⁰³ Overview (July 2000 Situation) § 1.5 (copy on file with author) [hereinafter 2000 Overview].

⁴⁰⁴ Negotiating Market Access, *supra* note 11, at 4.

⁴⁰⁵ Common Agricultural Policy, *available at* http://europa.eu.int/eur-lex/en/lif/ind/en_analytical_index_03.html (last visited Dec. 8, 2003). See also Derek W. Urui, COMMUNITY OF EUROPE 132-35 (1991).

likely to resist such an initiative.⁴⁰⁶ This situation may already be manifesting itself. After the EU presentation of its tariff proposal (which included agricultural products), the MERCOSUR reaction was merely to thank the EU side for their proposal and indicate that a counterproposal would be forthcoming. Furthermore, the Common Agricultural Policy is currently the subject of reform as part of the EU's "Agenda 2000." This process of reform, which is also tied to the EU's enlargement, is highly sensitive and could be contentious.⁴⁰⁷ Until the EU has reformed the Common Agricultural Policy, it is unlikely that a final agreement on agricultural matters will be reached.⁴⁰⁸

Lastly, two cultural issues may interfere with the negotiations themselves. The first is that of organizational culture. Clearly, there is a view among at least some quarters in the EU that it is a more "modern," "advanced," better organized, and more developed international organization than MERCOSUR, which is more of a less-developed "junior partner" which requires mentoring and assistance.⁴⁰⁹ Although there is some truth to this perception,⁴¹⁰ the temptation to overreach, or to attempt to "dictate terms" to the other party may be very strong and hard to resist. Following that impulse could be disastrous, however. Furthermore, the EU is presently in the throes of a very difficult process dealing with its own expansion.⁴¹¹ This expansion will in all

⁴⁰⁶ See, e.g., *Brussels Report: Latin Anger at Slow EU Agenda*, THE GROCER, Apr. 22, 2000, available at LEXIS, ALLNEWSPLUS Database; *Distant Friends—The EU and Latin America*, ECONOMIST, May 18, 2002, at 36 [hereinafter *Distant Friends*].

⁴⁰⁷ Negotiating Market Access, *supra* note 11, at 11.

⁴⁰⁸ *Id.* at 3.

⁴⁰⁹ 2000 Overview, *supra* note 403. This document, referring to MERCOSUR's lack of "autonomous" (supranational) central institutions, describes it as "inspired by the example of the EU, but which did not copy the EU model." *Id.* at para. 1.2. It also goes on to note that

[a]t present, MERCOSUR is still in the transition phase towards its common market, comparable to where the EU was during the 1960s. It is an imperfect common market, but one that is moving forwards as part of a process of regional economic integration. . . . Common commercial policies are being developed . . . however, their adoption or application is sometimes delayed.

Id. para. 1.5. The tone of the description of the MERCOSUR integration process in this document is somewhat negative and patronizing. See *id.* para. 1.1-1.7. Interestingly enough, this language has been deleted from the current Overview on the EU's website, and substituted with much different language. Compare EU OVERVIEW 2001, *supra* note 261, at 2, 4. The 2000 Overview has been removed from the EU website.

⁴¹⁰ COFFEY, *supra* note 33, at 12; Marta Haines-Ferrari, *MERCOSUR: A New Model of Latin American Economic Integration*, 25 CASE W. RES. J. INT'L L. 413, 427-28 (1993). See *supra* notes 290-92 and accompanying text.

⁴¹¹ Agenda 2000: For a stronger and wider Europe, COM (97) 2000 final and The Challenge of Enlargement, COM (97) 2000 final/2, available at <http://europa.eu.int/> [hereinafter White Paper].

likelihood include the admission to the EU of a number of countries with vastly different economic and political situations and characteristics from those of the current EU members. The expansion has also been the subject of a substantial amount of controversy.⁴¹² Some of the issues in (or solutions to) the controversies engendered by the expansion of the EU may have unintended consequences that spill over into the MERCOSUR negotiations and make the negotiations more complicated and difficult.

2. *Economic Disaster*

MERCOSUR has generated many great achievements since 1990, more than any other economic integration organization in Latin America. It has formalized and expanded cooperation and trading relationships among Brazil, Argentina, Paraguay, and Uruguay, and has developed these relationships into a viable and vibrant economic integration organization. For a substantial period of time, its members enjoyed unprecedented expanded trade and greater prosperity. As discussed in the Introduction, it has agreed on a common external tariff covering eighty-five percent of the items currently being traded by its members⁴¹³ and has reached agreement on a substantial number of trade matters. It has adopted many measures to eliminate barriers to free trade and to harmonize the legal and regulatory systems of the member states.⁴¹⁴ It has convinced the elites of its member states that the idea of economic integration is both feasible and desirable.⁴¹⁵ It has an agenda for the future and is working towards its implementation.⁴¹⁶ It has created an awareness in the private sectors of the member states of new regional export markets and has stimulated new investments and diversification.⁴¹⁷ Indeed, proof of this progress is an agreement to liberalize trade in the automotive sector entered into between MERCOSUR and Mexico in July 2002.⁴¹⁸ At that time, commentators in the member states were talking about more integration, macroeconomic policy

⁴¹² *Id.*

⁴¹³ Negotiating Market Access, *supra* note 11, at 5.

