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Opinions expressed herein are strictly personal, not necessarily reflecting views of the University of São Paulo or any other institution.
### Abbreviations most frequently used

#### Institutions and institutional Devices

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>ACP</td>
<td>Afrique, Caraïbes, Pacifique (countries associated with the E.C.: IV Lomé Convention, 15 December 1989)</td>
</tr>
<tr>
<td>ALADI</td>
<td>Latin American Association for Development and Integration (Treaty of Montevideo of 12 August 1980)</td>
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<tr>
<td>ALALC</td>
<td>Latin American Free Trade Association (Treaty of Montevideo of 18 February 1960)</td>
</tr>
<tr>
<td>Andean Pact</td>
<td>Acuerdo de Cartagena (Treaty of Bogotá of 26 May 1969)</td>
</tr>
<tr>
<td>CJI</td>
<td>Comité de Juristas Interamericanos</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ILAM</td>
<td>Instituto Latino-Americano (S. Paulo)</td>
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<tr>
<td>MERCOSUL</td>
<td>Common Market of the Southern Cone (Treaty of Asunción of 26 March 1991)</td>
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<td>OAS</td>
<td>Organisation of American States</td>
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#### Periodicals and Publications

<table>
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<th>Abbreviation</th>
<th>Title</th>
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<tbody>
<tr>
<td>AFDI</td>
<td>Annuaire Français de Droit International</td>
</tr>
<tr>
<td>AJCL</td>
<td>American Journal of Comp. Law</td>
</tr>
<tr>
<td>AJIL</td>
<td>American Journal of Int'l. Law</td>
</tr>
<tr>
<td>BILA</td>
<td>Boletim de Integração Latino-Americana (Brasília, Ministry for Foreign Affairs)</td>
</tr>
<tr>
<td>CDE</td>
<td>Cahiers de droit européen</td>
</tr>
<tr>
<td>CJFE</td>
<td>Cahiers jur. et fisc. de l'exportation</td>
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<tr>
<td>CMLRev</td>
<td>Common Market Law Review</td>
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### Other Abbreviations

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<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>art.</td>
<td>Article</td>
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<tr>
<td>BIICL</td>
<td>British Institute Int'l. &amp; Comp. Law</td>
</tr>
<tr>
<td>BPDS</td>
<td>Brasília Protocol for Dispute Settlement (MERCOSUL/Brasília, 17 December 1991)</td>
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<tr>
<td>CCFB</td>
<td>French-Brazilian Chambers of Commerce (São Paulo and Rio de Janeiro)</td>
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<tr>
<td>CFCE</td>
<td>Centre Français du Commerce Extérieur</td>
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<tr>
<td>CUP</td>
<td>Cambridge University Press</td>
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<tr>
<td>et al.</td>
<td>&quot;et alius&quot; or &quot;et alii&quot; (and other(s))</td>
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<tr>
<td>EUI</td>
<td>European University Institute (Florence)</td>
</tr>
<tr>
<td>EUT</td>
<td>European Union Treaty (Maastricht, 7 February 1992)</td>
</tr>
<tr>
<td>FCE</td>
<td>Fondo de Cultura Economica (México)</td>
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<tr>
<td>Festschr.</td>
<td>Festschrift für (...)</td>
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<tr>
<td>ff.</td>
<td>(and) following</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>Gedächtn.</td>
<td>Gedächtnisschrift für (...)</td>
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<tr>
<td>i.a.</td>
<td>&quot;inter alia&quot; (among other(s))</td>
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<tr>
<td>i.e.</td>
<td>&quot;id est&quot; (that is)</td>
</tr>
<tr>
<td>IEE-ULB</td>
<td>Inst. d'Études européennes (Univ. Libre de Bruxelles)</td>
</tr>
<tr>
<td>Misc.</td>
<td>Miscellanea (...) (Collected Papers)</td>
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<tr>
<td>OUP</td>
<td>Oxford University Press</td>
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<tr>
<td>n/d</td>
<td>date not stated</td>
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<tr>
<td>pb</td>
<td>paperback</td>
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<tr>
<td>Reg.</td>
<td>Regulation</td>
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<tr>
<td>RIIA</td>
<td>Royal Institute of Int'l. Affairs</td>
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Notes to the Text

- Dates are stated according to ICJ practice;

- Reference to E.C. "Member-states", hyphenated and without a capital "s" reflects terminology of the European Union Treaty; MERCOSUL Member States are referred to as "Member States"

- Names of authors (or main author, followed et al.) and date of publication (or copyright date, if exact publ. date is not given) are stated in capital letters in the text, followed by note number for additional references and/or comments, e.g.: (SCHLESINGER, 1945) (13). Such device is also used to separate different works of the same author;

- Books are quoted in normal type, following name of author; articles and papers are listed inside "quotation marks", also following name of author.
1. Introductory Remarks

To cultivate the appropriate intellectual atmosphere among us today, I suggest we adopt the Socratic method, along the line of Platonic scholarship (F. M. CORNFORD, 1932; C. RITTER, 1933; R. L. NETTLESHEP, 1933; W. JAEGER, 1936; R.H.S. CROSSMAN, 1937; A. LESKY, 1957/58; O. GIGON, 1961; W. K. C. GUTHRIE, 1969; A. J. FESTUGIERE, 1971, 1975) (1), more of a dialogue with open-ended conclusions than a formal academic lecture.

This reveals both my method and my expectations in today's attempt to address a "comparative approach to competition law in the E.C. and the MERCOSUL": I do not intend to make a fully formulated and 'closed' presentation - but will necessarily rely on your active 'homologeis', or in the vernacular, "joint-thinking", if it may be so expressed, on the subject matter hereof, referring to Wolfgang SCHADEWALT (1950/72) (2).

Paraphrasing Alfred EINSTEIN (Größe in der Musik, 1941) (3), this lecture has come to be written just after the completion of an extensive and purely scientific work, which thanks to its extraordinary proportions, has not yet achieved publication (CASELLA, 1993) (4):

"The writing of the present volume, requiring no long preliminary research, no copious scientific equipment, and no learned annotations was, so to speak, a recreation. It is not long; but it may be pertinent to remember that a French writer once apologized for the great length of one of his books by saying that 'he hadn't the time to be brief'. True, this one was written in a short time, but it is nevertheless the result of considerable experience and long preoccupation with the great masters. In a few of its sections it takes the form of variations on thoughts already recorded by the author in his critical effusions. Its general stimulus came from the chapter on historical greatness in Jacob BURCKHARDT's Weltgeschichtliche Betrachtungen, a book to be recommended to all who are humanistically inclined as especially elevating in times of moral and intellectual upheaval or atrophy.

"The author has spoken as freely and critically of the great masters of music as though they were still living and subjects of dispute. Some people may resent this. (...) No one is to be deprived of these pastimes. But it is hoped that, never-
theless, some readers may feel that the compelling motives in writing this book were reverence, gratitude and love"(5).

I also wish this lecture could flow as freely as the essay by Alfred EINSTEIN, from which the quotation above was made.

Owing to the impossibility of covering the entire universe of economic integration law, the field which seems most apt for comparison, for many reasons as will be discussed further in this lecture, is "competition law". One such reason, paradoxical though it may seem, is because of the impossibility of making an adequate comparison in this field, due to the lack of parameters for such an exercise (CASELLA, 1992 & 1993) (6).

If my proposal is to compare things incomparable, we shall face not only an "aporia", but a full "contradictio in terminis" as well. Instead of attempting an apology - with doubtful results (7) - I will leave you with just this caveat.

An earnest listener (now adopting a more conservative approach) anticipating extensive case-law and legal scholarship (8) related to competition law, dumping and state subsidies in the EEC Treaty of Rome, of 25 March 1957 (the EEC Treaty), might have taken the precaution of looking for the corresponding provisions in the Treaty of Assunción, of 26 March 1991 (the preliminary Treaty for the Common Market of the Southern Cone, the MERCOSUL Treaty) (9).


Such preparation, before coming here today, assuming that earnest listeners are not yet extinct, inevitably reminds me the tale of the preacher who ends his sermon, one Sunday, requesting his congregation to read MARK chapter xvii for the following Sunday. Had this preacher also been a law lecturer, he would have been aware that this is the best way
to see your congregation dwindle to the point of extinction, before the following service. The preacher, with some luck, meets his full congregation on the following Sunday, and, in response to his request that all who had read MARK chapter xvii stand up, all present rose in unison, whereupon the preacher commenced his sermon on lying, well suited for the congregation on that particular Sunday, as the Gospel of MARK only has sixteen chapters.

Therefore I do not intend to ask whether or how far anyone has been looking for the corresponding provisions in the MERCOSUL Treaty.

Today's "congregation" certainly might question the choice of "competition law" as well as a comparative approach to the E.C. and the MERCOSUL, considering the divergent nature of each: with competition law in the European Community we have a reality, while in the MERCOSUL, its presumed counterpart, it is merely a prospect, and furthermore one attracting serious and wide-ranging doubts as to its eventual scope and contents. Opinions on this range from a significant aspect of the legal-economical-political and institutional life of the countries involved in the effort down to a purely theoretical wishful thinking anticipatorily dismissed as one more in a line of many hegemonic and/or integrational initiatives undertaken and thereafter voided by history.

