

# The democratization of international organizations



**IDW**  
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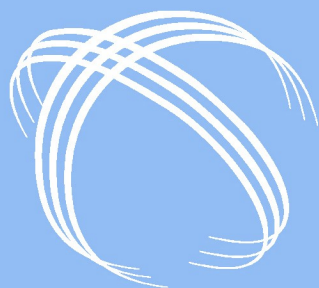


**CENTRE FOR STUDIES ON FEDERALISM**



**Southern Common  
Market**

by  
Mariana Luna Pont



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## **I. Introduction**

MERCOSUR (the Common Market of the South) is an integration scheme formed by Argentina, Brazil, Paraguay and Uruguay, whose central nucleus has been constituted by the first two countries from the very beginning, due to their development level.<sup>1</sup> In addition to a set of shared features, these countries are significantly different in terms of structure, both geographic and demographic; economy – development levels and productive structures; and politics and institutions – bureaucratic and administrative handling, political party system, political traditions, constitutional forms, etc. Most analysts identify two levels of asymmetry: on the one hand, there are the differences between Brazil and Argentina compared to Paraguay and Uruguay and on the other hand, the differences between the two members of higher relative power, in relation to productive structures and growth dynamics.

## **2. The Creation of MERCOSUR**

The current integration experience in Latin America is in line with a long tradition of unification and integration, dating back to the moment of emancipation and constitution of the new states. This tendency has been maintained over the years and experienced a major boost after the Second World War, especially since the 1960s, becoming concrete in initiatives such as the Latin American Free Trade Association (ALALC – *Asociación Latinoamericana de Libre Comercio*), the Central American

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<sup>1</sup> The status of associate member is established under bilateral agreements called *Economic Complementation Agreements*, signed between MERCOSUR and each country which decides to acquire said status. Under these agreements, a schedule is established to create a free trade zone and a gradual reduction in tariffs between the bloc and the signatory countries. Chile formalised its association with MERCOSUR on June 25<sup>th</sup>, 1996 upon the execution of the MERCOSUR-Chile Economic Complementation Agreement. Bolivia formalised its association on December 17<sup>th</sup>, 1996 upon signing the MERCOSUR-Bolivia Economic Complementation Agreement. In late 2006 Bolivia filed its request to be admitted as a full member. Peru, in turn, formalised its association in 2003 upon the execution of the MERCOSUR-Peru Economic Complementation Agreement. Colombia, Ecuador and Venezuela formalised their association in 2004 upon signing the MERCOSUR-Colombia, Ecuador and Venezuela Economic Complementation Agreement. The entry of Venezuela as a full member is still pending. To become associate members, the countries are required to, among other things, be members of the Latin American Association for Integration (ALADI – *Asociación Latinoamericana de Integración*) and execute the Ushuaia Protocol on Democratic Commitment. These states may take part in meetings of the bodies with the right to speak but not to vote and may participate in the signing of the different MERCOSUR protocols. Member states are part of the integration agreement as full members and consequently have the right to speak and vote in decision-making spaces. Additionally, they must transpose all regulations and agreements signed by them into their domestic law.

Common Market (MCC – *Mercado Común Centroamericano*) and the Andean Free Trade Agreement. The main objective of these schemes was to solve problems related to underdevelopment and increase international negotiation skills. The democratic transitions of the 1980s resolved different kinds of problems – especially foreign indebtedness and governance dilemmas – and fostered the countries' readiness to become associate members, deactivating conflict hypotheses and paving the way for mutual trust relationships, which laid the foundations for the deepening and expansion of the integration process.

Halfway through that decade, Presidents Alfossín and Sarney promoted a series of agreements, marking a fundamental change in the relationship between both countries. From the Strategic Alliance established by both of them and expressed in the 1985 Iguazú Declaration, about halfway through the following year they moved on to sign the Memorandum for the Argentin-Brazilian Integration, whose preamble established the following goals: integration and peace consolidation, affirmation of democracy as well as regional safety and development. Thus, the Programme for Integration and Economic Cooperation between Argentina and Brazil (PICAB – *Programa de Integración y Cooperación Argentino-Brasileña*) was signed, based on an intra-sectoral specialisation model aiming to offer equal benefits to the parties through gradual, flexible and progressive mechanisms. It was formalised through sectoral protocols implementing instruments of trade liberalisation. In 1998 both countries signed the Treaty of Integration, Cooperation and Development. This treaty was legally placed within the framework of ALADI (Latin American Association for Integration) which came after ALALC (Latin American Free Trade Association), whose main goal was the creation of a common trade space, starting with a free trade zone which would precede the subsequent creation of a common market.

During the 1990s and after the general elections which put new leaders into power (Menem in Argentina and Collor de Melo in Brazil), a new step in the integration process was taken. This step led to the participation of Uruguay and Paraguay in the creation of MERCOSUR and was instituted under the Treaty of Asunción signed in the Paraguayan capital on March 26<sup>th</sup>, 1991. The said treaty sets forth that the goal of regional integration is to increase the level of efficiency and competitiveness of the economies involved by expanding their market dimensions, a crucial condition to

accelerate the relevant development processes along with social justice. This goal should be achieved through the principles of graduality, flexibility and balance, making the most effective use of the available resources, through the protection of the environment, the improvement of physical interconnections, the coordination of macroeconomic policies and the complementation of the different economic sectors. This integration strategy broadly fitted what was defined as *Open Regionalism*<sup>2</sup> and implied a sensible change in the approach adopted during the beginning of the negotiations between Brazil and Argentina initiated in the previous decade.

The process was assuming a markedly economic-trade orientation in that it was a strategic response to international insertion dilemmas and intended to improve the international negotiation skills of the region. This new direction was the result of the changes taking place on the international scene – globalisation, negotiation deadlock among international trade organisations, European expansion and the creation of a domestic market, the launch of the Initiative for the Americas by the United States, etc. – and the dilemmas of international insertion created by this new scenario. On the other hand, it was complemented by programmes of structural reform embarked upon by regional countries. These reforms included, to name but a few, the privatisation of state-run companies, market deregulation and an important unilateral opening of the market to international goods, services and capital, in keeping with the neoliberal orientations backed by the Washington Consensus. As a result, the strategy of import substitution industrialisation, which the relevant processes of economic and social development and integration initiatives had been based on for more than 50 years, came to an end with marches and counter-marches (Obaya 2008).

Under the Treaty of Asunción, regional integration helps “achieve an adequate international insertion of the member states, taking into account the consolidation of large economic spaces and the evolution of international trade and financial dynamics.” Likewise, the need to promote the technological-scientific development and modernisation of their economies is also contemplated in order to expand the supply

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<sup>2</sup> As defined by ECLAC (Economic Commission for Latin America and the Caribbean), “Open Regionalism” refers to the following: “New regional and relatively open markets would be created, though keeping a margin of preference for their partners. These markets are based on a wide liberalisation in terms of sectors and countries, on the macroeconomic stability, with active policies and regulatory markets fostering an authentic competitiveness based on the productive transformation and incorporation of technological progress... acting as a defence mechanism against prospective protectionist pressures in extra-regional markets.”

and quality of goods and services and to improve the living conditions of the inhabitants.<sup>3</sup> The creation of a Common Market would entail the free movement of goods, services and productive factors (capital and work) by eliminating, among other things, customs duties and non-tariff barriers to the movement of goods, establishing a common external tariff (CET), adopting a common trade policy in relation to third states and defining positions agreed upon in economic-trade fora, both regional and international, as well as coordinating macroeconomic and sectoral policies among the member states to ensure adequate conditions for competitiveness among the members and committing themselves to harmonising their legislations in the relevant fields. Originally, a transition period was set until December 31<sup>st</sup>, 1994, when the Common Market should have been fully formed.<sup>4</sup> However, the limited advances achieved at the end of said period resulted in a key decision for the future of MERCOSUR: the adoption of a resolution establishing that there would not be a Common Market but an Imperfect Customs Union (Colonia, Uruguay, January 1994).

Halfway through the 1990s, a new phase began, considered by many to be the second stage in the history of the bloc. In December 1994, during the Summit Meeting of Heads of State held in the Brazilian city of Ouro Preto, several agreements were signed. These agreements established a new transition period (referred to as the “Adaptation to the Common Market”) intended to provide it with more dynamism in its advancement towards a Customs Union, the establishment of a new Common External Tariff and the resolution to progress towards a common customs code, a regime of valuation and other typical features of a Customs Union – apart from admitting lists of exemptions and adaptations. For the time being, the treatment of asymmetries is just focused on more complete lists and longer deadlines for smaller

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<sup>3</sup> To achieve a Common Market, the signatory countries agreed that they would mutually respect rights and obligations among the member states. They also agreed on non-discrimination policies among them, specific and fixed differences in the pace of the Trade Liberalisation Programme for Paraguay and Uruguay, the transparency in the coordination of national policies to guarantee fair trade conditions with third parties, the commitment to comply with the agreements until the execution date of the Treaty as well as the commitment to coordinate their positions in foreign trade negotiations.

<sup>4</sup> To achieve these goals, several instruments would be applied: (a) a trade liberalisation programme involving progressive, linear and automatic tariff reductions along with the elimination of non-tariff barriers and trade restrictions among member states so that on December 31<sup>st</sup>, 1994 the tariff would be zero rate and without non-tariff barriers; (b) the coordination of macroeconomic policies to be carried out gradually and in accordance with the programmes of tariff relief and the elimination of non-tariff barriers, and (c) the adoption of sectoral agreements in order to optimise the use and mobility of the production factors and achieve efficient operative levels.

economies. From that moment on, a more dynamic period opened up for MERCOSUR, especially in terms of intraregional trade growth and the location of foreign direct investments. In Ouro Preto, significant steps were also taken with respect to the formalisation of the institutional structure of the bloc in order to provide it with international legal status.

In the late 1990s, several factors caused a decline in these dynamics resulting, in 1999, in the most severe crisis that this integration project had to face as a consequence of the devaluation suffered by the Real in Brazil, a situation which spread and reached crisis levels in Argentina in 2001. This situation affected the relationships among all its members. The lack of coordination of economic policies among its members was a circumstance that emphasised this crisis. As a result, a new phase began, characterised by an alteration in trade flow, a decrease in regional investments, recurrent disputes and temporary settlements as well as repeated breaches of the agreements. Structural problems arose, affecting integration goals, instruments, strategies and deadlines, raising questions and uncertainties about the future of the process and, at the same time, contributing to debates over the integration scheme and its corresponding institutional support.

It is worth mentioning that despite all these difficulties, many political leaders and officers expressed their intention to “re-launch” the scheme. Around 2003, the political scenario in the region changed considerably resulting in the general election of Lula da Silva in Brazil, Nestor Kirchner in Argentina and Tabaré Vázquez in Uruguay. All these leaders had a political and ideological orientation that left behind the prevailing ideas and practices of the previous decade: the more active role of the state, a concern about the “social and productive debt” and, as an integral part of that, a firm commitment to an integration scheme in line with those orientations. The terms under which the *Buenos Aires Consensus* was stated after the Summit Meeting of the Heads of State held in October that year were an example of this new context realised in the Working Programme of the Common Market Council – the main institutional body of the bloc – for the years 2004-2006. This instrument set an agenda aimed at deepening the integration process by pinpointing a group of issues, shifting the focal point of action from one which was mainly commercial – prevailing in the 90s – towards a multidimensional programme focused on the political, social and productive aspects of

the integration process. In addition to measures intended to improve the Customs Union,<sup>5</sup> it was suggested they promote the expansion of citizen participation, pay greater attention to the cultural dimension of the process and refine measures in support of the free movement of persons. Among the provisions intended to strengthen the legal and institutional scheme of the bloc, it is worth highlighting the establishment of the MERCOSUR Parliament, the regulation of the Olivos Protocol on Dispute Resolution, the transformation of the Secretariat of MERCOSUR into a Technical Secretariat and other measures adopted to achieve the direct transposition of rules. On the new agenda, social and productive integration as well as cooperation in science and technology and physical and energetic integration were highlighted (CEFIR and Identidad MERCOSUR 2009).

From 2006 on work on social and production programmes was intensified. Under the heading “Towards a MERCOSUR with a human face and a social perspective,” the Buenos Aires Declaration issued in July 2006 pointed out: “To assume a social dimension of integration based on the economic development of equal distribution, intended to guarantee integrated human development, which sees the individual as a citizen entitled to civil, political, cultural and economic rights. Thus, the social dimension of integration is constituted as an inclusive space which strengthens both citizens’ rights and democracy.” In accordance with these definitions, in 2007 it was possible to progress towards the construction of institutional bodies, such as the MERCOSUR Commission of Coordination of Ministers of Social Affairs and the creation of the MERCOSUR Social Institute.<sup>6</sup> Since July 2009, transversal, integral and regional policies have been promoted, taking into account the common problems that

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<sup>5</sup> Among them are: the elimination of the double charge of the common external tariff and the removal of special regimes of national imports; measures intended to progressively reduce the use of incentives creating distortions in resource allocation, to improve competition and competitiveness conditions of the minor trading partners and the less developed regions through the creation of the MERCOSUR Structural Convergence Funds (in Spanish, FOCEM) as well as to improve the coordination of positions in multilateral negotiations, including a homogenous position of rejection in the Summit of the Americas held on November 2005 in Mar del Plata, facing pressures to include on the agenda the negotiation of the North American initiative to make progress towards a Free Trade Area of the Americas (ALCA – *Área de Libre Comercio de las Américas*).

<sup>6</sup> The goals of the MERCOSUR Social Institute – based in Asunción – are to: cooperate technically on the development of regional social policies, systematise and update regional social indicators, gather and exchange good practices regarding social issues and to promote cooperation mechanisms.



citizens face within the framework of the MERCOSUR Strategic Plan for Social Action (in Spanish, PEAS).<sup>7</sup>

The greater importance given to production asymmetries, a topic that, until then, had faded into the background of the bloc, reflects a clear awareness that the conservation of the integration scheme along with its political and social cohesion required the consideration of distribution problems – especially in contexts with no macroeconomic coordination policies. Thus, structural convergence, complementation and productive integration as well as the increase in the competitiveness of its economies became key issues. “To make progress towards the regional production integration along with social development emphasising the productive undertakings which include integrated networks, in particular small and medium-sized enterprises (SMEs) and cooperative associations” was the central objective of the “Programme of Integration of Production in MERCOSUR”<sup>8</sup> adopted in 2008.

The last Presidential Summit held in August 2010 in San Juan (Argentina) set out the conditions for the opening of a new stage in the evolution of the bloc. Lula da Silva, President of Brazil, considered it the best Summit after the one held in Ouro Preto in 1994, which laid the foundations of the Customs Union. Some of the results achieved were: the Common Customs Code, the double charge of the external tariff and the distribution of customs income, a uniform customs document and the handbook for control procedures of customs valuation. The commitment was made to continue working on the treatment of asymmetries and especially on the development and financing of joint projects of production integration, as well as the consolidation of all the rules regarding political, social, economic, commercial, judicial, migratory, educational, cultural, health, safety, environmental and sustainable development matters. On the other hand, their intention to strengthen commercial negotiations

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<sup>7</sup> The guiding principles of those interventions are as follows: a reaffirmation of the family unit as the focal point of the intervention of social policies, the inseparability of economic and social policies to guarantee a sustainable integrated development of equal distribution; to guarantee protection and social promotion as central themes of the policies, the importance of food and nutritional safety; respect for territorial features and dialogue with civil society.

<sup>8</sup> As per Decision CMC No. 128/08, the “Programme of Production Integration in MERCOSUR” was adopted and the Production Integration Group (in Spanish, GIP) was created, a body which reported to the Common Market Group (GMC). Specific conditions were established to allow for the use of the Structural Convergence Funds (FOCEM) to finance projects in the production integration area. The creation of a MERCOSUR Business Web Portal was approved as well as the creation of a MERCOSUR Guarantee Fund for Micro, Small and Medium-sized Enterprises (Decision CMC No. 41/08), which reflected the priority of these issues in the current stage of the bloc.

with other countries and blocs was reaffirmed as well as their willingness to make progress towards the negotiations to reach an agreement with the European Union, which were resumed last May after six years of being at a standstill.<sup>9</sup>

On that same occasion, the strategic alliance between Argentina and Brazil was forged, a relationship which may constitute the core of the Union of South American Nations (in Spanish, UNASUR). This is an initiative involving all the countries in the region and a sign of their desire to create a governable regional space in line with the goals of democratic stability, productive transformation and social cohesion. “UNASUR has become stronger in its capacity as an adequate instrument to exercise a multilateral and regional presidential diplomacy. Its value derives from the fact that it is the framework of an effective working method at the highest political level. MERCOSUR and UNASUR can supplement each other. Certainly their scopes of spatial and material action and, consequently, their operational mechanisms and instruments are different. However, they both have tasks related to the governance of the regional geographical space and the idea of joint work among their members” (Peña 2010). In this regard, it is like belonging to two spaces, but the fact they are supplementary does not mean that one moves forward to the detriment of the other. On the contrary, the need to act as a unified bloc when it comes to international negotiations with third parties amounts to an incentive to establish common points of views.

