CHAPTER 14

Economic Integration and Judicial and Police Cooperation in Mercosur[1]

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Introduction

In the period between 1980 and 1995, both Europe and the US made huge investments in Latin America. The process of democratisation in Latin America, especially in the countries marked by a tradition of military dictatorship, reinforces the belief in political and economic stability. The market economy displays considerable growth and, partly stimulated by the IMF and the World Bank, several countries are embarking on privatisation on a grand scale.[3] Political and economic cooperation between the countries is taking the place of political and military rivalry. The time is ripe for a new attempt at integration on this continent. The overtures between Argentina and Brazil led to the establishment of Mercosur. Its economic – Mercosur is the fourth largest trade bloc in the world after the US, the EU and Japan – and political importance were recognized in time by especially the EU. As early as 1996[4] an Inter-institutional Cooperation Agreement was concluded, an

1 A more extended Dutch version of this contribution has been published in *International Comparative Law Quarterly*, Vol. 54, April 2005, p. 387-410.

2 This article has been written thanks to a research visit (March-April 2003) to the Universidad de Buenos Aires (UBA).

3 Between 1990 and 1992 Argentina privatised its economy. The twenty State enterprises that were sold generated 4% of GNP and 21% of fiscal revenues.

4 Interregional Framework Cooperation Agreement between the European Community and Its Member States on the one part, and the Southern Common Market and Its Party States on the other, O.J. L 069 of 19 March 1996, p. 0004-0022 and L 112 of 29 April 1999, p. 0066.

interregional framework agreement for cooperation between the EU/Member States and Mercosur/States Parties.[5] Since then, the EU-Mercosur Bi-regional Negotiations Committee (BNC)[6] has already had ten meetings at which topics such as the free movement of goods, public procurement, investments, services, e-commerce and conflict resolution are discussed. The US has never appreciated the attempts at integration in Latin America and has always striven to conclude separate free trade agreements with each individual country. The free trade agreements with Chile[7] and with Central America[8] are clear examples.

The political developments did not shield the Latin American economies from economic storms. The 1994 Mexican tequila crisis led to delayed growth throughout the region. In 1999 Brazil decided to considerably devalue its currency as against the US dollar, while Argentine president MENEM had made monetary parity with the dollar a priority of his policy. Argentina temporarily stopped applying the common external customs tariff, which had meanwhile further been elaborated in the framework of Mercosur, and thereby suspended the effect of the customs union. Uruguay and Paraguay subsequently also established unilateral external tariffs. The Argentine economy, which was not very strong to begin with, went further downhill. In 2002, Argentina was forced to abandon parity to the dollar and to cease payment of the national debt, which by then had spiralled. The biggest defeat of a nation State in world history had become fact. Argentina was bogged down in the deepest ever economic political and monetary financial crisis in its history. The tango crisis created a tidal wave throughout the region. The Uruguay banking sector – traditionally a refuge for Argentine capital – was swept along in the crisis. Brazil faced diminishing economic growth, but managed to limit the damage to this fact.

For a while it seemed that Mercosur's fate had been sealed, but due to the new political developments and the region's tentative economic recovery the prospects for Mercosur are better than ever. The election of LULA DA SILVA and KIRCHNER as presidents of respectively Brazil and Argentina predict renewed fervour for Mercosur. At the meeting of the Mercosur Heads of State (17 June 2003) it became clear that LULA and

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5 ROMI, R.D. & MOLINA DEL POZO, C., *Acuerdo Mercosur-Unión Europea*, Buenos Aires, Ediciones Ciudad Argentina, 1996.

6 See also Commission staff working paper concerning the establishment of an inter-regional association between the European Union and Mercosur, http://europa.eu.int/comm/external_relations/mercosur/bacground_doc/work_paper0.htm.

7 See http://www.ustr.gov/new/fta/Chile/text/+free+trade+agreement+Chile&hl=en&ie=UTF-8.

8 See http://usembassy.or.cr/Cafta/cafta.html.

KIRCHNER wish to deepen the integration in the framework of Mercosur. Their common agenda[9] reflects the new zeal. At a special summit in October projects were discussed which have to ensure that the integration within Mercosur is both deepened and speeded up. Brazil has already submitted a programme headed "Objective 2006". Its purport may be compared to the operation for establishing the internal market in the EC in 1992. The programme centres around five themes: 1. the institutional structure and its political and socio-cultural objectives; 2. the customs union; 3. the pillars of the common market; 4. the new integration; and 5. border integration and the abolishment of internal frontiers. Argentina has submitted a proposal for the establishment of a Monetary Institute for Mercosur, with the idea of coordinating monetary policy and fixing exchange parity within certain bandwidths. The similarities with the EMU and the European Monetary Institution are apparent. The proposals have clear political and economic components. In Argentina's current government, Brazil has found a partner for the reinforcement of integration in the region, which will also strengthen the position in the negotiations with the US concerning liberalisation. By 2006, the US wants to conclude a free trade agreement, the FTAA,[10] with all American States, not only to replace the existing agreements, but also – at least in the eyes of the US – as an alternative to regional community integration.[11] The EU is also seeking to conclude a free trade agreement,[12] but with Mercosur as its partner and therefore based on regional integration. The stakes are high,[13] as they first of all involve access to not only product markets, but also to the markets for services and for example intellectual property rights.

Ample reason therefore to further analyse the organisation and functioning of Mercosur which has now been effective for over a decade. This article will successively discuss regional integration in Latin America, the genesis of Mercosur, its institutional structure and the

9 18 June, see http://www.mercosur.org.uy/pagina1esp.htm.

10 Free Trade Association of the Americas, *ALCA* in Spanish. The negotiations started in 1994.

11 This probably also explains why relatively little has been written in the US concerning Mercosur. For a further explanation of the free trade agreements and their impact on US law, see JACKSON, J.H., *The World Trading System. Law and Policy of Internatonal Economic Relations*, Cambridge/London, MIT Press, 2002. See also MILNER, H., "Regional Economic Co-Operation, Global Markets and Domestic Politics: A Comparison of NAFTA and the Maastricht Treaty", *Journal of European Public Policy*, 1995, p. 337-360.