Long and tedious, even superfluous, would it be to recount the evolution of Europe, since the beginning of the XIVth century (A. BLACK, 1992; R.H. FOERSTER, 1963; J.-B. DUROSELLE, 1965 & 1976; A. CAVANNA, 1982; J. BOUDET, 1991) from DANTE to Pierre DUBOIS (ca. 1306), from Enea Silvio PICCOLOMINI (1454) to George PODIEBRAD (1464), from ERASMUS of Rotterdam (1517) to the Duke of SULLY (1632), from Gottfried W. LEIBNIZ (1670) to William PENN (1692), from Jean-Jacques ROUSSEAU (1756) to Immanuel KANT (1784 and 1795) and so forth from H. KEYSERLING (1928) to Karl JASPERS (1947, 1949), or more specifically of Western Europe in the aftermath of World War II - until this ideal is turned into a concrete political will, with Winston S. CHURCHILL (1946, 1948), Robert SCHUMAN (1950) and Konrad ADENAUER - in spite of the fact that the repetition of known stories is a key to easy success in many different fields of knowledge (E. POUND, 1954) - but one fact may not be omitted: attempts at economic integration in Western Europe are directly and necessarily linked to the disastrous consequences of World War II, this having been a vital condition for all such subsequent endeavours.
Starting with the comparative approach, one conclusion may be drawn immediately: no similar catastrophe on a continental scale has ever occurred among neighbours in South America. The highlights on this particular topic do not extend much beyond the rows between Brazil and Argentina over the Cisplatine Province, i.e., Uruguay, during the first half of the XIXth century and the ravage done by the three aforementioned in Paraguay, during the second half of the XIXth century. The level of destruction and inhumanity that Europe unleashed on itself and the world twice, that in this century alone, remains unmatched (i.a., ALAIN, 1936; William L. SHIRER, 1950; H.R. TREVOR-ROPER, 1964; A.J. TOYNBEE, 1972; J. DROZ, 1972; J.-B. DUROSELLE, 1978; B. TUCHMAN, 1984; P. KENNEDY, 1988; E. BEHR, 1989; D. VAGTS, 1990) (18). I cannot refrain from expressing my concerns about the striking similarities presented by some recent events.

This does not mean that the neighbours do not have a guilty conscience or have avoided strained relations vis-à-vis Paraguay, until nowadays - as the insertion of preferential clauses in favour of Paraguay (both for its lesser importance and for historic reasons) and of Uruguay (for its lesser importance) tend to suggest. What happened, disastrous as it may have been, is more apt to have exacerbated differences than to have created a "day-after-feeling", strong enough to overcome such differences, as was possible in Western Europe only after 1945.

The difference in historic momentum may be further stressed by comparing Western Europe immediately after the war to the countries in the Southern Cone of the Americas today: integration may be necessary in both cases, but, badly off as the MERCOSUL countries may be today, their situation certainly not comparable to Europe in 1945. While being too badly off has a positive side, it may also hinder an awareness of the inevitable need for a true and wide-ranging economic integration effort, such as was undertaken in Europe, in an attempt to leave behind centuries of conflict for a new era of regulated and institutionally integrated economic life.

Furthermore there is no parallel in the context of the Southern Cone, especially because no one seems to be willing to make extensive investment in the development of these four countries - unfortunately the MARSHALL Plan and the BRADY Plan have few, if any, similarities - regardless of speculations and conjectures about the relevance, e.g., of German investment in Brazil, or the privileged role Brazil might play in connection with international economic operations for Japan (L. HOLLERMAN, 1990) (19), and hard as it
may be to view Brazil, a hard-to-fit-into-the-pattern-country from the outside (e.g., E. TAIEB and O. BARROS, 1989) (20).

In the E.C. we have over four decades of effective experimentation verging towards full implementation of a new supranational institutional and legal order, while the MERCOSUL is so far no more than a project, a plan that may come to be seriously considered or may in the end be deprived of any effect due to shifts in political concerns or party priorities.

Comparison between the E.C. and the MERCOSUL rests on this fundamental difference, that the former is 'real' while the latter is merely 'prospective'. Such circumstance, if it does not make the comparative approach utterly impossible, must at least entail a considerable margin for error. The purpose of this analysis, therefore, will be prudently limited to searching for achievements, highlighting successes, and trying to determine how far similar parameters might be transferred or translated into the MERCOSUL effort.

Among such 'success stories', competition law is arguably one of the most outstanding - not only because detailed regulation of the economy is mandatory on a common market scale and has been adequately done in the E.C., and if we were to transfer the EC provisions, they would displace nothing because, surprisingly enough, no similar provisions at all have been placed in the preliminary MERCOSUL Treaty!

An effective comparative approach should detect successes achieved in one particular case, namely, competition law in the European Community, while searching for generally applicable concepts, i.e., the theory of competition law, or at least devising a framework translatable into a different context, such as requirements and expectations for competition law in the MERCOSUL - a subject which seems to have been carefully avoided so far, particularly in view of the lack of such a legal tradition in countries like Brazil and Argentina. Nor is there even a national equivalent, such as the role played by German Competition Law for the E.C., that could be transposed to a supranational scale within the MERCOSUL: so such legal concepts will have to be developed ab ovo, from scratch.

Similarly as with the E.C., regulatory provisions related to competition law will have to be set up against a hostile background. Each of the MERCOSUL countries, especially Brazil and Argentina, have in the past adopted in varying degrees strict restrictive business and commercial policies, allegedly intended to safeguard "national industry"
against merciless "foreign" competition, with disastrous or at least non-competitive results.

Therefore to effectively implement competition law in the MERCOSUL economic area the first step would be to roll back time-honoured protectionist tendencies in the two most significant economic powers. It should be acknowledged, nevertheless, that Argentina may be a few steps ahead of Brazil in reversing the effects of such an undesirable and doubtful heritage.

Legal science does not require new creations from chaos: grafts and transfer are normal, often workable, increasing in number and becoming a permanent part of the new legal landscape, provided the environment is not entirely hostile to the in-coming buds or shoots, and institutional devices for implementation are controlled and guaranteed by an independent arbiter, in this case, a supranational Court, having full and unconditional jurisdiction on all matters related to the "common", i.e., the supranational rules.

It is essential that such 'supranational rules' should not be interpreted by each national Court, within its national legal framework and case law. The inevitable differences in interpretation and implementation would lead to quite varying results within a short period, leading to differing case law and evolution.

This is the second element of the comparative approach: the crucial role played by the Court of Justice of the European Communities in the formation and evolution of Community Law, specifically in connection with Competition Law, not forgetting the ensuing additional references to other legal fields where ECJ case-law had a relevant effect in the construction of a Community-wide legal framework.

My audience is perfectly aware of the extension and relevance of such jurisprudential developments within the E.C. - no extensive references being required in support of my assertion (M. LAGRANGE, 1967, 1968; M. CASANOVA-DEMARCHI, 1969; L. PLOUVIER, 1975; R. LECOURT, 1976; M. WAELBROECK, 1982; J. MERTENS DE WILMARS, 1976, 1981, 1986; J. MISCHO, 1990; et al.) (21). Surprisingly enough the adoption of a similar institutional device in the MERCOSUL is an idea not favoured by the majority, it being very likely that the "final" MERCOSUL Treaty, intended to replace the "preliminary" Treaty of 1991, at the end of the transition period, from 1995 onwards,
will maintain the device of "arbitration panels" for settlement of differing interpretations, putting in jeopardy the entire integration effort and its legal regulatory framework.

There are examples of failed attempts in the recent past to be avoided by the MERCOSUL. Latin American or preferably Interamerican integration has never worked properly. ALALC and ALADI, not to mention other subregional attempts, such as the Andean Pact or CARIFITA, were grandiloquent labels that hardly ever went beyond that.

There is a terminological issue already at stake, the very concept of "Latin America". Taken for good currency abroad, it seems clear only if seen from abroad, as was stressed by authors such as Manuel BONFIM, at the beginning of the century (1905, 1929), and there have been a few, if any changes since (22). The entire concept of Latin America seems to rely more on a sentimental than on an actual basis, be it viewed from an economic or from a sociological perspective. But irrationality is not an exclusive feature of Latin America, considered as a whole. Brazil and Brazilians, aptly points out J. O. de MEIRA PENNA, should grow up institutionally and politically, in order to come to their own age of reason (1967, 1972, 1974, 1980, 1985, 1988, 1988, 1991, 1992) (23).

A conceptual point may be usefully raised right at the beginning: from inside "Latin-America" it is more common to mention the different national identities. A "Latin American identity" is in itself questionable, even doubtful, and only operates to differentiate from non-Latin America (24), just as one should avoid mentioning "Eastern" Europe as that term is more of an outdated political than an actual geographical concept and is made otiose by recent changes, rather than "Central" Europe, which is both geographically and politically correct and not subject to sudden changes in fashion, as scholarly research over the decades well evidences (e.g., R. SCHLESINGER, 1945; S. PAPCKE and W. WEIDENFELD, eds., 1988; B. DOPPLER, E. JAHN & K. GYöRGY, 1989; R. KURZ, 1991; A. PRZEWORSKI, 1991) (25).

The uncertainties around the eventual institutional features and the effective implementation of the MERCOSUL are and for a certain time to come will remain unresolved, since the "final" MERCOSUL Treaty is now being negotiated.

Allegedly the short transition period stipulated in the so-called "preliminary" MERCOSUL Treaty of 1991, ending on 31 December 1994, was intended to avoid a long term of inaction, during which instead of paving the way with required steps for completion of
the Common Market of the Southern Cone, the governments and entrepreneurs would be more likely to delay all action until the last minute. A short deadline brings about the intended "deluge feeling" of the need to hurry-up: the day of doom is coming closer, there is no time left for inaction, forcing initiatives to be taken on the spot, thus compensating for both the personality and the reigning atmosphere in the region.