### **3. MERCOSUR Governance Structure**

Since the nature of the institutions reveals the political conception behind each process, when it comes to the integration process, the definition of its institutional

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<sup>9</sup> In addition to all the external negotiations, either concluded or on-going, two great initiative moments can be established: one, at the beginning of the process and the other since 2002. The former, during the first half of the 1990s, included all the negotiations within the framework of ALADI (MERCOSUR Agreements with Bolivia, Chile, Mexico, Peru, the Andean Community “CAN” and Cuba) and those with other developed countries (the USA and the EU), considered top priorities. This period lasted up to the end of the decade (1998, 1999) when the processes reached a plateau due to external and internal difficulties. The second period started in 2002, when better consensus was reached among the member states of the bloc, pending negotiations from the first impulse were resumed and intense negotiations on South-South trade, based on the market diversification precept, were added to the agenda. The agreements between MERCOSUR and India, the Southern African Customs Union (SACU), the Gulf Cooperation Council (GCC), Morocco, Jordan, Pakistan, Egypt and Turkey fall within this category as well as those with other countries such as Canada, Russia, Australia and New Zealand, Japan, Korea, the Association of Southeast Asian Nations (ASEAN) and Singapore.

structure is not just a technical issue. In the case of MERCOSUR, a minimalist and functional strategy was adopted with regard to its institutions, which would be perfected as integration created new dynamics and stressed the need to manage the increase in new demands. The regional governance structures of this process would develop under a Master Treaty (the Treaty of Asunción), whose scope and coverage would expand through the production of “secondary legislation” by the intergovernmental bodies created for that purpose. On the other hand, the notion of institutional design has historically been conditioned. The design established in MERCOSUR reflects the regional, political and ideological context of the 1990s with the chosen integration model being mainly mercantilist.

Its institutionalisation was finally completed through an international instrument upon the execution of the Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR (Ouro Preto Protocol, 1994) in compliance with section 18 of the Treaty of Asunción. This agreement completed the functional organisational design of the bloc with respect to its institutional structure, the specific powers of the bodies and its decision-making system – a scheme which was not definitive and was likely to be later revised – and provided the organisation with legal capacity under International Law. In the same document, there is an unlimited enumeration of bodies. These bodies can be distinguished according to their decision-making capacity, their advisory duties or their jurisdictional nature (as well as their permanent or auxiliary roles).

The first group includes the three main bodies of the organisation: the **Common Market Council**, the **Common Market Group** and the **MERCOSUR Trade Commission**. These are permanent bodies with decision-making capacity, made up of the members of the National Executive Powers, appointed by the member states and not independent of them. Linked to these bodies, there are several peripheral negotiation spaces that do not have the capacity to adopt their own decisions: Ministers’ Meetings, Specialised Meetings, Working Subgroups, Committees, *Ad Hoc* Groups, Fora, to name but a few. Altogether, they make up more than 260 negotiation spaces.

The **Common Market Council (CMC)** is the highest political body and is composed of the Ministers of Foreign Affairs and the Ministers of the Economy, or

their equivalents existing in the Member States. As the highest body, it is in charge of the political handling of the integration process and takes decisions to ensure that the goals set forth in the Treaty of Asunción are fulfilled and also to achieve the final creation of the Common Market. The President's office of the CMC is held by alphabetical rotation by the member states, for a six-month period. The member state in office is referred to as *Presidency Pro Tempore*, a definition which may also be applied to the other bodies of the bloc. Its duties and powers are as follows: to administer the legal personality of MERCOSUR; to negotiate and enter into agreements on behalf of the bloc both with third states and international organisations; to create such bodies as it deems necessary as well as modify or remove them; to appoint the Director of the Secretariat of the bloc; to adopt decisions on financial and budget matters and to make pronouncements on proposals submitted by the Common Market Group.

The regular meetings of the CMC are held once a semester and are attended by the Presidents of the Member States (Presidential Summits). As per the 2008 amendment to its internal bylaws (Decision No. 14/08), it was established that those meetings could be held in three sessions: the first in the presence of the Ministers of Foreign Affairs and Ministers of the Economy; the second also attended by Ministers or authorities with a similar rank as determined by each member state, having the power to discuss the matters included in the negotiation agenda; the last with the Ministers of Foreign Affairs, the Ministers of the Economy and the Presidents of each member state. The CMC may hold special meetings as often as deemed necessary and, depending on the items on the agenda set for the meetings and when considered convenient, the Council may invite representatives of the economic and social sectors as well as representatives of international organisations or associations of different countries to attend such meetings.

In performing its duties, this body pronounces on matters by issuing Decisions which are binding upon the member states. It is assisted by the following auxiliary bodies: the Ministers' Meetings,<sup>10</sup> Groups,<sup>11</sup> the Permanent Representatives

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<sup>10</sup> Ministers' Meetings (the following acronyms are in Spanish): Agriculture (RMA), Culture (RCA), Economy and Presidents of Central Banks (RMEPBC), Education (RME), Industry (RMIND), Interior (RMI), Justice (RMJ), Environment (RMMA), Mines and Energy (RMME), Ministers and Higher Authorities on Science, Technology and Innovation (RMACTIM), Ministers and Higher Authorities on Social Development (RMADS), Health (RMS), Work (RMT) and Tourism (RMTUR).

<sup>11</sup> High-Level Groups (the following acronyms are in Spanish): MERCOSUR Strategy of Employment Growth (GANEMPLE), High-Level Group to examine the consistency and dispersion of a Common

Commission of MERCOSUR (CRPM),<sup>12</sup> the MERCOSUR Policy Consultation and Consensus Forum (FCCP)<sup>13</sup> as well as the Meeting of Higher Authorities on Human Rights Matters (RADDHH).

The **Common Market Group (GMC)** is the executive body of MERCOSUR, and has the power to make decisions, pass rules and issue Resolutions. It is made up of four permanent members and four alternate members per state, appointed by their respective governments. Among them, it is required to appoint representatives of the Ministries of Foreign Affairs, Ministries of the Economy (or equivalent authorities) and the Central Banks, under the coordination of the Ministries of Foreign Affairs. Its main duties are to organise the meetings and issue the decisions of the CMC, enforce said decisions, design rules in the form of Resolutions<sup>14</sup> and organise the technical work necessary to advance in the integration process. Its auxiliary bodies are Working External Tariff (GANAEC), High-Level Group to develop the Strategic Plan to overcome MERCOSUR asymmetries (GANASIM), Ad Hoc High-Level Group for Institutional Reform (GANRI), High-Level Group for the development of a South-South trade cooperation programme (GANASUR).

<sup>12</sup> *The Commission of Permanent Representatives of MERCOSUR (CRPM)* is made up of Permanent Representatives of each member state of MERCOSUR and one Chairperson, who shall be a distinguished political figure and must be a national of a member state and appointed by the Common Market Council upon the motions of the Presidents of each member state. He shall remain in office for a period of 2 years but the Common Market Council may extend this period for an additional year. His/her duties include: helping the Common Market Council and the Presidency Pro Tempore of MERCOSUR in all the activities as he/she may be required; bringing initiatives before the Common Market Council on matters related to the integration process, foreign negotiations and the creation of the Common Market; consolidating the economic, social and parliamentary relationships within the bloc by establishing bonds with the Parliament and the Social and Economic Advisory Forum, as well as the MERCOSUR Specialised Meetings. Besides presiding over the work of this committee, the Chairperson of the CRPM represents MERCOSUR in its relationships with third states, groups of countries and international organisations as empowered by the Council. In said capacity, he/she also takes part in the meetings of the Common Market Council and in the Ministers' Meetings of MERCOSUR. The CRPM has a permanent office in the city of Montevideo and has the support and collaboration of the Secretariat of MERCOSUR.

<sup>13</sup> *The MERCOSUR Policy Consultation and Consensus Forum (FCCP)* is composed by Higher Officers of the Foreign Offices of the member states and the associate countries of MERCOSUR to discuss topics of common interest. Each state appoints a permanent and an alternate National Coordinator. Among its tasks are: to deepen the review and coordination of the political agenda of MERCOSUR, including those items related to international political issues and common political interests with third states, groups of countries and international organisations; to put forward recommendations for the implementation of the political agenda; to prepare drafts of joint announcements of the Presidents of the member states and associate countries; to propose and raise announcements about items on the political international agenda when deemed necessary; to take part in meetings of the Common Market Group, in the preliminary meetings of the Common Market Council when suitable for the discussion of issues within its jurisdiction, in Ministers' Meetings and Specialised Meetings within its jurisdiction; to coordinate along with the Common Market Group political matters to be included on the agenda of the meetings held by the Common Market Council; to organise Working Groups and convene *Ad Hoc* Groups when necessary for the fulfilment of its duties; to propose initiatives within the scope of its jurisdiction and to perform such activities as empowered by the Common Market Council.

<sup>14</sup> On all matters related to integration, excluding those customs and tariff matters which are within the scope of the MERCOSUR Trade Commission (CCM).

Subgroups,<sup>15</sup> Specialised Meetings,<sup>16</sup> *Ad Hoc* Groups,<sup>17</sup> Groups<sup>18</sup> and Technical Committees.<sup>19</sup> There are other bodies which collaborate with the GMC such as the Social Labour Commission of MERCOSUR (CSLM); the Consultation Forum of the Municipal Districts, Federated States, Provinces and Departments (FCCR), the MERCOSUR Training Institute (IMEF) and the Technical Meeting for the Incorporation of the MERCOSUR Regulatory Framework (RTIN).

The **MERCOSUR Trade Commission (CCM)** is in charge of handling the daily problems resulting from the intra-zone trade relationships and the implementation of the Common Trade Policy. It is made up of four permanent members and four alternate members from the member states, coordinated by the Ministries of Foreign Affairs. This body has the power to make decisions by issuing Directives and Proposals. If compared to the rest of the bodies, it is the only body having the power to hold meetings without the presence of all the member states. Its assistance structure is composed of a network of Technical Committees organised according to the subject matter.<sup>20</sup>

The **MERCOSUR Parliament (PM or PARLASUR)** is a successor to the Joint Parliamentary Commission.<sup>21</sup> It was established under CMC Decision No. 49/04 to act

<sup>15</sup> Working Subgroups: Communications, Institutional Aspects, Technical Resolutions and Evaluation of Compliance, Financial Matters, Transport, Environment, Industry, Agriculture, Energy, Labour Matters, Employment and Social Security, Health, Investments, E-Commerce, Mining.

<sup>16</sup> Specialised Meetings (acronyms in Spanish): Family Agriculture (REAF), Film and Audio-vision Authorities (RECAM), Drugs Competent Authorities, Prevention of Drug Abuse and Recovery of Drug Addicts (RED), Science and Technology (RECyT), Social Communication (RECS), Youth Cooperative Associations (RECM), Public Defenders of MERCOSUR (REDPO), Infrastructure of Integration (REII), Youth (RE), Women (REM), Justice Departments of MERCOSUR (REMPM), Governmental Organisations of Internal Control (REOGCI), Joint Trade Promotion (REPCCM), Tourism (RET), Governmental Agencies for Nationals Residing Abroad (REEG).

<sup>17</sup> *Ad Hoc* Groups: MERCOSUR Customs Code (GAHCAM), Concessions (GAHCON), Consultation and Coordination for the WTO (World Trade Organisation) Negotiations and GSTP (Global System of Trade Preferences among Developing Countries) (GAH OMC-SGPC), External Trading Relationships (GAHRE), Sanitary and Phytosanitary (GAHSF), Sugar Sector (GAHAZ), Agricultural Biotechnology (GAHBA), Tobacco Trade of MERCOSUR (GAHCC), Borderline Integration (GAHIF), Ad Hoc Group for regional policy on pneumatic tyres, both modified and used (GAHP), Biofuels (GAHB), MERCOSUR Domain (GAHDM), FOCEM Experts (GAH-FOCEM), MERCOSUR Funds for Small and Medium-sized Enterprises (GAHFME).

<sup>18</sup> *Groups*: Public Contracts, Services, Budget Issues of the Secretariat of MERCOSUR, issues related to the Production Integration of MERCOSUR.

<sup>19</sup> *Committees*: Automotive Committee, Technical Cooperation Committee.

<sup>20</sup> *Technical Committees (TC)*: TC 1: tariffs, nomenclature and classification of goods; N2: customs matters; N3: rules and trade disciplines, N4: public policies distorting competitiveness; N5: competition defence; N6: foreign trade statistics; N7: consumer protection, trade protection and safeguards committee.

<sup>21</sup> The former body of the Parliament was the Joint Parliamentary Commission (CPC), a representative regional body of the National Parliaments, established under the Treaty of Asunción. Its main objective

as an independent and autonomous body representing the citizens. Its Constitutive Protocol was approved in 2005 and has been in force since 2007. This one-chamber body is permanent, with its main office in the city of Montevideo (Uruguay). Its sessions are open to the public. It has a majority rule decision-making process as established in its Protocol and Internal Bylaws, i.e. the consensus formula is not applied, as in the rest of the bodies of the bloc having decision powers. Nowadays, it has 18 parliamentary members per country, who serve a four-year term of office. They are appointed by the national parliaments themselves, meaning that the parliamentary members have a double-office: national and regional. From the year 2011, its members should have been directly elected through a universal, direct and secret ballot, thus becoming the only institution of the bloc with direct democratic representation; the deadline, however, was postponed to 2014.<sup>22</sup> Although the rules issued by this body are not binding, it has specific jurisdiction over matters related to the development of the integration process, the procedures of adaptation and the integration of rules and access of new States to the organisation, matters related to human rights and the protection of the democratic system in the member states.<sup>23</sup>

The **Economic and Social Advisory Forum (FCES)** is the representative body of the economic and social sectors of the member states. It is made up only of representatives of business people, workers and organisations from civil society of the four countries (cooperative associations, NGOs, consumers, freelance professionals, etc.). The states have no representation or powers within this body. It has advisory

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was to facilitate the path towards the constitution of the Common Market. It played an advisory and deliberative role. It could also make proposals in order to facilitate the progress of the MERCOSUR and act as a connecting link among the National Parliaments. It could carry out the necessary research to harmonise the member states' legislations and allow for the legislative proceedings of those rules that required the intervention of the National Parliaments as well as prepare the necessary measures to allow for the future establishment of a MERCOSUR Parliament. The Ouro Preto Protocol included this commission in the organisational structure of the MERCOSUR.

<sup>22</sup> Between 2011 and 2014, the Parliament's elections will be held according to the agenda of each state and strive towards adequate gender, ethnic and regional representation based on the reality of each state. However, from the year 2014, these elections will be held simultaneously in all countries, with unique and identical terms of office for four years. According to the *criterion of citizen representation*, the composition of the Parliament will be as follows: Brazil, 36 members of parliament; Argentina, 32; Paraguay and Uruguay, 18 members each.

<sup>23</sup> The Parliament has ten Commissions that address the following matters: legal and institutional; economic, financial, trade, tax and monetary; international and interregional affairs and strategic planning; education, culture, science, technology and sport; work, employment policies, social security and social economy. Sustainable Regional Development, Territorial Organisation, housing, health, environment and tourism; citizenship and human rights, internal affairs, safety and defence, infrastructure, transport, energy resources, agriculture, livestock and fish, budget and domestic affairs.

duties though they are not binding. At the regional level, the structure of the FCES is composed of the Plenary Meeting – the highest body, made up of nine members per country, with equal representation of workers (4) and employers (4) and a ninth member representing “miscellaneous activities,” which holds meetings at least once a semester; the Permanent Secretariat, the Theme Areas and the Counselling Bodies. The FCES is made up of National Sections, one per country, composed of three sectors. The representatives constituting both the regional bodies and the National Sections are appointed by the organisations themselves, without any official participation. The Coordination shall rotate among the four countries. The main powers of the FCES are, to name but a few: to deal with the social dimension and analyse and assess integration impact; to promote economic and social development and make contributions that will increase civil society’s participation in the scheme. It issues Recommendations, which may refer to MERCOSUR internal matters as well as the relationship between MERCOSUR and other countries, international organisations and other integration processes, which are submitted directly to the Common Market Group and shall be adopted by consensus in the presence of all the National Sections.<sup>24</sup>

The **Secretariat of MERCOSUR (SM)** was established under the Treaty of Asunción as a subordinate body to the GMC, with the purpose of helping the Common Market Group in the protection of documents and communications. Its main offices are in Montevideo (Uruguay). In late 1994, the Protocol of Ouro Preto established its role as an institutional body of MERCOSUR responsible for providing operational support services to other bodies within the bloc. Its duties and functions further involved publishing and disseminating the rules adopted, editing the Official Bulletin of MERCOSUR, organising the logistic aspects of the meetings of the governing bodies, providing information about the transposition process of rules in the member states and recording national lists of arbitrators and experts. However, the most significant change occurred in 2002 when Decision 30/02 established the gradual transformation of the Administrative Secretariat of MERCOSUR (SAM) into a technical body with “full operational capacity,” a body that should work from a common

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<sup>24</sup> The FCES is linked to the European Economic and Social Committee; it is an associate member of the International Association of Economic and Social Councils and Similar Institutions (IAESCSI); it has signed an agreement with the MERCOSUR Parliament and is a consulting prescriptive body over some matters related to the MERCOSUR Social Institute.



regional integration perspective and reflect the objectives of the bloc as a whole. The body was then called Secretariat of MERCOSUR (SM). It is made up of a Director and three Sectors: the Technical Advisory Sector, the Rules and Documentation Sector and the Support and Administration Sector. The Director must be a national of one of the member states and is elected by the GMC on a rotating basis prior consultation to the states and appointed by the CMC. He/she shall remain in office for two years and cannot be re-elected. In 2007, as per Decision CMC No. 07/07 on the Structure and Functions of the Secretariat of MERCOSUR, the jurisdiction of the Sectors was redefined, the number of officers increased and the technical profile strengthened through the creation of the following Units within its sphere: the Technical Unit of Foreign Trade Statistics, in charge of designing, building and updating the trade statistics database of the member states, providing high-level information regarding import and export disaggregation of MERCOSUR Member States; the FOCEM Technical Unit (in Spanish, UTF/SM) established as a technical body in charge of the assessment and monitoring of the implementation of projects financed by FOCEM funds. Said funds are administered by the Director of the Secretariat along with the Coordinator of the FOCEM Technical Unit and the PAMA Executing Unit (in Spanish, UE/PAMA): in 2005, the “Action Programme for an Apthous-Fever Free MERCOSUR” (PAMA) was created with the purpose of contributing to the development of regional livestock activities for their insertion in the international market and strengthening sanitary structures. The PAMA Executing Unit works within the Secretariat of MERCOSUR and has been operating since 2008.