⁴¹⁴ See *supra* note 12 and accompanying text.

⁴¹⁵ See *Elites*, *supra* note 343 and accompanying text.

⁴¹⁶ Buenos Aires, *supra* note 15; Montevideo, *supra* note 15; Florianópolis, *supra* note 15.

⁴¹⁷ Robert Devlin, THE FREE TRADE AREA OF THE AMERICAS AND MERCOSUR-EUROPEAN UNION FREE TRADE PROCESSES: CAN THEY LEARN SOMETHING FROM EACH OTHER?, Occasional Paper 6 INTAL/ITD (2000), available at http://www.iadb.org/intal/publicaciones/devlin_op6.pdf.

⁴¹⁸ Tony Smith, *Mexico and Brazil Sign Bilateral Trade Pact*, N.Y. TIMES, July 4, 2002, at W1.

harmonization, and even a single currency.⁴¹⁹ The future looked very bright indeed.

This bright future seems to have been obscured since 1999, when major economic difficulties created substantial distress, first in Brazil, then in Argentina, and lastly in Paraguay and Uruguay.⁴²⁰ Argentina and Brazil found themselves unable to agree on further norms and seeking (or talking about seeking) to repeal or ignore norms previously agreed to.⁴²¹

Clearly, the dramatic economic distress that the MERCOSUR member states are currently undergoing is distracting them from the MERCOSUR agenda.⁴²² In their current situation, the natural instinct is to fully dedicate their resources, efforts, and energy to resolving their domestic economic problems first, and to consider the regional trade liberalization and economic integration agenda later. This will clearly be the case where the choice might be between a protectionist measure that might yield short-term domestic benefits and a liberalization measure that might actually provoke a short-term negative economic effect in the member states. Given the current configuration of MERCOSUR, until its member states resolve their economic difficulties, there is little likelihood of any substantial further progress on the implementation and expansion of the MERCOSUR agenda.

3. "Relaunching" MERCOSUR

In December 1999, the presidents of the MERCOSUR member states reiterated that the prompt incorporation of MERCOSUR norms into the national systems of the member states had extremely high priority and noted that measures were needed to ensure this incorporation.⁴²³ Concern had been expressed in the media that the economic problems and frictions that occurred in 1998-1999 between Argentina and Brazil might substantially hamper the progress of the MERCOSUR agenda.⁴²⁴ Shortly thereafter, in April 2000, the Council and the member states agreed to "relaunch" MERCOSUR. This relaunching featured an agreement by the economic ministers and central bank presidents of the member states to harmonize their statistics and to engage in

⁴¹⁹ See Florianópolis, *supra* note 15, at para. 7.

⁴²⁰ See *supra* notes 360-81 and accompanying text.

⁴²¹ *Id.*

⁴²² DANIEL HEYMANN, REGIONAL INTERDEPENDENCE AND MACROECONOMIC CRISES: NOTES ON MERCOSUR, 132 (Buenos Aires, Nov. 2001).

⁴²³ Montevideo, *supra* note 15, para. 11.

⁴²⁴ *MERCOSUR's Trial by Adversity*, ECONOMIST, May 27, 2000, at 37 [hereinafter *Trial by Adversity*].

macroeconomic coordination to establish “convergence criteria” on fiscal policies, prices, and public debt.⁴²⁵

Additional agreements included a market-access agreement, which forbids member states from adopting any measures which restrict reciprocal trade.⁴²⁶ This decision required all member states to supply a list by July 30, 2000, of all measures of any type which limited market access and required the Group to establish, by November 11, 2000, a plan of action to eliminate these restrictions.⁴²⁷

The Council also instructed the Group to formulate, by November 30, 2000, a proposal to limit antidumping investigations and their application to interzonal commerce.⁴²⁸ The Group was also to instruct its committees and technical groups to prepare a proposal to eliminate antidumping measures within MERCOSUR and to establish a common regulation on antidumping by non MERCOSUR member states. These proposals were to be submitted to the Council no later than December 31, 2001.⁴²⁹

The Council also reaffirmed its commitment to joint negotiations for commercial agreements granting tariff preferences which involve non-member states, and barred member states from executing, after June 30, 2001, any new tariff agreements that have not been negotiated by MERCOSUR.⁴³⁰

The Council also instructed the Group to present a proposal for the “institutional strengthening” of the Administrative Secretariat. The language of the decisions implied an expansion in its number of personnel and in its

⁴²⁵ *Id.* Buenos Aires, *supra* note 15, para. 5. Some have argued that these should be the first steps to a common currency for MERCOSUR. See, e.g., *Economist looks at Prospects for Further MERCOSUR Integration*, BBC Summary World Broadcast, Jan. 5, 1998, available at LEXIS, ALLNEWSPLUS Database); Mario Osava, *Trade-LATAM: Fiscal Discipline, New Key to MERCOSUR Integration*, Inter Press Serv., May 9, 2000, at LEXIS, ALLNEWSPLUS Database [hereinafter *Fiscal Discipline*].

⁴²⁶ OAS/SICK, Decisiones del Consejo del Mercado Común, MERCOSUR/CAC/Dec.22/00, art. 1, available at <http://www.sice.oas.org/trade/mrcsrs/decisiones/Dec2200s.asp> (last visited Dec. 7, 2003).