Therefore, today's attempt at a comparative approach to competition law in the E.C. and the MERCOSUL should be taken neither for more nor for less than it is: not for more, in the sense that a "complete" or "final" view of the matter is not yet feasible, in regard to the "final structure" of the European Union (26) but particularly in connection with the MERCOSUL; nor for less, in the sense that the experience of the European Community, taken apart from those features too particular to the context of Western Europe in the aftermath of World War II, may still provide valid parameters for economic integration attempts in other regions, especially regarding some of its most significant and innovative features, such as the role of the supranational ECJ, which has been of paramount importance in the effective building of the legal system of the European Community, especially in connection with art. 177 EEC, in the interpretation and application of Community Law and in the formation and development of one of the most important fields for any attempt at building a "Common Market", namely, an adequate and detailed regulatory system for competition law.

Some of these issues may have to be addressed rather briefly or may not yet be entirely assessed: it should be understood that this entire process is being developed simultaneously in Europe and in the "New World" (27), under different conditions, both in North and South America, and its outcome is yet to be known to the full extent. Within a few years it will be extremely interesting to compare NAFTA and the MERCOSUL, with reference to the present situation, issues and perspectives.

Going beyond obvious differences, the aim of this lecture is to reach a sub-layer of common features, attempting to reach the "coincidentia oppositorum", conceptually proposed by NICHOLAS OF CUSA (28).

After these introductory remarks, I would like to consider articles 85 and 86 EEC Treaty and the present structure of the MERCOSUL, before coming to a few comments on the political dynamics of economic integration, and to my final remarks and perspectives.
Notes


"Diese sokratischen Fragen wird nun verbunden mit dem Begriff des Philosophierens: Aneignung von Wissen, Trachten nach Wissen. Nicht perfektes Wissen und ein Verfügen darüber, das auch den Stolz und die Arroganz bewirkt, ein Wissender zu sein. Im Gegenteil: ein Wissen, das man nur vollziehen kann im Wissen des Nichtwissens, in einem Prozeß. Dies ist es, was SOKRATES tut, wenn er die Leute befragt, etwa was die Tapferkeit ist oder die Gerechtigkeit, und dann zeigt, daß sie keine Ahnung haben. Das führt zum Gespräch, zur Eglektik, 'Widerlegung', und so ist es denn bei PLATO das Gespräch, das große Teile - nicht das Ganze! - des Philosophierens trägt. Nicht der grosse zusammenhängende Lehrvortrag, den man nicht nachprüfen kann und der zu einem Schein des
Wissens führt, sondern ein der Wahrheit Nachgehen im Gespräch, ständig sich kontrollierend, immer wieder fragend: *homologēis, 'buchst du gleich mit mir?'*, und wenn ja, kann man zum nächsten Schritt in der Bilanz gehen. Es geht darum, ständig im Einverständnis zu sein."


(4) P. B. CASELLA, Elementos de direito comunitário ("tese de livre docência", delivered to the Law School of the University of São Paulo as of 28 April 1993, 1051 pages).

(5) Alfred EINSTEIN, Greatness in Music (op. cit.; preface pp. vi/vii).

(6) I have been dealing with the subject recently, such as, i.a.: "O direito da concorrência na CEE e no MERCOSUL" (lecture delivered upon invitation from the São Paulo Lawyers Association, 19 March 1992; in the series "As tendências de integração e globalização dos sistemas jurídicos e o direito brasileiro: algumas influências e perspectivas"; also available in video); "Enfoque comparativo do direito da concorrência na CEE e no MERCOSUL" (lecture delivered to the Legal Commission of the French Chamber of Commerce, São Paulo, 28 April 1992; also publ. Atualidades Jurídicas, no. XXXIII, 06/92, the full issue); "Análise comparativa da concorrência na C.E. e no MERCOSUL" (lectures delivered upon invitation from the German Chambers of Commerce for Asunción, Buenos Aires, Montevideo, Porto Alegre, Rio de Janeiro and São Paulo, July 1992); "Droit de la concurrence dans la C.E. et le MERCOSUL: essai d'une approche comparative" (Lettre du Brésil, CCFB, Rio de Janeiro, no. 165, Sept. 1992); "Direito da concorrência na C.E. e no MERCOSUL" (as a chapter in the vol. MERCOSUL: das negociações à implantação, ed. L.O. BAPTISTA and A.A. MERCADANTE, S. Paulo, Ed. LTr, 1993); "Soberania e direito da concorrência na C.E. e no MERCOSUL" (RIL, Brasília, 31.1994, no. 121, in printing).

The extent of available legal scholarship on E.C. Competition Law makes extensive quotations utterly impossible, not to say useless. References will be restricted to works more or less closely connected with my research.

References to the "Southern Cone" are to be understood as encompassing the four member-States of the MERCOSUL, namely Argentina, Brazil, Paraguay and Uruguay. Chile would geographically be within such concept, politically, at least for the time being, Chileans seem to be doing much better by themselves and intend to stay outside the current developments, or may eventually come to closer or looser integration with the NAFTA. I.a. see, Francisco ORREGO-VICUÑA, La participación de Chile en el sistema internacional (Santiago de Chile, Gabriela Mistral, 1974). The very definition of "Latin America" raises an issue by itself (see note 22 below).


(13) Herbert KÜHN, "Eiszeitmalerei 50.000-10.000 v. Chr." (München, R. Piper & Co. Verl., 1958); Walter TORBRÜGGE, "Europäische Vorzeit" (München, Naturalis Verl., n/d); Magnus BACKES and Regine DÖLLING, "Die Geburt Europas" (München, Naturalis Verl., n/d).


(16) It is impossible to determine when this ideal turned into a concrete political will, but some of the highlights may be picked up: Winston S. CHURCHILL's Lecture at the University of Zurich (19 September 1946; W. S. CHURCHILL, The Sinews of Peace: postwar speeches; London, Cassel & Co., 1948); the SCHUMAN Plan (9 May 1950); text and comments apud Pascal FONTAINE, "Uma nova idéia de Europa: a declaração Schuman 1950-1990", Luxembourg, SOPEC, 1990, pp.
(17) Ezra POUND, Literary Essays of Ezra Pound (ed. with an Introduction by T. S. ELIOT, London, Faber & Faber, 1st. publ., 1954; reprint, 1974), incl. "How to read" (1927/28, pp. 15/40) or his ABC of reading (transl. A. CAMPOS and J.P. PAES, S.Paulo, Cultrix, 3rd. ed., 1977) as well as in other essays, with his usual sardonic and biting sense of humour, POUND defines the art of easy success, as that writing which avoids unknown or unusual ideas, and spreads in every page only what an average reader paying average attention would be ready to perceive in a first reading.


All history books related with the period could provide such an overview. Mention of one or another does no more than reflect the taste of the reader, such as, e.g., David THOMSON, World History 1914-1961 (Oxford, OUP, 1964; Galaxy

For an approach from the specific viewpoint of international law see Detlev F. VAGTS, "International Law in the Third Reich" (AJIL, 84.1990. 3, pp. 661/704).


(21) Maurice LAGRANGE, "The Court of Justice as a factor of European integration" (AJCL, 15.1967, no. 4, pp. 709/725), "La interpretación unitaria del derecho de las Comunidades Europeas: aspecto de la acción prejudicial" (DI, 3.1968, Oct., pp. 59/80); Manuel CASANOVA-DEMARCHI, La función jurisdiccional en las Comunidades Europeas y la del proceso de integración latinoamericano (Santiago de Chile, Editorial Jurídica, 1969); Liliane PLOUVIER, Les décisions de la Cour de Justice des Communautés européennes et leurs effets juridiques (Bruxelles, Bruylant, 1975); Robert LECOURT, L'Europe des juges (Bruxelles, Bruylant, 1976); Michel WAELBROECK, "Le rôle de la Cour de Justice dans la mise en oeuvre du Traité CEE" (CDE, 18.1982, no. 4, pp. 347/380); Jose MERTENS DE WILMARS, "La jurisprudence de la Cour de Justice comme instrument de l'intégration communautaire" (CDE, 12.1976, nos. 2-3, pp. 135/148), "L'efficacité des différentes techniques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales et les particuliers" (CDE, 17.1981, no. 4, pp. 379/409), "Réflexions sur les méthodes d'interprétation de la Cour de Justice des Communautés européennes" (CDE, 22.1986, no. 1, pp. 5/20); Jean MISCHO, "Un rôle nouveau pour la Cour de Justice?" (RMC, 33.1990, no. 342, pp. 681/686) et al.

(22) Manuel BONFIM, A América Latina: males de origem (Rio/Paris, H. Garnier Ed., 1905) e O Brazil na América: caracterização da formação brasileira (Rio, Livr. Francisco Alves, 1929). His tone may be assessed with this brief quotation from the introduction to the latter (op. cit., 1929, pp. 11/17):
"Nós outros - Argentinos, Peruanos, Brazileiros, Chilenos ... - que somos dos chamados latino-americanos, nunca pensamos em América Latina. Para os nossos conceitos de realidades, no simples positivo das relações comuns, ou como convergência de qualquer ação inmediata, tal unidade não existe. Consideramos, apenas, cada um dos povos com que os dissertadores formaram o latinismo da América. O mesmo acontece a qualquer estrangeiro que aqui tenha feito vida conosco: falará de - Venezuela, Paraguai, México, Nicarágua ... mas nunca sentirá necessidade de concentrar o espírito nesse concepto - América Latina. Em compensação todos que não nos conhecem, si fazedores de theories, com língua em cousas sociais, históricas ou políticas, não falham no repetir de emfáticos e pueris preconceitos a cerca da irreal unidade - América Latina."