MERCOSUR has two bodies with jurisdictional capacities. The **MERCOSUR Permanent Court of Review (TPR)** seated in Asunción is an international court of public law of an interstate nature, whose objective is “to guarantee the correct construction, application and fulfilment of the fundamental instruments of the integration process and the whole set of MERCOSUR rules in a consistent and systematic fashion.” This body establishes a review procedure of the awards rendered by the Ad Hoc Arbitrators’ Court. It is a collegiate body made up of five national arbitrators from MERCOSUR: four appointed by the member states and the fifth elected from an eight-candidate list submitted by the countries to the MERCOSUR Administrative Secretariat. They remain in office for two years and can be re-elected

for two additional successive terms; the fifth arbitrator is appointed for a three-year term of office and cannot be re-elected.

The **MERCOSUR Administrative-Labour Court (TAL)** is a jurisdictional body with powers to hear and resolve disputes related to labour matters arising between the Secretariat of MERCOSUR and its officers or hired staff, after taking recourse to all other relevant internal administrative procedures – all the necessary proceedings related to the petition before its immediate higher body and before the Director of the Secretariat of MERCOSUR. It is made up of four members, one per member state, who are appointed by the Common Market Group to remain in office for a two-year term and are entitled to be re-elected for equal periods. The members must be jurists with recognised experience in labour matters and shall act with total independence and in their own capacity. The Chairperson shall be the member holding the nationality of the Member State currently in charge of the MERCOSUR Presidency Pro Tempore.

The **MERCOSUR Centre for the Promotion of the Government of Laws (CMPED)** was created in 2004 with the purpose of analysing and affirming the development of the state, democratic governance and all other aspects of the regional integration processes. It performs its duties in the seat of the Permanent Court of Review (TPR) situated in Asunción. The CMPED and the Commission of Permanent Representatives of MERCOSUR (CRPM) are responsible for the coordination of the activities of the MERCOSUR Democracy Observatory (ODM) created in 2007 to help reinforce the goals set forth in the Protocol of Ushuaia on the Democratic Commitment in MERCOSUR, the Republic of Bolivia and the Republic of Chile. It is in charge of monitoring the electoral processes in the countries of the bloc and coordinating the activities of the MERCOSUR Electoral Observer Body.

#### **4. Democracy at the National Level in MERCOSUR**

In the 80s, the issue of democracy became crucial throughout Latin America, especially in the MERCOSUR countries. Many decades of ruptures in the institutional order and authoritarian regimes largely contributed to this. From that moment on, three moments in the political evolution of the region can be distinguished: the 80s, the 90s

and the period up to the present, especially since 2003. During the first period, attention was focused on democratic transition as an alternative. In the second period, with democracy consolidated – at least as far as alternation and institutional validity was concerned – development was conditioned by adjustment policies and pro market reforms. The third period was dominated by reactions to the effects of neoliberal policies.

Even when the above-mentioned reforms sought justification by claiming they would reinforce governance, the effects were far from the ones originally anticipated. As some authors point out “democracy seems to have turned into something weak and poor as evidenced by frequent governance crises” (Sunkel 2007).<sup>25</sup> The ways in which administration was handled compromised leaders’ ability to respond to citizens’ demands, thus deepening the crisis of the methods of representation, triggering corruption mechanisms and the use of political clientelism by governments and political forces, weakening the public and civic culture spheres and solidarity bonds at the heart of civil society, leading to what is known as “*low-intensity citizenship*.” The effects of this on the perception of politics and political activity were not less important. The description of *electoral democracies* denotes the vulnerability and even the undermining of citizens’ expectations about the merits of democracy. In addition, aspects of social balance in terms of poverty, exclusion and marginality in turn, led to the greater prominence of social movements working outside the traditional forces and mechanisms of representation in response to demands for social equity and public policies to meet these demands.

Despite the differences in the adjustments and pro-market policies implemented in the four markets, their social and political outcomes were quite homogenous. This provided leeway in the process of transformation in political orientation from 2003 on, a period of renewal that paved the way for the subsequent victories of the Agreement in Chile, the two triumphs of Lula da Silva in Brazil, Néstor Kirchner’s arrival in power and the later election of Cristina Fernández de Kirchner in Argentina, the victory of Frente Amplio in Uruguay and Fernando Lugo’s triumph in Paraguay. All their policies,

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<sup>25</sup> For example, the fact that since 1990, at least 9 presidents have had to resign from office earlier than anticipated: A. Fujimori (Peru, 1992), J. Serrano (Guatemala, 1993), A. Bucaram (Ecuador, 1997), L.M. Argaña (Paraguay, 1999), J. Mahuad (Ecuador, 2000), F. de la Rúa (Argentina, 2001), G. Sanchez de Lozada (Bolivia, 2002), in addition to other examples of institutional instability.

though in different ways, were aimed at combining growth, income distribution and a return to a more active role of the state.

The tensions democracy had been experiencing in the region – also in MERCOSUR – led to the growing concern about the notion of *democracy quality*, evidenced, among other things, by the creation of several Democracy Observatories and Centres for Crisis Prevention. Almost all of them agree on their diagnosis, both from a descriptive and prescriptive point of view. In addition to aspects of the social agenda, i.e. issues related to income concentration, inequity, exclusion, poverty, etc., and the necessary articulation of the *political, economic and social dimensions of democracy*, attention is given to those procedures that guarantee transparency, inclusion, efficiency and consolidation of the institutional network; to the electoral systems; to the internal democracy of the political parties and their sources of funding; to citizens' access to information; to the balance between state powers and derivations of the presidentialist forms and to the affirmation of the ability to manage and prevent political-institutional crisis.

## **5. Input Legitimacy and MERCOSUR**

### **5.1. Regional civil society**

Describing the state of civil society in all MERCOSUR countries as a whole is a complex task given the wide variety of components and attitudes. Its prevailing shared feature is heterogeneity, whether they are political parties, business entities, trade unions, non-governmental organisations or any other forms of expression of corporate interests.

The differences among countries according to size, power, organisation, capacity to articulate the demands, etc. of those actors are extremely evident and derive from different factors: levels of economic growth and social modernisation, institutional fabric, history and political culture, to name but a few. These differences recur when taking into account the new social actors who have emerged in recent years. A situation common to all the countries was the conditioning of the institutional order, even though its adaptations are dependent on their own structural capacities.

The attitudes adopted by each of these actors towards the integration process depend, to a considerable extent, on the nature and type of interest they pursue.

Unlike the integration experiences which took place in the 60s and 70s, one characteristic of MERCOSUR was the *expectation* that originally emerged within civil society. In some sectors of civil society, this attitude was maintained over the years regardless of the nature of the interests, whereas in other sectors attitudes changed depending on the orientation and the way their specific interests were affected.

Moreover, civil society's level and methods of *involvement* gradually changed according to the level of growth of the integration process, the evolution of the agenda, the progressive increase in the capacities for action and the creation of institutional bodies to include them. Naturally, the most sensitive sectors were those which responded rapidly, resulting in changes in actions, strategies and methods of articulation over the years.

From a historical perspective, the first actors of civil society to adopt an active position in relation to MERCOSUR were business groups – divided into representatives of transnational, national or small and medium-sized enterprises – and trade unions.<sup>26</sup> Many professional associations then followed as well as institutions engaged in academic activities and non-governmental organisations with different focal issues. The motivations of these sectors were not homogeneous, neither were the speeches accompanying their involvement: from the expansion of business

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<sup>26</sup> As widely noted by many analysts, in MERCOSUR, the behaviour of transnational enterprises, the most important national groups and small and medium-sized producers has different features. The first sector achieved a high level of autonomy after adopting regionalisation strategies through which they obtained benefits and which could be implemented independently into the regional integration process. The second group – national enterprises – has proved to be more politically agile, having searched for a strategy to balance the benefits resulting from domestic reform processes with the impact resulting from the creation of an expanded market. This sector actively took part in the preparation of schedules and sensitive sectors in the bloc – with different levels of involvement and support to the process according to country and sector. In fact, a factor that facilitated the coordination of positions and the participation in the scheme was the creation of the MERCOSUR Industrial Council (CIM), which gathered entities representing the industrial sector of the four countries as well as the formation of business groups in each of them, in many cases oriented towards a direct influence strategy over their respective governments. It is often highlighted that business strategies and alliances in the case of transnational and national enterprises have a certain level of autonomy *vis-à-vis* the process of intergovernmental negotiation. In the case of small and medium-sized enterprises, their interest in the subregional integration processes is determined to a considerable extent by their capacity to establish relationships with the above-mentioned sectors. The main source of opportunities for these enterprises lies in the outsourcing process driven by large-sized industries – either national or international – which provides leeway for the so-called niches of intra-industrial specialisation. In the case of trade unions, these associations started taking part in the bloc through the Trade Union Coordinating Office for the Southern Cone (created in 1986), with a strong presence leading to the creation of Groups and Specialised Meetings to address social and labour issues. Their demands are mainly oriented towards labour legislation, the definition of a regional Social Charter, the preparation of a multilateral agreement on a social security system and on the migration of the labour force, competitiveness, employment and industrial reconversion.

opportunities to ideological political projects and then on to the affirmation of democratic institutions and strategies for insertion in a world undergoing transformation. The evolution of the scheme implied adapting expectations and changes in the sectors' range within civil society which would direct attention to it. To a considerable extent, this was the result of the integration method itself and the effects of the macroeconomic policies which were part of it.

While some sectors, mainly the representatives of large-sized enterprises, made an effort to maintain the trade orientations of the bloc, the larger sectors of civil society – especially those most affected by pro-market and deregulating practices – started developing a more critical view. The speech of one of the supporters of the MERCOCities Network initiative provides a clear example of the perception of MERCOSUR and the need to reformulate it:

We identified the constitution of MERCOSUR as an institutional process among countries with an exclusively economic nature. From this economic point of view, the large-sized enterprises, especially the multinational ones, led the integration with the idea of creating a better market situation and thought that the integration was to happen from the top, from the summit. It lacked the other mechanisms to carry out a social integration, taking into account the interests of the less favoured groups and the average citizen. A different polarity could be created, defending an inclusive social, political and economic agenda, more from the point of view of medium-sized enterprises and the workers' interests [...] There was a need for a critical space over the integration process which was not occupied by any political actor. Or, if occupied, for example by the opposition political parties or big trade unions, there was no very positive speech[...] It was necessary to think of the integration from the bottom, an integration that gets the communities involved, not only the governments or the monopoly interests (Meneghetti Neto 2005).

Since 2003, the new orientations of the bloc have been reflected in an agenda containing goals and objectives with higher social, cultural and productive features and in the reinforcement of channels to expand the participation of civil society, creating the conditions for a different-style of involvement. Any analytical assessment of the status of civil society in the region identifies the existence of a wide and compact range of networks, social movements and active organisations, surpassing the established institutional environments and mechanisms, especially in sectors such as cooperativism,

human rights, gender, family agriculture, consumers, professional associations, scientific communities, universities, environmentalism, etc. Some analysts identify elements capable of deepening the integration process and providing it with governance in the values and proposals of these new actors.

Despite their participation in formal negotiations or in the institutional structure of the bloc, the sector of collective actors suffered the impact and consequences of the decisions adopted within the bloc, which obliged them to incorporate that prospect into their action strategies, while at the same time, the issues involving them acquired a regional dimension. Examples of the main social networks that have MERCOSUR as a referent for their performance are: the Feminist Movement Network; MERCOCities Network, Trade Union Coordinating Office (CCSC), Cooperative Movement, MERCOSUR Social and Solidarity Programme, Cultural Network, University Network, to name but a few.

In spite of the developments achieved in this field and the identification of the sectors of society with the integration project, a convergent and integrated vision of said project has not been reached. Each one takes action based on specific agendas and there are no mechanisms to harmonise them. What's more, their relationship to the political forces which are more committed to the appraisal of the public environment and to a more balanced relationship between the State and the market is weak, if not nonexistent.

## **5.2. Political parties in MERCOSUR**

In Latin America, the political parties of democratic origin have historically been in favour of integration. This positive attitude, which in a way reflects a long-lasting unifying tradition, was evidenced by programmatic formulations and the attitudes adopted by their leaders, both among the Christian Democrats as well as those from a social democratic tradition and those generally referred to as populists.

Despite changes in political circumstances, all the countries reaffirmed their participation in the integration project, which then became a sort of “state policy.”

The differences among political parties concerning regionalism do not refer to the integration itself but to issues related to its overall orientation, operational aspects or

its relationship with other options for international insertion such as the ALCA or the Free Trade Bilateral Agreements.

Originally, the intergovernmental design of MERCOSUR did not favour an active role of the political parties, so they had to indirectly express their views through the Executive Power or the Joint Parliamentary Commission, whose creation was provided for in the Treaty of Asunción. This commission had an advisory and deliberative role and had the power-to formulate proposals, playing an instrumental role and occupying a lateral position in the institutional architecture. Its members represented their respective National Parliaments, a situation which did not favour the formation of inter-political party networks. The Ouro Preto Protocol established that this Commission should act as a body of the bloc, introducing changes in its duties and fostering the greater participation of legislators, both in the monitoring process as well as in the adoption of initiatives. This resulted in a strengthening of the bonds among political forces, a situation which members of Parliament considered an experience facilitating more significant interactions in the current Parliament.

The establishment of a MERCOSUR Parliament changed the logic of representation of the bloc. It was necessary to reach a laborious consensus regarding the definition of the representation criterion to be adopted for its formation, by way of a Political Agreement which eventually established the *criterion of citizenship representation*. This is a criterion of attenuated proportionality with the aim of compensating for the asymmetries existing in the population and in the Gross Domestic Product (GDP) among the member states and it implies that the states do not have a number of representatives directly proportional to their populations.<sup>27</sup> By virtue of the mechanism of direct election, the political parties acquire a particularly significant role, even when conditioned by the powers granted to the Parliament. They will be the necessary instrument to elect the members of the Parliament, obliging them to adopt clear and open positions with respect to MERCOSUR.<sup>28</sup> The members will not be

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<sup>27</sup> Under this criterion, each parliament represents the following number of inhabitants: 2,529,930 inhabitants in Brazil; 1,197,909 inhabitants in Argentina; 340,388 inhabitants in Paraguay and 185,555 inhabitants in Uruguay.

<sup>28</sup> An event reflecting the increasing interest among the political forces in the integration process as a whole, as well as among some other specific fields, is the participation of the youth in several youth meetings of political parties and their active role in the MERCOSUR Social Summits. The creation of the *Forum of Regional and Local Legislators of MERCOSUR* should also be highlighted because of its potentiality; the purpose of this forum was to foster greater interaction and visibility with respect to the integration issue at a sub-national level.



elected based on territory and will not represent their National Parliaments but rather the citizens. By doing so, “the centre is moved from the national view to the ideological one, from the territorially limited populations to the sectors of civil society represented in their cross-border dimension” (Drummond 2009).

The natural environment of political parties was traditionally the nation-state, but this new context changes the action scenario, incorporating a new supranational logic. From now on, the political parties making up the Parliament will have to reconcile two different logics: an ideological one and national one. Sometimes these logics coincide but other times they contrast, a question which is connected to another topic directly focused on the behaviour and evolution of the Body and the political forces composing it: the capacity to form supranational political parties or political party families at a regional level (Kelly, Plecon and Farizano 2010).