⁴²⁷ *Id.* arts. 2-3. See *Proyectos de Decisión, MERCOSUR/GMC/Res. No. 38/02 (Acuerdo del Plan General de Cooperación y Coordinación Recíproca para la Seguridad Regional entre los Estados Partes del MERCOSUR, Bolivia y Chile)*, available at <http://www.mercosur.org.uy/espanol/snor/normativa/resoluciones/2002/0238.htm> (last visited Dec. 7, 2003) [hereinafter *Proyectos*].

⁴²⁸ MERCOSUR/CMC/DEC No. 28/2000, art. 1, available at <http://www.sice.oas.org/trade/mrcsrs/decisiones/Dec2800s.asp> (last visited Dec. 7, 2003).

⁴²⁹ *Id.* arts. 2-3. See *Proyectos, supra* note 427 (Acuerdo Antidumping de la Organización Mundial de Comercio).

⁴³⁰ MERCOSUR/CMC/Dec. No. 32/00, arts. 1-3, available at <http://www.sice.oas.org/trade/mrcsrs/decisiones/dec3200s.asp> (last visited Dec. 7, 2003).

budget and required this proposal to be presented to the Council before December 10, 2000.⁴³¹ The latest proposals for the year 2002 include a budget of \$980,000⁴³² and a staff of twenty-seven.

The Council, at its Florianópolis meeting in December 2000, recognized that the current MERCOSUR dispute resolution mechanism is inadequate and established a group of senior officials that are to propose "improvements" to the system, which would consider the establishment of a MERCOSUR arbitral tribunal.⁴³³ These improvements are set forth in *Olivos*.⁴³⁴ In the same communiqué, the MERCOSUR presidents hailed the agreement, after nine years, on a common policy on the automotive sector;⁴³⁵ identified a policy agreement on the sugar industry as a high priority; and reiterated the importance of macroeconomic coordination.⁴³⁶ The process of macroeconomic coordination has gone very slowly. As of July 2002, the MERCOSUR presidents were reiterating the importance of macroeconomic coordination and agreeing again to undertake and continue the process.⁴³⁷

These are welcome developments. They clearly show that substantial areas of the MERCOSUR agreements and agenda need to be incorporated and implemented into the domestic legal and economic systems of the member states. They also show that even one of the most intractable tariff problems facing MERCOSUR, that of the automotive sector, can eventually be resolved, and show some level of commitment by the organization and its members to a continuation of the integration process. By imposing short deadlines for continued progress, they seek to energize it. They also have recognized the absolute need for an effective Administrative Secretariat and dispute resolutions systems and have undertaken a commitment to strengthen and expand the former and create the latter.

These developments illustrate, however, obstacles to the MERCOSUR integration process. There seems to be a substantial gap between the agreement on policy at the MERCOSUR level and the implementation of this policy at the member-state level. Neither the Administrative Secretariat nor

⁴³¹ MERCOSUR/CMC/Dec. No. 24/00, arts. 1-2, available at <http://www.sice.oas.org/trade/mrcsrs/decisions/dec2400s.asp> (last visited Dec. 7, 2003).

⁴³² Res 01/02, *supra* note 148. Res 15/02, *supra* note 147, art. 01.

⁴³³ Florianópolis, *supra* note 15.

⁴³⁴ See *Olivos*, *supra* note 100 and accompanying text.

⁴³⁵ Florianópolis, *supra* note 15, para. 11.

⁴³⁶ Florianópolis, *supra* note 15, para. 12.

⁴³⁷ Comunicado Conjunto de los Presidentes de los Estados Partes del Mercosur, July 5, 2002, *supra* note 346, paras. 4-5. See also Comunicado Conjunto 2002, *supra* note 248, para. 5.

any other MERCOSUR institution has the resources to effectively supervise, on a current basis, the negotiation of new norms, the implementation of established norms, and the negotiations to expand the organization. The member states may be too preoccupied with their domestic concerns, perspectives, and priorities to be able to do any of it.

Relaunching MERCOSUR, in the sense of expediting the integration process and making it more effective and efficient, will require a paradigm change. Given all the progress that has been made, the future agenda and its implementation have become far too extensive and complex for MERCOSUR's current framework. The supranational integration process, by now very successful, needs to be managed by a supranational actor with adequate resources and authority. The supranational norms created by this process need a mechanism to ensure that they are implemented by the member states in an expeditious and uniform fashion. Some sort of effective enforcement mechanism needs to be created to ensure that norms are followed and those who fail to do so are sanctioned.

4. *The Lack of a Supranational Entity*

As seen above, MERCOSUR's institutions, with the exception of a very small Administrative Secretariat, are all member-state based. The members of the various institutions and their staffs are representatives of the governments of the member states and are subject to their government's authority and direction.⁴³⁸ The member states have not delegated a substantial amount of power to the organization's institutions. Furthermore, no institution

⁴³⁸ See *supra* notes 111-53 and accompanying text. There are currently twenty-seven members of the Secretariat staff. See *supra* notes 146-48 and accompanying text. For an illuminating discussion of the tension between the supranational institutions of the EU and the interests of its member states, see Barbara Crutchfield George et al., *The Dilemma of the European Union: Balancing the Power of the Supranational EU Entity Against the Sovereignty of its Independent Member Nations*, 9 PACE INT'L L. REV. 111 (1997) [hereinafter *Dilemma*].

equivalent to the EU commission or its extensive bureaucracy⁴³⁹ is in charge of identifying, implementing or enforcing the MERCOSUR norms and agenda.