Without further developments, it may be worth pointing out that the entire set of Interamerican Conventions on Private International Law (Panamá, 1975 and Montevidéu, 1979) has not yet come into force. Latin American Cooperation and Legal Integration is a matter of unresolved requirements and expectations.

(23) José Osvaldo de Meira PENNA, Psicologia do subdesenvolvimento (Rio, APEC, 1972); O Brasil na idade da razão (Rio/Brasília, Forense Universitária/INL, 1980); A ideologia do século XX: uma análise crítica do Nacionalismo, do Socialismo e do Marxismo (São Paulo, Convívio, 1985); O dinossauro: uma pesquisa sobre o Estado, o patrimonialismo selvagem e a nova classe de intelectuais e burocratas (São Paulo, T.A. Queiroz Ed., 1988); Utopia brasileira (Belo Horizonte, Itatiaia, 1988, col. Ensaios, vol. 13); Opção preferencial pela riqueza (Rio, Inst. Liberal, 1991); Decência, já! (São Paulo, Nórdica/Inst. Liberal, 1992)


In the series of the Saarbrücken VRBEI quite a few forthcoming titles address the issues of the European Union.

(27) Garcilaso de la VEGA Inca referring to the new Continent stresses its originality stating "toda razón le llaman Nuevo, porque lo es en toda cosa" (Comentarios reales, 1609 and 1617; apud Bella JOZEF, Historia da literatura hispano-americana, Rio, F. Alves, 3a. ed., 1989).

2. Articles 85 and 86 EEC-Treaty and the present Structure of the MERCOSUL


This phenomenon also tends to increase and intensify their effects vis-à-vis their inevitably ensuing extraterritorial projections (F.A. MANN, 1964, 1984, 1990)\(^{(4)}\). Because most legal systems only regulate economic rules as lex fori rules, under the heading of extraterritorial effects three main possibilities are to be considered: applying rules of public-policy of a national legal system, rules of foreign public-policy of the legal system connected to the contract, and the public-policy rules of a third State. To these issues must be added the consideration of whether and to what extent a foreign public-policy rule should be applied. The answer will depend on the status given by the lex fori to the foreign public-policy rules and the interaction between economic rules issued by different legal systems.

Fascinating as the topic of extraterritorial projections of economic, namely competition, law may be (G.A. van HECKE, 1962, 1977; B. GOLDMAN, 1969, 1969-ff., 1972; M. HAYMANN, 1974, J.-G. CASTEL, 1983; I. JALLES, 1988; et al.)\(^{(5)}\) this is and has to be treated as the main focus of a separate subject, and not just mentioned "en passant" (U. DROBNIG, J. BASEDOW, K. SIEHR, F. RIGAUX, A. V. LOWE and E.-J. MESTMAECKER; 1986)\(^{(6)}\).

The contribution and innovative features of United States Antitrust Law are not forgotten but will not be dealt with today: a comparison between E.C. and U.S. Law on Competition would also be an entire subject by itself, not forgetting that it has already been extensively studied.
The case of the European Community is not an isolated one under this particular heading (I. JALLES, 1988; L. FOCSANEANU, 1965 etc.; R. JOLLET, 1969; R.T. JONES, 1975; B. BALASSA, 1978; J. PEETERS, 1989; P.M. ROTH, 1992) (7), but the most specific and interesting feature of EC Competition Law is that it was conceived and applied from its very beginning as a supranational body of law to counteract former protectionist practices embodied in the legal systems and practices of the six original member States, directly impacting the economic life and legal systems of the countries involved in the experiment, which were bound to observe and strictly apply Community guidelines and regulations both at domestic and extraterritorial levels (see i.a., R. MERKIN, G. HARDING & K. WILLIAMS, 1987-ff.; M. van der WOUDE, Chr. JONES & X. LEWIS, 1992) (8).

The resulting conceptual change is that private economic and legal relations are restructured because of the intervening economic rules as public-policy rules. E.C. Law appears as a legal system of "economic democracy" (F. VILMAR, U. ANDERSEN and D. CASSEL, in D. NOHLEN, (Hrsg.), 1991) (9), whereby the original Treaties and the entire regulatory system, comprising regulations, directives and decisions, made by the Council or the Commission in order to carry out their task, in accordance with art. 189 EEC Treaty, are built into an "öffentliches Wirtschaftsrecht", or public economic law, as already stated by Attorney General ROEMER, as early as the case NOLD KG v. High Authority of the ECSC (Case no. 18/57, 1957) (10).

It has been argued (e.g., C. CHAMPAUD, 1970) (11) that Community Law is the "outcome of an affair between a political dream and an economic will", whereby although initially resulting from International Conventions, celebrated and ratified among States (i.a., Ch. VALÉE, H. THIERRY, J. COMBACAU and S. SUR, 1981; Ch. ROUSSEAU, 1984; J.F. REZEK, 1984, 1991) (12) its contents embody an international regulatory system, of economic nature and regional character.

Notwithstanding the accuracy of the international convention statement the conventional basis of Community Law was soon superseded by the life and operation of the Communities and their institutions (i.a., E. NOEL, 1988; Rudolf BERNHARDT, 1984; Deirdre CURTIN, 1990; F. E. DOWRICK, 1983) (13). This experimental system went beyond interstate relations, regulated by traditional concepts of international law, and strictly avoiding any interference with sovereign, independent States (C.F. OPHÜLS, 1965; H.
MOSLER, 1966; M. WAELBROECK, 1964, 1972; M. WAELBROECK et al., 1976; P. PESCATORE, 1974; J.H.H. WEILER, 1981, 1984) (14), which proved to be insufficient to ensure valid legal and theoretical support for the entire range of complex issues faced by the Community legal system, in its rôle as the "internal legal system of a community of nations", whose aim was to build progressively a European federation (I. SEIDL-HOHENVELDERN, 1982; N. NUGENT, 1989; W. WALLACE (ed.), 1990) (15). The device chosen for attaining such a European federation, ensuring the viability of the goal, was the construction of economic solidarity, now being strengthened to encompass more or less relevant political features, including alleged former omissions such as, i.a., the human rights issue (A. CLAPHAM, 1991; J.-F. FLAUSS, 1992) (16).

The process proved to be a progressive effort, in successive steps, from the building of the customs union to the implementation of the "common" market, whereby, in view of building closer ties among national economies integrated in such a common market, have been established unified systems for free circulation of goods, persons, services and capital, after completion of the customs devices apt to ensure the uniform operation of such market, avoiding the weight of internal distortions. Such "common" market is now stepping towards an economic and monetary union and eventually some degree of political union as well, of which some of the requirements are being brought to the fore such as, i.a., the evolution of the European Monetary System and its currency, the ECU, and the definition of common policies in fields stretching from the environment to consumer protection, from industrial to consequential policies, from agriculture to competition.

With the aim of implementing this Community, the member States have initially built an economic unit, to such an extent that the means seemed to be turning into ends by themselves, considering that the great majority of regulatory provisions, issued by Community Administration, focus on the regulation of economic activities within the Community.

European Community Law is unmistakably and essentially a system of economic law with specific contents and based upon the premise of the acknowledgment of the efficiency of market economy, and the precedence of this system in Western Europe. Such articles of economic faith have been incorporated into the EEC Treaty as legal provisions, having significant effect upon Community Law as a system of economic law, not only for its essence but also for the nature and the orientation of its regulations separately considered.
The last decades have evidenced the appearance and development in Europe of three elements, consisting of (a) structuring and development of complex post-industrial economic systems, with concurrent essential evolution, both in social as well as in economic matters; (b) building of an entirely new supranational legal system, namely E.C. Law; and (c) the birth and growth of economic law as an autonomous legal field, with inevitable overlaps among the three phenomena mentioned, resulting in the first truly and deeply liberal yet extensively regulated economic legal order of supranational application.

From the viewpoint of liberal economics, Community Law sets a new standard: never before has there been, to a similarly comprehensive and thorough extent, such a protection of economic freedom, embodied in a complex and precise body of law, regulating in detail the performance of economic agents, while combining such contents with the features of an intrinsically supranational system, avoiding reference to traditional international rules.

Community Law on competition evidences the need for the coexistence of market security and market freedom, replacing and counteracting opposed former protectionist trends and regulatory systems at national levels. Community Law embodies many teachings worth noting, starting with the positive effects of detailed market regulation, ensuring adequate levels of competitiveness, and the ensuing technical progress being transferred as benefits consumers, at growing speed and declining costs, to which it may be added institutional stability, stretching from the reasonable levels of profit expectations to reliable price levels, not to mention, under a broader view, collateral effects stretching from social to macro-economic effects, conceptually as innovative as its supranational character.

Extensive quotations in E.C. Competition Law would be as hazardous as useless, in view of the bulk and the level of quality attained, comprising regulatory provisions, case-law and legal scholarship (17), and needless to say there is awareness of such contents and features from the audience (18). My assumption is also broad enough to comprise that it is neither necessary nor is it my intention to resume a presentation of the MERCOSUL as such, such a presentation having been proficiently done already (e.g. J. SAMTLEBEN and C. SALOMAO, 1992) (19).