The Parliamentary Bylaws foresee the formation of political party families, establishing the necessary requirements for the creation of *Political Groups*. These groups shall be composed of at least 10% of the total members of Parliament if they represent only one member state, or there shall be 5 members of Parliament if they represent more than one state. So far, two groups have been formed: the National Party Group, made up of members of only one party – *Partido Nacional Uruguayo* – and the Progressive Group, made up of political parties from the four member states – in the case of Argentina, representatives of *Frente para la Victoria-PJ*, *Nuevo Encuentro* and the *Socialist Party*; in the case of Brazil, representatives of the *Labour Party*; in the case of Paraguay, the *Tekojojá Movement* and in the case of Uruguay, the political party *Frente Amplio* – all of them operating according to a supranational logic (ibid). A third coalition can be mentioned. Although it is not a political group, it works as such: the vast majority of the members of Parliament from Paraguay. Naturally, the formation of Groups alone is not enough to consolidate the regional political party system neither is it enough to generate common interests and positions. In order to achieve this, it will be necessary to overcome some existing differences among them and in their history, structures and entrenched ways of functioning.

## **6. Popular Participation in MERCOSUR**

### ***6.1. Civil society participation in MERCOSUR***

According to Section 14 of the Treaty of Asunción, the GMC may invite representatives of the “private sector” to take part in the development of their work when deemed convenient. However, during the transition period established by said Treaty, the procedure related to the direct representation of citizenship or organisations was undefined. Through the Ouro Preto Protocol two mechanisms for civil society representation were established: the Economic and Social Advisory Forum (FCES) and the possibility to take part in the *preliminary meetings* of the auxiliary bodies of the GMC, such as the Technical Working Subgroups (SGT) and their respective commissions, the Specialised Meetings and the Ad Hoc Groups.

In the early years, the GMC was reluctant to raise consultations or initiate said participation, especially in the case of the FCES. After Resolution GMC 35/00 of the year 2000, for the first time a mechanism was established to receive initiatives from civil society and the FCES was made a central participant after being introduced as a necessary go-between. Additionally, since 2003, the changes in the orientation of the bloc have allowed the issue of the participation of civil society to start being better integrated into the official speeches and working programmes of the scheme. Item 3 of the Buenos Aires Consensus (October 2003) is an example: “We strongly agree to promote the active participation of civil society in the regional integration process, consolidating the existing bodies as well as the initiatives which may contribute to complementation, associativity and a broad and plural dialogue”. As a result, all the member states started organising bodies, taking on the responsibility of their establishment and affirming national and common spaces for social participation in the integration process.

As above-mentioned, the **Economic and Social Advisory Forum (FCES)** is the body representing the economic and social sectors of the member states, made up of representatives of enterprises, workers and civil society. It is organised into National Sections which, according to their internal bylaws, have organisational autonomy and may establish which economic and social sectors it will be composed of, which accounts for the important differences existing in their formation and performance dynamics. An organisation may not take part if the National Section of a

country does not allow it, which means there is a risk of participation elitisation, inclusion limits and, at the same time, a reduction in the interlocutors of the bloc.

Although it is true that direct participation spaces for organised sectors were opened, this participation ended up enveloping those sectors with higher lobby power to the detriment of the citizenship and proper representation in the Forum. This shortcoming is in turn exacerbated by the working mechanisms established, i.e. the representation of these sectors through National Sections makes it difficult to generate a regional perspective through their proposals. On the other hand, it is often claimed that these dynamics turn the forum into an *ex post facto* communication and exchange vehicle, rather than an active actor in the construction of a regional agenda (Bouzas 2005).

Several organisations find insertion spaces as *sectoral actors* by participating in other MERCOSUR bodies, especially in the *Specialised Meetings*,<sup>29</sup> *Working Subgroups* and *Commissions*. Section 26 and the following sections in the internal bylaws of the GMC, dealing with the participation of the private sector, establish that these bodies may perform their duties in two phases: a preparatory and a decision-making phase, being entitled to request the participation of the private sector in the preparatory phase. The representative delegations of the private sector may be composed of a maximum of three members per state. However, there are no clear provisions regarding how actors qualify to take part. Even more importantly is the fact that civil society is excluded from meetings in which those bodies take decisions (recommendations to be submitted to the relevant body).

Other institutional participation spaces are the MERCOSUR Social Summits and the Regional Programme “We Are MERCOSUR”. In the year 2005, the Uruguayan Presidency Pro Tempore of the bloc submitted the “We Are MERCOSUR” Initiative, with the following slogan “to fill MERCOSUR with citizenship.” This initiative listed a number of proposals aimed at expanding and affirming citizenship participation spaces, especially for non-traditional actors, so that citizens could discuss, present requests and define shared points of view. In 2006, the initiative turned into the “*We are MERCOSUR*” *Regional Programme*, creating focal points in each country. This

<sup>29</sup> Specialised Meetings were established by the CMC to deal with matters not covered by the Treaty of Asunción. They are organised by way of National Sections, which are very different in terms of civil society integration as well as governmental representation predominance and the associate states’ participation.

Programme seeks to coordinate the government agenda with that of civil society in order to rescue the social, political and cultural dimension of MERCOSUR. It is a programme of actions on a six-monthly basis, arranged by the Presidency Pro Tempore in office along with the organised civil society of MERCOSUR, whose Technical Secretariat is responsible for the Training Centre for the Regional Integration (CEFIR) (Aguerre and Arboleda 2009).

In 2006, while the MERCOSUR Presidents Summit was taking place in Córdoba (Argentina), the First Meeting for a Social and Productive MERCOSUR was held and gathered more than 500 regional social organisations, thus being the first experience of massive participation and exchange of ideas among social and political actors. This event was followed by the Summit in Brasilia that same year. Since 2007, *Social Summits* have been institutionalised after being established as permanent activities within the framework of the MERCOSUR Meetings of Heads of State, to which the recommendations resulted from their work are submitted.

The analysis of the institutional opportunities offered by the bloc shows that the greatest *participation deficit* of civil society lies in the quality of participation and not in the quantity of the existing mechanisms. From a numerical and formal point of view, these mechanisms do exist but have deficiencies in their definitions and scope. The reason why participation is admitted in certain areas and not in others remains unclear. In many cases, participation is a result of political circumstances or, in other cases, of a personal and non system-related situation. Regarding the established consultation mechanisms, generally speaking, they do not provide for the accountability duty with regard to the utilisation of results by the institutional structure (Caetano 2009). The bloc's lack of publicity and transparency should also be added (a topic which will be discussed in another section of this report), making its visibility difficult and consequently putting at risk the active involvement of civil society.

Furthermore, the citizens of MERCOSUR do not have the right to petition the bloc institutions unless they do so by way of their participation in the regional bodies designed for that purpose. The suggestions and requests that may be sent through the official websites of some bodies of the bloc do not require a response or consideration since they lack the legislative initiative right. The MERCOSUR Parliament, as a place for citizenship representation, offers two ways of providing for social participation: *Public*

*Hearings and Seminars.*<sup>30</sup> Pursuant to the internal bylaws, the Commission may hold public hearings with organisations of civil society, productive sectors, non-governmental organisations and social movements to discuss matters within its scope, upon the proposal of any member or upon the request of an entity or stakeholder.<sup>31</sup> The Commission selects the authorities, interested parties and specialists of the entities that may take part in said Hearings. In the event of differences in relation to the matter being examined, the Commission shall act so as to ensure the participation of different opinions. The invited parties are allowed twenty minutes to present the topic being discussed, which can be extended at the sole discretion of the Commission. The opinions of the participants and the conclusions reached at those hearings are not binding. In the case of Seminars, they are informative activities, carried out by the Commission as well, with the participation of specialists invited by the Chairperson of the Commission, as indicated by the proposing Member of Parliament. Some analysts point out that these consultation phases can contribute to the publicity and transparency of the matters *under negotiation* and allow for social control levels operating through a regional logic. Additionally, the specialists' contributions may help improve the technical quality of the rules and the legitimacy of the rules adopted by the decision-making bodies, in this way achieving legal stability within the bloc.

## **6.2. MERCOSUR and gender**

The activity of women's and feminists' organisations at the regional level are channelled through the Women's Specialised Meeting (REM), Working Subgroups of the GMC and the Civil Society Advisory Forum. All these bodies seek to establish the gender perspective both in the general orientations of the bloc as well as in the sectoral fields.

This interest in the MERCOSUR project was the result of a long mobilisation process which began in the 70s and is evidenced in initiatives throughout Latin

<sup>30</sup> The official website of PARLASUR offers a "Citizen Mail," a service allowing citizens to ask questions, request information and submit proposals. Likewise, citizens can file petitions, individually or collectively, on matters within the scope of the responsibilities of the bloc and the activities of the countries directly affecting them. The petition may be presented as a complaint or request or observation about the application of MERCOSUR laws or as an appeal to Parliament so that this body can assume a position regarding a specific issue. The Parliament has no obligation to reply or take action with respect to citizens' requests.

<sup>31</sup> Public meetings may be held in any member state, in countries whose accession is pending or in associate member states, by a majority vote of the members of the relevant Commission and are ruled by the principles of simplicity, speech, informality, participation and procedural economy (Chapter 7 of the internal Bylaws of the Parliament).

America. Originally, these initiatives were a response to the incorporation of women's issues in the agenda of the United Nations. Women's organisations and movements were working at a regional and sub-regional level – Women from the Southern Cone and Women from the Andean Region – to find a consensual strategy to make themselves visible on the global scene. This situation gave rise to dense and very active networks which did not automatically react to the formation of MERCOSUR. The first sign of a reference to the bloc came from women belonging to trade unions – especially, in Uruguay and Brazil – who expressed themselves in favour of the recognition of working women's rights and promoted actions to fight against discrimination practices and segregation by gender within the scheme.<sup>32</sup>

In 1995, prior to the Conference of the United Nations on Women, the First Women's Seminar of Training and Analysis of MERCOSUR was held in San Pablo (Brazil). After this seminar, the *MERCOSUR Women's Network* was created, encompassing governmental organisations for women, female parliamentary members, NGOs, female researchers, female trade union members and businesswomen, with the purpose of exchanging information and promoting research. The prevailing characteristics of its conception and activities were its consideration and mobilisation efforts regarding the impact of integration on employment markets through the implementation at a national level of the Platform of Regional Action for the Fourth United Nations World Conference.<sup>33</sup> The specific demand for a “space for MERCOSUR women” was the result of the work of a small group of elite women from the four countries – female government officers, businesswomen, women belonging to political parties and female members of Parliament. They created the *MERCOSUR Women's Forum*, focused primarily on influencing the decisions of the regional bloc and gaining formal recognition within the scheme.

In 1998, when the Women's Specialised Meeting was formed within MERCOSUR (REM, as per Resolution MCM 20/98), the *MERCOSUR Women's Forum* was recognised

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<sup>32</sup> The initiatives of the Trade Union Women were mainly submitted to the Subgroup of the GMC dealing with Labour, Employment and Social Security matters.

<sup>33</sup> The Platform for Regional and World Action was a milestone in the consolidation of the institutionalisation of gender, not only because of the recommendations it puts forward, but also because of the alliance created between the women's movement and government representatives – albeit not without dispute – for its implementation.

as the main reference for advisory tasks.<sup>34</sup> Feminist organisations, women's trade unions and academic institutions were not part of the structure of the REM until 2005, when a decision was made to open that space to all the women's networks in civil society (Celiberti 2009).<sup>35</sup> Research shows that this work represented a new breakthrough as far as the gender issue in the bloc is concerned. From that moment on, the action plans of the REM pursued the following objectives: to submit Recommendations to the GMC in order to incorporate the gender perspective into MERCOSUR; to increase women's political influence in the integration processes and in the defence of their economic, social and cultural rights; to work on issues related to domestic and sexual violence; to integrate databases and harmonise methodologies and indicators regarding the situation of women; to draft reports about rules, measures, programmes and projects affecting women; to introduce the gender perspective in specific areas such as employment policies, educational systems and the preparation of national budgets; to analyse women's political participation ratio and assess its impact;<sup>36</sup> to establish a Gender Plan for Equal Opportunities on issues such as work, employment, social security, small and medium-sized enterprises and cooperative associations and to define strategies of coordinated action with other bodies of the bloc, to name but a few.

Throughout 2005, an assessment carried out by the Technical Secretariat of the REM came to the conclusion that neither the gender perspective nor the women's participation ratio in the bodies of the bloc could be introduced effectively in the integration process. To overcome this deficit, the suggestion was made to "combine regional work with national work and, in particular, to reinforce the horizontal coordination capacity of the mechanisms available to women and the networks and organisations of civil society with other spaces of MERCOSUR." On the agenda of the CMC for the year 2009, some progress in this area was achieved through the recognition that "it was necessary to develop actions within the framework of the paradigm of decent work and gender equality, guaranteeing healthy educational and

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<sup>34</sup> The creation of REM cannot be analysed without mentioning the institutional affirmation and insertion of gender in the member states' agenda and the social legitimacy that these agendas were gaining in the civil societies.

<sup>35</sup> As from the Third Meeting, representatives from Chile and Bolivia joined the network.

<sup>36</sup> The Recommendation to the GMC was included, among others, stating that the formation of a MERCOSUR Parliament should be based on the parity between women and men according to the concept of Parity Democracy, a subject which was not covered by the Internal Bylaws of the Parliament.

working environments, health services and occupational safety, accessibility and opportunities for disabled and aboriginal people.” However, a great step forward in key areas of this agenda is still pending (López and Alemany 2009).

## **7. Popular Control of MERCOSUR**

The control mechanisms of MERCOSUR are minimal and are not analogous to the political control installed in the internal legal systems of the member states. To this regard, there are a number of shortcomings related to transparency problems in the decision-making process, the lack of access to documentation and the lack of accountability, which partly explain the difficulties of managing social control.

In general terms, it has been admitted that MERCOSUR has a significant *deficit in the duty of accountability*, a fact related to the obscurity of the decision-making process and the shortcomings in the consultation mechanisms established by the bloc. It is difficult for the political, social and technical actors of the governmental entities indirectly linked to the process to identify the point of responsibility in the decision-making mechanisms, which affects its political, social and technical legitimacy. The Secretariat of MERCOSUR warns that the low level of commitment to the decisions taken by the MERCOSUR institutions makes it difficult for many agents, either governmental or non-governmental, to apply or enforce these decisions when they have not actually been consulted.

The deficiencies in the institutionalised methods of social participation, especially in relation to the established consultation mechanisms, have an impact on this area as well. The accountability of the bloc bodies is a problem with respect to how and to what extent they receive and incorporate information, opinions and recommendations in their decision-making processes, especially considering that most of the internal bylaws of the decision-making bodies do not set forth guidelines or obligations in this regard. This channel is accessible, but its way of functioning is not. Additionally, there is not enough information available to the general public on how to develop the participation mechanisms, i.e. those who do not take part have difficulty accessing information concerning who takes part and how, and to what extent his/her participation influences the decision-making process.



This issue is related to the *transparency deficit* of MERCOSUR. One example is the “principle of publicity” of the legal systems of the member states, even though it is not contemplated in the Treaty of Asunción or the Ouro Preto Protocol. From the very beginning, the following distinction was established: while the decisions adopted (minutes, rules and exhibits) as a general rule would be made public unless otherwise stipulated by the member states, the bills under negotiation (proposals submitted by the member states) would be confidential and only available to government officers. In fact, most of the important documents, especially those prepared and discussed by the MERCOSUR bodies having decision powers, are kept confidential. The following data illustrates these problems as regards the documents issued by the CMC, GMC and CCM between January 2003 and November 2005: 235 confidential documents were issued as exhibits to their minutes, out of a total of 382 documents. During the same period, the GMC itself classified as confidential 45% of the exhibits to the minutes (100 out of 243).

It was not until 2005 that the Resolution issued by GMC 08/05 modified this rule and established that the publicity of all resolutions and bills should be compulsory, unless a Member State requests confidentiality. Failure to require that national positions should be clearly expressed makes it impossible to know which state or states have vetoed the proposal, as well as who has requested the confidentiality of a rule and why. The absence of a standard of publicity interferes both with the dynamics of internal transparency – among the member states and the bodies of the MERCOSUR structure – and external transparency with the general public, including civil society and sub-national governments.

In short, only the minutes must be made public through an official web page, which is not always updated, or the Official Bulletin of MERCOSUR. This does not apply to research, bills or report exhibits to the minutes, which may be kept confidential. The internal dynamics of the bodies with decision powers should also be discussed. As we have already mentioned although civil society has the right to take part in the preparatory stage of the auxiliary bodies of the bloc, the rest of the discussions and decision-making processes are carried out privately.

The transparency issue concerns not only the access to documents but also how comprehensible they are to the citizenship as well as the policies of dissemination to

be prepared for the integration process. In addition to the serious difficulties in access, the rules are written in a way that is sometimes not very clear. As stated in a report by the Secretariat of MERCOSUR: “The intelligibility of the information made available to the public or certain sectors, whether civil society or sub-national governments, will make it useful for the actor, even to maintain his participation and interlocution capacity in the decision-making process. The text of the rules issued by the bloc is, in general, ambiguous, self-referential, with little technique and it seems to be addressed to the bloc officers themselves” (Caetano 2009).