Two effects spring from this situation. First, the absence of a supranational "guardian of the agenda" makes the progress of the integration process uneven. When times are good and member state enthusiasm for integration and trade liberalization is high, the organization's work will move expeditiously. When times are bad and the member states' attentions are focused elsewhere, the institutions will not function as well.⁴⁴⁰ Second, the EU Commission, in its "guardian of the treaties function," serves an important function in enforcing member state compliance with the EU's norms. The Commission has the right to investigate and commence proceedings before the ECJ against any member state which has violated the Treaty of Rome.⁴⁴¹ The fact that the institution which has substantial powers to implement and enforce EU law is an "objective," supranational entity⁴⁴² unconnected to any particular member state gives its actions great credibility. Without a similar institution (and, as shall be seen below, without a truly effective system of dispute resolution and norm enforcement), enforcement of MERCOSUR norms will be very difficult. Without effective enforcement of these norms, they will become meaningless and the organization will become powerless.⁴⁴³

⁴³⁹ The European Commission consists of 20 members, appointed by agreement between the member governments. There are two nationals each from France, Germany, Italy, Spain and the UK and one from each of the other ten member states. Throughout their four-year term of office members must remain independent of the government and of the Council . . . In broad terms the Commission's role is to act as the guardian of the Treaties, to serve as the executive arm of the committees, to initiate Community policy, and to defend the Community interest in the Council.

JAMES D. DINNAGE & JOHN F. MURPHY, *THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 22 (1996). The term Commission is also used to mean the 13,000 members of the staff. *ORIGINS AND DEVELOPMENT OF THE EUROPEAN COMMUNITY* 198 (David Wigall and Peter Stirk, eds., 1992).

⁴⁴⁰ In the EU, the Commission, with its long-term planning and persistence, is credited with "keeping the flame of European integration alive" and promoting the expansion of the organization through times of economic trouble and low member state interest. DEREK W. URWIN, *THE COMMUNITY OF EUROPE* 81 (A.J. Nicholls & Martin S. Alexander, eds., 1991). See also Jenna Bednar et al., *The Politics of European Federalism*, 16 *INT'L REV. L. & ECON.* 279 (1996).

⁴⁴¹ Treaty of Rome, *supra* note 128, arts. 169-70.

⁴⁴² Members of the EU Commission are chosen chiefly for their dedication to the integration agenda and are not permitted to take instruction from their home states. JAMES D. DINNAGE & JOHN F. MURPHY, *THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION, DOCUMENTARY SUPPLEMENT* 94 (1996).

⁴⁴³ See *Dilemma*, *supra* note 438, at 117, 128; Felipe A.M. de la Balze, *Finding Allies in the*

5. *The Lack of an Effective Dispute Resolution System*

MERCOSUR has quite successfully begun the process of reversing decades of mistrust and hostility among its member states and has been able to enact a number of trade liberalization norms.⁴⁴⁴ In order to be effective, these norms must be interpreted in a consistent manner and must be effectively enforced. Unfortunately, MERCOSUR simply does not have an effective dispute-resolution mechanism. It has no institution equivalent to the ECJ that will interpret and explain a growing body of community law and norms. A panel of permanently appointed, objective, professional judges, sitting in open court in transparent proceedings, ensures a consistent interpretation of the institution's legal norms that will be perceived as fair. This perception ensures that its rulings will be followed by all participants.⁴⁴⁵

The MERCOSUR ad hoc arbitration dispute resolution procedure, even as strengthened by *Olivos*,⁴⁴⁶ is simply not adequate. It was designed for two or more member states to submit a dispute arising out of the MERCOSUR norms to an ad hoc panel of administrators appointed for that particular case. These arbitrators, selected from a list compiled and kept by MERCOSUR, may not necessarily be objective.⁴⁴⁷ They serve for the individual case and are not guaranteed to be reappointed to another case.⁴⁴⁸ The Tribunal functions as another arbitration panel, with the difference that the same members will always hear all appeals. Although the arbitration awards entered into pursuant to this system are published, the process itself is private among the parties only, with no participation by *amici curiae*.⁴⁴⁹ The process is not transparent. The mechanism for enforcing decisions is extremely weak. The mechanism itself has been used only a limited number of times since its creation.⁴⁵⁰ This is simply not the equivalent of a professional, permanent judiciary that, by

Back Yard: NAFTA and the Southern Cone, 80 FOREIGN AFFAIRS 7, 10 (2001) [hereinafter *Finding Allies*].

⁴⁴⁴ As has been seen above, some of these norms are more aspirational than others, and others require substantial implementation by the member states before they can achieve their purposes. See, e.g., Colonia Protocol for the Reciprocal Promotion of Investments MERCOSUR/CMC/Dec No. 11/93, available at <http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/DEC1193.htm> [hereinafter *Colonia*]; Non Member States Protocol, *supra* note 219.

⁴⁴⁵ See *supra* note 189 and accompanying text.