Therefore, I do not intend to resume presentation and comments on articles 85 and 86 EEC, and subsidiarily articles 87 to 94 EEC as well, but we ought to keep in mind the
legal and institutional framework set up by these provisions and subsequent regulations and binding interpretative criteria laid down by ECJ case-law as well as the effect of such liberal inspiration, based on the dynamism of market forces, already mentioned in article 3.(f) EEC, as a body of rules organizing and regulating competition within Community boundaries.

Fields covered by E.C. Competition Law, ranging from concerted practices to abuse of dominant positions, from dumping to governmental subsidies, provide a comprehensive legal frame for the exercise and development of economic activities. The simple mention of the main fields covered by E.C. Competition Law is apt to evidence the needs within the MERCOSUL and the lacunae of its preliminary Treaty.

The preliminary MERCOSUL Treaty, as mentioned, executed in Asunción, on 26 March 1991, came into force in Brazil as of 29 November 1991 (20), stipulating it should "be performed and fulfilled as fully as stated therein", in view of the implementation of the Common Market of the Southern Cone, the MERCOSUL, until 31 December 1994 (art. 1), based on the reciprocity of rights and obligations (art. 2), with a "transition period" (art. 3), extending until the date of implementation (stipulated in art. 1).

Already in the "whereas" section, second paragraph, there was mention of the "coordination of macro-economic policies", not forgetting to mention, in the following paragraph, the tendency towards "evolution of international events towards consolidation of large economic areas, and the relevance of achieving an adequate international economic insertion for its member States".

Economic performance rules are stated in art. 4, stipulating that "in their relations with third countries, member-states will ensure equitable conditions of trade", stressing that "for such purpose, the national legal systems will be applied, to deter imports whose prices may be influenced by subsidies, dumping or any other unfair trade practices", while, internally, "similarly, member-states will coordinate their respective national policies in view of structuring common rules on commercial competition".

The assignment of jurisdiction to the "national legal systems" should be a matter of concern; in the meantime no such "structuring of common rules on commercial competition" has yet occurred. Such a matter, handled by different national legal systems, is apt to produce substantially different results. Such diversity, within an attempt at building eco-
nomic integration as recent as the MERCOSUL is prone to generate more trouble than uniform principles. A common basis will be lacking, until such "common rules on commercial competition" are structured, if ever.

From the foregoing, it might be assumed that, in view of the implementation of a common market, it would be foreseeable to go through the preliminary steps of a customs union, combining a uniform customs tariff in their relations with third countries, with the elimination, or at least the substantial reduction of internal tariffs, among member-states, before going ahead towards a "common market".

The following provision, art. 5, deals with the "progressive, linear and automatic tariff reductions", to be made simultaneously with the "elimination of all other restrictions, or of all charges having equivalent effect", in view of the goal of ending the transition period and "reaching the deadline of 31 December 1994 with zero tariff, without barriers, including non-tariff barriers, on the entire tariff range".

The deadline of 31 December 1994, in addition to the already mentioned "day of doom" feeling it is aimed to stir, not leaving time for hesitations, will not represent the implementation of the internal market - as seems to have been broadly and wrongly assumed - but will simply mark the end of the transition period, during whose term member-states are bound to adjust progressively their respective internal tariffs vis-à-vis the other member-states, while the negotiation of the final Treaty, which will replace the preliminary Treaty, is completed.

This should be the initial step towards a customs union, referring to a common customs tariff, that is also intended to "foster the competitiveness of member States" (art. 5.(a) and (c)).

The "coordination of macro-economic policies" (art. 5.(b)) is the mandatory following step, considering that it is not viable to intend to reach a "common market" without a minimum level of economic coordination among its partners, and their aim is also expressed in the wish to "adopt specific sectorial agreements, in view of fostering the use and the assignment of production factors, and reaching efficient operative scales" (art. 5.(d)), at the risk of rendering void the efforts in view of the customs union, as above mentioned.
Notwithstanding the foregoing, the common customs tariff and the mere approximation rather than effective coordination of macro-economic policies do not seem enough, *per se*, to conduct the partners in this venture in the Southern Cone towards true and relevant economic integration, without the concurrent and firm political will to achieve such goals, there being the risk of merely reissuing former projects, or not going beyond some features of a free trade area, with many imperfections.

Differing levels of economic integration may or may not be achieved within a simpler institutional framework; the NAFTA Agreement could be cited as evidence. The "common market" label is not essential to achieve economic integration, as in the NAFTA case, at least under present features, it is not a question of a "common market" but rather, as stated, a "free trade" area - but I am again obliged to refrain from a review of its contents, within the limits of today's lecture.

Even if such a political will to achieve full economic integration was to be found in the member-states in the Southern Cone, and its permanence could be ensured within the MERCOSUL, the legal structures being formulated are too simple and technically not prone to set up the legal environment apt to pave the way towards an effective "common market", which would also require the free circulation of economic factors of production, goods, persons, services and capital, while competition and levels of state interference in and over economic activities were strictly regulated.

The mere "approximation of macro-economic policies in view of formulating common rules on commercial competition", stated in art. 4, represents substantially less than the uniformization and the level of detail of competition rules contained in arts. 85 to 94 of ECC Treaty. My assertion is not to be understood as implying that EC Competition Law would be the sole legal framework apt to convey such a favorable environment, but it is and remains an extraordinarily useful tool of trade in the effort for building a true and wide-ranging "common" market.

The actual features of such "approximation of macro-economic policies" will have to be specified, in view of stating under unified and stable provisions, the contents of such "common rules on commercial competition". In that respect, competition law has played a crucial role in the structuring of the legal and institutional environment set up within the European Community, for all its implications and consequences in the economic life of the twelve member-states.
Seen from inside, critics tend to concentrate on missing details, forgetting the imposing ensemble already built: notwithstanding shortcomings and areas requiring extensive restructuring, Community Law is an achievement, not only as the regulatory system of the E.C. but also as an institutional and legal pattern for similar issues under different contexts.

Viewing E.C. Law from such a perspective its relevance may be better assessed, also as a source for comparative law analysis, along lines such as is being attempted today. Direct transference of E.C. Law to other continents and circumstances may not be feasible and is not to be attempted as such: that would oversimplify the issue, and miss the point up to which the parameter set up by E.C. Law is a valid standard of inspiration for other efforts.

Nevertheless, sucessful solutions should not be disregarded when similar issues are being faced. Especially because within the E.C. there were also contrary tendencies resulting from national historical traditions and legal systems opposed to or at least not built to foster integration: the impact of such forces had to be stopped and reversed, in order to reach a new trend. The achievements over the four past decades are relevant enough not to be dismissed as an experience that is too specific to be useful elsewhere.

I hope this parallel becomes clear when we set down what has been achieved under the heading of E.C. Competition Law and distill similar needs for the MERCOSUL, before moving ahead to an inquiry into the political dynamics of economic integration, such as, in the case of the European Community, the interesting though different levels of relations with third countries or groups of countries.

N o t e s

(1) After HEDEMANN, in his Grundzüge des Wirtschaftsrechts (1922); F. de KIRALLY, "Le droit économique, branche indépendante de la science juridique: sa nature, son contenu, son système" (Études en honneur de François GENY, Paris, 1934, pp. 111 ff.); Michel VASSEUR, Le droit de la réforme des structures industrielles et des économies régionales (Paris, LGDJ, 1959); Michel VASSEUR, "Un nouvel essor du concept contractuel: les aspects juridiques de l'économie concertée et contractuelle" (R.T.D. Civil, 1964, pp. 1 ff.); Gérard FARJAT, L'ordre public

(2) Orlando GOMES and Antunes VARELA, Direito econômico (São Paulo, Saraiva, 1977); Washington P. A. de SOUZA, Direito econômico (São Paulo, Saraiva, 1980); Anchises BRETAS et al., Direito econômico do planejamento (Belo Horizonte, Fund. Vale Ferreira, 1980); Giovanni BOGNETTI, Costituzione economica e Corte costituzionale (Milano, Giuffrè, 1983); Eros R. GRAU, Planejamento econômico e regra jurídica (S. Paulo, Ed. RT, 1978); Elementos de direito econômico (S. Paulo, Ed. RT, 1981); Direito, conceitos e normas jurídicas (S.Paulo, Ed. RT, 1988); A ordem econômica na Constituição de 1988: interpretação e crítica (S. Paulo, Ed. RT, 1990); Fernando F. SCAFF, Responsabilidade do Estado intervencionista (S. Paulo, Saraiva, 1990); Manoel Gonçalves FERREIRA Fo., Direito constitucional econômico (S. Paulo, Saraiva, 1990); Isabel VAZ, Direito econômico das propriedades (Rio, Forense, 1992); Fábio NUSDEO, Elementos para uma codificação do direito econômico (Sao Paulo, "tese de cátedra", 1993).