### **7.1. Mass media and MERCOSUR**

MERCOSUR does not have an integral communication strategy, nor does it have integrated communication policies. The Specialised Meeting on Social Communication Media (RESC) is the main body of the bloc to address this matter.<sup>37</sup> The *Buenos Aires Memorandum of Undertaking*, submitted to the Heads of State of the bloc in 2007, established the working guidelines. This letter also states that in keeping with the Social Charter of MERCOSUR its objectives are to coordinate actions that help foster regional integration beyond the coordinated interaction of the public communication structures of the Member States of MERCOSUR; to gather and exchange information and experiences related to communication and the creation of spaces and permanent tools for the coordination of public communication policies within MERCOSUR.<sup>38</sup> Requests have been made to incorporate in the Action Plan of the bloc a response to the existing asymmetries in the communication infrastructure of the Member States as well as the definition of a Public Communication Policy, whose objectives should be the creation of a citizenship, equal opportunities, universal access to information and cultural assets as well as the recovery and preservation of people’s memory and culture, which all contribute to the formation of a shared citizenship and identity.

To pursue these objectives, the RESC focuses its work on the coordination of communication policies among and within the countries. They have realised that there is another subject that still needs to be addressed by the member states, i.e. better

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<sup>37</sup> Also the Working Subgroup on Communications, dealing with specific issues in this field.

<sup>38</sup> Memorandum of Undertaking executed within the framework of the Seminar organised by the Specialised Meeting RESC: “Public communication in the regional integration process” held in Buenos Aires in January 2007, which gave rise to other similar events encouraging the work of the Specialised Meeting.

coordination among the press entities of each country, at least among those which are more directly involved in the process (presidential communication departments foreign offices, Ministries of the Economy, etc.) and the training of journalists.

The bloc promotes and endorses the current international public communication initiatives in the region, such as *Telesur* and *TV Brasil-Canal Integración*, as well as the creation of media networks such as the proposal made by the Union of MERCOSUR Parliamentary Members (in Spanish, UPM) to create a *MERCOSUR Social Communication Network* to integrate press media, radio stations, TV stations, web portals and alternative media: a network enabling journalists and mass media to generate and receive information from the bloc.

It is worth mentioning the private initiatives aimed specifically at disseminating the integration and treatment of bloc-related issues, such as the *News Agency of MERCOSUR (Agencia Periodística del MERCOSUR - APM)*, the radio station *Radio MERCOSUR*, the electronic publication of *MERCOSUR ABC* and the activities of university networks and research centres of Social Communication such as the *Red MERCOSUR*, *ENDICOM* and *EXPOCOM*, among others.

The coverage that MERCOSUR receives in the media is crucial as both the mass media and journalists are fundamental agents for the social legitimacy of the integration process and the production of symbols used by the citizenship to give meaning to the integration process. It must be said that journalists often lack the necessary information to responsibly address the integration issue or they do not know the relevant sources of information. The regional media usually claim there is no “dissemination service of MERCOSUR activities with available and well-trained staff to answer all the questions presented by the journalists.” In other cases, the mass media, limited by their own editorial opinions, do not give space or enough importance to the information generated by the bloc. The situation is worse when it comes to multimedia groups.

It should be mentioned that the type of coverage that MERCOSUR generally receives by the mass media is selective, circumstantial and sporadic and only receives coverage when important and noticeable events take place – such as the Summits of the Heads of State. MERCOSUR is not given much importance, except during crises. Information is presented from a national and/or local perspective, eluding a regional

point of view. What prevails is the dissemination of the popular concept of a trade-oriented MERCOSUR, highlighting the bloc's conflicts – for example, trade imbalances, unilateral measures, etc. Many newspaper articles have been written criticising other local leaders or political leaders from other countries of the bloc (magnifying the scheme's internal contradictions or the disagreements between Heads of State and social sectors). The press often indirectly refers to MERCOSUR through association when it covers other foreign policy issues, for instance when ALCA was being negotiated or when the Real in Brazil suffered devaluation.

The coverage that the Summits of the Heads of State receive is very indicative. In general, the agenda is not comprehensively communicated and, in many cases, only the aspects of the agenda that will make the highest impact or that are the most closely related to the internal agenda of the Member States are communicated. Some research suggests that if we compare the coverage of the same Summit by the mass media of the different countries of the bloc, we can see that the Presidents do not necessarily give the same speech in their press conferences. Each President tends to highlight different aspects of the Summit, probably highlighting matters that would receive more attention in their countries with respect to what is at stake for them in the integration process, or they tend to address the demands of domestic policy, an issue clearly reflected in the media.

Despite their importance in the Mercosur countries, the mass media do not seem able to exert genuine control on the governments. Their political-ideological orientation deprives them of the necessary capacity and objectivity to achieve this goal. In general, they develop their activities as followers or opponents of the governments in power, a situation which biases the way they address and express their opinions, including those related to the regional integration process.

### ***7.2. Is it possible to resort to a Court when a decision adopted by the government bodies is contrary to the law?***

MERCOSUR does not have a body equivalent to a Court of Justice with whom the citizens may file an appeal. It only has a Permanent Court of Review (TPR), which can serve as a stage for dispute resolution. In accordance with the Protocol of Brasilia on Dispute Resolution (signed on December 17<sup>th</sup>, 1991 and in full force and effect since

1993) and the Protocol of Olivos (signed on February 18<sup>th</sup>, 2002 and in full force and effect since January 1<sup>st</sup>, 2004), a MERCOSUR, GMC or CMC act may be rendered void if there is a controversy. In MERCOSUR, there is no contentious jurisdiction for legality, but it would be possible to render an act void through a binding decision, on the grounds of a controversy.

Persons (either natural or artificial) are not allowed to file claims against acts performed by MERCOSUR bodies, but they may do so against the member states in relation to “statutory or administrative measures entailing a restricted or discriminating effect or unfair competition,” passed or applied in violation of the Treaty of Asunción, the agreements entered into within the framework of said treaty, the decisions adopted by the CMC or the Resolutions issued by the GMC.

Member states are the only parties allowed to take part in dispute resolution proceedings. The persons affected by these measures do not have direct access to justice but must formally file their claim with the National Section of the GMC of the state where they are residents (Martinez Puñal 2005). This means that the state must make that claim as if it were its own so that the person may have access to justice, either at the stage of diplomatic negotiation and settlement (by the GMC) or the jurisdictional stage (Arbitration Court), ultimately depending on their capacity to reach government representatives (lack of active legitimacy of the persons in order to have direct access to justice).

## **8. Interstate Democracy in MERCOSUR**

MERCOSUR is an intergovernmental integration process. The states are represented in accordance with the sovereign equality principle, having equal powers in the decision-making process. In this scheme, the rules are adopted regardless of their compatibility with national points of view. The decision-making mechanism is based on the principle of consensus (one vote per country, with the presence of all member states), which means that each of them has the power to veto.

It is not only an interstate institutional system in which the states centralise power to the detriment of the common institutions, but also a system which concentrates all decision-making in the national Executive Powers and especially in certain government agencies. What prevails is an *interpresidential dynamics*, the Heads of State Summit being

the highest ranking decision-making stage. So-called “presidential diplomacy” in practice has turned into a last resort for the adoption of strategic decisions and crisis resolution. When conflict arises, the direct participation of the presidents makes it possible to overcome impasses and reach pragmatic and committed solutions, thus presidential willingness becomes a fundamental part of reinforcing the process and establishing its pace and scope.

Some analysts have referred to *Power-Concentrated Presidentialism* pointing out that representatives, who are at the same time Heads of Government and Heads of State, have institutional and political resources which give them an advantage over other potential actors of the bloc – who can be institutionally weak or insufficiently united. Among these resources special attention should be given to legislative initiative capacity, veto power over parliamentary decisions, the capacity to issue executive orders of a legislative nature and prepare the agenda. Likewise, we could mention their ability to form coalitions to support their initiatives. This manoeuvring space is what presidents have successfully transferred to the regional level, thus transforming presidential summits from deliberative fora into decision-making spaces (Malamud 2003: 53-57).

The office of the President Pro Tempore of the bloc is responsible for convening and conducting Meetings, defining the agenda and the items to be addressed, the guidelines of negotiation, etc. Moreover, there is a direct relationship between the status of a President Pro Tempore and the institutional dynamics of MERCOSUR. The President’s initiative capacity can have clear and direct consequences on the results of each six-month period of negotiation, and consequently on the evolution of the bloc.

Besides the concentration of power in the decision-making bodies, there is a clear *de facto* predominance of the Common Market Group over the Common Market Council and the Trade Commission. In theory, the Council, responsible for the management and administration of the bloc, is higher in rank than the Group, but its working dynamics and the fact that the Common Market Group is responsible for preparing the decisions of the former in the *preparatory meetings of the Council* have influenced the actual performance of the bloc.

The normal frequency for meetings of the CMC is once a semester, which is not enough to discuss all the regulatory agenda of an integration process which is complex and sensitive and which makes progress through the production of secondary legislation. This fact led to delegate a great number of influence and responsibility over the GMC, a body which gathers government representatives of lower ranks who normally do not have the necessary political powers to adopt decisions in crucial matters. The result was the concentration of a very important dose of influence and decision power in a body with little political initiative capacity and where the accountability mechanisms are quite poor (Bouzas 2005).

On the other hand, these dynamics lead to a temporary concentration of the decision-making process up to the end of each semester. Basically, all of the decisions produced in the negotiation stage of said period – often a result of years of discussion in specific fora – result in a “paperwork avalanche” during the few days of the last meeting of the Group and the preliminary meetings of the Council (Caetano 2009).

In turn, the institutional structure of the bloc assigns a fundamental role to certain sectors of national bureaucracies, especially to the National Foreign Offices, which monopolise, even formally, the coordination of the activities of different Meetings. Thus, the internal mechanisms used to define national positions do not favour better “inter-ministry density.”

In brief, there is a strong concentration of power in the decision-making institutions of the bloc (Council, Group and Trade Commission) whose members lack autonomy with respect to the Member States appointing them. This purely interstate system is in turn reinforced by the proliferation of “negotiation spaces without decision powers,” a situation which has not been substantially modified by the amendments and innovations included in the schedule in the last few years. Lower ranking bodies do not participate in the preparatory stages of the functioning of the higher ranking bodies, even in the event they can forward matters to the higher bodies when an agreement has not been reached or when ministerial participation is necessary. This is why the overlap of decision-making bodies and the existence of broad areas of ambiguous jurisdiction may lead to potential inconsistencies, law conflicts and the absence of hierarchy regarding the priorities. These risks multiply when these two lower ranking bodies at the political national representation level (the

GMC and the CCM) have their own structure of technical and auxiliary bodies, which are in general poorly interconnected.

Its status as a formal democracy, rather than a substantive democracy, and its tendency to power concentration as evidenced in the institutionality of MERCOSUR are also reflected in the relatively little space available for sub-national levels – regional, provincial and municipal – to articulate their requests. Only 10 years after the execution of the Treaty of Asunción was the Specialised Meeting for City Departments and Districts (REMI) created with consultative powers. However, it failed to include provincial units and this was solved in 2004 by creating a Consultation Forum for Municipal, Federated, Provincial and District Departments of MERCOSUR (FCCR), made up of a Municipal Committee and a Federated, Provincial States and District Committee, both having consultation duties (Bouzas 2005).

Any analysis of the democratic methods of MERCOSUR must include two processes that impact them: on the one hand, the creation of the Parliament – the only body representing the citizenship – by direct balloting, and on the other hand, the access of the current Associate countries to full member status, which could modify institutional balance.

## **9. How Supranational Is MERCOSUR?**

Although MERCOSUR aims at being a common market and formally is already a Customs Union, it has performed and acted without developing an organisational institutional structure at a supranational level. The creation of a Parliament amounts to the establishment of the only body with a supranational appearance. The decision to progress in the creation of a Parliament has to do not only with the states' political intention or the calculations of the effects on sovereignty and the relative position of its members, but also with the existence of constitutional provisions enabling or obstructing its implementation.

The Constitutions of all four members include regulatory provisions to facilitate trade and the social integration of the state. There are important differences related to the structure of each provision itself, which is specific and detailed in the case of Argentina and Paraguay, but programmatic in the case of Brazil and Uruguay. On the other hand, the first two countries have established in their recently amended



Constitutions – Argentina in 1994 and Paraguay in 1992 – the supremacy of international treaties over national laws, while the Constitutions of Brazil and Uruguay do not establish said constitutional system.

The Constitution of Argentina, section 75 subsection 24 sets forth the approval by the Congress of “all integration treaties which delegate jurisdictional powers to supranational organisations in reciprocal and equal conditions and which respect the democratic system and human rights. Hence, the rules passed shall be higher in the hierarchy than the statutes.” The second part of said subsection deals with the mechanisms to approve or terminate these kinds of treaties. Treaties are divided into those executed with Latin American States and those with other states. In the first case, approval requires “the absolute majority of all members of each Chamber of the Congress.”

Regarding the integration processes, section 145 of the Constitution of Paraguay establishes that “the Republic of Paraguay, in equal conditions with other states, recognises a supranational legal system which guarantees the existence of human rights, peace, justice, cooperation and development rights, in political, economic, social and cultural matters. Said decisions shall only be adopted by the absolute majority of the members of each Chamber of the Congress.” Thus, the supremacy of Treaties over national statutes is established.

According to the 1998 Constitution of Brazil, section 4 “The Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the peoples of Latin America, by approving the formation of a Latin American Community of Nations.” It establishes the goal of seeking Latin American integration but fails to define the model to be followed. This instrument seems to lack a written provision related to the recognition of the supranational scheme and delegation of powers, a situation which has raised intense debate among Brazilian constitutionalists in this regard. According to the interpretation of some of them, Section 4 establishes seeking integration through a Latin American community of nations, and one consequence of this may be supranationality, thus implying this possibility. Most analysts suggest that the Constitution does not recognise the creation of a supranational body because sections 22, 23 and 24, dealing with the jurisdictional power distribution system would be the greatest obstacle since they do not make any reference to the possibility of

delegation to a community system. In order to enable such delegation, the Constitution would have to be amended. However, over the past years the Brazilian Federal Court in full attendance stated – in writing – that the institutionalisation of supranational bodies, such as a Court of Justice, is compatible with the Constitution, particularly by virtue of section 4, last paragraph.

The Constitution of Uruguay 1992, section 6, establishes that “The Republic shall seek the social and economic integration of the Latin American States, especially with regard to the common defence of their goods and raw materials and the complementation of public services.” Section 4 sets forth that sovereignty as a whole deeply exists within the Nation, which is entitled to the exclusive right to enact its laws. Although this Constitution does not expressly include the legal system provisions dealing with supranationality and the delegation of powers, the answer to whether or not this country recognises the supranationality principle sparks off fierce debates. Some specialists believe that since the Constitution fails to include explicit provisions in this regard, it could be concluded that the integration it fosters is only intergovernmental. Others believe that the expression *social and economic integration* includes all the institutional forms that integration may adopt, whether intergovernmental or supranational. However, according to the most restricted interpretations, a Constitutional amendment should be mandatory in order to reduce the sovereign dimension necessary to make progress towards supranationality and to accept community bodies whose decisions will be directly applicable to the internal persons of the state – contrary to the current jurisdictional system.

The existence of these discrepancies regarding the interpretation of constitutional provisions is referred to in political analysis as “open doors” to the possibility of moving towards supranational forms in the bloc. Some analysts point out that the difficulties within MERCOSUR of making progress in this direction may be attributed to the interests and incapability of the political leaderships inside their countries to involve their societies, rather than to constitutional obstacles. “Within the MERCOSUR system, interests are considerably different as a result of the disparities among its members. The larger members are slow to move towards supranationalism, whereas the smaller members seem to find here a solution to make up for the existing inequalities” (Martinez Puñal 2005). An example of this situation would be Uruguay,

which defended the idea to reform MERCOSUR institutions and adopt a supranational structure, especially with regard to the creation of a Court of Justice and a Technical Secretariat as a central and permanent body. Some interpret this attitude as the result of political calculations that demonstrate how greater institutional guarantees in the bloc would enable this small member to limit the unilateral actions of the larger members.

### **9.1. Legislative powers within MERCOSUR**

The creation of a Parliament was the result of the intention to provide the process with more representativity. This is expressed in the Constitutive Protocol: “The establishment of a MERCOSUR Parliament with an adequate representation of the interests of the citizens of the member states will contribute to the institutional quality and balance of MERCOSUR, thus creating a common space where pluralism and regional differences are both reflected. It will also contribute to democracy, participation, representativity, transparency and social legitimacy, in the development of the integration process and its rules. The election of its members by direct and universal balloting is established as a tool for the promotion of citizens’ participation and the growth of democratic legitimacy of the bloc.”

Its jurisdiction can be divided into three main areas: democratisation of MERCOSUR (representation of citizens’ interests, plurality and diversity); legislative area (recommending and transposing rules and legislative harmonisation); control (reports requested to the bodies of the bloc; to receive the Presidency Pro Tempore at the beginning and end of each semester to account for the Working Plan and the tasks performed); and promotion and preservation of democracy and human rights (research on democratic development, monitoring of electoral processes and preparation of an annual report about the human rights situation in the region).