⁴⁴⁶ *Olivos*, *supra* note 100.

⁴⁴⁷ See *Olivos*, *supra* note 100 and accompanying text.

⁴⁴⁸ The majority of arbitrators who have served are taken from the list of arbitrators, but only three arbitrators have served more than once. See *Arbitros*, *supra* note 187.

⁴⁴⁹ See *Olivos*, *supra* note 100 and accompanying text.

⁴⁵⁰ *Laudos*, *supra* note 191.

virtue of hearing cases repeatedly, develops a consistent body of law. Moreover, this system is also not designed to be a mechanism which the organization itself can use to enforce compliance with the norms it enacts. The process of enforcing decisions also leaves much to be desired.

The absence of an effective and trustworthy dispute-resolution and norm-enforcement mechanism creates major obstacles to the implementation and expansion of the MERCOSUR agenda. First, member states who generally abide by the rules and who are aggrieved by another member state's abuse or noncompliance with a MERCOSUR rule or norm will naturally conclude that they have no effective mechanism with which to protect their interests within the organization. They "lose" more than they gain by participating in MERCOSUR and abiding by its rules,⁴⁵¹ whereas there is no effective penalty for noncompliance with community norms. The implication from both Trachtman and others⁴⁵² is clear: an international economic organization that cannot effectively enforce compliance with its norms and resolve disputes arising out of its operations will not be effective.

6. *To Infinity and Beyond?*

Since the beginning of MERCOSUR's existence, a number of countries have expressed an interest in joining MERCOSUR and have commenced negotiations toward that end.⁴⁵³ Two countries in particular, Bolivia and Chile, completed negotiations and joined MERCOSUR as associate members.⁴⁵⁴

Bolivia, Chile, and the EU do not seem to be the only candidates for inclusion in some sort of free-trade area with MERCOSUR. In 1997, after announcing its withdrawal from the Andean Group, Perú asserted that it wished to open talks with MERCOSUR with the intention of joining Bolivia and Chile as associate members. An Economic Complementation Agreement was signed between Perú and MERCOSUR in late August 2003.⁴⁵⁵

Since 1998, MERCOSUR has either commenced negotiations or entered into agreements seeking to establish free-trade areas (or heightened trade

⁴⁵¹ This can be especially true for Paraguay and Uruguay, MERCOSUR's smaller members, who have often felt that Brazil and Argentina dominate the organization to their disadvantage.

⁴⁵² See *Dilemma*, *supra* note 438; *Finding Allies*, *supra* note 443.

⁴⁵³ See *infra* notes 458-72 and accompanying text.

⁴⁵⁴ See *supra* notes 194-97 and accompanying text.

⁴⁵⁵ Geoff Dyer, *Peruvians Seek Mercosur Talks*, FIN. TIMES, May 16, 1997, at 7; Acuerdo de Alcance Parcial de Complementación Económica MERCOSUR-Perú (Aug. 25, 2003), available at <http://www.sice.oas.org/Trade/MRCSRPER/ACE.asp> [hereinafter Perú Agreement].

relations) with the Andean Community,⁴⁵⁶ Mexico,⁴⁵⁷ the European Free Trade Association,⁴⁵⁸ South Africa⁴⁵⁹ and India.⁴⁶⁰

These efforts follow a similar pattern in the form of a continuum. In the case of Perú, the agreement establishes a free-trade area between Perú and MERCOSUR, subject to the limitations and dispositions set forth therein.⁴⁶¹ In the cases of the Andean Group, the objective of the agreement is to establish a free-trade area between MERCOSUR and the Andean Group and promote the development of integration among the members of the two organizations.⁴⁶² This free-trade area agreement is to come into effect on December 31, 2003.⁴⁶³ The achievement of this agreement, then, appears to be a high priority one. The case of South Africa seems to have a lesser priority; the goal is to promote the development of commercial interchanges and establish the conditions for

⁴⁵⁶ Acuerdo Marco para la Creación de la Zona de Libre Comercio entre la Comunidad Andina y el MERCOSUR (Apr. 16, 1998), *available at* http://www.sice.oas.org/trade/mrcsr/meanco_Fs.asp [hereinafter Andean Pact Framework Agreement]. Acuerdo de Complementación económica celebrado entre la Comunidad Andina y el Mercado Común del Sur (MERCOSUR) (Dec. 6, 2002), *available at* <http://www.sice.oas.org/Trade/MRCSR/acMerAns.asp> [hereinafter Andean Pact Agreement].

⁴⁵⁷ MERCOSUR/CMC/DEC No. 37/00 (June 29, 2000), *available at* <http://www.sice.oas.org/trade/mrcsrs/decisions/dec3700s.asp> [hereinafter Mexican Negotiations]. An economic complementation agreement for trade in automotive products was signed in August 2002. Acuerdo de Complementación Económica No. 55 celebrado entre el MERCOSUR y los Estados Unidos Mexicanos (Sept. 27, 2002), *available at* http://www.sice.oas.org/Trade/MERCOSUR/MexACE55/MERMexAuto_s.asp [hereinafter Mexican Auto Agreement]. A general framework agreement was signed in July 2002. Acuerdo de Complementación Económica No. 54 celebrado entre los Estados Unidos Mexicanos y los Estados Partes del Mercado Común del Sur (MERCOSUR) (July 5, 2002), *available at* http://www.sice.oas.org/Trade/MERCOSUR/MexACE54/MERMex_s.asp [hereinafter Mexican Agreement].