12 http://europa.eu.int/comm/external_relations/mercosur/intro/index.htm.

13 LOPEZ, D., "Dispute Resolution under Mercosur from 1991 to 1996: Implications for the Formation of a Free Trade Area of the Americas", *NAFTA: Law and Business Review of the Americas*, 1997, Volume 3, No. 2.

legal character and legal force of Mercosur law, the arbitration clause, the objectives and the degree of their achievement, the incorporation of Mercosur law within the States Parties, the rule-making competence with respect to the enforcement of Mercosur law and judicial cooperation within Mercosur.

I. Integration in Latin America

During the 19th century, at the time of the formation of nation states, numerous attempts were made to form a large, strong Latin American nation, all of which failed as a result of internal tensions and differences.[14] The first foundation for a free trade zone was laid in recent history in 1960 in the Montevideo Convention. The Latin American Free Trade Zone[15] (LAFTA) developed into a zone comprising ten South American countries and Mexico. This economic cooperation can easily be compared with the current North American free trade zone NAFTA between the US, Canada and Mexico.[16] LAFTA did not prove to be very successful. Negotiations soon foundered over the harmonization of customs tariffs. The arbitration scheme for conflict resolution lacked the strength needed to withstand the political differences between the States Parties. In addition, the countries in the economic middle bracket and below feared the economic trade domination of Argentina, Brazil and Mexico.[17] Against this background the *Pacto Andino* was created, by which Bolivia, Chile, Colombia, Ecuador and Peru under the 1969 *Cartegena de Indias* Agreement transferred certain powers to a common supranational structure. For the most part, the *Comunidad Andina* was a copy of the EC, both institutionally and substantively. Even the structure and powers of the European Court of Justice were copied, including the power to refer matters for a preliminary ruling.[18] However, the States Parties were not prepared to accept the binding effect of Andino law. This meant that every individual decision had to be ratified and transposed into national law and only

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14 See, e.g., the attempts made by Simón DE BOLIVAR, who succeeded in uniting the territories of what are now Ecuador, Colombia, Venezuela and Panama into what he termed "*Nueva Granada*".

15 LAFTA in English, *ALALC* in Spanish.

16 North American Free Trade Agreement, entered into force on 1 January 1994.

17 Here, too, history appears to repeat itself. Free trade within NAFTA is heavily complained about in Mexico at the moment, especially as regards the lack of compensating measures comparable to, e.g., the structural funds in the EC, in order to lessen the structural differences among the participants and thereby guarantee loyal competition.

18 See GARCIA-AMADOR, F.V., *The Andean Legal Order*, New York, Oceana Publications, 1978.

became binding after ratification by all States Parties. This process of incorporation led to frustration among the partners and Chile's withdrawal in 1976 was the deathblow. Interest in the free trade zone was revived and LAFTA was transformed into the Latin American Association for Integration (LAIA).[19]

II. Mercosur: Genesis and Objectives

During the second half of the 1980s negotiations started between Brazil and Argentina, the two major players on the continent, concerning regional community integration. It was intended to further deepen the integration process starting from LAIA as the *acquis*. The negotiations resulted in the 1991 Treaty of Asuncion (hereinafter: TA). The economically highly dependent countries of Uruguay and Paraguay also acceded. During the course of the 1990s Bolivia and Chile became associated members[20] based on an agreement concerning the free trade zone with Mercosur.[21] Mercosur is based on an international treaty establishing intergovernmental institutions and laying down objectives which all sound quite familiar: the realisation of a customs union and a common market, linked to the four freedoms. It also has common policy areas and the accompanying harmonisation. As such it is an intergovernmental structure with a community integration project in mind, in short, quite definitely not limited to a free trade association.

Article 1 TA provides for a transitional period until the end of 1994 for the realisation of a common market. The common market comprises the customs union, the four freedoms and the coordination of policy in the field of agriculture, fiscal and monetary matters, foreign trade, etc. In addition, Article 1 expressly provides for the necessary harmonisation of the legislation of the States Parties.[22]

It soon became apparent that the agreed timeframe, namely the period between 1991 and 1994, was much too short to be able to achieve these goals. The elimination of the internal trade barriers for the purpose of the customs union and the realisation of a common external customs tariff proved much more difficult than expected.[23] In 1993

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19 *ALADI* in Spanish. LAIA/ALADI currently has its headquarters in Montevideo.

20 With Peru, negotiations on this are ongoing. Venezuela has indicated that it wishes to open negotiations.

21 See CMC 14/96 concerning their participation in the working groups. Many decisions between the Mercosur States Parties are separately declared binding upon the associated members, not only in the field of economic integration, but also with respect to justice and security (see *infra*).

22 The TA speaks of States Parties instead of Member States.

23 See hereon in the Conclusion of this article.

Mercosur[24] decided to abandon the date, without however abandoning the actual goal of creating the customs union and the common market. It is now sought to have these in place by 2006.

III. The Institutional Structure of Mercosur[25]

Even though where content is concerned Mercosur strongly resembles the EEC in its early stages, from the institutional perspective the differences are striking. Based on Article 18 TA the institutional structure of Mersocur is further determined in the 1994 Protocol of *Ouro Preto* (hereinafter: POP).[26] Article 3 POP defines the *Consejo del Mercado Común* (CMC) as the highest political organ. It consists of both the Ministers for Foreign Affairs and the Economy and of the Meetings of the Heads of State. The CMC is also authorised to arrange new meetings of ministers and has made ample use of this competence. Besides the Meetings of the Ministers of Agriculture and Industry there are now also Meetings of the Ministers of Justice, the Interior and Social Affairs. In short, the competence of the CMC[27] may be compared to that of the Council of Ministers and the European Council in the EU Treaty. The *Grupo del Mercado Común* (GMC) is without doubt the executive branch of Mercosur (Article 10 POP). The GMC runs all working groups, *ad hoc* groups and specialised meetings concerning agricultural matters, the harmonisation of technical product norms, the environment, financial services, border control, tourism, etc. The *Comisión del Commercio del Mercosur* (CCM) falls under the GMC (Article 16 POP). It has competence[28] in specialised economic issues, like competition, procurement, customs, consumer protection, etc. The

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24 CMC 02/93.