(5) Concerning extraterritorial projections or effects of law, or specifically competition law, bearing in mind some of the most relevant contributions, see, i.a.: Georges A. van HECKE, Le droit antitrust: aspects comparatifs et internationaux (RCADI, 1962-II, t. 106, pp. 253/356) and also "Règles antitrust et concentration d'entreprises à l'échelon international" (1977; collected in Misc. Georges van HECKE, Antwerpen, Kluwer, 1985, pp. 85/96); Berthold GOLDMAN, Le champs d'application territoriale des lois sur la concurrence (RCADI, 1969-III, t. 128, pp.
631/729), as well as "Les effets juridiques extraterritoriaux du droit de la concurrence" (RMC, 15.1972, pp. 612 ff.), and also (the relevant items for this matter in his) Droit commercial européen (Paris, Dalloz, 1st. publ. 1969; and subsequent editions); Michael HAYMANN, Extraterritoriale Wirkungen des EWG-Wettbewerbsrechts (Dissertation, Zürich/Baden-Baden, ed. n/s, 1974); Jean-Gabriel CASTEL, The extraterritorial effects of Antitrust Law (RCADI, 1983-I, t. 179, pp. 9/144); Isabel JALLES, Extraterritorialidade e comércio internacional: um exercício de direito americano (Lisboa, Bertrand Ed., 1988).

(6) In addition to the foregoing sources, it is also worth mentioning the seminar "Extraterritoriale Anwendung von Wirtschaftsrecht" (held at the Max Planck Institut für ausländisches und internationales Recht, Hamburg, 16/17 April 1986, celebrating the 60th. Anniversary of the Institute; RabelsZ 52.1988, nos. 1-2, pp. 1/302; comprising contributions by U. DROBNIG, J. BASEDOW, K. SIEHR, F. RIGAUX, A. V. LOWE and E.-J. MESTMÄCKER; followed by discussions coord. by H. BERG, K. ANDREGG and Chr. ENGEL, the latter having drawn up a thematic summary, pp. 256/302).


(10) Case NOLD KG v. High Authority of the ECSC (Case no. 18/57, 1957; ECR 121).


(13) Emile NOEL, As instituições da Comunidade (Luxembourg, SPOCE, 1988); Rudolf BERNHARDT, As fontes do direito comunitário: a 'Constituiçao' da Comunidade (in Trinta anos de direito comunitário, Luxembourg, SPOCE, 1984, pp. 73/86); Deirdre CURTIN, "The province of government: delimiting the direct effect of Directives in the Common Law context (ELR, 15.1990, no. 3, pp. 195/223); F.E. DOWRICK, A model of the European Communities Legal System (YEL, 3.1983, pp. 169/237); etc.


(16) Andrew CLAPHAM, Human rights and the European Community: a critical overview (Florence/Baden-Baden, EUI/Nomos Verl., 1991); Jean-François FLAUSS, Les droits de l'homme comme élément d'une constitution et de l'ordre européenne (Saarbrücken, VRBEI, No. 264, 1992); etc.

(17) See, i.a., references above. E.C. Competition Law scholarship is reaching ungodly proportions, with so many authors having dealt with different aspects of the subject, extensive quotations would be a separate work in its own right, going beyond the scope of this lecture. From my own experience, just the bibliographical references on competition law, tax and legal harmonization comprise over 60 pages of my Elementos de direito comunitário (S.Paulo, 1993, pp. 787/849).

(18) The catalogue of the contributions in the Europa-Institut series of "Vorträge, Reden und Berichte" gives a perfect example, growing to an impressive bulk of legal scholarship, comprising already over three hundred titles since 1981.


3. **Political Dynamics of Economic Integration**

The example of the European Community, in addition to its intrinsic relevance and effect, is also extremely useful as an evidence of the political dynamics inherent to economic integration efforts, also providing a parallel for analysis of different contexts, especially when attempts at different levels of economic integration are undertaken.

Economic integration is not merely a "technical" process as such but engenders ensuing factors, which might be brought under a general reference as the political dynamics of its own, with wide-ranging consequences, comprising the definition of levels of association within and without such economic integration attempts combined with the restructuring of traditional patterns, from the classical standards of state sovereignty to the exercise of jurisdiction, both territorial and extraterritorial, by this very same state (P. CASELLA, 1994) \(^1\).

As aptly noted by Neill NUGENT (1991), the Community should not be viewed too narrowly: "Whilst many of the factors which have influenced its development have applied to it alone, many have not. This is most clearly seen in the ways in which modernisation and interdependence, which have been crucial in the creation of many of the central features of the Community, have produced similar effects elsewhere in the international system - albeit usually to a more modest degree. There has, for example, been a steady increase in the number and variety of international actors, and some corresponding weakening in the dominance of states. An increasing range of methods and channels are used by international actors to pursue their goals. (...) And there has been a decline, in the Western industrialized world at least, in the use of physical force as a policy instrument - conflicts over trade imbalances and currency exchange rates are not solved by armed conflict but by bargaining, adjusting and compromising" \(^2\).

Such matters do not lend themselves to easy conclusions: the changes since 1989 have been too deep and too unexpected to have yet been fully assessed (R. KURZ, 1991; J. A. MOISÉS, ed., et al., 1992; C. FURTADO, 1993; A. HIRSCHMANN, 1993; C. OFFE, 1993; etc.) \(^3\), and it is more likely that we shall have to ruminate over them for the next few years, not only from the perspective of the European Community, now scheduled to turn into the "European Union" within a foreseeable future (G. RESS, Hrsg., 1988; M. BANGEMANN, 1989; R. BIEBER, 1983; J.-P. JACQUÉ, 1985; K.-H. NARJES, 1987; A. STEPNIAK, 1985; J. WEILER, 1987; M. R. WILL, Hrsg., 1985; D. WILLOWEIT,

The combination of modernisation and interdependence within economic integration requires an interplay of elements among which, or rather as "primus inter pares", has to be redefined the very concept or dogma of state sovereignty, considering the creation of supranational structures, as elements of an entirely new supranational legal order (D. SIDJANSKI, 1990 and 1961; E.-S. KIRSCHEM, 1987; H.-G. KOPPENSTEINER, 1963; J. WEILER, 1981; N. SCHUMACHER, 1988; J. ZEEGERS, 1989) - a relevant conceptual innovation E.C. Law has brought, being directly applied vis-à-vis national legal systems, national courts and administrations, individuals and corporate entities, within which the economic integration efforts come into play.


These aspects have been dealt with so far, but to the foregoing could now be added the recent and extremely interesting developments in the relationship between the E.C. and other countries and/or groups of countries, and from that point onwards to attempt to sort out some of the features and issues of the political dynamics of economic integration (D. COOMBES, 1970; J. RIDEAU, ed., 1973; J. CAPORASSO, 1974; L. HURWITZ, 1980; P. FONTAINE, 1990).
The external relations of the E.C. were left open to a certain extent (L.-J. BRINKHORST, 1984; P. LACHMANN, 1984; F. E. DOWRICK, 1983) (9). This means that strict and comprehensive regulations were not made from the beginning; nonetheless no relevant conceptual changes have been achieved since then (e.g., B. CONFORTI, 1964; A. CASSESE, 1960) (10). The development and the role of the E.C. as a major trading partner made its profile at international level increasingly visible, and the acceptance of the European Community as a subject of international law more widespread.

Still more interestingly, there has been less a theoretical enquiry than a practical consent and acceptance, due to trade needs and convenience, implicitly based on the principle stipulated by Art. 2 of the Vienna Convention on Diplomatic Relations, whereby "the establishment of diplomatic relations between states and the exchange of permanent diplomatic missions is made by mutual consent".

As a consequence, the E.C. has built a net of relations with different countries and/or groups of countries. The external relations of the E.C. are well known and well studied (J. v. ARNIM, 1993; J. BOULOIS, 1978) (11), and it is not necessary to recount them here (F. MOUGIN, 1980; P. PESCATORE, 1979-80) (12), nor will such external relations be considered in the perspective of the relationship between E.C. Law and International Law (e.g., W.J. GANSHOF van der MEERSCH, 1975) (13). But the relations per se, between the E.C. and different countries and/or groups of countries and their different categories might be useful to illustrate the point I would like to stress.

These countries and/or groups of countries might approximately be divided in four categories, each of which can be separately considered, with many issues related thereto, namely: (a) the EFTA countries, either in the perspective of the European Economic Area, the EEA (e.g., Cl.-P. LUCRON, 1990; D. THÜRER, 1990) (14) or each of them separately - foremost with Austria (A. MOK, 1990; I. SEIDL-HOHENVELDERN, 1990, 1983, 1982, 1981, 1980, 1963, 1955; F. WEISS, 1977; A. NYDEGGER, 1962; G. STADLER, 1989; N. WIMMER & W. WEDERER, 1990; H. WOLLMANN, 1991) (15), to a lesser degree with the Scandinavian countries, and a separate and less probable case for Switzerland (D. SCHINDLER et al., 1990) (16); (b) the Central European countries, now emerging from decades of centrally-planned economies into free market and politically democratic systems, to be more or less closely connected with the European Community, initially through trade agreements, also called "first generation" and impending "second generation" agreements with the E.C., later building closer ties,

Even within this fourth and last group of States, "Latin American" countries are being left behind other less developed countries, with dwindling share of total trade and progressive loss of relative importance as a trade partner to the E.C., downsized from a yearly average of 29.4% in the period 1961/63 to 19.2% yearly average in the period 1982/84 (20). Add to this the unfavourable consequences of more than a decade of stagnation and growing problems, the 80's, the so-called "lost decade" for "Latin America".

The point in mentioning such external relationships here is to hint at the circumstance that European integration has not only had crucial effects vis-à-vis its member-States, but also relevant consequences at world level, building a major economic and eventually political power, necessarily to be taken into account when major issues are at stake. Examples might be quoted both in favour of and against the assertion above, but the trend is clear enough not to be subject to controversy.