⁴⁵⁸ MERCOSUR/CMC/DEC No. 63/00 (Dec. 14, 2000), *available at* <http://www.sice.oas.org/trade/mrcsrs/decisions/dec6200s.asp> [hereinafter EFTA Declaration].

⁴⁵⁹ MERCOSUR/CMC/DEC 62/00 (Dec. 14, 2000), *available at* <http://www.sice.oas.org/trade/mrcsrs/decisions/dec6200.asp>. [hereinafter South African Accord]. These negotiations continue. See Comunicado July 2002, *supra* note 313, at 521.

⁴⁶⁰ Acuerdo Marco entre el MERCOSUR y la República de la India (June 17, 2003), *available at* http://www.sice.oas.org/trade/MRCSR/Mercosur_India/MerIndia_s.asp [hereinafter India Agreement].

⁴⁶¹ Peru Agreement, *supra* note 455, arts. 3-11. The Perú Agreement greatly resembles the Chile and Bolivia Agreements, but does not have the specific timetables for implementation of the free-trade area that they do. See *supra* notes 202-226 and accompanying text.

⁴⁶² Andean Pact Agreement, *supra* note 456, art. 1.

⁴⁶³ *Id.* art. 2(c). Clearly, this has not yet happened. Andean Pact Agreement, *supra* note 456, at section 3(a). The Andean Community has also signed separate partial scope agreements with Argentina on Aug. 1, 2000, and with Brazil on Aug. 16, 2000.

the creation of a free-trade area between the parties, with no target date set.⁴⁶⁴ The process with Mexico is not as advanced; all the Mexico Agreement has done is to recognize the Automotive Agreement and the previous agreements signed between Mexico and the individual member states and to authorize the initiation of negotiations with Mexico leading towards the execution of a free-trade agreement.⁴⁶⁵

The EFTA Declaration is even less specific from the point of view of results. Its objective is to increase economic relations, investment, and cooperation between the EFTA countries and MERCOSUR through negotiations.⁴⁶⁶ It is accompanied by a vague "Plan of Action" that describes some of the substantive areas that the parties agree to discuss, again with no target dates.⁴⁶⁷ The India agreement seeks an even more limited goal: to put in place a fixed-preference agreement of limited scope directed to increase the bilateral flow of trade between India and the MERCOSUR countries.⁴⁶⁸

Each of these agreements designates a "negotiating committee" composed of representatives of both parties which will conclude the required negotiations to achieve or implement the stated goal.⁴⁶⁹

This flurry of additional expansion activity on the part of MERCOSUR is, in balance, problematic. On the one hand, if all of these plans were implemented and came to fruition, MERCOSUR would form part of a free-trade area covering a vast portion of the South American and European continents. Free access to this enormous and highly sophisticated source of capital for its raw materials and manufactured products would be highly advantageous. A close relationship with the EU, a large, highly sophisticated common market organization with substantial experience in integration, could also assist MERCOSUR in its own internal development.

There are, however, problems. As noted above, MERCOSUR has not yet been able to complete the integration process among its own members and associate members.⁴⁷⁰ Extending the integration process before a template "integration model" has been developed and proven successful (as was done

⁴⁶⁴ South African Accord, *supra* note 459, art. 2.

⁴⁶⁵ Mexican Agreement, *supra* note 457, art. 1.

⁴⁶⁶ EFTA Declaration, *supra* note 458, art. 1.

⁴⁶⁷ *Id.* at Annex. For example, the "Plan of Action" covers "the interchange of information and technical cooperation in certain essential sectors" and the "identification and analysis of measures, including those related to third countries, that influence commerce and investments." *Id.* arts. 2(a), 2(b).

⁴⁶⁸ India Agreement, *supra* note 460, art. 4.

⁴⁶⁹ Andean Pact Agreement, *supra* note 456, art. 5; EFTA Declaration, *supra* note 458, art. 3; South African Accord, *supra* note 459, arts. 4-5.

⁴⁷⁰ *See Normativa, available at* <http://www.mercosur.org.uy>.

in the EU) to a number of other countries with whom MERCOSUR does not have current extensive trade relations is to invite a repeat of the LAFTA disaster.⁴⁷¹ Furthermore, engaging at the same time in a process of economic and commercial integration with the EU, a highly integrated and extremely complex economic and political system, can be even more challenging. Moreover, there is a substantial logistical process involved in implementing the process anticipated by these agreements. As seen by the example of the EU, these negotiations cover a very large number of different technical areas, economic sectors, and concepts, and generally involve the participation of dozens of officials and other experts. Supervising the implementation of the MERCOSUR common market and negotiating at least four different free-trade (or economic harmonization) agreements at the same time presents a nearly impossible task for MERCOSUR's small staff.⁴⁷²

There is another possible way to consider these agreements. The experience of the EU shows us that the process of integration is an extremely long-term one. Perhaps these agreements and negotiations can be thought of as creating a more symbolic, informal long-term relationship, rather than an actual short-term formal relationship between MERCOSUR and other potential partners. They are chiefly creating a link and a channel of communication. They can be seen as statements of intent, meant to create, nurture, and establish a generalized relationship and a tradition of cooperation among the participants, rather than an actual free-trade area agreement within the short term. In this case, the formal relationship can follow after MERCOSUR has developed its own integration template for expansion and "EU-type negotiations," involving dozens of actors need not follow in every case.⁴⁷³

The bottom-line question of whether MERCOSUR is "developed" and "successful" enough to be able to expand its integration model and absorb other economies and markets is, of course, extremely hard to answer. It is a question with which the EU has been struggling for many years. Perhaps the only way in which it can be answered is retrospectively; if MERCOSUR can successfully negotiate free-trade agreements with other parties and if these relationships are successful, then it was "developed and successful" enough to expand.