25 For an up to date organisation chart see http://www.mercosur.org.uy/pagina1esp.htm. For comments, see RUIZ DIAZ LABRANO, R., *Mercosur. Integración y Derecho*, Buenos Aires, Intercontinental Editora, 1998; DROMI, M.A. EKMEKDJAN, R., RIVERA, J.C., *Derecho Comunitario. Sistemas de Integración. Regimen del Mercosur*, Ediciones Ciudad Argentina, 1995; BAPTISTA, L.O., *O Mercosul suas Instituições e Ordenamento Jurídico*, São Paulo, Editora São Paulo, 1998; GONZALEZ OLDEKOP, *La Integración y sus Instituciones*, Buenos Aires, 1997; CALDANI, C. & ANGEL, M., *Integración Europea y Mercosur*, Mendoza, Ediciones Jurídicas Cuyo, 2001; CALDANI, C., *La Filosofía del Derecho en el Mercosur*, Buenos Aires, Ediciones Ciudad Argentina, 1997; GALEANO PERRONE, C., *Ordenamiento jurídico del Mercosur*, Asunción, 1995; CALDANI, C. & ANGEL, M., *Integración, Unión Europea y Mercosur*, Buenos Aires, 2001; PÉREZ GONZÁLEZ, *Desafíos del Mercosur*, Ediciones Ciudad Argentina, 1997.

26 For a detailed explanation see RUIZ DIAZ LABRANO, R., *Mercosur. Integración y Derecho*, *supra* note 24.

27 See Article 8 POP.

28 See Article 19 POP

CMC further deals with complaints in these areas from States Parties and private parties.[29]

The CMC, GMC and CCM make decisions that are binding on the States Parties. Binding secondary Mercosur law consists of CMC decisions, GMC resolutions and CCM directives (Articles 41 and 42 POP). The right of the legislative initiative is in the exclusive hands of the States Parties submitting proposals in the CMC, GMC or CCM. Mercosur also has several institutions with purely advisory powers, such as the *Comisión Parlementaria Conjunta* (CPC) and the *Foro Consultivo Económico Social* (FCES). The CPC has an important advisory function with respect to the harmonisation of legislation. Finally, Mercosur has an administrative secretariat (SAM) with its headquarters in Montevideo. Its powers, however, are rather weak (see Articles 31 ss. POP) and purely supporting. The SAM has no executive power, let alone any initiating legislative power. The SAM can therefore in no way be compared with the European Commission in the EC Treaty or EU Treaty. It is a supporting secretariat which organises meetings and handles documentation. In 2002 it was decided to expand the administrative secretariat and turn it into a technical secretariat.[30]

IV. The Legal Character and Legal Effect of Mercosur Law

The majority of authors agree that the organic structure of Mercosur, as elaborated in chapter II of TA is an intergovernmental organisation with community objectives, but not a supranational organisation.[31] The intergovernmental character also emerges from the division of powers between the Mercosur organs and the weak position of the SAM. However, Mercosur remarkably does posses legal personality (Article 34 POP) enabling the CMC to conclude treaties on its behalf.

Article 38, taken together with Article 42 of the Protocol, lays down various obligations for the States Parties. The decisions of the CMC, the resolutions of the GMC and the directives of the CCM are all binding on the States Parties.[32] All decisions are taken unanimously (Article 37

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29 See *Procedimiento general para reclamaciones ante la CMC*, Annex to the *Protocolo de Ouro Preto*. See also section V of this article.

30 CMC 16/02. See also http://www.mercosur.org.uy/pagina1esp.htm.

31 For a detailed explanation, see RUIZ DIAZ LABRANO, R., *Mercosur. Integración y Derecho*, *supra* note 24.

32 Article 42 speaks of *carácter obligatorio*.

POP).[33] Binding does not mean incorporated in domestic law and thereby a source of rights and duties for legal subjects. In short, the legal instruments of Mercosur have no direct effect whatsoever. Based on Article 42 POP, all States Parties are under the obligation to incorporate binding Mercosur decisions, to the extent of course that they need to be incorporated in domestic law.[34] Article 38 POP in addition includes a provision concerning loyalty to Mersocur comparable to Article 10 of the EC Treaty. Article 42 further provides that incorporation is to take place in accordance with the internal procedures of every State Party. All States Parties that ratify and incorporate have to notify the SAM. After the final notification the SAM informs the States Parties, within thirty days of which the rules in question will simultaneously enter into force in all States Parties.[35] Despite the strong intergovernmental influence, both in the adoption of decisions and in their entry into force, the importance of the community objectives in the TA must not be underestimated. In a dispute between Argentina and Brazil concerning the free movement of goods, quantitative restrictions and measures having equivalent effect, the non-entry into force of the customs union and the common market – argued by Brazil – was rejected by the court of arbitration.[36] A State Party is not allowed to suspend or undermine the community objectives, even if these have only partly been realised. Notably the decision[37] continuously refers to European Community case law and uses concepts like interprétation in accordance with the treaty, effectiveness (*effet utile*), etc.

The provisions of Article 42 POP make the respective constitutional provisions of the States Parties and the related case law concerning the relationship between national and international law vitally important for the efficiency of Mercosur's legal instruments. For instance, several Latin American countries have integrated international and regional human rights treaties into their domestic law. Some countries have given supremacy to the treaty rules, including supremacy over constitutional norms (cf. Guatemala); others have given these rules equivalent

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33 For an overview of Mersocur law, see http://www.mercosur.org.uy. This source does not, however, shed any light on the degree of implementation and/or entry into force. For this, see http://www.mercosul.org.uy/paginalesp.htm.