Regarding its legislative duties, it does not hold full powers. Firstly, its legislative powers include the ability to issue *declarations*, *recommendations* and *reports* on matters related to the development of the integration process, i.e. non-binding acts. It may submit *bills* of MERCOSUR rules to the Common Market Council, which shall report on a six-monthly basis on its handling and prepare *research and preliminary plans of national rules* aimed at the harmonisation of national legislations of the member states,

which shall be submitted to the national Parliaments for discussion. Neither powers obligate the decision-making bodies of MERCOSUR – in the first case – or the national Parliaments – in the second case – to legislate based on the proposals made by the Parliament (Alvarez Macías 2009).

The Constitutive Protocol of the Parliament establishes the procedure by which the decision-making bodies of the bloc must submit all bills to the Parliament before their approval so that the Parliament can issue an official report. If the bill is approved by the decision-making body in accordance with the terms and conditions of the parliamentary official report, the rule must be considered by the national legislative powers within 180 days through a preferential approval procedure. However, the MERCOSUR bodies are not obliged to approve said rule within the terms imposed by the parliamentary report, they are only obliged to consult it.<sup>39</sup>

From the foregoing explanation, it is evident that the Parliament does not produce binding rules of positive law for the bloc. In this sense, its role is basically advisory, deliberative, a role which includes putting forward proposals and a partial follow-up on the performance of the other bodies without real power to create rules. Many analysts have long discussed the consequences of these characteristics of the parliamentary body in relation to the so-called “*democratic deficit*” of the bloc.

The most pessimistic views point out that the democratic deficit exit should have required the constitution of a Regional Parliament with supranational characteristics and broad powers to reduce the hegemony of the executives of the bloc. From this perspective, it would be difficult to change the way in which it was instituted. It is far from being an authentic legislative body since regulatory power remains in the hands of

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<sup>39</sup> For the purpose of speeding up the internal procedure related to the effective date of the rules in the member states, the Parliament prepares reports on all MERCOSUR bills requiring legislative approval in one or more member states within a 90-day term after the consultation date. Said bills shall be submitted to the Parliament by the decision-making body of MERCOSUR before its approval. If the bill is approved in accordance with the directives of the Parliament report, the rule shall be sent by each National Executive Power to the Parliament of the respective member state, within a 45-day term period after its approval. In the event that the rule approved does not comply with the Parliament report, or if the Parliament does not express its opinion within the above-mentioned term, said bill will be subject to the ordinary incorporation proceedings. National Parliaments, according to the applicable internal proceedings, shall adopt the necessary measures for the instrumentation or creation of a preferential proceeding to consider the MERCOSUR laws which were approved in compliance with the terms and conditions of the Parliament report. The maximum term for the proceeding shall be one hundred and eighty calendar days as from the entry of the rule in the relevant National Parliament. If within said term of preferential proceeding the Parliament of the member state rejects the rule, this shall be submitted to the Executive Power so that it can be reconsidered by the relevant MERCOSUR body.

the decision-making bodies and the procedure only requires a report which *de facto* is not binding. Its control powers are practically inexistent, thus becoming a body with duties which are basically advisory. The lack of important jurisdiction and consequently its relegated role in the decision-making process results in a Parliament of little legal importance within the institutional structure, thus its contributions to the legal certainty of the bloc are not clear (Alvarez Macías 2009).

On the other hand, we find a fundamental optimism by which these limitations would be compensated because

[a]s a space for public and permanent policy expression of the citizens of the member states, the Parliament can become a driving force of a 'community ideal', getting beyond the arbitration logic of the national interests of each Member State. That is why the working perspective is supranational and not interstate. In the Parliament, a space for all the regional political expressions, a combination of common interests is sought and the projects so generated are then submitted to the Council where the States decide whether they grant consent or not. Far from being a 'supranational' threat to the sovereignty of each state, the Parliament entails a new dimension of aggregate and shared sovereignty, which allows a greater pressure power and negotiation in the global scenario (Conde 2009).

## **9.2. Are the rules approved by the organisation directly applicable and enforceable in the legal systems of the member states?**

MERCOSUR does not have a community law consisting of three fundamental characteristics: direct applicability, direct effect and supremacy over the internal legal system. The rules of the bloc are not directly or immediately applicable in the member states: they are required to be transposed by the relevant institutions, unless it is expressly indicated that this procedure is unnecessary.<sup>40</sup> Additionally, when applying the rules, these are subject to the plurality of interpretations derived from a number of judges or other jurisdictional authorities involved.

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<sup>40</sup> There are rules issued by the bodies which do not require transposition, though this is mainly limited to those cases where the member states believe that the contents of the rule regulates organisation or internal functioning aspects of MERCOSUR. These rules will come into effect upon their approval unless a member state decides that the rules do not require transposition because their provisions have already been foreseen by the national legislation. In this case, the Secretariat of MERCOSUR must be informed and will take necessary action as it sees fit. A third case arises when the rule does not require transposition because it was repealed.

The *implementation gap* is often claimed to be one of the greatest deficits of the bloc: about two thirds of the rules passed at a regional level require transposition to come into full force and effect, and nearly half of the members have failed to do so. This situation can be explained by the nature of the rules and the procedures for their adoption and transposition. Regarding the first issue, a distinction should be made between ordinary rules, resulting from the constitutive Treaties, and derivative rules, created by the decision-making bodies of the bloc, both of them legal sources of MERCOSUR.<sup>41</sup> The Treaty of Asunción and the Protocol of Ouro Preto are governed by the general principles established by the International Public Law (essentially, the Vienna Convention on the Law of Treaties), while the derived rules issued by the decision-making bodies are incorporated in accordance with the provisions contained in Chapters IV and V of the Protocol of Ouro Preto.

In Chapter IV, entitled “Internal Application of the Rules Issued by the MERCOSUR Bodies,” section 38 firmly establishes that “the member states agree to adopt all the necessary measures to guarantee, in their respective territories, the fulfilment of all the rules issued by the bodies of MERCOSUR, these rules being compulsory.” It also states that “where necessary, they shall be incorporated in the national legal system by means of the procedures established in the national legislation.” For this purpose, the Protocol sets forth a procedure described in section 40, which includes three successive steps. Firstly, it is explained that “once the rule has been approved, the member states shall adopt the appropriate measures to incorporate said rule into their national legal systems and shall also submit this rule to the Administrative Secretariat of MERCOSUR.” Secondly, “once all member states communicated the incorporation of the rules into their respective internal legal systems, the Administrative Secretariat of MERCOSUR shall report this situation to each member state.” Thirdly, “all rules shall come into effect simultaneously in the member states 30 days after the date of the communication made by the Administrative Secretariat of MERCOSUR.”

The following is an illustrative example: out of a total of 1411 community rules issued in the year 2004, 68% were GMC Resolutions, 22% CMC Decisions and 19%

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<sup>41</sup> The legal sources of MERCOSUR are: (i) The Treaty of Asunción, its protocols and the additional or supplementary instruments; (ii) The agreements entered into in the framework of the Treaty of Asunción and their protocols; (iii) The Decisions of the Common Market Council, the Resolutions of the Common Market Group and the Directives of the Trade Commission of MERCOSUR adopted from the moment the Treaty of Asunción came into full force and effect.

were CCM Directives. From all these rules, 67% required transposition but only 49% were actually transposed. The percentage of transposed rules differs among the member states, in terms of percentage of rules effectively incorporated as well as the procedure adopted to carry out said transposition – parliamentary acts, acts of the Executive Power, Ministerial Resolutions and other acts performed by autonomous bodies with powers to approve binding regulations. Besides these differences, some difficulties in understanding which rules are actually in full force and effect should be mentioned, even for those who are more involved in the process (Rivas 2006). It has been pointed out that the fact that the adopted system requires that all rules come into effect simultaneously and that the procedures to achieve this are in the hands of each member state may give them the chance of a *second veto opportunity*, i.e. the chance to evade the fulfilment of the agreements (Bouzas 2005).

In order to make up for these inconveniences, in 2002 it was established that prior to the preparation of a rule, Consultations – technical and legal – with the competent national bodies were mandatory, so as to guarantee the absence of contradictions within the internal legal system and to get the relevant bodies involved in the design of the rules they should enforce later. In 2003, an Agreement between the Common Market Council and the Joint Parliamentary Committee was reached in relation to the rules whose incorporation into national legal systems is carried out through parliamentary approval. The Constitutive Protocol of the MERCOSUR Parliament – as discussed above – introduces a procedure for *Prescriptive Consultation* by which all the decision-making bodies have the obligation to submit the bills to the Parliament before their approval, so that it can issue a report. However, the decision-making bodies are not obliged to approve the rule in accordance with the instructions of the parliamentary report. However, there are doubts about the procedure by which the MERCOSUR rules, once in force, will repeal the national rules having the same or a lower hierarchy contradicting them. Decision No. 01/03 established that the Secretariat of MERCOSUR should carry out the legal compatibility control of the acts and rules issued by the MERCOSUR bodies. To this end, prior to the meetings held by the MERCOSUR decision-making bodies, the Secretariat will analyse all bills prepared by the different technical bodies for the sole purpose of examining their consistency with all of the MERCOSUR rules and identifying possible contradictions with the rules

already approved or possible implications for the negotiations currently in effect. Lack of previous analysis by the Technical Advisory Sector does not obstruct the consideration of a certain act or rule by the decision-making bodies of MERCOSUR.

The difficulties concerning transposition have a direct impact on *the application of the rules of MERCOSUR* by the Judicial Powers. Judges have acquired a new role as “community judges,” since they are bodies that apply the legal provisions of the bloc, thus becoming one of the highest guarantors of the rights those rules grant to citizens. Therefore, the possible lack of application of the legal system or its wrong or incomplete application affects the functionality of said rules when it comes to the integration process, thus giving rise to conditions of legal instability.

Similarly, as it has been stated in a Report of the Secretariat of MERCOSUR “the absence of a community body in charge of unifying the sense and the scope of the legal provisions of the bloc may result in giving different interpretations to the same regional rule, even different applications among the courts of the different countries and even in the interior of each of them” (MERCOSUR 2004). Under these circumstances, the *Mechanisms of Advisory Opinions* established in the Protocol of Olivos become of great importance. Under these mechanisms, the Courts of Justice of the Member States can refer to the Permanent Court of Review (in Spanish, TPR). In this case, the advisory opinions can exclusively address the legal construction of the MERCOSUR rules, provided that they relate to the legal actions that are pending before the Judicial Power of the requesting member state. The TPR issues a written report within a 45-day term which comes into effect as from the date the request for Opinion was received.

Efforts have been made to solve many problems regarding the lack of communication among the Judicial Powers by means of several procedures. One of them was the creation of the *Permanent Forum of the Supreme Courts of MERCOSUR and Associate States*, which gathers members of the highest courts of the member states, arbitrators of the Dispute Resolution System and scholars. Within the framework of the institutional structure of MERCOSUR, in addition to the Meeting of Ministers of Justice, the Specialised Meeting of Official Public Defenders and the Specialised Meeting of Justice Departments have been included, favouring the exchange of data and



experiences in relation to the application of MERCOSUR Law in the internal legal systems.

### **9.3. Secretariat of MERCOSUR. Powers and jurisdiction**

The Secretariat of MERCOSUR was created in 1991 but it was not until 1994 that it was included in the institutional structure of the bloc as an autonomous support operational body, ceasing to be part of the Common Market Group. After many successive amendments, its functions were expanded. Originally, it had only administrative tasks – without the power to file initiatives – until recent years when it was assigned with greater technical and operative tasks. Having said that, it cannot be defined as an autonomous body with powers to operate and decide on behalf of the bloc as a whole, since it has to resort to the relevant intergovernmental bodies for which the Secretariat acts as technical support. There is consensus about the need to turn it into a General Secretariat, with its own weight in the work of coordination and infrastructure of the institutional system.

### **9.4. Jurisdictional body**

MERCOSUR has a jurisdictional body represented by the Permanent Court of Review (TPR) created in 2002 by the Protocol of Olivos on Dispute Resolution. It is the main body in the dispute resolution system of the bloc with its seat in Asunción (Paraguay).<sup>42</sup>

In order to comprehend the nature and functions of this body, it is necessary to take into account the system it is a part of, whose application scope only involves conflicts between member states and claims filed by persons. In the first case, the court deals with conflicts concerning the construction, application and breach of the Treaty of Asunción, the Protocol of Ouro Preto, the agreements concluded in its framework as well as the decisions adopted by the CMC, Resolutions by the GMC and

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<sup>42</sup> The statutory instruments of the Systems for Dispute Resolution are the Treaty of Asunción (Exhibit III), the Protocol of Brasília, the Protocol of Olivos and their respective regulations. Additionally, MERCOSUR is a party to the international treaties on dispute resolution among which we can mention the Convention on the Recognition and Execution of Foreign Arbitration Judgements, New York 1958 (Brazil did not sign it); the Inter-American Convention on International Trade Arbitration, Panamá 1975 - CIDIP, the Treaty of International Law of Procedure of Montevideo, 1889; the Treaty of International Law of Procedure of Montevideo, 1940; the Inter-American Convention on Extraterritorial Efficiency of Judgements and Arbitration Awards, Montevideo, 1979. Lastly, the International Trade Arbitration Agreements were signed with the same text: one for MERCOSUR and the other between MERCOSUR and Bolivia and Chile.

the Directives of the CCM. The claims filed by persons (either natural or artificial) may be related to penalties or applications by any member state of either statutory or administrative measures comprising a restrictive, discriminating effect or unfair competition. These claims must be filed through the National Section of the GMC in each country where the person is a resident (this issue is discussed in another section of this paper). The system is completed by the possibility of instituting claims before the MERCOSUR Trade Commission (CCM) granted by the 1994 Protocol of Ouro Preto.<sup>43</sup> It must be noted that the Protocol of Olivos provides for alternative jurisdiction by introducing a *forum option*, under which the parties may, by mutual consent, agree to submit the matter to the MERCOSUR system for dispute resolution, the World Trade Organisation and other preferential trade schemes to which the member states may belong.<sup>44</sup>

Only the member states are allowed to take part in these procedures, a subject which highlights the lack of mechanisms concerning dispute resolution among the bodies of MERCOSUR, between the bodies and the member states and between the bodies and the member states and the persons. The procedure established by the Protocol is divided into two stages. The first stage is pre-contentious, with direct negotiations between the parties and the alternative to submit the controversy to mediation by the Common Market Group. The second stage is jurisdictional, represented by the arbitration proceedings carried out by the Ad Hoc Arbitration Courts (TAH)<sup>45</sup> or the direct intervention of the Permanent Court of Review.<sup>46</sup>

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<sup>43</sup> In this case, claims may also be filed by member states or persons. Petitioners file their claims before the Presidency Pro Tempore of the CCM, which shall reach an agreement on the controversy; otherwise, the matter shall be submitted to the GMC and if a settlement is again not reached, the parties may resort to arbitration.

<sup>44</sup> All member states of MERCOSUR are members of the World Trade Organisation (WTO) and also of ALADI, the legal umbrella of the bloc, since the Treaty of Asunción falls within this institution as a Supplementary Economic Agreement No. 18, in order to exclude it from the application of the most favoured nation clause.

<sup>45</sup> The Court is created for each case in particular. To create an Ad Hoc Court each party chooses an arbitrator from a permanent list made up of 12 jurists from each member state. The third arbitrator, who also acts as the president, cannot hold the nationality of any of those states. If the parties cannot agree on an arbitrator, he/she will then be chosen by casting lots among those making up the pre-fixed list of non-national arbitrators. The court has 60 days, which may be extended to 30 additional days, to issue a written opinion. The Award is adopted by majority and must be well-grounded and signed by all members. The grounds for dissenting votes are prohibited.

<sup>46</sup> It works with five arbitrators in the following cases: disputes concerning more than two member states, when the court is acting as a sole instance body, in the exceptional cases requiring urgent treatment and when it is necessary to issue advisory opinions. It does not sit in a plenary session when it comes to disputes between two member states, in which case the number of members is only three.

The states may expressly agree to appear directly, and in a sole instance, before the Permanent Court of Review. This court may also act as an *Appeal Court* in the event that a dispute was originally filed before an Ad Hoc Arbitration Court and a motion was instituted to review the Award, in which case the Permanent Court of Review may confirm, amend or nullify the legal grounds and the decisions adopted by the Ad Hoc Court.<sup>47</sup> Its pronouncement is compulsory for the member states involved in the controversy and shall not be subject to appeal, thus prevailing over the Award granted by the Ad Hoc Court (TAH). If a term period is not fixed, it shall be performed within 30 days of the date of notice. The court has no authority to guarantee the enforceability of the awards granted; thus, the member states shall adopt the *compensatory measures* in the event such award is not accomplished.<sup>48</sup>

The Permanent Court of Review (TPR) may act in exceptional cases considered urgent, operating in very summary proceedings, upon the request of a member state, in matters involving perishable or seasonal goods or goods rapidly losing their trade value that are held back without any just cause in the member state being sued. Finally, the Court has a very important role in the integration process due to its ability to issue *Advisory Opinions*, which are not binding. In fact, the Protocol of Olivos includes the possibility of petitioning an Advisory Opinion by a decision-making body (Council, Common Market Group, Trade Commission), the member states jointly, the Parliament and the Superior Courts of the member states, concerning the construction of the MERCOSUR rules.