⁴⁷¹ See *supra* note 29 and accompanying text.

⁴⁷² The current Secretariat consists of twenty-seven persons. See *supra* notes 146-48 and accompanying text.

⁴⁷³ The successful conclusion of a framework free-trade area agreement between the EU and MERCOSUR can provide such a template.

Apparently the increased trade, economic prosperity, and interdependence which manifested itself in the member states throughout the early- and mid-1990s excited other countries' interest in at least closer relations with MERCOSUR. Furthermore, MERCOSUR's impressive track record in drafting an agenda and in adopting norms to implement it gave a vastly different impression to Latin American observers than LAFTA did; here was an economic integration organization that got things done.⁴⁷⁴ Things were going so well that suggestions about adopting a common currency like the EU's were being seriously discussed.⁴⁷⁵ The more prosperous and integrated the economies of the member states became, the more potential members could conclude that joining MERCOSUR could result in substantial economic gains.

This initial excitement does not appear to have translated itself into a substantial number of new MERCOSUR members. There are, of course, many individual economic and political reasons, on the part of both the organization and the interested potential applicants, why these initial inquiries or negotiations have not been successfully concluded. MERCOSUR also does not seem to have a clear policy regarding expansion. Should there be limits on new members? What should the nature of these limits be? Should there be any new members at all?

The present ad hoc new membership policy did attract two new member states to MERCOSUR: Bolivia and Chile joined as associate members.⁴⁷⁶ They have not yet become full members. Indeed, it appears that Chile has chosen not to consider full membership by discontinuing negotiations with MERCOSUR.⁴⁷⁷ This conclusion of negotiations is problematic. Since Chile's entrance as an associate member, the organization has tried very hard to integrate it. Both Chile and MERCOSUR have tried very hard to complete full membership negotiations as promptly as possible.⁴⁷⁸ As discussed previously, possible reasons for Chile's withdrawal include an unwillingness to increase its already low tariff base to meet the MERCOSUR Common External Tariff and a calculation that greater gains would be available from

⁴⁷⁴ As noted above, between 1990 and 2000, in accordance with its plan of action, MERCOSUR adopted a Common External Tariff and 123 directives and resolutions. This level of activity greatly exceeded LAFTA's and reflects impressive gains and movements in the integration agenda. *See supra* note 29 and accompanying text.

⁴⁷⁵ *See supra* note 359 and accompanying text.

⁴⁷⁶ *See supra* notes 194-97 and accompanying text.

⁴⁷⁷ *See supra* notes 246-47 and accompanying text.

⁴⁷⁸ *See supra* notes 195, 238-46 and accompanying text.

either a free-trade agreement with the United States or membership in a United States-led free-trade zone, such as the FTAA.⁴⁷⁹

MERCOSUR needs to examine its potential membership negotiations with interested countries to determine whether any of its norms, negotiating styles, or positions, or other factors, have negatively affected its ability to implement free-trade area agreements or successfully conclude membership negotiations with potential new members. As seen above, its lack of an effective supranational institution to keep its agenda "on track" can serve as a deterrent for new members. An organization without a supranational "arbiter" among its member states and their interests can find itself at the mercy of its largest and most powerful members. Becoming thought of as an organization that is dominated by its two largest members may not attract many potential new members. Furthermore, MERCOSUR's lack of an effective, transparent, and efficient dispute-resolution and norm-enforcement mechanism also acts as a deterrent to potential new members.

Moreover, MERCOSUR needs to arrive at a concrete policy on expansion. If it acquires members with little current trading contacts with its members, it risks running into the same situation LAFTA ran into: members divided into conflicting "interest" groups which might paralyze the organization completely. This was a major cause of LAFTA's failure and is a situation to be avoided.⁴⁸⁰

V. CONCLUSION

As has been seen above, MERCOSUR has generated many great achievements since 1990, more than any other economic integration organization in Latin America. It has formalized and expanded cooperation and trading relationships among its members and has developed these relationships into a vibrant and viable economic integration organization. It has agreed upon the gradual elimination of internal tariffs and on a common external tariff covering approximately eighty-five percent of the items being traded by its members. It has reached agreement on a substantial number of trade matters and has adopted a large number of directives and resolutions seeking to harmonize the legal and regulatory systems of the member states.⁴⁸¹ Trade among its member states expanded substantially and,⁴⁸² for a substantial period of time, its

⁴⁷⁹ See *supra* notes 247-49 and accompanying text.

⁴⁸⁰ See *supra* note 29 and accompanying text.