34 For example, decisions concerning the internal organisational structure of Mercosur do not need incorporation.

35 Certain decisions provide for early entry into force as between the ratifying states.

36 Concerning arbitration, see section V.

37 *Laudo I Comunicados Decex, Argentina v. Brazil*, 1999.

constitutional status under domestic law (cf. Argentina).[38] Equivalent status means that the treaty rules cannot alter the constitutional rules, but can merely complement them. They do, however, have the same effect as the constitutional norms with respect to other domestic law. The ratification of the TA has not exactly resulted in corresponding constitutional provisions. Article 45 of the Constitution of Paraguay expressly refers to the international legal order and accepts its supremacy. The Argentinean Constitution also refers to the international legal order, more particularly in Articles 27, 31 and 43. Scholarly debate concerning dualism and monism and whether there is supremacy or not has been decided by Argentina's Supreme Court in favour of supremacy.[39] The Constitutions of Brazil and Uruguay pose more of a problem. Uruguay's Constitution does not include a provision granting supremacy to international law. Instead, Articles 256 and 239 start from the principle of constitutional supremacy. The Constitution of Brazil[40] is explicitly dualist, in addition to providing a complex mechanism for incorporation. Article 5(2) clearly states that international treaties complement constitutional norms. In other words, treaty norms are subject to testing against the Constitution.[41] The President is competent to conclude treaties (recital VIII to Article 84). Parliament is subsequently required to 'internalise' the treaty by means of a legislative decree. The *Supremo Tribunal Federal* may then test the decree against the Constitution. The validity of the legislative decree still does not end the matter. Only after the President has ratified the legislative decree can the international treaty's content become part of domestic law. This process of incorporation is not only applied to the constitutive Mercosur treaties, but also to all secondary Mercosur law.

It is therefore not surprising that precisely the application of Mercosur law is one of the major problems. Only 40% of the always unanimously taken decisions have been effectively incorporated by all States

38 CAFFERATA NORES, J.I., *Proceso penal y derechos humanos. La influencia de la normativa supranacional sobre derechos humanos de nivel constitucional en el proceso penal argentino*, Buenos Aires, 2000.

39 See cases *Ekmekdjian, Miguel Angel v. Sofovich, Gerardo and others*, decision of 7/7/92, La Ley, 1992, C 543; *Servini de Cubria, María Romilda s/amparo*, decision of 8/9/92, CSJN S.289.XXIV, S.292.XXIV and S.303.XXIV; *Fibraca Constructora S.C.A. v. Comisión Technici MIT de Salto Grande*, decision of 7/7/93, CSJN F.433 XXIII.

40 See hereon DE MEDEIROS, A.C., *O Poder de celebrar Tratados*, Porto Alegre, Fabris Editor, 1995.

41 Although Brazil has signed the Vienna Convention, it has not yet ratified it.

Parties and have therefore entered into force.[42] There are no supranational Mercosur institutions charged with the supervision of compliance with Mercosur law. Nor are there judicial procedures to which the Mercosur institutions can have recourse in order to enforce such compliance before a Mercosur Court of Justice. Still, the States Parties are not entirely free to do as they please, because an arbitration mechanism has been provided to deal with commercial disputes between the States Parties.

V. Judicial Cooperation within Mercosur

Judicial cooperation is not expressly included in the Treaty, either as an objective or as an instrument. Nevertheless, judicial cooperation within Mercosur, both in the private law and the criminal law sense, has been an important priority from the start. Not only does this appear from the Protocols that have been concluded, but also from the fact that some of the more important Protocols have already entered into force. As early as 1991 the CMC established the Assembly of Ministers of Justice.[43] On impulse from the Ministers of Justice various regional Mercosur agreements were elaborated in the field of private international law, cross-border civil procedural law and international criminal law. In 1996 the Assembly of Ministers of Home Affairs was created.[44] Over the past few years, these Ministers have been very active in the field of police cooperation and intelligence. The recommendations of the Assemblies are submitted to the CMC which practically always approves them in the shape of binding decisions.

In the field of private law[45] one of the first main results of the Justice Assembly was the 1992 Protocol of *las Leñas*.[46] This Protocol concerning judicial cooperation in civil and commercial matters, employment questions and administrative affairs was clearly inspired by the 1968

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42 For a thorough legal analysis of the incorporation, see COZENDEY, C.M.B., "Sistema de Incorporação das Normas do Mercosul à Ordem Jurídica Interna", www.mercosul.gov.br/forum/default.asp.

43 CMC 7/91. This instrument was supplemented with an internal regulation 94/009 concerning the methods and establishment of technical working groups.

44 CMC 7/96.

45 See DREYZIN DE KLOR, A., *El Mercosur, generador de una nueva fuente de derecho internacional privado*, Buenos Aires, Zavalia, 1997 and TELECHEA BERGMAN, E., "La cooperación jurídica internacional en el Mercosur" in *Mercosur. Balances y Perspectivas*, Montevideo, Fundación de Cultura Universitaria, 1996, p. 111-133.

46 CMC 5/92 *Protocolo de cooperación y asistencia jurisdiccional en materia civil, comercial, laboral y administrativa*, entered into force in March 1996.

Brussels Convention.[47] The Protocol deals with both the mutual recognition of judgments concerning the private law interests of affected parties (i.e. with the exception of criminal law judgments) and the letters rogatory for obtaining evidence. In 1994 the Protocol of Buenos Aires concerning international jurisdiction with respect to contract law[48] was adopted, providing priority rules for determining jurisdiction. Also relevant are the Protocol of *Ouro Preto* as regards provisional measures[49] and the Protocol of Santa Maria[50] as regards international jurisdiction in consumer protection cases. In addition, regulations concerning cross-border legal assistance were approved in 2000.[51]

When Mercosur was established, matters of international criminal law were mostly dealt with in bilateral treaties. In 1992 the multilateral Treaty of Nassau concerning mutual legal assistance[52] was approved in the OAS. However, this Treaty was only ratified by a few states.[53] A regional legal assistance protocol along the lines of the private law conventions was subsequently negotiated within Mercosur.[54] In 1996 the Protocol of San Luis concerning judicial cooperation in criminal matters was adopted.[55] Notably, this Protocol has been ratified and incorporated by all States Parties and is in force as of 2001.[56] In 2002, a supplementary agreement[57] standardised the documents for requests for mutual legal assistance. At least according to European standards, this legal assistance protocol is a classic, although on some specific points it is

47 O.J. L 319/9 of 25 November 1988, now implemented in Community law by means of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L 12/1 of 16 January 2001, p. 0001-0023.