After analysing the functioning of the TPR, it is necessary to take into account that there are important discrepancies regarding the interpretation of its nature and scope, not only among analysts and specialists but also among the internal members themselves.<sup>49</sup> In fact, the specialised literature tends to question the definition of the TPR as a *permanent Court strictu sensu*, pointing out the lack of exclusivity of its members and its *ad hoc* nature, only acting when cases are presented. It would be a

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<sup>47</sup> When the Permanent Court of Review performs legal reviews of the Awards granted by the Ad Hoc Courts, it shall be restricted to matters of law and legal constructions, not being able to study the facts or assess evidence. When acting as a sole instance body, it performs all the duties of the Ad Hoc Courts (assessment of facts, admission of evidence and law application).

<sup>48</sup> This situation fades the work of the Court and may lead to the adoption of reprisals among the states, which in many occasions are not related to the original dispute.

<sup>49</sup> To develop the positions of this body we take into account its official publications, for example the News Bulletin of the Permanent Court of Review.

*Court at disposal* according to section 19 of the Protocol of Olivos, establishing that the arbitrators shall be *permanently available* to act *when summoned*. Under this minimalist position, the jurisdictional scope of the TPR is exclusively focused on the fulfilment of the tasks expressly empowered by the Protocol of Olivos.

The official bulletins of the Court define it as a Court of *permanent vocation*. In addition to its explicit tasks, it has *implied functions*, i.e. those which are inherent and relevant to provide the body with stability, continuity, coherence and preparation for a procedural and substantial performance. From this perspective, the Court was not created to solve and prevent conflicts as well as preserve the harmony and a reasonable state of balance among the member states: the Court may and has to cooperate actively in the interpretation, legal development and reinforcement of the mission to be achieved. Under this maximalist approach, the Court must work in a coordinated, systematic and continuous fashion; it must be summoned for certain tasks and must work on those matters which will provide it with a solid structure, a corporate soul and a collective spirit.<sup>50</sup> However, not all the parties of the Protocol of Olivos share this criterion.

Regarding its performance, specialists often point out that the TPR works as an *Arbitration Court*. Even within the Court, the members think that rather than an arbitral court it is an *International Jurisdictional Court* since the arbitration system established in the Protocol, typically *sui generis*, implies a break with the ordinary rules governing traditional arbitration to create a jurisdictional Court. “In this regard, we understand that the creation of the TPR and the role it has in the institutional structure within the bloc, its composition and the tasks entrusted to it are totally new measures which aspire to attain two different goals. On the one hand, resources and an Appeal Court are created to challenge the awards rendered by the Ad Hoc Courts, though this review is not commonly admitted in the operation of the international courts of

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<sup>50</sup> News Bulletin of the Permanent Court of Review, No. 002 August 2010. “The effective performance of the TPR to fulfil the tasks entrusted to it calls for an implied process of collectivisation. The members of the Court cannot work and reach criteria only when the cases are presented, because that does not guarantee the correctness, certainty and coherence of the judgements and advisory opinions which must be pronounced urgently and with varied compositions from time to time by rotation. The aim sought is for the TPR to reinforce and develop its rank, jurisdiction and specialisation and, finally, to act as the antecedent, when reality so requires, of the formation of a Permanent Court with judicial functions and full legal control. Only this will allow homogeneous and well-balanced jurisprudence to arise from its coordinated and systematic functioning, a jurisprudence setting uniform and coherent conceptions of the MERCOSUR rules.”

arbitration. On the other hand, the Permanent Court is established, providing coherence, uniformity and certainty to its awards and rulings, thus enabling the formation of the development of jurisprudence in MERCOSUR, which in some cases allows for direct access and hears cases as a sole instance so as to accelerate the proceedings and economise on means.”<sup>51</sup>

In addition to the different approaches that may be adopted, there is consensus about making progress towards a reform of the Dispute Resolution System prevailing in MERCOSUR for the purpose of defining a permanent system, capable of guaranteeing a uniform application and construction of the Law.<sup>52</sup> To achieve this it would at least be necessary to amend the current settlement criteria held by the Court – to revert the interpretation of rules and application problems arising from the settlement differences in the successive cases. It would also be necessary to establish a mechanism enabling the direct consultation of the national judges to achieve uniform law construction, optimise its accessibility – especially, direct access by persons – and introduce mechanisms entailing the possibility to file claims among the MERCOSUR bodies, between them and the member states and the persons.<sup>53</sup>

## 10. Power Limitation

The nature of the institutional structure of MERCOSUR is weak as regards the separation of the different powers of the bloc and the control tools of administration handling. There are three bodies that are equal from a legal and technical perspective, all of which are made up of representatives of national governments with different

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<sup>51</sup> Ibid.

<sup>52</sup> In compliance with section 53 of the Protocol of Olivos. Said section establishes that before ending the convergence process of the common external tariff, the member states shall carry out a review of the current dispute resolution system so as to adopt a permanent system.

<sup>53</sup> Decision 26/05 only establishes that disputes in connection with the construction, application or breach of the international agreements made by the Ministers’ Meetings of MERCOSUR are subject to the Protocol of Olivos and in compliance with a special proceeding: direct negotiations conducted by the relevant Ministers or the representatives appointed for that purpose. Should the parties decide on a joint agreement to submit the dispute to the GMC, representatives of the relevant Ministers’ Meeting shall take part in the meetings held by said body hearing the dispute. If the dispute is not settled in this manner, any member state shall resort to the TPR, which shall render a final ruling. Once the award is rendered and the party obliged to fulfil the award fails to do so, the party or parties affected by such breach may suspend any and all rights and benefits concerning the defaulting party under the agreement subject-matter of the dispute. If said suspension of rights and benefits under said agreement is unfeasible or inefficient, the injured party may suspend rights or benefits arising from another agreement (or agreements) made by the forum of Ministers itself from which the agreement subject-matter of the dispute was made.

ranks and with regulatory capacity. One of them is the highest political body of the bloc – the Common Market Council – and an executive body – the Common Market Group –, whereas the Trade Commission has a limited scope of action. The MERCOSUR Parliament lacks truly legislative power and its Recommendations of rules must be submitted to the Council for their consideration. On the other hand, there is no Court of Justice with powers to achieve a uniform construction and application of rules and establish penalties in the event of non-fulfilment.

It should be added that there is a lack of internal control mechanisms in the bloc, even when taking into account the powers granted to the Parliament and the Permanent Court of Review in this subject. As it has been pointed out, the MERCOSUR Parliament can only *make requests of reports or opinions in writing* to the decision-making and advisory bodies of the bloc about matters related to process development and must *receive* the President Pro Tempore at the beginning and end of each semester to submit the Working Programme and *communicate* the activities carried out during said term period. The Parliament does not have the power to appoint or remove the members of the decision-making bodies of the bloc nor does it have budget powers, since it is only *notified* about these matters when it receives a report describing the execution of the budget of the Secretariat of MERCOSUR for the previous year, lacking control tools over both matters.

As regards the Permanent Court of Review, we have also pointed out its only capacity is as a sole instance court for dispute resolution. Under the provisions established in the Protocols of Brasilia and Olivos on Dispute Resolutions, it is only possible to annul the acts of the decision-making bodies of the bloc in relation to a controversy. Said acts are not subject to Court control, a task which widely exceeds its scope of duties and capacities, and would also require the creation of a MERCOSUR Court of Justice.

Likewise, there are no external control mechanisms, either from civil society or the mass media. The way civil society is integrated in the bloc excludes decision powers, liability and control capacity over the decisions adopted by the bodies of the bloc. In turn, the mass media are far from being organs capable of performing a monitoring and supervisory role with respect to the integration process.

## **II. MERCOSUR and the Promotion of Democracy and Human Rights**

### ***II.1. The promotion of democracy within MERCOSUR***

In response to the institutional crisis faced by Paraguay in April 1996, when the Constitutional President Carlos Wasmosy was to be removed from office, the Ministers of Foreign Affairs of Argentina, Brazil and Uruguay gathered in Asunción (Paraguay) and made fierce statements on behalf of MERCOSUR. They warned those who were encouraging the *coup d'état* that if they succeeded, Paraguay would be excluded from the bloc. Legally speaking, the threat to expel an anti-democratic member was somehow debatable because in those days MERCOSUR did not have a democratic clause. Although it is true that there were presidential declarations linking the integration process to democracy – the Declaration of Las Leñas dated 1992, in Colonia de Sacramento in January 1994 and in Buenos Aires in August that year – these declarations lacked the strength of argument to impose a democratic principle.

Soon after this crisis, *democratic clause* of MERCOSUR was adopted in the Presidential Summit in San Luis (Argentina) in June 1996. On that occasion, the presidents declared a “*democratic commitment*” through the Presidential Declaration on Democratic Commitment in MERCOSUR as well as the Protocol of Accession by Bolivia and Chile. In addition, during the meeting of the CMC held in July 1998, the Protocol of Ushuaia on Democratic Commitment in MERCOSUR, the Republic of Bolivia and the Republic of Chile was signed, giving the democratic institutions full force and considering them a fundamental condition for the development of the integration processes. It was also stated that “any alteration or rupture of the democratic system shall amount to an unacceptable obstacle to the continuation of the process.”<sup>54</sup>

The *Democratic Clause* establishes the protection of democracy, human rights and the Government of Law as core values of the bloc, the ethical-legal element for legitimacy and the requirements for integration. For MERCOSUR promoters, it is not

<sup>54</sup> Likewise, on that occasion the “Political Declaration of MERCOSUR, Bolivia and Chile” was executed as a Zone of Peace by which the six countries established that peace constituted a fundamental element for the continuity and development of the regional integration process. Among other topics, they agreed to reinforce the mechanisms of consultation and cooperation in security and defence matters concerning their countries, to promote progressive coordination and make joint efforts in the relevant fora to progress towards the consolidation of international agreements oriented towards nuclear disarmament and non-proliferation in all aspects.

only the ideological adhesion to the democratic forms but also a question of operation and efficiency. “Political conditions are deemed necessary in the participating states so that the interactions among common interests can be established. If there were no adequate political conditions to address the social demands generated by integration-linked stimuli, there would be no chance for all those interests to be coordinated among the actors involved. Only in this institutional political context can there be a democratic atmosphere (one with representative democracies)” (Passini 2000).

Under the Protocol of Ushuaia, if the democratic system is broken in a member state, the other members shall initiate the relevant consultations with each other and with the affected state. The nature and scope of the actions to be taken will vary depending on the nature and seriousness of the situation. These actions range from the suspension of the right to participate in the different bodies of MERCOSUR to the suspension of the rights and obligations arising from the integration process – actions which shall be taken by consensus and informed to the affected state, which is not allowed to take part in the relevant decision-making process. These measures shall come into full force and effect on the date the relevant communication is made. Additionally, under Decision CMC 18/04, among the conditions to enter MERCOSUR, it was established that those countries interested in becoming an Associate Member of the bloc should sign both the Presidential Declaration as well as the Protocol of Ushuaia. The expansion of MERCOSUR would then be a progressive extension of the regional democratic agreement.<sup>55</sup>

Within the institutional structure of the bloc, there are bodies specifically devoted to the promotion of Democracy and the Government of Law. This is the case of the *MERCOSUR Centre for the Promotion of the Rule of Law (CMPED)*, created by Decision 24/04 to reinforce the development of the government of law, democratic governance and all aspects of the regional integration process. Another example is the *MERCOSUR Democracy Observatory (OMD)* created in 2007 as per Decision CMC 05/07 and coordinated by the CMPED and the Commission of Permanent Representatives of MERCOSUR. The objectives are as follows: to contribute to the fulfilment of the Protocol of Ushuaia on Democratic Commitment in MERCOSUR, the Republic of Bolivia and the Republic of Chile; to promote the exchange of experiences and

<sup>55</sup> Said intention is also expressed in the ratification of the Inter-American Democratic Charter (2001) by the four countries of the bloc.



cooperation in elections among the member states; to monitor the electoral processes in the member states of MERCOSUR, the associate states and those states which so require and to carry out activities and research related to democracy consolidation in the region, including the necessary indicators and statistics for that purpose.<sup>56</sup>

On the other hand, the Parliament of MERCOSUR established the creation of the *Parliamentary Observatory of Democracy in MERCOSUR (ODPM)*, having the following tasks: to fulfil the Protocol of Ushuaia on Democratic Commitment, to promote the exchange of experiences and cooperation in the elections among the member states; to monitor the elections in the MERCOSUR member states, the associate members and those states which require the participation of the ODPM and to carry out activities and research related to democracy consolidation in the region, including the necessary indicators and statistics for that purpose. Among its powers, it can make proposals related to the composition of the Body of Electoral Observers of the MERCOSUR Parliament (COEPM), including criteria to monitor the electoral processes and observation tasks of said collegiate body; to elaborate rules for the performance of the COEPM duties and to coordinate the activities of the electoral observation missions that are carried out in the states holding elections. It will submit a quarterly report about its activities, which shall be submitted to the Common Market Council and the Commission of Permanent Representatives of MERCOSUR (CRPM).

### **11.2. Human rights and MERCOSUR**

All the countries of MERCOSUR have ratified the main international instruments for human rights protection, either issued by the UN or by the Inter-American System<sup>57</sup>

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<sup>56</sup> An example of this are the supervisors sent by MERCOSUR to the Recall Referendum of August 2004 to remove the president of Venezuela, Hugo Chávez from office. In the event of a “no” vote, Chávez would hold power until the end of his term in January 2007; in the event of a “yes” vote, general elections would be called. In addition, in August 2008 a Mission of MERCOSUR Observers was sent to the Recall Referendum called by the president of Bolivia, Evo Morales, to decide on the continuity of his office and the regional authorities, in an attempt to reinforce his political legitimacy. Bolivia has nine departments, six of which were ruled by governors belonging to the opposition political party. Four of them – Beni, Pando, Tarija and Santa Cruz – voted in favour of their autonomy. The Observers were responsible for supervising and guaranteeing the transparency of the referendum to which the President and Vice-President of the Republic were subjected, in addition to eight of the other nine prefects. A delegation of the bloc also travelled to that country to act as observers of the constitutional referendum held on January 25<sup>th</sup>, 2009.

<sup>57</sup> The main international instruments for human rights protection were ratified by the countries of the bloc in the 1980s, as a result of the re-democratising experience in the region. It should be borne in mind that experienced dictatorships in the region inflicted profound social and political wounds which still have not healed. The legacy of State terrorism is still part of the political debate. The role of the

and are subject to the jurisdiction of the Inter-American Court of Human Rights (in Spanish, CIDH). Said treaties have constitutional hierarchy, which enables effective protection.

The Treaty of Asunción failed to introduce express references to the protection of human rights. While there are several programmatic directives of the Presidents in this regard, for the time being there is no Human Rights Charter in MERCOSUR, even though it is being prepared. There is consensus among the Heads of State that

[a] representative and pluralist democracy founded in the Government of Law amounts to the best system to guarantee and allow for the full exercise of human rights. These rights are not limited to the existence of civil and political rights, but they necessarily must be accompanied by the progressive realisation of economic, social and cultural rights, as well as the intention to establish and reinforce the regional instruments to progress towards a common and integrated strategy enabling an effective realisation of all human rights.”

The notion of elaborating a charter of fundamental rights arose two years after the creation of the bloc and dates back to the proposal of the trade union movements in the four countries, written by the Council of Social Coordination of the Southern Cone in December 1993 as part of a future Social Charter of MERCOSUR. This initiative was based on the recognition that trade integration involved inevitable social aspects and effects which required solutions and guarantees for specific rights. This project of the Charter gathered all fundamental human rights not only in their traditional expression of civil and political rights (the so-called first-generation rights) but also economic, social and cultural rights (second-generation rights) which were accepted on a national, regional and international scale; however, the project failed to be adopted. Finally, the *Social-Labour Declaration of MERCOSUR* was approved and executed in Rio de Janeiro on December 10<sup>th</sup>, 1998. This declaration amounts to a record of all the fundamental second-generation rights and serves as an instrument

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Armed Forces, the trial against the Military Junta leaders who were responsible for the violation of human rights and the interpretation itself of the events are part of the current democratic disputes. Among the ratified instruments are: the Universal Declaration of Human Rights (1948), the International Covenant on the Civil and Political Rights (1996), the International Covenant on Economic, Social and Cultural Rights (1996), the American Declaration of Rights and Duties of Man (1948), the Inter-American Charter of Social Guarantees (1948), the Charter of the Organisation of American States – OAS (1948), the American Convention of Human Rights on Economic, Social and Cultural Rights (1988), the Declaration of the WTO on fundamental principles and rights at work (1998).

aimed at guaranteeing the fulfilment of a limited range of fundamental individual rights and establishing mechanisms to enable collective negotiation and create a space for dispute resolution among the economic and social segments and/or countries. The creation of the Social-Labour Commission of MERCOSUR was ordered. This commission was tripartite, equal, promotional and non-punishing and responsible for *monitoring its application* by the member states. Its capacity to guarantee fulfilment is limited given the fact that the Declaration is not binding regarding the rights and obligations derived from the agreements between the Parties, i.e. it protects against state public power but not against community power.<sup>58</sup>

The other instruments oriented to the promotion and protection of human rights in the bloc are: the *Protocol on the Commitment to Promote and Protect Human Rights in MERCOSUR*, approved as per Decision CMC 17/05, known as the “clause of human rights”, and the *Presidential Declaration of Asunción on the Commitment to Promote and Protect Human Rights*, signed on June 19<sup>th</sup>, 2005, in force since May 2010.

