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MERCOSUR: A New Model of Latin American Economic Integration?*

Marta Haines - Ferrari**

I. INTRODUCTION

If the salient characteristic of the Latin American economic integration model has been an overcautious attitude on the part of the Member States, the 1991 Treaty of Asunción that posited the establishment of a Southern Common Market (MERCOSUR) between Argentina, Brazil, Paraguay, and Uruguay by December 31, 1994, has only strengthened this characteristic. Such hesitation has been manifested by the constant refusal of the Member States to adopt a supranational juridical model compatible with the advanced systems of integration envisaged. Instead, traditional international law frameworks have been preferred, thus ensuring Member States' full control over the effective realization of integration, even though the agreements lacked the means truly suitable for the purpose. Such a passive compromise reflects an ambivalent attitude on the part of Latin American countries. For example, while aiming to

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* This Article is dedicated to the Director of Legal Studies at Cambridge University, K. Pollock, Fellow of King's College whose teachings made this article possible.

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Since this Article was written, the MERCOSUR Council adopted several important measures designed to further the implementation of the common market at its Second Summit Meeting held at Las Leñas on June 26-27, 1992. The new measures set forth a scheme by which a regime will be established, during the transitional period, for ensuring the free circulation of services and productive factors. In addition, the Council adopted a strategy for the creation of an institutional structure fully capable of implementing the Treaty. The adoption of these measures remedies several of the shortcomings of the Treaty of Asunción that are discussed in this Article.

Despite these positive developments, however, a more serious threat to the achievement of MERCOSUR has arisen. To date, the Parties have failed to coordinate their divergent macroeconomic policies as required by the Treaty. Although numerous working groups have made vigorous efforts to resolve this problem, the results are far from satisfactory. Market asymmetries between Parties continue to severely hinder the harmonization of Member State's macroeconomic policies. As a result, it is unclear whether Member States will be able to effectuate the common market before the expiration of the transitional period on December 31, 1994.

carry out in-depth integration, countries have refused—unlike in the European Community—to surrender sovereignty in favor of community institutions essential for international economic amalgamation.

This lack of compatibility between the juridical institutional framework and stated economic aims has been inherent in all Latin American integration models since integration was first attempted in 1960 under the Treaty of Montevideo, which created the Latin American Free Trade Association (LAFTA). This trend continued in the 1980 Treaty of Montevideo, which established the Latin American Integration Association (LAIA). Both treaties were supposed to establish a Latin American Common Market. In the Asunción Treaty, however, this incompatibility is more striking as the economic commitment for establishing a Common Market has been emphasized more decisively than on former occasions. Indeed, while the central commitment under the Asunción Treaty was the establishment of MERCOSUR by December 31, 1994, any juridical superstructure to enforce this all-encompassing economic mandate is lacking.

On the other hand, MERCOSUR embodies a radical shift of focus in the economic strategy of integration applied by LAFTA and LAIA, both of which were grounded on import substitution policies. Changing trends in the world economy, which required innovative production patterns through improved technology rendered such integration schemes utterly unworkable. In reality, since the mid-1980s, Latin American countries have been driven to reformulate their relationships with one another and with the industrialized world by the need to overcome persistent economic stagnation and increasing international marginalization. Domestic inward-looking policies were abandoned and traditionally enclosed and isolated economies were opened to the world market. Economic growth was no longer to be fostered through import substitution policies, and integration was no longer to be grounded on the regionalization of such policies. Accordingly, block defensiveness shifted to export-based drives since

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integration and external openness were no longer seen as incompatible. MERCOSUR reflects the new role assigned to integration: specifically, to bridge the gap between Member States’ economies and the world economy by seeking international competitiveness of domestic products through technological advancement, rather than by merely increasing intra-MERCOSUR trade. Hence, MERCOSUR was conceived as an outward-looking Common Market, organizing the pooling of Member States’ previously dispersed capacities to accomplish their collective reinsertion into the world market.

From a critical appraisal of the Asunción Treaty and of its predecessor, the 1988 Argentine-Brazilian Treaty of Integration, Cooperation and Development, it will be argued that the failure of MERCOSUR Member States to adopt a supranational legal structure caused them to be unprepared at the time of the Treaty to consent to any irreversible encroachment upon the full sway of national decision-making. Alternatively, perhaps Member States decided to avail themselves of the option of unilaterally maintaining links with third countries and with other economic blocks or, conversely, to deepen the integrative thrust. Such an ultimate outcome seems strongly influenced by the opportunities MERCOSUR may offer States to attain larger international reinsertion on a joint basis rather than on an individual basis. Accordingly, it will be argued that this outcome will determine MERCOSUR’s definitive legal model.

II. IN SEARCH OF A VIABLE FRAMEWORK OF INTEGRATION

A. From Multilateralism to Subregionalization

To frame integration within a supranational legal model has invariably been controversial in Latin America. Undeniably, the juridical nature of legal regimes embodied in treaties aiming at profound integration, like the European Community Treaties, disclose the underlying political willingness by Member States to actually attain such an aim. Hence, cases like the EEC, where states consent to a pre-established irreversible progression towards integration by operation of a self-contained legal superstructure, stand in sharp contrast to those where such a progression is essentially subordinated to direct step-by-step interstate negotiation. In this connection, the existence of sound entrepreneurial interstate networks provides a strong incentive. Actually, when the EEC and the LAFTA Treaties were

8 Paul Reuter, Communautés Européennes et Techniques d'Unification, in LES PROBLEMES JURIDIQUES ET ECONOMIQUES DU MARCHE COMMUN 18 (1960).
respectively concluded, such networks were already fully developed among EEC countries, but not among Latin American nations in 1958 and in 1960. Indeed, at that time, intra-regional relationships were quite meager. On the other hand, for special historic reasons, economic links with world markets were crucial to the autonomous growth and development of Latin American countries. In fact, exports to industrialized markets had provided the basis for the transition from primary to manufactured goods. To overcome this pattern, various Latin American countries began to apply import-substitution policies.

For its part, since the mid-1950’s, the structuralist school of the United Nations’ Economic Commission for Latin America (ECLA) had suggested that the speed of domestic industrialization would be increased if import-substitution policies were grounded on an enlarged regional market, rather than on isolated national markets. Such a regional market would absorb external trade and foster a network of economic interdependence between Latin American countries. Thus LAFTA was set up with the central function of redirecting international trade towards the regional market. Countries would substantially liberalize reciprocal trade, promote sustained development, and eventually establish a Latin American Common Market. However, ECLA’s recommendation to implement this strategy by initially setting up an Economic Preferential Area - consistent with the low regional interdependence - could not be carried out under GATT’s Rules requiring trade agreements to be framed within no less than a Customs Union or a Free Trade Area system, based on the full operation of the Most Favored Nation’s Clause (MFNC) as well as on the reciprocity principle.

Accordingly, under the LAFTA Treaty, the establishment of a Latin American Common Market was agreed upon with the initial basis of this market being a Free Trade Area among Member States.

Although LAFTA was largely influenced by the EEC economic model, it relinquished its supranational legal model, adopting instead a traditional international law framework. Indeed, despite the rigid tariff liberalization scheme inspired by the EEC Treaty, LAFTA Member States

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10 GERALD M. MEIER, LEADING ISSUES IN ECONOMIC DEVELOPMENT 387 (1989).
12 Wionczek, supra note 11, at 47-53.
withheld control over its implementation by adopting an intergovernmental legal structure. Norms automatically triggering cohesion were conspicuous by their absence; tariff liberalization was not to become enforceable pursuant to a pre-determined progressive normative scheme, but instead was to develop through cumbersome negotiation mechanisms, based on product-by-product concessions. In other words, to contemplate integration as a distant goal was acceptable, provided there were no restrictions to free decision-making stemming from a compulsory legal system. In practice, by the Free Trade Area agreement, countries stubbornly retained their sovereignty to govern extra-LAFTA links, sheltered under a legal framework that granted extreme latitude and imposed no commitment to the progression towards integration without their express consent.

Although intra-regional trade increased under LAFTA, it was insufficient to foster domestic development while countries' individual growth had persisted thanks to sustained exports to nations outside the region. As a result, after reducing reciprocal tariffs on non-competitive goods, states continued favoring individual links with extra-regional markets and protecting domestic trade.

In reality, Latin American countries were much too heterogeneous to consent to absolute multilateralization of any tariff concession by the MFNC, or to renounce any tariff to control competition. Such disparities led to stagnation of the integrative thrust. As a result, a Free Trade Area was not established. In Lowenthal's words, "Latin America's industrialization during the 1960s and 1970s was rapid by any standard; the rate of growth is remarkably comparable to that the United States experienced from 1890 to 1914, during the country's industrial transformation."