48 CMC 1/94.

49 CMC 27/94.

50 CMC 10/96.

51 CMC 49/00, *Acuerdo sobre el beneficio de litigar sin gastos y asistencia jurídica gratuita entre los estados partes del Mercosur.*

52 http://www.oas.org/juridico/english/Treaties/a-55.html.

53 None of the Mercosur states have ratified this treaty.

54 FERNÁNDEZ, G.D., *El Mercosur y la regionalización del derecho penal*, Montevideo, 1992.

55 CMC 2/96. For literature on criminal law legal assistance, see the contributions in CERVINI, R., *Curso de cooperación penal internacional*, Montevideo, Uruguay, 1994 and CERVINI, R. & TAVARES, J., *Princípios de Cooperação Judicial Penal Internacional no Protocolo do Mercosul*, São Paulo, Editora Revista dos Tribunais, 2000.

56 CMC 12/01 extends its application to Chile and Bolivia.

57 CMC 27/02.

surprisingly different.[58] Requests for mutual legal assistance, for the exchange of information, for the performance of investigative acts (e.g. the questioning of witnesses), for the temporary transfer of persons within the framework of criminal proceedings, etc., can be made by any judicial authority[59] and the judicial authorities of the requesting State may also be present at the fulfilment of the request for mutual legal assistance in the requested State. It is not required that the principle of double criminality be fulfilled. Requests for proactive investigative acts or the use of special investigative methods, such as infiltration, controlled supply, etc., have not been included in the Protocol. The requests are dealt with between the central authorities of the States Parties. The classical royal route is not used,[60] therefore, but neither is there direct cooperation between the enforcement authorities themselves. Furthermore, the central authority for this Mercosur protocol is not automatically the same central authority as for the bilateral treaties. The authority for Mercosur in Argentina, for example, is part of the Ministry of Foreign Affairs. The Protocol includes a duty to cooperate, but it has been watered down by a classic series of exceptions, like exceptions for military, tax and political offences or violations of public order or security. Worth mentioning is that the *ne bis in idem* principle has also been listed as a ground for exception. The execution of the request in the requested State is subject to the *lex locus regit actum* rule, but the requesting State may request the application of special aspects of its law (*lex forum regit actum*) on condition that this does not conflict with the domestic law of the requested State. The requests may also extend to seizure and provisional measures with respect to illegally obtained property, in the framework of the cross-border fight against organised crime and money laundering.

As regards extradition, the Mercosur States Parties have concluded many bilateral treaties, which were mostly ratified before Mercosur's entry into force. The only multilateral treaty, the Inter-American Extradition Convention of Caracas (1981),[61] has not been ratified widely. For

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58 For a comparison with private law legal assistance, see TELLECHEA BERGMAN, E., "La cooperación judicial internacional en material penal con especial referencia al ambito del Mercosur y estados asociados" in *La Justicia Uruguaya*, 2002, Tomo 126, p. 3-16.

59 This broad wording takes account of the differences in the procedural law systems. Not all countries have an examining magistrate and until recently Chile did not even have a public prosecutor's office.

60 By the royal or diplomatic route is meant that both the Ministry of Justice and the Ministry of Foreign Affairs have to give authorisation.

61 See TELLECHEA BERGMAN, E. & ALVAREZ COZZI, C., *Extradición. Normas nacionales y convencionales*, Montevideo, Uruguay, 1997, for a commentary on the bilateral treaties and on the Inter-American Convention.

this reason, the Extradition Agreement of Rio de Janeiro (1998)[62] was approved in the framework of Mercosur. This is another classic regulation with a few surprising aspects. The agreement includes a duty to extradite for offences punishable in both states by a maximum of no less than two years' imprisonment. Political and military offences have been made exceptions, but it is expressly provided that war crimes or crimes against humanity, attacks on political authorities and terrorism do note fall under this heading. Military offences are only excepted insofar as they are of an exclusively military character. Tax offences therefore do not come under the exception. Another striking aspect is that the extradition of one's own nationals is the rule, unless a State Party's constitutional provisions determine otherwise. In that case the State in question is not obliged to extradite. Extradition for the purpose of standing trial before *ad hoc* tribunals is also excluded. Moreover, the requesting State Party is not allowed to impose the death penalty or life imprisonment.[63] In such cases the penalty must be limited to the maximum penalty which could be imposed in the State asked to extradite. The procedure is classic and uses the royal route.[64]

The field of customs cooperation[65] has also witnessed due progress. In 1997 an assistance agreement was concluded concerning the prevention and repression of customs infringements. The assistance can be used in the context of both administrative law and criminal law enforcement procedures and the information obtained may be passed on between the administrative and judicial authorities. This is direct assistance, either by request or voluntary, between the mutual customs authorities. The requests may concern the exchange of information, the performance of controls or the special supervision of persons or goods. The assistance cannot be used for the execution of fines, taxes, customs arrears, etc. In 2000[66] the Committee of Customs Directors was established, which is to give priority to the fight against smuggling.[67] The

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62 CMC 14/98. Extended to Chile and Bolivia pursuant to CMC 15/98. These agreements have not yet entered into force.

63 The provisions concerning *ad hoc* tribunals, the death penalty and life imprisonment may of course be explained by the recent dictatorships in Latin American history, but are also relevant in the light of the negotiations with the US.