The present focus on the political dynamics of economic integration is not an attempt at rewriting the theory of economic integration, already done well enough by different authors, with emphasis on different aspects, over the decades (e.g., C.D.A. MELLO, 1993; F. DE LY, 1992; B. BALASSA, 1962; J.E. MEADE, 1955; J. TINBERGEN, 1954; J. VINER, 1950; W. KAUFMANN, 1924) (21) or adopting a more or less conceptual approach to the European integration (i.a., A. H. ROBERTSON, 1957 & 1961, quoted above, as well as M. ALLAIS, 1960; K. SCHMID, 1966; M. BYE, 1970; K. LIPSTEIN, 1974; H. SMIT & p. HERZOG, eds., 1976-ff.; G. RESS, G. LÜKE u. M.R. WILL (Hrsg.), 1983; G. MOREAU, 1984; J. PELKMAN, 1984; M.O. PICQUET-

Notwithstanding the success story in Western Europe since World War II, not excluding the possibility of significant extensions within the present decade, with the more or less realistic perspectives of a more or less integrated Europe stretching from the Atlantic to the Urals within concentric circles of integration levels, regional integration attempts in Latin America have had a less than successful record.

The great disparity between the emphatic optimism of official talks and the voidness of results becomes clearly perceptible when one attempts any private initiative. Private entrepreneurs tend to be wary of being lured into the official enthusiasm of integration talks, viewing the process more clearly and critically, in terms of cost-benefit relations.


It could be argued that a regional model or pattern for economic integration in the Americas has never been developed, which does not mean that extensive writing on the topic is lacking. There are literally entire libraries of studies and reports on economic integration in Latin America, mostly from an economic-political perspective (R. CARBALLO-LAZARO, W. BALIERO SILVA and H. RODRIGUEZ MELITON, 1973; S. ANDIC & S. TEITEL, eds., 1977; L.R. CACERES, 1980; J. CASTANEDA et al., 1976; F. FAJNZYLBER, ed., et al., 1980 & 1981; R. FFRENCH-DAVIS, ed., et al., 1983; E.F. LIZANO, ed., et al., 1975; F. ORREGO-VICUNA, ed., et al., 1974; C. PORTALES, ed., et al., 1983; L. TOMASSINI, ed., et al., 1981; special issue, RIL, 21.1984, no. 81, passim and A.F. MONTORO, 1992) (24), but if these are to be evaluated by the results so far achieved, little remains of any relevance.
Such a model or pattern, as stated, would not necessarily have to follow strictly choices made within the E.C., to the extent that many of the circumstances are different, but some similarities may be drawn, some general concepts could be reached, in order to set up a valid frame for experience with economic integration in the Americas.

One of the most relevant aspects seems to be dismissingly taken for granted: the issue of state sovereignty (A. M. ORANTES, 1980; G.O. MARTIN, 1980; E.A. GIBSON, 1983; F. POCAR, 1984; C.R.M. PELLEGRINO, 1985; J.R. VANOSSE, 1986; J.M. VACCHINO, 1981, 1982, 1983, 1985, 1986) (25); there has and there is abundant talk on more or less grandiose - to avoid saying grotesque - plans for economic integration between "brother countries" and "friendly neighbours" in "Latin" America, but the hardcore is carefully avoided.

Paraphrasing a cynical remark about politics in Latin America, "everything must be changed, so that everything remains the same". To evoke a comparative picture, talking about integration without restructuring both the concept and the implementation of state sovereignty seems to me like pretending to be willing to make an omelette without breaking eggs: I can hardly see how or rather how far one could intend to reach a "common market" such as the MERCOSUL, without going deeply into such thinking, in view of some sort of hybrid or innovative model. State sovereignty does not have to be wiped out; it has to be restructured so as not to block the way for proper functioning of integration attempts.

This point seems to be missed even by authors discussing economic integration requirements, even at a theoretical or conceptual level (see, e.g., R.A. BARBOSA, op. cit., 1991, also quoting Manfred MOLS, of Mainz University in a lecture allegedly held in Montevideo, in 1990) (26) whereby the "possibility of European integration serving as a model for Latin-american integration offers few elements ("poucos elementos paradigmáticos") taking into account the diversity of the historical, political, social and economic context of the two regions" and goes ahead to state: "As known, the legal foundations (Treaties of Rome/EEC and Paris/ECSC) and the community institutional devices (supranational organisms) are totally different from those chosen by Latin America (Montevideo Treaties of 1960 and 1980/ ALALC and ALADI). In a Europe marked by nationalism and devastating wars there was the necessity of transferring, for instance, some part of national sovereignties to supranational organisms. This is not the historic context of Latin Ame-
rica, and for this and for other reasons, Latin-american integration is being built on different basis" (27).

Worse than not achieving any concrete results is to pretend to justify such inefficiency behind distinct conceptual choices. There are few exceptions (J.A. ESTRELLA FARIA, 1990) (28) while many authors tend to take for granted economic integration.

The opportunity for an adequate regulation and insertion of these issues within Brazilian legal system could be the pending constitutional reform in Brazil (e.g., D.F. MOREIRA NETO, 1991; J. CRETELLA Jr., 1993; P. CASELLA, 1993; L.O. BAPTISTA, 1992) (29); oh, yes, already, for the Constitution of 1988, but the view of indispensable structural changes seems to attract only a minority (see V. MAROTTA RANGEL, 1993) (30).

Amazing as it may be, the Treaty of Asunció́n has not created any jurisdictional institution. During the transition period, i.e., 1991-1994, it was stipulated "in order to facilitate the constitution of the Common Market" that the Member States adopt a system of peaceful dispute settlement, according to Exhibit III of the Treaty (art. 3). By 31 December 1994 the Parties are bound to adopt a permanent system of peaceful dispute settlement for the Common Market.

In compliance with art. 3 and Exhibit III of the Asunció́n Treaty there was signed, on 17 December 1991, the Brasilia Protocol for Dispute Settlement ("Protocolo para a Solução de Controvérsias", hereinafter BPDS), valid only during the transition period, until the permanent system of peaceful dispute settlement for the Common Market comes into force, whereupon the device valid during the transition period is to be replaced (art. 34).

The procedures for dispute settlement stipulated in the BPDS are applicable for the settlement of disputes related to the interpretation, application or performance of provisions stipulated in the Asunció́n Treaty, in the related agreements and protocols, as well as the Decisions of the Common Market Council and the Relations of the Common Market Group, not being restricted however to controversies among Member States, comprising "claims submitted by private parties (individuals or legal entities)" (arts. 1 and 25 BPDS).
Without going into further details and technicalities, the Brasília Protocol remains strictly intergovernmental, it being incumbent upon a Member State to raise such a dispute (arts. 2 and 3 BPDS), whereby dispute settlement is to be achieved through *ad hoc* arbitration panels (to be constituted according to the provisions of arts. 9 to 14 BPDS, and to operate according to civil procedure rules stipulated in arts. 15 to 24 BPDS).

Sources for decisions are stipulated in art. 19 BPDS. Inevitable comparison turns up not only with art. 38 (I) (c) of the ICJ Statute, but also in a broader view, in connection with the "general principles of law recognized by civilized nations" (as reviewed, e.g., by Lord McNAIR, 1957; see also F.A. MANN, 1957) (31).

The BPDS regulates dispute settlement not only among States but also claims "submitted by private parties (individuals or legal entities), related to enforcement or application, by any Member State, of legal or administrative measures having restrictive, discriminatory or unfair competition effects, in violation of the Asunción Treaty, the related agreements and protocols, as well as the Decisions of the Common Market Council and the Relations of the Common Market Group" (art. 25 BPDS).

Such claims will initially be processed before the National Division of the Common Market Group in the Member State where the claimant has its domicile or main seat of business (art. 26.1 BPDS).

In the second step in the procedure, the National Division of the Common Market Group will contact either the Common Market Group or directly the National Division of the Common Market Group of the Member State against which a violation of the Treaty is alleged (arts. 27 and 28 BPDS).

The third step in the procedure takes place within the Common Market Group, in case any such claim is accepted, and involves submitting the claim to a three-member board of technicians.

The fourth step in the procedure, in case a favourable opinion towards any such claim is reached, is that any Member State may request against the claimed Member State the adoption of corrective measures or the revocation of the measures questioned (art. 32 BPDS).
Should the above stated procedure not be enforced, the fifth step is to be started, whereby an arbitration panel will be summoned, in accordance with the BPDS, regulating disputes among Member States, as already stated. This would be a long and difficult way to go, to end in a controversy between Member States.

This extremely complex procedure will become crucial if it is extended beyond the transition period as the permanent system of peaceful dispute settlement for the Common Market. Amazingly enough, many seem to favor such an alternative.

The inconvenience of such a permanent system of peaceful dispute settlement for the Common Market is manifold, to the extent that such a device (a) is bound to the present institutional structure of the MERCOSUL, which is very likely to change, and (b) no device for control of acts issued by the MERCOSUL institutions is stipulated.

I do not have to emphasize the crucial role played by the ECJ, not only vis-à-vis Member-states and private parties, to the extent that similar although not equivalent devices are stipulated within the MERCOSUL, but particularly through the exercise of rights of confrontation against Community institutions, in order to ensure the lawfulness of measures adopted. The lack of an equivalent device within the MERCOSUL should be a matter of concern.

V. MAROTTA RANGEL (1993, quoted) appropriately stresses that the "Brasília Protocol, subject to regulatory and institutional improvements, could be satisfactory for the purpose of dispute settlement, in a context of strict intergovernmental relations" but it seems clear that the BPDS "would not generate a 'corpus' of decisions ensuring the minimum level of uniformity required for interpretation (...) and application of community rules".