The 1980 Montevideo Treaty replaced LAFTA with the Latin American Integration Association (LAIA), aiming to relaunch integration through a legal model that established a multilateral system just short of a Free Trade Area - an Economic Preferential Zone. This integration was complemented by subregional agreements as GATT Rules now allowed

15 Johnson, supra note 13, at 717. See also WHITHAKER, supra note 14, at 406 (individual countries retained the right to veto substantive measures); Wionczek, supra note 11, at 42.
16 Johnson, supra note 13, at 719; Wionczek, supra note 11, at 39-42.
18 Johnson, supra note 13, at 720, 728.
19 WHITHAKER, supra note 14, at 405.
these to be set up among the less developed countries. LAIA introduced an innovative technique to by-pass the unconditional application of the MFNC. Two or more Member States were enabled to build bilateral or multilateral discriminatory economic blocks, framed as Partial Scope Agreements (PSA), freezing the operation of the MFNC and curtailing its automatic application. Multilateralization would then take place not automatically but through unilateral negotiations with remaining LAIA Member States. Accordingly, two or more countries would be able to organize integration under the method best suited to their own purposes.

Like LAFTA, the ostensible goal of LAIA was to set up a Latin American Common Market. However, a more flexible model consistent with countries' divergences was agreed upon. To a great extent, LAIA seemed to postpone multilateralization and to foster a juridical framework compatible with major Latin American countries' preferred negotiational mechanism. Indeed, Argentina, Brazil, and Mexico had traditionally tended to establish bilateral links at a regional level, while preserving sovereign governance of their foreign economic policy. Due to the utilization of PSA, an intra-Latin American network of bilateral trade links steadily developed.

However, integration was not yet a priority for Latin America. In fact, LAIA insisted on applying LAFTA's import-substitution policies regionally whereas countries continued favoring world market linkages. Therefore, no supranational mechanisms were foreseen in LAIA. Consensus was lacking for legal integration models operating without States' individual control so that in turn, integration did not develop beyond incipient levels. Again, political willingness failed to support the proper formation of an area of economic preferences.

In the 1970s and 1980s, the oil crises halted Latin American exports to developed markets. As large external debts piled up, most Latin American countries reinstated reciprocal protectionism, while investment in infrastructure and economic activity sharply declined. Industrialization through protectionism did not undergo the drastic international changes of production patterns and Latin America's output fell dramatically. The crucial fact was that Latin America seemed to have no resources to bridge the technological gap it had with international production standards and

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21 Tokyo Round, Habilitation Clause.
23 La Evolución, supra note 22, at 6-7; Radway, supra note 22, at 15.
24 Lowenthal, supra note 20, at 174-176.
to participate competitively in the world markets. This participation could no longer be based merely on natural resources but had to meet innovative technological patterns. In reality, if national development strategies had largely responded to international economic requirements, then this wide-ranging technological gap would not have imposed the need for Latin American countries to search for an innovative breakthrough.

B. The Fore-runner of MERCOSUR: Argentine-Brazilian Integration

In the mid-1980s, with the aim of redefining its development strategies and to overcome international economic marginalization, Argentina and Brazil refocused their relationship with one another and with the industrialized world. Adopting an outwardly orientated approach and attempting to update productive patterns and industrial infrastructure toward achieving international competitiveness, Argentina and Brazil relaunched integration on a new and imaginative basis. Integration was no longer to be regarded as incompatible with the development of extra-regional links and was no longer to be based on rigid, uniform frameworks. Instead, integration was conceived as a strategy enabling domestic production to be increased and enhanced, satisfying the requirements of both the regional and the international market. This strategy was to be implemented through sectorial frameworks, with each sectorial framework applying its own time-tables and techniques. The central goal was not merely to widen commercial linkages, but most importantly, to develop the faltering entrepreneurial networks.

In the context of LAIA’s subregional legal framework (PSA), this process was initiated by the 1985 Iguazu Act, developed by the 1986 Argentine-Brazilian Economic Cooperation and Integration Act, and through the 1988 Argentine-Brazilian Common-Market Treaty, its consolidation was attempted.

The aim of the 1986 Act was to set up a “Common Economic Space.” The central methodological features of the Argentine-Brazilian

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27 La Evolución, supra note 22, at 13.
29 Argentine-Brazilian Iguazu Act, signed at Foz de Iguazu, Nov. 30, 1985.
30 Agreement on Argentine-Brazilian Economic Integration, July 29, 1986, 27 I.L.M. 901 [hereinafter the 1986 Act].
31 See generally Behar, supra note 28, at 529 (referring to frequent failures in and overall pessimism toward Latin American integration).
model were its firm adherence to the principles of gradualness and flexibility. The central conceptual economic guidelines were the principles of dynamic equilibrium and of symmetry. The central implementing technique was integration by sectors that covered diverse productive aspects and not merely commerce. Thus, economic goals were cautiously set up in a progressive and concrete manner. The axis of the 1986 Act was centered in industry and specialization within sectors. Integration was conceived to develop through balanced trade progressing within self-contained sectors. Intrasectorial specialization would arise from the dismantlement of tariff and non-tariff barriers thus resulting in intertwined economic networks. Each sector was separately and specifically regulated by individual Protocols. Each Protocol could contemplate diverse objectives, mechanisms, time-tables, and levels of integration. Under the 1986 Act, twelve Protocols were annexed initially with more following. Protocol 1 stipulated setting up a Common Market for capital goods. Trade was to be attained in a dynamically balanced fashion, so special mechanisms were adopted to foster exports from the country having a deficit. Protocol 5 introduced a Statute for Argentine-Brazilian Binational Companies.

At that stage, no organic structure was adopted to administer integration; its momentum was subject to the governments' annual assessment and decisions. The technique of Protocols allowed governments to deal with reciprocal asymmetries and to introduce necessary adjustments.

Fruitful results attained through this imaginative approach paved the way for an attempt to consolidate integration and to refocus inherent problems that had halted the progress of economic intertwining. However, Argentina's and Brazil's divergent economic policies had hindered basic harmonization between them, so tariff dismantlement had been insufficient in itself to develop intra-sectorial specialization as expected and had failed to avoid the reinstatement of protectionist barriers. The purely sectorial approach was replaced.

The 1988 Treaty of Economic Development, Cooperation and Integration reformulated the instrumental model of the 1986 Act but retained both its conceptual and its methodological approach. Thus, a general economic goal was set: to establish a global Common Market. Additionally, under the principles of gradualness and of flexibility on one

32 See id. at 530 (referring to the preamble, the author states, "balanced trade growth and time for domestic firms to adopt to increased competition").
33 See generally id. at 532 (refers to increasing intra-industry trade pushing integration forward).
hand, and of dynamic economic equilibrium and symmetry, on the other hand, the 1988 Treaty prescribed:

i) a two-phased term for the setting up of the Common Market, following an initial ten-year stage where a diffusely defined “Common Economic Territory” would be formed;\(^{35}\) ii) the gradual reduction, during the initial ten-year phase, of customs duties and non-tariff barriers on goods and services through the coordination of pertinent national economic policies;\(^{37}\) iii) during the second phase, the coordination of economic policies required to constitute a Common Market;\(^{38}\) and iv) the adoption of an intergovernmental system without envisaging any organic structure.

Once again, integration lacked common independent institutions so that tariff and non-tariff dismantlement and domestic macroeconomic and sectorial policies coordination were to be implemented through specific interstate agreements. These agreements were to be ratified by national parliaments as and when required during the first phase of integration and invariably as regards the Common Market phase.

C. A New Model Under a New Administration

The 1990 Buenos Aires Act\(^ {39} \) dramatically shifted the focus of the Argentine-Brazilian economic relationship. Its distinctive characteristics were to resort to an automatic tariff dismantlement system, to stress the coordination of macroeconomic policies, and to institutionalize integration. Thus, the undefined characteristics of the 1988 Common Market Treaty were reformulated in terms of a precise Common Market system. The two-phased sequence was replaced by a single stage and its attainment was advanced by five years. Central mechanisms were a generalized, linear, and automatic tariff reduction scheme, designed to reach zero duty by December 31, 1994, as well as the coordination of macroeconomic policies. A preliminary institutional structure was set up, while the system of protocols was not entirely abandoned.\(^ {40} \)

In 1991, the Treaty of Asunció, which incorporated most of the 1990 Buenos Aires Act provisions, was concluded by Argentina, Brazil, Paraguay, and Uruguay with the aim of setting up a Common Market by December 31, 1994. Since the Argentine-Brazilian agreements remain in

\(^{35}\) Id. art. 1.

\(^{37}\) Id. art. 4.

\(^{38}\) Id. art. 5.

\(^{39}\) “Act of Buenos Aires” signed by Argentina and Brazil in Buenos Aires, July 6, 1990.

\(^{40}\) See Behar, supra note 28, at 529-30; La Evolución, supra note 22, at 13-14.
force, these two countries are participating in two distinct overlapping integration schemes.

D. Preliminary Appraisal

A trend rejecting multilateralism and in-depth integration seems discernible in Latin America. This is manifest in the failure to develop integration beyond incipient levels, as demonstrated by the reluctance to create a Latin American Free Trade Area and to negotiate an Economic Preferential Area under the 1960 and 1980 Treaties of Montevideo. Accordingly, countries would not be willing to consent to legal integration models operating without their full individual control. This unwillingness appears to have permeated the Asunción Treaty. Under this treaty, the Member States, while expressly agreeing to attain full implementation of a Common Market by December 31, 1994, have not yet consented to a legal framework capable of developing a relentless progression toward such a goal.