64 For an opinion from the point of view of applicable law, see ANTONINI, M.A., *Ley de cooperación en material penal. La extradición y la opción*, Buenos Aires, Ad-Hoc, 1998.

65 See VAZQUEZ, V.J.C., "El código aduanero del Mercosur y el delito de contrabando", *Revista del Mercosur*, 1988, p. 158 and TOSI, J.L., "Principios de cooperación aduanera", *Revista del Mercosur*, 2001, p. 181.

66 GMC 87/00.

67 GMC 10/01.

action plan for countering customs infringements was approved in 2001.[68] The plan contains a long list of concrete measures, ranging from the introduction of standardised customs controls to the exchange of knowledge in the field of customs intelligence.

In the field of financial regulations and the fight against money laundering[69] the results are less than impressive. There is only a framework agreement between the Central Banks,[70] providing duties to cooperate and obligations to perform to the best of one's ability, but lacking any obligation to establish financial intelligence units[71] or to introduce specific obligations for financial service providers.

The vitality demonstrated over the past few years by the Assembly of Ministers of Home Affairs has no doubt been the main cause of surprise, however. It strongly appears that an *acquis* is being built within Mercosur in the field of police cooperation and intelligence which is similar in many respects to the Schengen *acquis* and the cooperation within the third pillar of the EU, although in this case not with the aim of compensating for the abolishment of internal borders. In 1999 an integrated security plan was approved,[72] elaborating the 1998 outlines of this plan.[73] The plan regulates the cooperation between police and security services of the States Parties in the field of the exchange of information and operational cooperation. It also provides for the establishment of an automated database for storing and exchanging information, the SISME.[74] *Ratione materiae* the cooperation is intended to prevent and detect crime, of which the trade in drugs and precursors, terrorism, trafficking in goods and people, vehicle theft[75] and organised crime are specifically regulated,[76] and to serve non-criminal law purposes. This last category comprises migration (forum shopping with respect to visas, political asylum, etc.), transnational protection of

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68 CMC 3/01.

69 BULIT, G., "El lavado de dinero en el Mercosur", *Revista del derecho comercial y de las obligaciones*, 1999, Volume 32, p. 413-444.

70 CMC 40/00.

71 Directive 2001/97/EC, O.J. L 344/76 of 28 December 2001.

72 CMC 22/99 *Plan general de cooperación y coordinación recíproca para la seguridad regional.* This plan replaces the assistance agreement of 1998 and a secret security scheme named "*Plan de seguridad para la triple frontera*".

73 CMC 5/98 *Plan de cooperación y asistencia recíproca para la seguridad regional en el Mercosur.*

74 *Sistema de Intercambio de Información de Seguridad.*

75 See Memorandum in CMC 14/99.

76 Decisions CMC 8/00 and CMC 10/00 broaden this competence to economic and financial offences and illegal trade in endangered flora and fauna (CITES-protected species) respectively.

the environment and the trade in radioactive materials. Finally, due attention is paid to the common training of police and intelligence officers. The plan further elaborates the *modus operandi* concerning the exchange of data. For example, for terrorism which, by the way, is not a specific punishable offence in most States Parties, a fast cross-border alerting system has been built into SISME. The access to and security of the SISME database[77] has been further detailed in a number of specific decisions and regulations.[78] The responsible SISME subcommittee is mainly a managing body and a coordinating body with respect to all the specific technical substantive committees (migration, terrorism, etc.). It has no function with respect to data protection. The way the operational cooperation is run remains vague and *ad hoc* agreements between the States Parties are referred to. Special technical working groups have been established under the Assembly of Ministers for topics like "Offences", "Environment", "Migration", etc. In 2001 the cooperation was given further shape and substance and was made operational.[79] Regional operational cooperation was provided for drug trafficking and terrorism in a geographical zone to be agreed later. In addition, liaison officers were going to be appointed in each other's regions. Finally, a special system for the exchange of information was elaborated with respect to bio-terrorism. In 2002, the training of police and intelligence officers was assigned to a Coordinating Centre for Police Training. The Centre is really a network under revolving chairmanship, rather than a Mercosur police academy.

In 2002, the CMC approved several agreements reached by the Ministers of Home Affairs. Agreement 15/02 provides for the intensified exchange of information concerning cross-border offences committed by means of aircraft. The Agreement applies to nineteen described offences committed with the aid of planes, such as terrorism, trafficking in human beings, smuggling, hazardous substances, counterfeiting, drug trafficking, etc. In addition to the exchange of information, Agreement 17/03 concerning the fight against border corruption also provides for a complaints committee. Agreement 19/02 provides measures in the fight against the cross-border movement of goods posing an environmental risk (including a threat to biodiversity). Finally, Agreement 23/02 provides for cooperation between police and intelligence forces in the fight against terrorism and related offences. This Agreement of Salvador

[77] CMC 13/99 *Reglamentos internos de la subcomisión de seguimiento y control y de la comisión administradora del sistema de intercambio de información Mercosur, Bolivia y Chile*, including Annex III – *Mercosur/RMI/Acuerdo No. 14/99 Reglamento interno comisión administradora del SISME.*

[78] CMC 18/00 and 19/00.

[79] CMC 13/01.

do Bahia, which was negotiated in special technical working groups on terrorism, aims to supplement the classical legal assistance in criminal matters[80] with police assistance and mutual assistance between intelligence agencies. It not only regulates the exchange of information, but also the joint cross-border *ad hoc* operations. The initiative for this has to come from a recognised authority and the terms (time span, powers, geographical area, etc.) have to be established per *ad hoc* operation.[81] Other states[82] may participate in these operations, but only as observers. A striking aspect is that this does not concern cross-border investigative acts, but rather police intelligence in the fight against terrorism. Neither "intelligence", nor "terrorism" has been further defined and the boundaries between intelligence and law enforcement have been completely erased here.[83] During the Assembly of Ministers of June 2003 the CMC[84] has widened the scope of application of the regional security scheme to include tobacco smuggling, theft of goods and imitation of goods and has introduced special measures against cross-border cattle smuggling.