By virtue of the *Protocol on the Commitment to Promote and Protect Human Rights in MERCOSUR*, the member states agree to jointly cooperate in the promotion and effective protection of human rights and fundamental freedoms through institutional mechanisms established within MERCOSUR. They acknowledge their existence, even if serious and systematic violations of human rights arise in scenarios of institutional crisis or civil commotion in a member state. Under those circumstances, in the event it fails to succeed, a mechanism of consultation is activated which enables the other states to adopt measures ranging from the suspension of the right to participate in the different bodies of the integration process to the suspension of rights and obligations deriving from said process.

The *Presidential Declaration of Asunción on the Commitment to Promote and Protect Human Rights in MERCOSUR and Associate States* was signed when the 57<sup>th</sup> Anniversary of the Universal Declaration of Human Rights (June 2005) was being commemorated. This Declaration affirms the commitments adopted by the signatory countries at a

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<sup>58</sup> The Declaration considers that integration involves social aspects and effects whose recognition implies the need to foresee, analyse and solve the different problems which can arise in this scenario. To achieve that, it puts forward several guarantees of workers' rights and the recognition of the Conventions of the ILO (International Labour Organisation) as a legal source. It suggests an efficient intervention to guarantee the free movement of the work force and the equality of rights as well as working, living, housing, educational and health conditions. Regarding collective rights, it proposes the freedom of trade unions, collective negotiation, the right to strike and the right to information.

regional and international level to guarantee the respect of human rights. Likewise, the signatory states are committed to the consolidation of the Inter-American System of Human Rights, a vehicle of the region to exchange information and experiences as well as respond to the petitions and complaints filed by citizens.

Both instruments lack the force of a charter or an international treaty on human rights with their resulting rights and obligations. They are documents and commitments oriented to the *promotion* of human rights, in which the specific rights are not listed, nor is a political or jurisdictional body created to enable citizens to resort to a regional body to demand protection. In this sense, they do not imply multilateral commitments between the member states themselves, but rather each member state agrees to guarantee human rights and fulfil the commitments adopted at a regional and international level.<sup>59</sup>

It should be borne in mind that MERCOSUR has established an Area of Free Residence and Work within its territory, the only requirement being proof of nationality and no history of a criminal record; in this area there is no common criminal jurisdiction.<sup>60</sup> The Permanent Forum of Supreme Courts of the bloc and the Meeting of Ministers of Justice (RMJ) considered the need to make progress and introduce an Arrest Warrant of MERCOSUR to replace the extradition proceedings established under the bilateral Treaties signed by the member states and the Agreement on Extradition among the member states of MERCOSUR which came into effect in May 2002.<sup>61</sup> Pursuant to section 5 of said Agreement, extradition will not be granted in the case of offenses that the requested member state places in the political category or connects to that category. The mere mention of a political purpose or

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<sup>59</sup> Interview with Mrs Luciana Barcina, Secretary of Human Rights of the Ministry of Justice and Human Rights of the State, dated August 2010.

<sup>60</sup> It was established in the Summit of Presidents in Brasilia, through the *Agreement of Residence for Nationals of the Member States of MERCOSUR, Bolivia and Chile* signed on December 2002. Within the bloc, there is no free movement of capital, services and persons. While the Area of Free Residence and Work does not amount completely to the free movement of persons (where migrating paperwork is not required), the six countries have taken a huge step forward and have expressly established their intention to achieve the full freedom of persons movement in the whole territory.

<sup>61</sup> In this regard, the following instruments were signed (in chronological order): the so-called “Protocol of Las Leñas” in Mendoza, Argentina (1992) on jurisdictional cooperation and support in trade, labour and administrative matters; the “Protocol on Injunctions” (Ouro Preto, Brazil in December 1994); the “Protocol of Joint Legal Support on Criminal Matters”, signed in June 1996 in San Luis, Argentina; the above-mentioned “Treaty on Extradition of MERCOSUR”, signed in December 1998 in Brasilia and in December 2004, the Treaty on the Transfer of Sentenced Persons among the member states, signed in Belo Horizonte (Brazil).

reason does not imply that it shall necessarily fall within said category. For the purposes of this Agreement, *under no circumstances shall* the following offenses be considered *political offenses*: genocide, war crimes or offenses against human kind in violation of the International Law rules.<sup>62</sup>

MERCOSUR has an institutional body devoted to these matters: the *Meeting of High Authorities on Human Rights* (in Spanish, RAADDHH), created as per Decision No. 40/04 and composed of governmental bodies competent in these matters and the relevant Foreign Offices, whose duties are coordinated by the MERCOSUR Policy Consultation and Consensus Forum (FCCP).<sup>63</sup> This body is in charge of elaborating the pending MERCOSUR Charter of Human Rights. Among its duties, it must elaborate and promote strategies, policies and joint actions related to human rights, to act jointly in multilateral fora – for the purpose of expanding the visibility of the regional bloc in the promotion and protection of human rights; to hold joint meetings with other institutional bodies of MERCOSUR dealing with matters related to human rights and invite international organisations to take part in the sessions; to put forward recommendations before the Common Market Council within the scope of its jurisdiction and to cooperate with the MERCOSUR Policy Consultation and Consensus Forum, coordinating activities related to matters concerning fundamental freedoms.

For the purposes of addressing specific matters related to *civil, political, economic, social and cultural rights*, its internal structure includes Permanent Commissions, Working Groups and Reporters' Offices made up of representatives of the member

<sup>62</sup> Under no circumstances shall the following events be considered political offences: (a) an attempt against the life or an action causing the death of the person of a Head of State or Government or other national or local authority or a member of their family, (b) acts of terrorism which shall include, but are not limited to, some of the following behaviours: (c) an attempt against the life, the physical integrity or the freedom of the persons who have the right to international protection, including diplomatic agents; (e) hostage taking or kidnapping; (d) an attempt against persons or property by means of bombs, grenades, missiles, explosive mines, guns, letters or packets containing explosives or other devices capable of causing common danger or public commotion; (e) illegal hijacking of vessels or planes; (f) in general, any act not specified among the above-listed events which is committed with the aim of frightening people, classes or sectors of society, attacking the economy of the country, its cultural or ecological heritage, or committing political, racist or religious reprisals. Extradition shall not be granted in the case of exclusively military offenses.

<sup>63</sup> The *Ad Hoc Group dealing with Human Rights* has been working since the year 2000. This group reports to the FCCP (MERCOSUR Policy Consultation and Consensus Forum), and it is oriented to cooperation and dialogue related to the protection, promotion and fulfilment of the decisions adopted by international organisations in this subject, to the search for consensus as well as the coordination of positions in multilateral fora in which the countries of the bloc take part and to the exchange of information and experiences.

and associate states and civil society organisations. Like the plenary meetings, the recommendations are adopted by consensus, keeping record of the debates and conclusions in the relevant minutes so that they can later be submitted to the High Authorities for their consideration.<sup>64</sup>

The working mechanism of the Meeting of High Authorities on Human Rights (RAADDHH) has some distinctive characteristics such as the attendance and the permanent participation of the Associate States of the bloc, thus constituting a regional forum for the exchange of good practices in the field of human rights; the active interaction with civil society organisations in a space of constant dialogue and the participation in the meetings of other sectors of the bloc such as representatives of the Specialised Meeting of Women (REM) and the Specialised Meeting of MERCOSUR Official Public Defenders (REDPO) as well as the legislators of the MERCOSUR Parliament (who report advances and inform about the difficulties in the harmonisation process of rules and public policies on human rights in the region). On several occasions, representatives of international organisations were present, such as the Secretary of the Inter-American Court of Human Rights and Commissioners of the Inter-American Commission of Human Rights. Many have noticed two very remarkable features of the experience of MERCOSUR related to Human Rights: continuity and commitment. Generally speaking, these officers have a long history of working on the subject – even before the bloc existed – and have long remained in their offices, which resulted in a mutual knowledge and formal and informal bonds enabling convergence and agreements. A shared characteristic is the strong involvement in the subjects and firm convictions regarding the importance of preserving human rights for the life of societies and the reinforcement of democracy.

A brief description of the Working Plan of RAADDHH for the years 2008/2009 shows some signs of a diverse theme agenda: the coordination of multilateral human rights bodies; the legislative harmonisation of the implementation of judgements,

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<sup>64</sup> After a reform Project of the RAADDHH (Meeting of High Authorities on Human Rights), which will come into effect next year, the internal structure will be defined as follows: Permanent Commissions: Niñ@sur; Memory, Truth and Justice, Discrimination, Racism and Xenophobia; Educational and Culture of Human Rights. Working Groups: Disability; Lesbians, Gays, Bisexual and Transgender (LGBT); Grown Adults; Economic, Social and Cultural Rights (ESCR) indicators. The Reporters' Offices will be in charge of matters with less continuity and to this end a well-experienced and knowledgeable person will be chosen, who will monitor the matter in particular. Likewise, a new element was introduced: a figure with permanent responsibility for the technical coordination, who will act as a link and will prepare reports on the situation of the different topics, resulting in the rationalisation of time and resources.

recommendations and resolutions of the bodies in charge of the supervision of treaties; the creation of the *MERCOSUR Institute of Public Policies in Human Rights* – whose structure and budget was approved in the last Summit held in San Juan (Argentina) in August 2010; to encourage the fight against racism, race discrimination, xenophobia and other forms of intolerance; the encouragement of issues related to the right to the truth, memory and justice; the initiative *Niñ@sur* to promote and protect childhood and adolescence rights; the exchange of information, better practices and cooperation to prevent and fight the trafficking of persons and trade offenses; to deepen and coordinate actions in the area of education, training and culture in human rights; to continue working on the development of a system of indicators of economic, social and cultural rights so as to enable the monitoring and compliance with such rights; to prepare a MERCOSUR charter for the protection of human rights and ethnic and racial minorities – along with civil society; to strengthen the protection and promotion of migrants' rights;<sup>65</sup> to foster the protection of the human rights of adults and disabled people; to promote regional mechanisms for the prevention, research and punishment of torture and other cruel, inhumane and degrading treatments or penalties; to promote anti-discriminatory laws and related public policies for the lesbian, gay, intersex, transgender and bisexual community.

The challenge is to move on towards a new mechanism for the RAADDHH so it can encompass the new scenario that UNASUR represents. The first step was the creation of the Special Commission, through the Moneda Declaration (Chile, September 2008), to conduct impartial research and present recommendations based on the events of September 11<sup>th</sup>, 2008 in the city of Pando (Bolivia). Furthermore, the intention to coordinate positions in the international fora was reinforced, particularly the support of the International Criminal Court and the advances in reviewing its bylaws with a view to improving the international system of criminal justice.

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<sup>65</sup> It is worth highlighting that when it comes to migrants' rights, MERCOSUR has defined positions within the bloc and in international fora, thus setting it apart from other regional context directions. At the heart of the regional perspective is the defence of human rights of migrants, regardless of their migrating condition, nationality, ethnic origin, gender, age or other considerations, as well as the systematic rejection of harsh migration policies violating their fundamental rights and targeting them in their destination countries.

## **12. Output Legitimacy**

Almost two decades after the Treaty of Asunción came into effect, MERCOSUR has not been consistent regarding certain subject areas and in relation to the originally established goals. Several objectives have not been reached yet, especially those related to the creation of a Common Market. The integration scheme is currently an incomplete Customs Union due to various circumstances. (1) Despite substantial advances in trade volume and quality, MERCOSUR has encountered huge difficulties in meeting the successive established schedules and even in implementing the rules agreed upon. (2) The liberalisation of intra-zone trade is still incomplete (an example is the sugar and automotive sectors, which are excluded from the zero tariff rates). (3) While there is a common external tariff for many goods, there are a lot of exemptions and the member states have the power to elaborate lists indicating which goods are excluded from that tariff as well as amend them on a six-monthly basis. (4) The bloc has not achieved a definite coordination of trade policies. Usually, this requires the existence of a Common Customs Code, which was only adopted in May 2010. On the other hand, there have been modest advances towards the elimination of tariff barriers and the harmonisation of policies which may contribute to reinforcing the integration process. (5) Within the bloc, there is no free movement of capital, services and persons. Although the Agreement on Residence for Nationals of the member states, of Bolivia and Chile was adopted, we have seen that it does not amount to the free movement of persons. The commitment assumed has not come into force yet, a commitment which was made during the Summit held in San Miguel de Tucumán (Argentina, July 2008), in which the leaders established the free movement of persons within the South-American continent without the need of a passport.

The adoption at the institutional level of a minimalist and functional strategy, which should be improved since integration generates new dynamics and makes it necessary to cope with more and new demands, has enabled the substantial expansion of the bloc agenda and its jurisdiction, but there are still methodological problems which obstruct its performance. Even during its foundation, there was much debate about whether the decision adopted in the Treaty of Asunción in favour of a minimalist and strongly inter-governmental strategy, without effective spaces of supranationality or defined rules in different areas, was the suitable method for an integration process



with such goals. Some analysts, decision makers and operators agree that the permanence of an institutional architecture whose key and almost exclusive goals for more than a decade have been to foster a negative trade integration does not operate well with the new objectives and goals arising from new domestic and international scenarios – a social and productive integration, implementation of regional public policies in strategic areas, performance within UNASUR, etc. We must add the persistence of structural asymmetries among the members and a range of transversal deficits – visibility, access, communication and implementation – that may jeopardise the democratic legitimacy and necessary social supports for the improved performance of the bloc. The persistence of an institutional culture that in general terms gives priority to national and sectoral views in negotiations in addition to its secrecy regarding information obstruct both the construction of regional views, the coordination of a collective project and the development of a “possession” and sense of belonging by citizens.

## **Abbreviations**

**ALADI:** Latin American Association for Integration (*Asociación Latinoamericana de Integración*)

**ALALC:** Latin American Free Trade Association (*Asociación Latinoamericana de Libre Comercio*)

**ALCA:** Free Trade Area of the Americas (*Área del Libre Comercio de las Américas*)

**CAN:** Andean Community (*Comunidad Andina*)

**CET:** Common External Tariff (*Arancel Externo Común*)

**CCM:** MERCOSUR Trade Commission (*Comisión de Comercio de Mercosur*)

**CMC:** Common Market Council (*Consejo del Mercado Común*)

**CRPM:** Commission of Permanent Representatives of MERCOSUR (*Comisión de Representantes Permanentes del MERCOSUR*)

**ECLAC:** Economic Commission for Latin America and the Caribbean (*CEPAL*)

**EU:** European Union (*Unión Europea*)

**FCCP:** MERCOSUR Policy Consultation and Consensus Forum (*Foro de Consulta y Concertación Política*)

**FCES:** Social and Economic Advisory Forum (*Foro Consultivo Económico y Social*)

**FOCEM:** MERCOSUR Structural Convergence Funds (*Fondos para la Convergencia Estructural del MERCOSUR*)

**GMC:** Common Market Group (*Grupo Mercado Común*)

**ILO:** International Labour Organisation (*Organización Mundial del Trabajo*)

**MERCOSUR:** Common Market of the South

**MCC:** Central American Common Market (*Mercado Común Centroamericano*)

**NGO:** Non-Governmental Organisation

**PICAB:** Programme for Integration and Economic Cooperation between Argentina and Brazil (*Programa de Integración y Cooperación Argentino-Brasileña*)

**PM-PARLASUR:** MERCOSUR Parliament (*Parlamento del MERCOSUR*)

**RAADDHH:** Meeting of High Authorities on Human Rights (*Reunión de Altas Autoridades en Derechos Humanos*)

**SAM:** Administrative Secretariat of MERCOSUR (*Secretaría Administrativa del MERCOSUR*)

**SM:** Secretariat of MERCOSUR (*Secretaría del MERCOSUR*)

**SMEs:** Small and Medium-Sized Enterprises

**TAL:** MERCOSUR Administrative-Labour Court (*Tribunal Administrativo-Laboral del MERCOSUR*)

**TPR:** Permanent Court of Review (*Tribunal Permanente de Revisión del MERCOSUR*)

**UN:** United Nations (*Naciones Unidas*)

**UNASUR:** Union of South American Nations (*Unión de Naciones Suramericanas*)

**WTO:** World Trade Organisation (*Organización Mundial del Comercio - OMC*)

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### **Interviews**

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