In reality, MERCOSUR should be understood as a subsystem operating within LAIA's global framework, more specifically, as a Partial Scope Agreement. It may be recalled that, within each such subsystem, concessions granted between its Parties are not automatically extended to remaining LAIA Member States. In fact, the four MERCOSUR Member States participate in a wide network of overlapping independent agreements.

Against the above background, an analysis of the Asunción Treaty will be attempted. After a general discussion of the methodology adopted to implement MERCOSUR by December 31, 1994, it will be argued that the Asunción Treaty, far from embodying a single agreement to establish a Common Market, contains two separate overlapping agreements. On one hand, there is an agreement stipulated under a compulsory legal framework leading to the establishment of a Free Trade Area alone which does not prevent Member States from maintaining integration links with other countries. On the other hand, there is an agreement for Member States to carry out negotiations conducive to the setting up of a Common Market. In other words, an agreement that would be consolidated provided there existed political consensus to the strictures upon independent trade relations necessarily implied in the implementation of such a market system.

The following analysis of the Asunción Treaty has been organized in two parts. First, the Treaty's textual contents will be discussed regarding efficacy to achieve its Common Market goal (Part I). Later, an attempt will be made to discuss the rationale underlying its model in light of viability to translate into juridical terms the actual political decision of Member States to establish a Free Trade Area system or a Common Market system (Part II).
III. THE MODEL OF THE ASUNCIÓN TREATY: PART I

A. Describing the Treaty: Is the Treaty's Legal Machinery Viable?

By the Asunción Treaty (hereinafter Treaty), Argentina, Brazil, Paraguay, and Uruguay agreed to the establishment of the Southern Common Market (MERCOSUR) by December 31, 1994.\(^1\)

The Treaty marked a drastic methodological and conceptual departure from the model adopted by the 1988 Argentine-Brazilian Common Market Treaty. In methodological terms, the diffuse definition envisaged by the 1988 Treaty was reformulated as a global and comprehensive Common Market system: the two-phased sequential strategy was replaced by a single stage, and an organic structure was introduced in contrast to the model of the 1988 Treaty where Argentina and Brazil handled the progress of integration without formal institutions.

On the other hand, the Treaty adopted the principle of full reciprocity of rights and obligations.\(^2\) In this way it abandoned the concept of dynamic equilibrium and of symmetry applied by the Argentine-Brazilian Agreements.

Through a brief text comprising 24 Articles and 4 Annexes, the Treaty organized the legal machinery grounding the establishment of MERCOSUR during the time between its ratification and December 31, 1994, termed as the "transitional period."\(^3\)

Adopting a conceptual framework of a common market system founded upon the "four freedoms" as set forth in the EEC Treaty: free movement of goods, services, persons, and capital;\(^4\) article 1 of the Treaty categorically mandated the establishment by December 31, 1994, of MERCOSUR, a system that implied:

- The free movement of goods, services and other productive factors between Member States by means of, among others, the elimination of customs duties and of non-tariff restrictions and of measures of equivalent effect to the circulation of goods;
- The establishment of a common external tariff and the adoption of a

\(^{1}\) Treaty of Asunción, supra note 1, art. 1. See also Garre Coppel, EL TRATADO DE ASUNCIÓN Y EL MERCADO COMÚN DEL SUR (1991); Abreu Bonilla, MERCOSUR E INTEGRACIÓN (1991); Julio María Sanguinetti, ET AL., URUGUAY Y EL MERCOSUR (1991); Magarinós, URUGUAY EN EL MERCOSUR (1991).

\(^{2}\) Treaty of Asunción, supra note 1, art. 2.

\(^{3}\) Id. art. 3.

\(^{4}\) EEC Treaty, supra note 2, Title 1 & Title 3 (Title 1 establishes free movement of goods, while Title 3 establishes free movement of services, persons, and capital).
common trade policy with regard to third states or blocks of states and the coordination of positions at regional and international economic-trade forums;
- The coordination of macroeconomic and sectorial policies between Member States as regards foreign, agricultural, industrial, fiscal, currency, exchange and capital, as well as services, customs, transport, communications and other areas to be agreed upon, in order to ensure adequate competitive conditions between Member States;
- The commitment of Member States to harmonize their legislation in pertinent areas to strengthen the process of integration.  

Article 2 established that; "[t]he Common Market shall be founded on the reciprocity of rights and of obligations among Member States."  

These provisions enshrined the new focus of the Treaty of setting up a fully-fledged market system within the span of a single and remarkably brief stage. This happened without granting differential treatment to Paraguay and Uruguay, consistent with relatively lower economic development levels, contrary to LAIA.  

Also an extension of the December 31, 1994, deadline was not contemplated by the Treaty.  

Against this general background, an attempt will be made here to discuss the feasibility of the Treaty's legal model to carry out the Article 1 obligational framework, through a compatibility appraisal of the mechanisms and techniques prescribed to implement its foundational component freedoms.  

It will be argued that the juridical machinery inherent to the Treaty is inviable, per se, to ground as from January 1, 1995, throughout the territories of the Member States such a market system.  

This analysis will be mirrored against the concise statements that since a Common Market system "amounts to assimilating economic activity between individuals and undertakings in different Member States to economic activities within a single state. The legal implications are quite considerable..." and therefore require "the creation of a sound common juridical infrastructure for the ensemble of economic operators within a space such as that of the Community."  

Foundational treaties setting up profound integration systems, as the EEC Treaties, provide for such a structure either through treaty norms or

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45 Treaty of Asunción, supra note 1, art. 1.
46 Id. art. 2.
47 Lack of such a differential treatment breaches LAIA specific provisions found in Chapter III of the 1980 Montevideo Treaty. MAGARÍNOS, supra note 41, at 57; COPELLO, supra note 41, at 144-45.
49 P. Leleux, Écrits de Droit Européen, in CAHIERS DE DROIT EUROPEEN 89 (1980).
by entrusting enactment to community institutions. Strikingly, in this respect, the juridical corpus of the Asunción Treaty is insufficiently developed either at an instrumental or institutional level.

In other words, the Asunción Treaty lacks not only a coherent comprehensive normative body, but it also lacks a fully developed institutional structure capable of remodelling municipal legislation in order to ensure (throughout the MERCOSUR area) unhindered movement and non-discriminatory access to the development of economic activities by citizens of any Member State. Thus their assimilation would be comparable "to economic activities within a single state," as mandated by Article 1.

In reality, at variance with Article 1, the Treaty’s instrumental mechanisms and institutional tasks focused on carrying out a single foundational freedom of the Common Market, the liberalization of goods circulation between Member States, to the detriment of the remaining freedoms, which the Treaty regulated in a vague and non-committal way. On one hand, the attainment of unrestricted circulation of interstate goods at the end of the transitional period was precisely organized through a strict compulsory regime and its administration was concretely entrusted to MERCOSUR organs. However, the free interstate movement of services, person, and capital between national territories, as well as the establishment of a common external tariff towards third countries, agreed to be attained together with goods liberalization by December 31, 1994, failed to enjoy equivalent compulsive instrumental and institutional support. No precise instruments or timetables were foreseen, nor their enactment overtly entrusted to MERCOSUR organs, thus deepening the dichotomy.

Actually, as long as the Treaty skirted the sensitive sovereignty issues, stipulated norms were suitably binding, but whenever the slightest encroachment on this aspect occurred (i.e., as to the institution of the Common External Tariff, or the free movement of services and of other productive factors) rules became less stringent.

Admittedly, generic suppression of restrictions to access a state’s domestic economy by other state’s citizens tends to be strongly resisted since it ostensibly impinges on the core of national sovereignty. Such an ambivalent attitude was also apparent in the European Community:

This original construction explains the permanent tensions that have

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50 See W.J. Ganshof Van Der Meersch, Organizations Européennes 439-40 (1966) (contrasting the BENELUX case with the EEC system).
51 Magarinos, supra note 41, at 101; Copello, supra note 41, at 213-14.
52 Wyatt & Dashwood, supra note 48, at 21. See also Leleux, supra note 49, at 89.
signalled its first twenty years' history, tensions provoked by the historically inevitable persistence of strongly structured state formations linked, on one hand, to the state-nation phenomenon and to the dynamics inherent to an organization whose role is to ensure progressively an economic integration.53

However, the feebleness of the Asunción Treaty's juridical model is reflected by the skewed treatment given to liberalization measures concerning persons and capital movements - measures which are instrumentally functional as feature-modelling of market integration. Undeniably, these were also sensitive issues in the EEC case.54 Notwithstanding these issues, however, the formation of a European common market system was clearly organized on the basis of concrete treaty norms and institutional procedures covering the global liberalization of goods and productive factors together with the reformulation of competition rules. Thus, the EEC Treaty "creates first and foremost a custom union, but it goes further than that, it founds a 'common market.'"