Mercosur has thus adopted far-reaching operational measures, but has done so without first harmonising the underlying criminal (procedural) law.[85] Are the States Parties of the opinion that the Treaty of Asuncion does not provide the necessary legal basis for this? Quite the opposite, the prevailing view is that Article 1 TA includes this legal basis. Recital 2 of the legal assistance (criminal matters) agreement of San Luis[86] also expressly refers to the States Parties' compromise to harmonise their internal laws with a view to the common objectives established. In a decision of 2001[87] the CMC assigned a study on the provisions on terrorism in the Mercosur states as compared to the legislation of other countries on the American continent and in Europe. Also in 2001, the CMC[88] decided to elaborate measures for the harmoni-

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80 See *supra*.

81 Note the parallels with the Council framework decision concerning joint investigation teams, O.J. L 162 of 20 June 2002.

82 This is mainly intended for the law enforcement and intelligence agencies of the US.

83 In the US the Patriot Act (post-11 September anti-terrorism legislation) has pulled down nearly completely the partitions between the intelligence services and enforcement bodies (PL 107-56, 2001 HR 3162) and several European countries do follow this path to a certain extent.

84 CMC 05/03.

85 In contrast, see ALVAREZ, A.E., "L'internationalisation du droit pénal. L'exemple du Mercosur", *Revue de science criminelle et de droit pénal comparé*, 1999, p. 741-754.

86 CMC 2/96.

87 CMC 13/01.

88 CMC 3/01.

sation of provisions and penalties concerning smuggling and imitation goods. It therefore looks as if the criminal law harmonisation, especially of substantive criminal law, will be picked up in the coming years.[89] Meanwhile, the Mercosur states have already harmonised a number of offences, such as corruption and money laundering, but this took place based on international obligations assumed in the context of the UN or the OAS. Over the past decade, criminal procedural law in Latin America and in the Mercosur States Parties has modernised considerably.[90] It has proved to be possible, following periods of dictatorship, to organise the criminal procedure system in a constitutional way and to provide the right to be heard in procedures based on the principle of immediacy and thereby to abolish the written and secret prosecution procedures before, sometimes, single judges. By the reform the public prosecutor's office has also been strengthened and organised constitutionally. Remarkably, though, the reforms have not addressed aspects of cross-border cooperation in criminal matters or international criminal law.[91] Still, some[92] already dare to dream of common criminal law jurisdiction within Mercosur.

Conclusion

Mercosur is an intergovernmental organisation,[93] with community objectives, which is directed from the political centres of the States Parties and is therefore greatly dependent upon the political economic cycles in the States Parties. In the short term, this can be an advantage for safeguarding the political feasibility of the project, but in the medium term it is manifestly disadvantageous. Regional integration is not

89 The need for harmonisation is also recognised by the regional forum for criminologists and criminal law lawyers, see *Primeiro Fórum de Criminologia e Política Criminal do Mercosul*, Portalegre, 1998, tópico 4 "Cooperação criminológica-penal internacional" in CERVINI, R. & TAVARES, J., *Princípios de Cooperação Judicial Penal Internacional no Protocolo do Mercosul*, São Paulo, Editora Revista dos Tribunais, 2000, p. 40. See also ALBERTO GONZÁLEZ, C., "La necesidad de armonizar una Justicia Penal transfronteriza en el Mercosur ante el auge del crimen organizado", *Revista del Mercosur*, 1998, p. 18-85.

90 See MAIER, J.B.J., AMBOS, K. & WOISCHNIK, J., *Las Reformas Procesales Penales en América Latina*, Buenos Aires, Ad-Hoc, 2000.

91 In Latin America, this branch of the law is practised exclusively by lawyers who specialise in international law or private international law.

92 CERVINI, R. & VIANA GARCIA, C., "Reflexões sobre um eventual Tribunal Penal Comunitario no Ambito do Mercosul", *Revista da Academia Brasileira de Direito Criminal*, São Paulo, 2000, Ano 1, No.1, p. 56.

93 HAINES-FERRARI, M., "Mercosur: A New Model of Latin American Integration?", *Case Western Reserve Journal of International Law*, 1993, Volume 25, No. 3, p. 413.

always a path strewn with roses and conflict among states, among private entities, be they natural or legal persons, and among private individuals and national and/or regional authorities forms an integral part of regional integration. It is essential that these parties be given the necessary tools and autonomy to enforce their rights. This of course presumes that they are able to invoke the integrated rules and have access to legal remedies which they can use to have their cases decided by an impartial and independent body competent to impose binding decisions on the parties. The history of European integration proves that the Member States alone are unable to realise the regional integration and that a purely intergovernmental model does not suffice. That is not to say that a strong supranational organisation with supranational jurisdiction has to be created at any cost and at once. It is important, however, that some kind of common administration is established, in which national and regional authorities give shape and content to the regional integration through a system of checks and balances. It is also important that an independent body with judicial authority is able to cut knots and take decisions on principles, independent of the economic or political interests of the parties.

Against this background it is clear that Mercosur is struggling with the dilemma between community objectives and intergovernmental instruments. The position of the SAM is very weak and the right to introduce legislation is in the exclusive hands of the States Parties. The entry into force of Mercosur law is too complex and too dependent upon internal procedures and agendas in the States Parties. Because of the non-recognition of the direct effect of Mercosur law the legal subjects have a weak position in domestic law. Mercosur law provides no instruments for forcing compliance either by the States Parties, by Mercosur institutions or by legal subjects. In short, the parties who could ensure the autonomy of Mercosur law[94] are not given much leeway under the intergovernmental structure.