⁴⁸¹ See *supra* notes 413-17 and accompanying text.

⁴⁸² See *supra* notes 337-40 and accompanying text.

members enjoyed unprecedented expanded trade and prosperity. Unlike other organizations, MERCOSUR is based on existing and successful trading relations among its member states⁴⁸³ and has been strongly supported by their business and political elites.⁴⁸⁴ These two factors have added to its success to date.

There are some signs, however, that all is not well and that the MERCOSUR integration process is not progressing and expanding. There are signs that major economic difficulties that Brazil and Argentina have suffered since 1999 have distracted them from the MERCOSUR agenda. As noted earlier, given this current economic situation, their natural instinct is to fully dedicate themselves to resolving their domestic economic problems first, and to consider regional trade liberalization and economic integration agenda later. This is especially true when the choice is between a domestic protectionist measure that might bring short-term domestic benefits and a liberalization or integration measure that might provoke a short-term negative domestic effect in the member states. Negotiations for the accession of new members seem to have stalled⁴⁸⁵ and one associate member, Chile, has abandoned full member negotiations and sought instead a free trade agreement with the United States.⁴⁸⁶ The member states, especially Argentina and Brazil, have found themselves unable to agree on further norms, and have on occasion sought (or talked about seeking) the repeal of specific norms or, worse, found themselves ignoring previously agreed to norms. To make matters worse, MERCOSUR finds itself facing a new competitor, the United States-sponsored Free Trade Area of the Americas, which seeks to establish a hemisphere-wide free trade area on its own terms.⁴⁸⁷

At this point, moving the MERCOSUR integration process forward by implementing and expanding its agenda will be difficult. Given the current configuration of MERCOSUR, until its member states resolve their economic difficulties, there is little likelihood of any substantial further progress on the implementation and expansion of its agenda. Moving past this point requires a substantial paradigm change to resolve two problems: the lack of an effective supranational entity and an effective and trustworthy dispute resolution and norm enforcement mechanism within MERCOSUR.

⁴⁸³ *Id.*

⁴⁸⁴ *See supra* notes 27-29 and 341-56 and accompanying text.

⁴⁸⁵ *See supra* notes 454-70 and accompanying text.

⁴⁸⁶ *See supra* notes 249-60 and accompanying text.

⁴⁸⁷ *See supra* notes 387-401 and accompanying text.

Given all the progress that has been made, MERCOSUR's future agenda, and its implementation, has become too extensive and complex for MERCOSUR's current framework. The supranational integration process, by now very successful, needs to be managed by a supranational actor with adequate resources and authority. The supranational norms created by this process need a mechanism to ensure that they are implemented by the member states.

As has been seen above, MERCOSUR's institutions, with the exception of a very small Administrative Secretariat, are all member-state based. Both the members of the various institutions, and their staffs, are representatives of the governments of the member states, and subject to their governments' authority and direction.⁴⁸⁸ The member states have not delegated a substantial amount of power to the organization's institutions. Two effects spring from this situation. First, the absence of a supranational "guardian of the agenda" makes the progress of the integration process uneven. When times are good and member state enthusiasm for integration and trade liberalization is high, the organization's work will move expeditiously. When economic times are bad and the member states' attentions are focused elsewhere, the institutions will not function as well. Second, a powerful supranational entity, in the style of the EU Commission, serves an important function in enforcing member state compliance with the organization's norms.⁴⁸⁹ The fact that an institution within the organization, with substantial powers to implement and enforce community norms, is an "objective, supranational entity" unconnected to any particular member states gives its actions great credibility. Without a similar institutions, enforcement of MERCOSUR's norms will be very difficult. Without effective enforcement of MERCOSUR's norms, they will become meaningless and the organization will become powerless.

Furthermore, as noted above, the absence of an effective and trustworthy dispute resolution and norm enforcement mechanism creates major obstacles to the implementation and expansion of the MERCOSUR agenda.⁴⁹⁰ First, member states who generally abide by the rules and who are aggrieved by another member state's abuse or noncompliance with a MERCOSUR rule or norm will naturally conclude that they have no effective mechanism to protect their interests within the organization. They "lose" more than they gain by

⁴⁸⁸ See *supra* notes 111-53 and accompanying text.

⁴⁸⁹ In the case of the EU, the Commission has the right to investigate and commence proceedings in the European Court of Justice against any member state which has violated the Treaty of Rome. See *supra* notes 439-43 and accompanying text.

⁴⁹⁰ See *supra* notes 154-93 and accompanying text.

participating in MERCOSUR and abiding by its rules. A member state who, on the other hand, chooses not to implement, or comply with, the MERCOSUR norms may feel no obligation to do so, since there is no effective penalty for noncompliance with community norms. The implication is clear: an international economic organization that cannot effectively enforce compliance with its norms and resolve disputes arising out of its operations will not be effective. With its current dispute resolution mechanism, MERCOSUR is in danger of becoming just that.

If MERCOSUR resolves these two problems, it will be able to continue to substantially implement and expand its integration agenda and will be vastly strengthened. A strong MERCOSUR will be able to attract new members and to coexist with, or negotiate an advantageous position within, the FTAA. If the FTAA does not come into being, then a powerful MERCOSUR could become an economic powerhouse within the Southern Hemisphere.