The distinction is that whereas both free trade areas and customs unions are in their nature concerned with eliminating tariff and non-tariff barriers to trade between their members, a Common Market has two additional features. First, it seeks to remove obstacles to the free movement of factors and production; at any rate labor and capital. Secondly, the Common Market adopts an extended notion of the non-tariff barrier to trade.55

From this angle, it is evident that MERCOSUR was approached by Member States in an extremely cautious and contradictory fashion. However, if over-cautiousness may be understandable (see e.g. the Single European Act56) the unnecessarily rigid methodology adopted rejecting the 1988 Argentine-Brazilian Common Market Treaty and the EEC Treaty gradualness principle is certainly not.57

53 Leleux, supra note 49, at 17.


55 Wyatt & Dashwood, supra note 48, at 21.


57 Gradualness was enunciated in the Treaty's Preamble.
Strikingly, after adopting an explicit unconditional commitment to establish a fully-fledged Common Market system within an impressively short timeframe, Member States neglected to provide such a commitment, unlike the EEC countries, with a self-sufficient juridical corpus to bring it about. In other words, MERCOSUR was not framed within an autonomous juridical corpus independent from and supreme to the Member States in contrasting to EEC countries. The EEC Common Market was grounded on a model whereby the “[c]ommunity Law is . . . the autonomous law of an association of States . . .” It consists of “an organized system governed by its own legislative, judicial, and supervisory bodies.” To follow the EEC legal model would have required MERCOSUR parties to agree coherently, like the EEC countries, to extrapolate national governance over economic spheres subject to integration within a supranational legal framework. This would have been accomplished by enshrining supranational norms in the Asunción Treaty and by endowing MERCOSUR organs with sovereign powers so as to impress their regulatory acts with supranational legal force vis-à-vis national legal systems. “Community law and the legal systems of the member states operate in overlapping spheres. Community law is superior in the sense . . . that it restricts the sovereignty of member states.” The surrender of sovereignty implied in this kind of international arrangement was totally rejected by MERCOSUR parties since “the establishment of a new unit transcending individuals means — and it seems . . . that this is a general principle of law that the members are subject to measures taken by the law-making body in conformity with a treaty.”

In contrast, Member States zealously withheld their full governance over the whole spectrum of their economies, subordinating the progression of market integration to direct negotiation and control. Indeed, MERCOSUR Member States opted to frame integration under traditional international law. In so doing, the realization of the Treaty was assigned a different juridical effectiveness than the juridical effectiveness that would have occurred had a supranational framework been adopted. Essentially, the progression of integration was to leave intact national sovereignty; regarding its subject matter, the formation of MERCOSUR was not to imply a juridical construction possessing its own sovereign say upon national jurisdictions. In other words, in concluding the Asunción Treaty, countries made no transfer of sovereignty to MERCOSUR, but remained

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60 Hallstein, supra note 58, at 20.
61 Magariños, supra note 41, at 86-89 (see discussion on Andean Group scheme).
exclusive masters of authority, consistent with the traditional concept of sovereignty, a concept which is:

described in positive terms as the oneness of the legal system within the territory of a state. Oneness does not exclude plurality of laws within the system . . . but implies one supreme source of law . . . the jurisdiction over the territory is in the hands of one authority . . . which is supreme. In negative terms sovereignty means a system of law and administration of justice which is free from outside interference.62

In contrast, the construction of the European Community involved a reformulation of this concept since:

[proceeding from the assumption of the oneness of the legal system [of] the Member States of the Community are not entirely sovereign for, by [the EEC] Treaty, they have delegated a portion of their law-making power to an external authority (the Community) and at the same time consented to abide by the law so made.63

Against the above analysis, the viability of the juridical structure provided by the Treaty to set up MERCOSUR will be discussed from a threefold perspective:

A) Mechanisms provided by the Treaty were restricted to liberalizing goods circulation between Member States, but failed to deal consistently with the implementation of the Common Market mandated by Article 1. Namely, the liberalization of movement of services, persons, and capital, as well as the establishment of the Common External Tariff was not dealt with consistently.

B) The juridical nature of MERCOSUR's institutional structure created to administer the setting up of the Common Market was of a purely intergovernmental nature with no community organs prescribed nor expressly foreseen. This structure functioned under strictly traditional International Law, leaving no room for supranational features. Therefore, the basic issues of the Common Market had to be negotiated by Member States themselves since, arguably, such a function was not entrusted to MERCOSUR organs.

C) Treaty rules governing inter-Member States relations during the transitional period allowed their continued participation in pre-existing international agreements and their entering into new ones. This was precisely the case of the 1988 Argentine-Brazilian Integration Treaty that

63 Id. at 326. See also Bonilla, supra note 41, at 63-66, 72-77; Coello, supra note 41, at 11-117, 123-25, 135-37.
contemplated the establishment of a Common Market by December 31, 1994.

B. The Treaty at Work

1. Implementing Mechanisms

a. Stating the Mechanisms

The Treaty mandated the global establishment of a Common Market (MERCOSUR) during the transitional period. Accordingly, core mechanisms were stipulated by Article 5, complemented by other Treaty norms. Article 5 provides:

The main instruments to set up the Common Market during the transitional period shall be:

a) a Programme for Commercial Liberalization, consisting of progressive, linear and automatic tariff reductions, accompanied by the abolition of non-tariff barriers or measures of equivalent effect, as well as of other restrictions to interstate trade, to reach December 31, 1994 with zero duty, without non-tariff restrictions over the whole tariff universe;

b) the coordination of macro-economic policies to be carried out gradually and in convergence with the tariff dismantlement and non-tariff abolition Programmes stated in a);

c) a Common External Tariff fostering foreign competitiveness of Member States; and

d) the conclusion of sectorial agreements to optimize production factors utilization and mobility and thus attain an efficient operative scale.

In addition, Article 3 provided that to further the constitution of the Common Market during the transitional period, a General Regime of Origin, a System to Solve Controversies, and Safeguard Clauses were thereby adopted by Member States. Under Article 6, Paraguay and Uruguay were granted differential treatment, specifically in relation to the rhythm of trade liberalization. Article 7 stated the principle of national treatment for goods. It provided that products originating from any Member State were to enjoy national treatment in the other Member States with respect to taxes, tariffs, and other internal charges.

64 Treaty of Asunción, supra note 1, art. 1.
b. Applying the Treaty's Mechanisms

i. Free Movement of Goods

(a) Tariff Dismantlement

With the enforcement of the Treaty, a regime for interstate goods liberalization became compulsory. Its central mechanism, the Commercial Liberalization Programme (CLP), was complemented with Rules of Origin, with a scheme of Safeguard Clauses, and with a System to Solve Controversies. This was the only context where progressive and automatic principles were prescribed. Moreover, these principles were framed under strictly peremptory unextendable terms.

Thus, by effect of the CLP, an irreversible process of reciprocal tariff dismantlement began to take place throughout Member States' jurisdictions. The Program operated in an automatic, progressive, and linear way, covering the whole spectrum of goods. Its purpose was to eliminate all restrictions to reciprocal trade by December 31, 1994, when zero duty should be achieved. Initially, by June 30, 1990, the rate to be decreased every semester was 47 percent. A limited fixed number of goods were excluded from the Program and incorporated to "Exception Lists," which were also subject to a rigid reduction time-table to meet the 1994 deadline for Argentina and Brazil, and the 1995 deadline for Paraguay and Uruguay. This was the only exception admitted to the Treaty's reciprocity principle. Here, however, Member States retained sovereignty to decide upon goods to be removed and to become subject to the Program. An inflexible scheme of safeguard clauses also allowed goods to be momentarily removed from the Program. The operation of both the "Exception Lists" and the "Safeguard Clauses" were due to expire on December 31, 1994. Precise "Rules of Origin" were prescribed.

The main aspect here was that no room for negotiations between Member States was left and that the weak consensus exhibited by LAFTA and LAIA through their cumbersome product-by-product negotiation mechanism, was drastically superseded.

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65 Id. art. 5(a).
66 Id. art. 3 (as developed in extenso through annexes I, II, III, and IV respectively).
67 Id. art. 2.
68 Id. annex I.
69 Id. annex IV.
70 Id. annex II.
71 MAGARÍNOS, supra note 41, at 78-79.
(b) Non-tariff Dismantlement

Contrary to tariff barriers dismantlement, Article 5(b) failed to organize the elimination of non-tariff barriers in any specific way other than through the coordination of national economic policies. Although no time-tables were pre-established, Article 5(b) prescribed that coordination had to be carried out in convergent fashion with the “Commercial Liberalization Program” for the purpose of ensuring its proper fulfillment. Nevertheless, non-tariff barriers could subsist up to December 31, 1994.\(^{72}\)

ii. The Institution of a Common External Tariff and of Free Movement of Productive Factors

(a) The Scope of Article 5

In contrast to liberalization of interstate trade, Article 5 provided no specific mechanisms to implement the establishment of a Common External Tariff and a Common External Commercial Policy toward third countries or to institute free circulation of services, persons, and capital between territories of Member States. In reality, the realization of these foundational components mandated by Article 1 to be operative concurrently with goods liberalization as from January 1, 1995, was not grounded, unlike the latter freedom, on a compulsory instrumental framework nor was its later introduction peremptorily envisaged, whether by MERCOSUR ordinary institutional activity or by provisions otherwise prescribed by the Treaty.\(^{73}\)

Indeed, if Article 5 conceivably purported to furnish an all-inclusive instrumental scheme to set up MERCOSUR consistently with the Article 1 model — as would have been expected from its ambitiously comprehensive declaratory terminology stating “the main instruments to establish the Common Market during the transitional period” — it singly failed to do so. In practical terms, Article 5 provided two separate central mechanisms to implement MERCOSUR, both essentially focused on goods liberalization alone: on one hand, the Commercial Liberalization Program (Article 5(a)); on the other hand, the coordination of national macroeconomic and sectorial policies (Article 5(b)). Whereas the former was specifically formulated for free goods circulation, the latter, after being globally enunciated was narrowed down to strengthen the CLP, and entirely neglected to mention free services, persons, and capital circulation.\(^{74}\)

In article 5(c), laconic wording was hardly explicit in its mention of

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\(^{72}\) Treaty of Asunción, supra note 1, annex I, art. 10.