On the other hand, the Mercosur *acquis* as built up over the past decade is not without meaning. With respect to the customs union and the common market significant progress has been made. These are also the areas where the arbitral awards, which are comparable to important case law of the European Court of Justice as regards content and purport, have had an influence. Noteable too is the fact that, despite the as yet only partial realisation of the customs union, considerable action has already been taken in the field of positive integration. Mercosur law is

[94] PALACIO DE CAEIRO, S.B., "El derecho administrativo del Mercosur", *Revista de la Asociación de Magistrados y Funcionarios de la Justicia Nacional*, 2002, p. 131-147.

developing rapidly and the tentative outlines of, for example, Mercosur environmental law, are becoming visible. The same is true of the harmonisation of competition law, trademark law, etc. The States Parties are also aware of the *acquis* that has been built up and do not wish to see it undermined, for example, by *a posteriori* international agreements.[95] However, realism is in order here. The free movement of persons, services and capital is still in its infancy. Recognition of general principles of Mercosur law or references to human rights[96] – as guaranteed by the Inter-American Convention of Human Rights – or to citizenship are still far from sight. The fact stands out that the achieved harmonisation of substantive law has been introduced at the same time as the harmonisation[97] of national enforcement law, including the harmonisation of punitive sanctions. Where competition is concerned, the first hesitant steps towards a supranational competence to impose penalties have been made, a fact which, within an intergovernmental framework, is not self-evident. What is more, the harmonisation of enforcement law also includes areas such as customs, transport, etc. and in this respect therefore surpasses the *acquis* built up in the EC. However, due to the lack of ratification and incorporation, the incorporation of the Mercosur enforcement rules is lagging behind.[98]

The most striking aspect is no doubt that with an incomplete customs union and a common market still waiting in the wings considerable progress has been made in the field of judicial cooperation in civil, criminal and security matters. The dynamism displayed by the Ministers of Justice and of Home Affairs seems to exceed that of the economic Ministries. Within a relatively short time an impressive *acquis* has been elaborated, not only with respect to the regulation of judicial cooperation, but also with respect to immigration, information management and joint operational competence. A cause for concern is no doubt that these

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95 CMC 32/00 provides that States Parties cannot conclude new bilateral agreements in the field of external trade relations and thereby confirms the exclusive competence of Mercosur in this area.

96 PIERINI, A., "Derechos Humanos en el Mercosur, Archivos del Presente", *Revista Latinoamericana de temas internacionales*, 2000, Volume 2, p. 145-152. CAJARVILLE PELUFFO, J.P., "Garantias constitucionales del procedimiento administrativo en los países del Mercosur" in *Principios del procedimiento administrativo de los organos del Mercosur, Actualidad en el Derecho Publico*, Buenos Aires, Ad-Hoc, 1998, p. 25.

97 See TAVARES DE ARAUJO, J. & TINEO, L., "Harmonization of Competition Policies among Mercosur Countries", *Brooklyn Journal of International Law*, 1998, Volume 24, p. 441.

98 ALBERTO GONZÁLEZ, C., "Ante la crisis Brasileña: ¿Que papel podria haber jugado el 'Protocolo de Defensa de la Competencia del Mercosur'?", *Revista de Derecho del Mercosur*, 1999, p. 218-224.

developments are insufficiently linked with the political rights of citizens and therefore remain separate from Mercusor citizenship. The States Parties, partly due to the pressure of the post-11 September context, seem determined to keep adding to the judicial area.

Latin America and Europe share important historical ties and important political and economic relations. Europe believes that the Mercosur countries have an interest in strengthening the integration model and actively supports Mercosur. This in itself need not conflict with the WTO or the US in the framework of negotiations concerning a free trade agreement.[99] However, it is important for the Mercosur countries and for Europe that the regional integration in Mercosur is both widened and deepened. An evident course would be, therefore, to further expand the bilateral cooperation between Mercosur and the EU to include areas such as the free movement of persons, services and capital and judicial cooperation in civil, criminal and security matters.

The external relations of the EU have been intensively increased, not only with third countries and international organisations, but also with other models of community integration, as for instance Mercosur. After 11 September, the EU has used for the first time its competence under Article 38 of the EU Treaty to conclude agreements in the JHA field. Agreements were signed with the USA on extradition and on mutual legal assistance in criminal matters. Europol did sign an agreement with the USA on exchange of data, including personal data. Moreover, service providers, including passenger carriers and credit card companies have been obliged to transfer personal data to USA law enforcement authorities. The increased cooperation between the EU and the USA in the field of criminal intelligence and law enforcement is an important development and can have a spin off for the European criminal justice system. However, in concluding agreements of strengthened cooperation we should not set aside the European *acquis* in the field of fundamental rights, as established under the ECHR, the EU and enshrined in the Charter of Fundamental Rights. Mercosur has planned to establish an internal market with free movement of persons. (Illegal) Migration to Europe is becoming a high priority on the agenda both for the EU and Mercosur. It is time to widen the Interregional Framework Cooperation Agreement between the EU and Mercosur of 1996 to the migration aspects and the aspects of police cooperation and judicial

[99] O'KEEFE, T.A., "Potential Conflict Areas in any Future Negotiations between Mercosur and the NAFTA to Create a Free Trade Area of the Americas", *Arizona Journal of International and Comparative Law*, 1997, Volume 14, No. 2, p. 305; DE AGUINIS, A.M., "Symposium NAFTA at Age One: A Blueprint for Hemispheric Integration? Can Mercosur Accede to Nafta? A Legal Perspective", *Connecticut Journal of International Law*, 1995, Volume 10, p. 597.

cooperation in civil and criminal matters. In the Agreement of 1996 the JHA agenda was limited to drug-trafficking (Article 22). However, by doing so we should build in enforceable instruments for the respect of fundamental human rights. The actual Article 1 of the Interregional Framework Cooperation Agreement between the EU and Mercosur[100] provides that respect for democracy and fundamental human rights, as established by the Universal Declaration of Human Rights inspires the domestic and external policies of the Parties and constitutes an essential element of this Agreement. However, how will this condition clause be enforced by the Contracting Parties? It must be possible for citizens of EU states or Mercosur states to challenge the application of the Agreement for violation of fundamental human rights, making available local remedies and remedies at the ECJ and regional human rights courts.

[100] http://europa.eu.int/comm/external_relations/mercosur/bacground_doc/fca96.htm.

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