\(^{73}\) MAGARIÑOS, supra note 41, at 63-66, 72-76; SANGUINETTI, supra note 41, at 64-66.

\(^{74}\) SANGUINETTI, supra note 41, at 64.
the common external tariff towards setting up MERCOSUR while refraining from regulating its actual implementation.\textsuperscript{75}

Article 5(d) stated the utilization of Sectorial Agreements among its authorized instruments, including the central Argentine-Brazilian technique which failed to mesh operatively with the Asunción Treaty global model.

In a nutshell, the five aims comprising the integrated market's essential foundational freedoms and the common external tariff framing the common customs territory, plus the mechanisms provided for their fulfillment, boiled down to no more than two operational mechanisms barely sufficient to implement a single freedom - the free circulation of goods.\textsuperscript{76}

(b) Beyond Article 5

Having exhausted the resources contemplated in Article 5, it is found that throughout the Treaty no other provisions specifically deal with mechanisms designed to enable citizens and companies from any Member State to work, provide services, establish, set up companies, and invest within any other Member State.

Arguably, these sensitive issues, all of which Member States agreed to adopt within domestic jurisdictions during the transitional period in order to accomplish the realization of MERCOSUR as from January 1, 1995,\textsuperscript{77} were left in a legal void.\textsuperscript{78} Therefore, authority for their realization can only be gleaned by going back to the general commitment assumed by Member States in Article 1 itself: to coordinate macroeconomic and sectorial policies and to harmonize pertinent national legislation.

Against such a general commitment, it is contended that a different methodology to that applied for goods liberalization is apparent here; instead of providing a compulsory systematic scheme of general norms and time-tables, of guiding principles and global schedules in accordance with the specificity of each of the three remaining freedoms and of the common external tariff, the Treaty loosely organizes a scheme for Member States to negotiate for themselves the progression towards MERCOSUR — beyond its commercial aspects.\textsuperscript{79}

The operation of this negotiation scheme was totally left to the initiative of Member States. The Treaty provided no timetables or

\textsuperscript{75} MAGARIÑOS, supra note 41, at 77, 78-79.
\textsuperscript{76} Id. at 83, 101 (discussing the difficulty in establishing the common external tariff while Member States are allowed by the Treaty to continue participating in extra-MERCOSUR integration schemes).
\textsuperscript{77} Treaty of Asunción, supra note 1, art. 1.
\textsuperscript{78} MAGARIÑOS, supra note 41, at 79; BONILLA, supra note 41, at 66-68.
\textsuperscript{79} COPELLO, supra note 41, at 118, 119, 211; MAGARIÑOS, supra note 41, at 78.
 compulsory principles to be observed.\textsuperscript{80} It only organized its procedural infrastructure within the MERCOSUR institutional framework, through creation of various Working Groups\textsuperscript{81} at whose level (pursuant to Common Market Group instructions) interstate negotiations for coordination of national macroeconomic and sectorial policies and harmonization of national legislation, under Article 1, were to be initiated.

Arguably, as will be discussed in Part II, the development of these mechanisms was not contemplated by the Treaty as ordinary courses of action following a pre-established progressive development and was not included among the ordinary tasks of MERCOSUR's organs. On the contrary, the Treaty's actual juridical corpus fell short of MERCOSUR's extra-commercial objectives. Therefore, Member States themselves appear to have decided to discuss and negotiate the implementation of all remaining constituent aspects of MERCOSUR rather than to include such policy decision-making among MERCOSUR organs' ordinary tasks.

This would explain why no conceptual principles or guidelines governing coordination and harmonization actions under Article 1 were stipulated and why tariff dismantlement was the sole mechanism of automatic application. It would also explain that because the latter had already been negotiated, its implementation was readily incorporated to the Treaty. However, the former had not yet been negotiated at the time of the Treaty, although later agreements between Member States would presumably provide the rules governing their realization.

Admittedly, Article 5 did not preclude the employment of additional instruments since its text was qualified as a stipulation of "main instruments." However, silence regarding the free movement of services, persons, and capital and imprecise reference to the common external tariff were suggestively at odds with the needs of the market system heralded by Article 1. It is likewise suggestive that the most substantive treaty norms were explicitly devoted to regulating interstate trade while the remaining freedoms received little attention. Indeed, closer dovetailing would have been expected to synchronize the attainment of the four freedoms within the global single-phased framework categorically stated in Article 1 but dismally implemented thereafter.

Moreover, the Treaty failed to prescribe the principle of non-discrimination. Crucially, such a foundational framework to market integration was disregarded, contrasting with Article 7 of the EEC Treaty. In the latter, in addition to being generally stated, the principle was developed throughout the Treaty in the spheres of services, persons, and

\textsuperscript{80} AUSSANT, supra note 54, at 11.
\textsuperscript{81} Treaty of Asunción, supra note 1, annex V.
capital, as well as being reaffirmed by the Single European Act.\textsuperscript{82}

From this angle, the EEC's supranational dynamics\textsuperscript{83} are vividly discernible, particularly in its normative and institutional interplay. Indeed, through the combined operation of the principles of progressiveness and of non-discrimination stated by Articles 8 and 7 of the EEC Treaty, and of their implementation by normative activities of the Community organs, the overall integrative thrust can be projected beyond national legal restrictions.\textsuperscript{84} This interplay takes place on the basis of the Treaty providing "a pattern of requiring the progressive removal of restrictions on free movement, the abolition of discrimination in the application of national rules, and refrain from introducing new restrictions on free movement,"\textsuperscript{85} coupled with the European Court activism.\textsuperscript{86}

A marked contradistinction is evident in the methodology actually agreed upon by MERCOSUR countries. As we progress through the Asunci6n Treaty, we find it speedily looses stringency and fast acquires purely declamatory content, as the few concrete compulsory norms become increasingly diluted with non-enforceable provisions. This is apparent inasmuch as:

i. with respect to tariff dismantlement, a strict attitude is discernible on the part of Member States, in their adopting a compulsory regime, rigidly scheduled, highly restrictive, and narrowly allowing Paraguay and Uruguay to opt out of the Treaty's reciprocity principle;\textsuperscript{87}

ii. with respect to non-tariff dismantlement, Member States also agreed to the compulsory nature of implementation through policies coordination, although here no rigid rules were prescribed other than a

\textsuperscript{82} JACQUES SCHWOB, LES ORGANES INTÉGRÉS DE CARACTERE BUREAUCRATIQUE DANS LES ORGANISATIONS INTERNATIONALES 30 (Etablissements Emile Bruylant, S.A., 1987).

\textsuperscript{83} See DAILLIER, supra note 54, at 38-40 (Article 235 of the EEC Treaty enabled the EEC institutions to overcome the limitation of Article 27 to establish the Common External Tariff).

\textsuperscript{84} F. BURROWS, FREE MOVEMENT IN EUROPEAN COMMUNITY LAW 166 (1987).

\textsuperscript{85} Leleux, supra note 49, at 20 (discussing the EEC's application of progressiveness as a tool to facilitate integration, therefore certain requirements, like national implementation of Community measures would not be accepted to operate as a suspensive condition). In this respect, see WYATT & DASHWOOD, supra note 48, at 129 (discussing the European Court holding that: [t]he fundamental principle of a unified market and its corollary, the free movement of goods, must not under any circumstances be made subject to the condition that there should first be an approximation of national laws for if that condition had to be fulfilled the principle would be reduced to a mere cipher).

\textsuperscript{86} For an opposite view, see G. Hunt, MERCOSUR: situación y perspectiva, COMMUNITAS 25 (Nov., 1992).

\textsuperscript{87} Treaty of Asunción, supra note 1, art. 5(a), annexes I-IV.
general directive of convergence with the CLP.

iii. with respect to the implementation of the Common External Tariff and the free movement of remaining productive factors, a total lack of compulsiveness existed. Such crucial components of market integration had not yet been negotiated by Member States at the time of the Treaty. Therefore, no concrete commitments to implement these matters were adopted at the outset. Instead, a scheme was organized for the Member States to decide upon such unnegotiated matters during the transitional period. It was not grounded on the specific instrumental framework of Article 5, but on the general juridical framework of Article 1.

Indeed, the awareness that the core of any market integration inevitably impinges on national sovereignty explains the choice of a non-binding negotiational scheme, lumped within the overall framework of macroeconomic coordination and harmonization of national legislation under Article 1.

Within this latter awareness, perhaps even more crucially, the nonoperation of drastic coordination with regard to the abolition of non-tariff barriers would pose a severe hindrance to the accomplishment of the zero duty goal, even jeopardizing the realization of free goods circulation.

2. Completing the Treaty

Guidelines were decided upon at the Heads of State Council Summit Meeting on June 26, 1984, at Las Leñas, Mendoza, Argentina, when an executive schedule of measures was approved to define both the contents and the methodology by which the Common Market was to be set up before the December 31, 1994 deadline, prescribed by Article 1 of the Asunción Treaty.

Subject matter included the establishment of the Common External Tariff and economic policies coordination together with the formulation of a definitive institutional structure. However, substantially, Las Leñas Decisions barely surpassed commercial issues. Furthermore, decisions required parliamentary approval.

3. Institutional Structure

As observed from the instrumental viewpoint, Member States also adopted an overly cautious attitude in the institutional context. Thus, the
Treaty established a provisional organic structure to function during the transitional period and stated that the definitive system of the Common Market organs, their specific competencies, and decisional procedures were to be determined at an extraordinary meeting convened by Member States before the expiration of the transitional period on December 31, 1994.91

The temporary model adopted for organs and procedures was of a purely intergovernmental nature with no supranational organs or procedures expressly provided or foreseen. Thus, the structure was designed to function strictly under traditional International Law, leaving no room for supranational features,92 in accordance with the attitude of Member States discussed in relation to the Treaty's mechanisms. Basic issues were not entrusted to MERCOSUR organs, as prior negotiations by Member States themselves had to take place.

Accordingly, MERCOSUR was conceived as a cooperative organization, described as being characterized "by their respect for the sovereignty of States; they imply no transfer of competencies neither do they possess — in principle — more than a very limited authority of their own." In contrast:

integration organizations set in motion a dynamic process whereby their citizens interpenetrate within the context of a wider ensemble where nationality tends to lose its significance. Such organizations are, therefore, characterized both by their being endowed with certain competencies pertaining to the states and by the importance of their powers, including decisional powers, the enactment of compulsory community legislation, the supremacy of such community legislation, its direct applicability and majority procedural techniques.93

The Asunción Treaty did not include any of the latter formulae. Two main organs were set up: The Council of Ministers (Council) and the Common Market Group (CMG).94 The Council is comprised of Member States' Ministers of Foreign Affairs and Economic Ministers,95 and was conceived as the supreme organ of MERCOSUR, entrusted with policy-making and normative functions conducive to the implementation of the objectives and timetables prescribed for the establishment of the Common Market.96 It meets at least once per year and as often as deemed necessary beyond that. Heads of State Summit Meetings must also be

91 Treaty of Asunción, supra note 1, art. 18.
92 SCHWOB, supra note 82.
93 Id. at 30.
94 Treaty of Asunción, supra note 1, art. 9.
95 Id. art. 11.
96 Id. art. 10.
The CMG that is comprised of representatives of Member States Foreign Affairs and Economy Ministries and Central Banks was conceived as the executive organ, entrusted to supervise the fulfillment of the Treaty. It was granted broad initiative functions, excizable through proposals of concrete measures for the application of the Commercial Liberation Programme, the coordination of macroeconomic policies, and the negotiation of agreements with third countries, through the adoption of concrete measures to implement Council decisions, and through the establishment of Working Group programmes ensuring progression towards the constitution of the Common Market.

In compliance with Treaty directives, a system of solving controversies with compulsory ad-hoc arbitration was decided upon by the 1991 Protocol of Brasilia. The Protocol was also subject to congressional approval. Additionally, a MERCOSUR Parliamentary Committee was set up with members chosen from all four national parliaments.

4. Institutions at Work

Institutional powers have been restricted to the administration and execution of trade liberalization issues, while activities concerning the implementation of remaining components of MERCOSUR were left to the initiative of the individual Member States. Indeed, MERCOSUR organs lacked policy and law-making competence to enact legislation conducive to fully implementing the Common Market. Only Member States themselves could bridge the gap and provide valid contents to the overall framework established by Article 1.

In other words, there were no supranational consequences attributed to the MERCOSUR juridical and institutional arrangement, either at the decision-making stage or enforcement stage of integrative measures; neither were there organs whose functions would disclose definitive autonomous powers. Alternatively, organs were mere delegates of the Member States. Thus, the latter’s consent is essential to validate both the enactment and the enforcement of MERCOSUR legislation. As regards enforcement, unlike EEC Law, MERCOSUR legislation is dependent upon the intermediacy of Member States’ legal systems, wherein each system determines the method of insertion, the rank, and the enforceability upon its citizens and enterprises. This results from the international law
framework adopted by MERCOSUR countries:

[Community law is substantially different from traditional international law. It differs functionally, at least, from a double viewpoint: as a rule, it is directly applicable, exceptionally it is restricted to obligatory relations between Member States and the Community. We know that the opposite happens at public international law. In addition, it consists of an organized order, ruled by "legislative, . . . executive and . . . jurisdictional organs."]

Countries' control over the actual realization of integration was foremostly centered at the stage of enforcement: "the crucial problem is as to knowing whether decisions adopted by Community Institutions may be directly applicable to private undertakings and individuals. It is here that the idea of supranationality really lies, which implies that Community Institutions decisions have as their immediate [destinataries] such persons and undertakings."

5. Inter-Relationship of Member States.

Article 8 prescribed the following regime:

Member States agree to preserve commitments assumed to date, including accords concluded within LAIA's context, and to coordinate their positions in external trade negotiations undertaken during the transitional period.

Accordingly

a) Member States will avoid affecting one another's interests in trade negotiations concluded inter se;

b) Member States will avoid affecting the interests of remaining Member States and the Common Market objectives in future agreements concluded with other LAIA Members during the transitional period;

c) Member States will hold consultations inter se whenever broad tariff dismantlement schemes leading to the establishment of Free Trade Areas with remaining LAIA Members are negotiated;

d) Member States will automatically extend to other Member States any advantage, favour, concession or privilege granted upon products from or to third non-LAIA Member countries.

By means of this provision, the Treaty established a relatively flexible
framework for the relationship of MERCOSUR Parties during the transitional period. In particular, Member States were not barred from simultaneously participating in other discriminatory economic blocks, whether intra- or extra-MERCOSUR.

Strikingly, the Treaty froze the operation of the Most Favored Nation’s Clause (MFNC) with respect to new or pre-existing integration agreements concluded between two or more MERCOSUR Member States or with LAIA Member States, without the benefits granted being automatically extended to remaining Member States. In contrast, the MFNC was fully applicable to benefits granted by individual Member States to third countries. Thus, notwithstanding that the 1988 Argentine-Brazilian Common Market Treaty and the Asunción Treaty pursue the same goals, Argentina and Brazil would keep their bilateral links, with their own integration Programme - currently in an advanced stage of development - independent from the Asunción Treaty. Hence, two overlapping juridical frameworks inhere, postulating diverse integration links between the same Member States.104

Such a discriminatory framework actually represents LAIA’s main mechanism to promote integration; LAIA sought to solve the inconsistency of subregionalization within multilateral regional groupings as a strategy to allow the gradual increase of integration among Latin America’s heterogeneous and diversified economies.

The legal framework to all these arrangements is provided by Partial Scope Agreements (PSA) under LAIA. PSA are defined by the Treaty of Montevideo as a mechanism concluded among less than the full membership.105 Since MERCOSUR was framed as a PSA, benefits granted within its framework are not automatically extended to the rest of LAIA Member States.

In fact, as LAIA Members, MERCOSUR Parties may and actually do participate in a wide network of isolated economic linkages, founded upon the PSA legal framework. The Asunción Treaty is not the sole agreement designed to establish far-reaching integration among its Members: Argentina and Brazil are parties to the 1988 Treaty, concluded with a parallel objective to those of the Asunción Treaty, to establish an Argentine-Brazilian Common Market by December 31, 1994.106 In addition, Argentina and Uruguay are linked by the Argentine-Uruguayan Economic Cooperation Agreement, and Uruguay and Brazil by the

104 COPELLO, supra note 41, at 207; MAGARIÑOS, supra note 41, at 54-56; BONILLA, supra note 41, at 25-26.
105 LAIA, supra note 5, art. 7.
106 MAGARIÑOS, supra note 41, at 54; COPELLO, supra note 41, at 96; Gross Espiell, El Tratado de Asunción y Algunas Cuestiones Jurídicas que Plantea, 144 El DERECHO, BUENOS AIRES 915.
Commercial Expansion Protocol.

MERCOSUR Parties did not agree by the Asunción Treaty to waive their participation in such parallel and overlapping arrangements but, contrarily, they decided either to pursue them separately, or to deepen them, and ultimately to amalgamate with MERCOSUR.

On the other hand, notwithstanding that in politico-economic terms the Asunción Treaty might have been a consequence of the Argentine-Brazilian integration process initiated in 1985, juridically, the Asunción Treaty is an entirely independent and separate agreement.

In fact, the Treaty is juridically linked only with the LAIA Treaty and makes no reference to the 1988 Argentine-Brazilian Common Market Treaty that remains in force. Its very conclusion demonstrates that Argentina and Brazil preferred, rather than to incorporate Uruguay and Paraguay into their own accords, to conclude a fresh agreement independent of their pre-existing relationship. Thus, while the Asunción Treaty governs the relationship between Argentina, Brazil, Uruguay, and Paraguay as individual MERCOSUR Members, the 1988 Treaty governs the relationship between Argentina and Brazil as members of an Argentine-Brazilian Common Market.

IV. THE MODEL OF THE ASUNCIÓN TREATY: PART II

A. Discussing the Model of the Asunción Treaty

In Part I it was demonstrated that, in practical terms, the Treaty has specifically regulated but a single aspect of the Common Market system enunciated in Article 1, that is, the free movement of goods between Member States. It also was attempted to demonstrate that regulations for the implementation of the remaining components of MERCOSUR - the common external tariff and the free movement of services, persons, and capital - are absent or have received shallow normative treatment while enactment by MERCOSUR organs is not expressly stated. An attempt will be made to suggest a rationale for the Treaty’s model as to comprehend the underlying motivations of the Treaty’s glaring gaps, as well as its failure to commit Member States to fulfil their central agreement of actually establishing MERCOSUR during the transitional period, i.e. by December 31, 1994.

It has been widely recognized that the Treaty was not conceived as a foundational framework for MERCOSUR, but instead that the main purpose of the Treaty was only to provide a preliminary legal framework for its organization, since a definitive treaty would be concluded by

\[107\] Magarinós, supra note 41, at 55; Coppel, supra note 41, at 117.
December 31, 1994. This contention is based on the title of the Treaty and on the language of Article 18. The Treaty is specifically named: *Treaty for the Constitution of a Common Market Between Argentina, Brazil, Paraguay and Uruguay*.

Article 18 provides: "[b]efore setting up the Common Market on December 31, 1994, Member States will convene an extraordinary meeting in order to determine the definitive institutional structure of each of the administrative organs of the Common Market, as well as their specific competencies and decisional procedural system."

From these provisions, the Treaty is described as a temporary agreement, to be replaced on expiry of the transitional period. However, the Treaty fails to stipulate that Member States will actually conclude such a foundational act. A definitive commitment enforceable upon Member States to set up and organize a fully operative Common Market system is likewise wanting. Indeed, its provisional character hardly explains why the coordination of national economic policies, sectorial agreements, and the harmonization of national legislation, all three intrinsically complex and uncircumscribed, wide-ranging techniques, were vaguely adopted to implement the core foundational freedoms explicitly intended to characterize MERCOSUR. This was in sharp contrast to the bundle of precise mechanisms devoted to the freedom of interstate goods circulation. From this angle, the distinctive feature of the Treaty is the manifest incompleteness of its legal framework to provide for such a Common Market within the single-phased transitional period.

In reality, the Treaty fails to adopt progressiveness as a global principle covering the whole spectrum of market integration. This may be easily contrasted with the EEC Treaty:

> the drafters of the [EEC] Treaty knew the difficulties in establishing a global common market, thus Article 8 indicated that the common market would be established progressively, during the course of a transitional period of twelve years divided in three stages. The diverse chapters of the treaty stated the rhythm and the procedures for the setting up of the common market. According to the Asunción Treaty, the drafters of the Asunción Treaty are not required to adopt progressiveness as a global principle covering the whole spectrum of market integration. This may be easily contrasted with the EEC Treaty, which states that the common market will be established progressively, during the course of a transitional period of twelve years divided into three stages. The diverse chapters of the treaty state the rhythm and the procedures for the setting up of the common market. Accordingly, the EEC Treaty evinces a "pattern of creating an obligation to remove restrictions during the transitional period, so that a particular result is to be achieved by the end of it, coupled with a general 'standstill' provision operating with effect from the entry into force of the Treaty." Indeed, the Asunción Treaty fails to resort to such a gradual approach.

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103 Treaty of Asunción, supra note 1, art. 1.
109 BURROWS, supra note 84, at 215.
110 For a discussion of the duty of EEC countries to adjust domestic legislation determining the...
A deeper analysis affords another plausible explanation for the incompleteness of the Treaty; that it contains sufficient evidence to argue that it embodies two separate, clear-cut agreements. On one hand, there is a definitive concrete agreement by Member States to liberalize the reciprocal circulation of goods, thus leading to the creation of a Free Trade Area (FTA). On the other hand, there is a general and potential agreement to establish a Common Market concurrently with, but not subsequent to, the liberalization of reciprocal trade. Accordingly, regarding the FTA agreement, the Treaty provides a compulsory legal framework through a coherent normative and institutional system. With respect to the Common Market agreement, the Treaty provides a general legal framework for Member States themselves to pursue negotiations conducive to the implementation of the Common Market. Agreements reached on these latter aspects would complete the Treaty, but would obviously fall outside the initial framework of the Treaty and thus, perforce, require national parliamentary approval to endow them with juridical value. This is so since, unlike EEC organs, MERCOSUR organs have not been instituted with real powers to fulfil autonomously such functions within the framework of the Asunci6n Treaty itself, thus superseding national parliamentary intervention.

This dichotomy explains why the sequential model of the 1988 Argentine-Brazilian Common Market Treaty was not emulated as a stage subsequent to the development of a “Common Economic Territory.” On the contrary, between MERCOSUR Member States, the Treaty categorically rejects the model of regulating implementation of two progressive stages pertaining to a single conceptual agreement, namely, the establishment of a Common Market grounded on the prior creation of a FTA. Indeed, this would have implied an entirely different arrangement between Member States from the one actually embodied in the Treaty.

More strikingly, trade liberalization is not envisaged as a mere constituent component intertwined with all other corresponding constituent subordination of national parliaments to EEC Institutions directives, see J. Megret, La Technique Communautaire d’Harmonisation des Legislation, in REVUE DU MARCHÉ COMMUN 181 (1967).

The extensive treatment as regards origin rules seems out of proportion. The application of origin rules - inevitable in the free trade area - can lead to administrative procedures at the frontiers of the Member States which themselves constitute a barrier to interstate trade . . . . The customs union represents a further stage of economic integration, inasmuch as the problem of origin intrinsic in the free trade area are eliminated by the establishment of a common external tariff . . . .

Wyatt & Dashwood, supra note 48, at 20-21. For an opposite view, see Hunt, supra note 85, at 23.
components of a single compact unit to be set up, i.e. a full-fledged, comprehensive Common Market. In fact, trade liberalization is treated as an overlapping element of two separate agreements.\textsuperscript{112}

The foregoing conclusion seems inescapable. Broadly viewed, under the Treaty there is but a single objective, namely, the establishment of a fully comprehensive Common Market; and there is but a single stage during which to accomplish such an objective, expiring on December 31, 1994.\textsuperscript{113} However, the Asunción Treaty fails either to regulate an unavoidable passage from the transitional period to a subsequent stage or to provide for the extension of the transitional period itself. In fact, the Treaty leaves Member States quite free as to whether their relationship will be enlarged beyond the FTA to be fully operative by December 31, 1994.\textsuperscript{114} This is undoubtedly so, since the only provision where such a potential enlargement was contemplated by the Treaty is focused in an indirect way in Article 18, relinquishing its momentum to the entire discretion of Member States. Thus, Article 18 stipulated that Member States convene an extraordinary meeting to decide upon the composition of the institutional structure, the competence of its organs and their decisional procedure.

In actual practice, it is provided that before the expiration of the transitional period, Member States will decide whether to deepen their relationship as constituents of a FTA into a relationship of partners in a Common Market, thereby reformulating the loose terms of the Treaty as regards the Common Market objective into a comprehensive supranational framework, compatible with a fully integrated Common Market system.

In fact, the Treaty does not explicitly regulate between Member States the two progressive stages pertaining to a single agreement, namely, the establishment of a Common Market to be grounded on the prior establishment of a FTA, but contrarily, in an implicit way, it does regulate the implementation of two separate agreements whose common aspect, trade liberalization, is not envisaged to perform a liaison between each distinct system embodied in each separate agreement, but is simply left as an overlapping component.

This conclusion seems inescapable. Broadly viewed, under the Treaty there is but a single stage, expiring on December 31, 1994, and there is but a single goal to be accomplished: the establishment of a fully comprehensive Common Market. In defining this Common Market, trade liberalization is characterized as a component of a coherent whole. In organizing the implementation of the whole, concrete normative provisions

\textsuperscript{112} MAGARIÑOS, supra note 41, at 54; BONILLA, supra note 41, at 59.

\textsuperscript{113} SANGUINETTI, supra note 41, at 72.

\textsuperscript{114} MAGARIÑOS, supra note 41, at 101.
are inconsistently centered on trade liberalization in such a global manner that this essential stage appears severable from the whole. The Treaty makes no explicit reference whatsoever to an FTA as the first stage of an evolutionary process; it simply refrains from specifically regulating the implementation of the remaining components of the Common Market, other than falling back on individual Member States' negotiations. Going a step further, it may be contended that such negotiations are necessarily germane to the Treaty's machinery.

Accordingly, trade liberalization should not be understood as a manifestation of an agreed method orientated to the gradual implementation of the Common Market. With regard to the attainment of a global Common Market during the transitional period, it would appear that Member States opted not to carry it through predetermined rules initially incorporated into the Treaty or to be enacted by organs endowed from the outset with supranational competencies. Seemingly, Member States chose to develop the Common Market through specific Agreements negotiated and concluded among themselves as and when they saw fit to do so. Thus, a "wait and see" approach appears to have been adopted.

On the other hand, it is in the very nature of things that the attainment of tariff dismantlement may ultimately perform the function of triggering the ultimate integrative thrust. In this case, the Common Market agreement would become viable due to one component facilitating interstate entrepreneurial economic links and creating a more propitious scenario for Member States negotiations, even though under the express terms of the Treaty, all components must be globally, not sequentially, set in motion during the transitional period.

B. Reformulating the Machinery of the Asunción Treaty

1. The Rationale of the Transitional Period

Against the above analysis, it appears that the transitional period provides a framework for the development of two feasible integration schemes, whether a Free Trade Area alone or a Common Market subsuming the FTA. On one hand, the transitional period enables implementation of compulsory interstate trade liberalization actions as the sole concrete aspect agreed upon under the Treaty, namely, free movement of goods between Member States. On the other hand, the transitional period operates as a framework within which Member States may negotiate the contents and modalities of pending aspects essential to attaining the Common Market, through the conclusion of agreements which would complete the Treaty's text, once parliamentary approval had been obtained for their juridical validation. In this way, the initial agreement would acquire viability in terms of the ostensible central
objective consented by Member States thereunder — to set up MERCOSUR by December 31, 1994 — but where no specific mechanisms have been explicitly provided for actual implementation.

Actually, the methodology adopted in this context was to carry out negotiations intended to develop such mechanisms, since they had not been incorporated into the text of the Treaty because at that time, Member States were reluctant to do so, at variance with their acceptance of intertrade liberalization mechanisms which were expressly regulated.

For this reason, the Treaty focused upon implementation of integration from a double perspective, by no means implying sequential progress. This essential distinction as to alternative courses of action conceivably framed during the transitional period stemmed from the regulatory model of the Treaty; the restricted goal of an FTA in highly concrete and delimited terms versus the far-reaching aim of a fully fledged Common Market in cautiously restrained terms subordinated to a deadline in vacuo.\(^1\)

As the Treaty fails to specify the tools to establish the Common Market, given the fact that the momentum for such a goal rests with the Member States themselves,\(^2\) the Treaty could reasonably prescribe that all core activities relevant to the Common Market were to be set in motion in a simultaneous and coherent manner with trade liberalization, as would have been the case if the Treaty had embodied a single inseparable agreement. The attitude of Member States when agreeing on the implementation of free movement of goods, which was provided with an automatic mechanism and with measures for economic policies coordination prescribed, to be carried out in convergent fashion with trade liberalization, stands in sharp contrast to attitudes regarding the implementation of the Common Market, where neither automatic mechanisms, timetables, nor guidelines were included. These matters fell under the general scheme of national macroeconomic and sectorial policies coordination and national legislation harmonization, for which no rules had been provided and no real competence had been assigned to MERCOSUR institutions, as these actions pertained solely to Member States.

Accordingly, the rationale underlying the transitional period would imply a global term during which, should a network develop due to reciprocal tariff dismantlement among Member States, in-depth domestic policies changes essential to circumvent prevailing heterogeneity would be carried out, thus leading to a Common Market offering Member States better opportunities than mere bilateral trade links. The transitional period

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1. \(^1\) See supra note 78 and accompanying text.

2. \(^2\) For an opposite view see Hunt, supra note 85, at 23.
is, therefore, a global term wherein two crucial developments — a compulsory FTA and a purely voluntary Common Market — may take place, since concrete measures were only provided for the former.

Although the FTA was not coherently organized as a foundation for the Common Market,\textsuperscript{117} it may well create conditions conducive to the latter, which will then subsume the former. The Common Market may thus become attractive enough for Member States to relinquish sovereignty implied in pursuing integration beyond the FTA as in a Customs Union, where they would be required to set up a common external tariff for external trade.

Against this conceptual background, the Treaty contemplates a double interplay of its provisions and of its institutional structure to rule mutual Member States’ interrelationships within this double perspective, that is, as members of the FTA and as negotiators of the Common Market.

2. Implementing the Free Trade Area

Free movement of goods among Member States has deserved thorough and strict regulation from the Treaty and was provided with a compatible institutional structure to ensure its implementation. Institutions perform administrative and executive functions related to the Commercial Liberalization Programme and national economic policies coordination for the abolition of non-tariff barriers.\textsuperscript{118} In this context, measures enjoyed a compulsory character, implying Member States’ obligations under international law to adjust domestic legislation and see to its enforcement.

Relations among Member States have been organized in a fashion consistent with an FTA scheme; as a result, states withhold full sovereignty over trade links with third countries. As expressly stated by the Treaty, during the transitional period, Member States retain their faculty to conclude discriminatory trade agreements with one another and with LAIA countries.\textsuperscript{119} In practice, the lack of a common external tariff would mean setting up of an FTA.\textsuperscript{120}

3. Implementing the Common Market

In contrast to trade liberalization, the Treaty provided no specific mechanisms nor did it empower MERCOSUR Institutions to enact norms

\textsuperscript{117} See supra note 106 and accompanying text.
\textsuperscript{118} Treaty of Asunción, supra note 1, art. 5(a) & (b).
\textsuperscript{119} MAGARIÑOS, supra note 41, at 82; COPELLO, supra note 41, at 118.
condusive to the implementation of components essential to modelling the Common Market, i.e., the free movement of services and other productive factors. The methodology of the Treaty was to organize a scheme for Member States to negotiate during the transitional period the realization of such matters, a scheme framed under the general obligations Member States assumed under Article 1 to coordinate and to harmonize national macroeconomic and sectorial policies and pertinent legislation.

It may be argued that coordination mechanisms concerning the realization of the Common Market under Article 1 carry a different juridical nature from coordination measures under Article 5 (b) concerning abolition of non-tariff barriers to goods circulation. Under Article 1, coordination was designed as a foundational instrumental mechanism of a compulsory character. Instead, in the former, coordination was designed not as an instrumental mechanism to be utilized by MERCOSUR institutions in a direct manner, but as a prior method to enable Member States to negotiate among themselves.

In other words, coordination is not an activity for the institutions themselves to perform, but an activity for Member States to carry out within the framework of the Treaty. Institutions merely provide the infrastructure for negotiations through Working Groups. However, such activities serve to complete the Treaty itself and provide it with specific mechanisms, methods, guidelines, and time-tables, so far lacking express stipulation other than the loose recent Las Lenas Agreements. Notwithstanding such agreements, parliamentary approval is required, since institutions are not competent to enact compulsory coordination measures directing the implementation of the Common Market. Once such measures have been agreed upon and ratified by national parliaments, then and only then will they have broadened the juridical framework of the Treaty and brought such matters within the competence of institutions to administer.

Against this background, it is suggested that the institutional structure of MERCOSUR displays a double character: at times, it provides an institutional system of organs and of decision-making procedural schemes designed to carry out administrative and executive functions related to the implementation of interstate goods liberalization. At other times, it provides a forum that hosts the development of direct negotiations and the conclusion of agreements among Member States themselves which are essential to provide the foundational consensus for the realization of the Common Market. Whereas trade liberalization corresponds to MERCOSUR's ordinary institutional tasks, the institutions themselves merely provide the framework for diplomatic conferences held by Member

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121 Treaty of Asunción, supra note 1, art. 5(a) & (b).
States' representatives at Heads of State Council Summit Meetings,\footnote{Id. art. 12.} where negotiations germane to the Common Market are conducted in a way reminiscent of the EEC Member States' Representatives Acts at the Council.

In the EEC, a procedure of a similar juridical nature was developed in practice in "cases where actions by Community organs were completely excluded but where, nevertheless, an institutional framework was needed for the creation of executory norms . . . ." In adopting such norms, the European Council acts not as a Community organ, but as a participant at Member States' representatives' meeting. However this participation of "Community Organs" is very limited, as the Council is only to furnish a framework for negotiation and administrative infrastructure.

V. CONCLUSIONS

Socio-economic heterogeneity among Latin American countries has hindered multilateral integration attempts to progress beyond incipient levels, as under LAFTA/LAIA. In-depth integration at bilateral and multilateral levels seems to be highly conditioned by countries' divergent economic policy orientations and persistent trends to maintain individual links with industrialized markets. The Asunci6n Treaty adopted an ambitious market integration objective, but failed to provide a compatible juridical corpus to bring it about. Contrastingly, extensive permissiveness regarding Member States' relations with third countries and a strictly regulated intra-MERCOSUR trade liberalization regime are the main features of the Treaty. Therefore, in the final analysis it may not be too far-fetched to surmise that perhaps Argentina and Brazil seek to enjoy the benefits of a fully operative Common Market without relinquishing links with third countries. Indeed, these States have left the door open to become partners in a Common Market and, alternatively, not to progress beyond a Free Trade Area without forsaking current and potential trade linkages with one another, with third countries, and with international economic blocks other than MERCOSUR.