The capital sin of the Brasília Protocol, according to MAROTTA RANGEL is the failure to stipulate a device for the control of lawfulness of measures adopted by integration institutions (33). Such a device is only viable if a Court of Justice is incorporated in the Community structures, as has been adopted both in the European Community and in the Andean Pact (34).
Necessary and timely as it may be, the outcome of the MERCOSUL venture is jeopardized by such omissions: the lack of competition law provisions at 'Common Market' level and the absence of any jurisdictional institution.

Economic integration, allow me to stress it here today, is not to be taken for granted, it is not dispensed as a gift, it simply does not happen by itself; it has to be achieved, fighting against contrary tendencies; it requires the absolute conviction of its need, combined with steadfast political will to achieve any results. It only takes place where it is preceded by the conscience of its necessity; it has permanently to fight against isolationist and/or nationalistic trends and domestic lobbies, for the most varied markets or products; it will hurt powerful interests both at home and abroad, but this does not necessarily lead to dead-end streets, or heideggerian "Holzwege" (35); the experience of the EC proves it is viable.

European integration is an example of an attempt that has succeeded while permanently adapting itself to needs and trends, during its evolution since the early 1950's. It is extremely interesting to trace the evolution of the discussion concerning some of these conceptual topics in Europe, since the early 1950's, while attempting to draw a parallel with the present context in the Southern Cone, in view of striking albeit latent similarities. There were long controversies about the distinction between opposing currents favoring 'intergovernmentalism' and 'supranationalism', reflecting choices made within the Council of Europe and the at the time six members of the European Communities (e.g., A.H. ROBERTSON, 1956, 1957, 1959; 1952, 1952, 1954, 1956) (36).

Twenty-five years later, in the 1980's Joseph WEILER (37), attempting to sum up the matter, on different occasions (1981, 1984, 1987), although criticizing the term "supranationalism", and attempting the definition of categories within such concept, or its "dual character" did not find any other more suited to replace it: "Does it still make sense to refer to the Community as a supranational system? And indeed what do we mean when speaking of such a system?" (38).

Along these forty years the debate has oscillated around concepts such as "cooperation: integration: unification" and the "legal problems of European integration", quoting again Arthur H. ROBERTSON (in his books under such titles, published respectively in 1959 and 1957) (39) described his work (1959) as "an essay in that branch of international law which is coming to be known as 'the law of international institutions'" and already
stressed that "the law of European institutions is developing beyond the traditional concepts of international law".

Referring to the opening of the (at the time) 'European Parliamentary Assembly' as another "great moment in European history, in which events occur which could change the fate of the nations", ROBERTSON (1959) although belonging to the Council of Europe (40), insisted that the 'Europe of the Six' and its institutions be left wholly outside on the grounds that they "constitute a group which is 'sui generis'" since they "give expression to the will of the Six to engage in a process of integration involving the transfer of certain sovereign powers, which will probably lead during the lifetime of persons now living to some form of federation".

Simultaneously Max BELOFF, reviewing ROBERTSON's book (1959) remarked (1960) (41): "Mr. ROBERTSON's devotion to the cause of European integration tends to make him upon occasion over-emphasize the degree to which this has been achieved, as when he says that in the Consultative Assembly at Strasbourg 'the ties of party are stronger than those of nationality'. This should surely be qualified by a reminder that this is largely so only to the extent to which major elements of controversy between nations can be eliminated from the discussion".

Paradoxically we could say that both were and are correct: late in 1992 and early in 1993 we are still facing such antagonisms resulting from different trends, between "European integration" and "major elements of controversy between nations". Such opposition not only remains unsolved, but tends even to be aggravated by the European Union Treaty and subsequent evolution along such lines, despite its present surmountable hurdles.

My choice of the perspective of English legal scholarship is not innocent, considering the United Kingdom has - most often unjustly - been held to be the 'trouble-maker' of European integration. The differences of legal reasoning must not be stressed: they turn up by themselves (M.E. BATHURST, K.R. SIMMONDS, N. MARCH HUNNINGS, J. WELCH, eds., 1972) (42) as aptly described by Lord DENNING, in BULMER Ltd. vs. BOLLINGER S/A, 1974 (1979) (43) or also Georg RESS, Gerhard LÜKE and Michael R. WILL (Hrsg.), 1983; esp. G. CRISCUOLI, 1983; G. LANGROD, 1983; D. LASOK, 1983; see also M.P. FURMSTON, R. KERRIDGE, B.E. SUFRIN, eds., 1983; esp. D. FELDMAN, 1983 and J.J. FAWCETT, 1983; CHESHIRE FIFOOT & FURMSTON, 1986; P.B. CASELLA, 1989/90) (44) but the conceptual approach seemed to be useful,
although references to the issue of legal harmonization and unification and their interplay with economic integration will be carefully avoided herein (45).

The distinction between 'intergovernmentalism' and 'supranationalism' is not merely a technicality: it pertains to the essence of the process and impacts on its outcome. As long as the talks and discussions about economic integration in the Southern Cone remain within the boundaries of strict intergovernmentalism, it is hardly to be expected that such an 'economic integration' process may reach a 'political dynamics' of its own. This is a historical opportunity that should not be missed.

Some theoretical or conceptual points have to be possibly drawn from the EC experience, although how far this can be applied to Latin or any other America is another issue, again not to be addressed today. But this relevant contribution, for Europe itself and as a legal and institutional pattern, subject to changes, adaptations or even improvements may not, in good conscience, be so easily dismissed.

Notes

(1) See above as well as my paper "Soberania e aplicação do direito da concorrência" (RIL, Brasília, 31.1994, no. 121, in printing).


(5) Celso D. de A. MELLO, Direito internacional econômico (Rio, Renovar, 1993); Maarten SMEETS, "Globalisation and the trade policy response" (JWT, 24.1990, no. 5, pp. 57/73); Yves CHALOULT, "NAFTA e o livre comércio nas Américas (BILA, no. 8, Jan.-Mar. 1993, pp. 96/97).

l'Europe, ça peut être naturel sans douleur ... et fortifiant! Demandez aux Belges" 
(Le temps stratégique, no. "hors-série": La Suisse à pieds joints dans l'Europe, 
Nov. 1989, pp. 73/80).

(7) Max SORENSEN, Le Conseil de l'Europe (RCADI, 1952-II, t. 81, pp. 117/200); 
Paul REUTER, Le plan Schuman (RCADI, 1952-II, t. 81, pp. 519/629); Hamilton 
F. ARMSTRONG, "Postscript for the EDC" (For. Aff., 33.1954, no. 1, Oct.); M. 
KOHNSTAMM, The European Coal and Steel Community (RCADI, 1956-II, t. 
90, pp. 1/28); H. RIEBEN, De la cartellisation des industries lourdes européennes 
à la Communauté européenne du charbon et de l'acier (RCADI, 1956-II, t. 90, pp. 
117/171); M.J. de SOTO, Les relations internationales de la Communauté 
européenne du charbon et de l'acier (RCADI, 1956-II, t. 90, pp. 29/116); Tibor 
SCITOVSKY, Economic Theory and Western European Integration (Stanford, 
Stanford UP, 1958); Arthur H. ROBERTSON, "The European Political Commu-
nity" (BYIL, 29.1952, pp. 383/401), as well as his The Council of Europe: its 
structure, function and achievement (London, Stevens & Sons, 1956); idem his 
Legal problems of European Integration (RCADI, 1957-I, t. 91, pp. 105/211); 
William DIEBOLD Jr., The Schuman Plan: a study in economic cooperation (New 
York, Praeger, 1959); Louis LISTER, Europe's Coal and Steel Community (New 
York, 20th Cent. Fund, 1960); Konrad ADENAUER, Erinnerungen 1953-55 
(1966) and 1955-59 (1967) (apud Robert Noll von der NAHMER, "EWG und 
Weltwirtschaft", Integration, 1970/1, pp. 1/9); Emile BENOIT, Europe at Sixes 
and Sevens: the Common Market, the Free Trade Association and the United 
States (New York, Columbia UP, 1961); Ernst B. HAAS, The uniting of Europe: 
political, social and economic forces (Stanford, Stanford UP, 1961); Hans O. 
SCHECHTED, The path to European Union: from the Marshall Plan to the Common 
Market (Baton Rouge, Louisiana State UP, 1962); Bernard VOYENNE, Histoire 
de l'idée européenne (Paris, Payot, 1964); Jean-Claude MASCLET, "L'union politi-

Jürgen SCHWARZ (ed.), Legislation for Europe 1992 (Baden-Baden, Nomos 
Verl., 1989; the European Policy Unit at the EUI, Florence); A. SAUWENS, "De 
Six à Douze, d'importantes mutations pour la Communauté européenne en 30 ans: 
les conditions pour réussir à Douze sont-elles réunies?" (RMC, 30.1987, no. 307, 
pp. 336-342); BIEBER/BLECKMANN/CAPOTORTI u.a. (Hrsg.), "Das Europa 
der Zweiten Generation: Gedächtnisschrift für Christopher SASSE" (Baden-


(9) Laurens-Jan BRINKHORST, "Permanent missions of the EEC in third countries: European diplomacy in the making" (LIEI, 1984/1, pp. 23/33); Per LACHMANN, "International Legal Personality of the EC: capacity and competence" (LIEI, 1984/1, pp. 3/21); F. E. DOWRICK, "The model of the European Communities Legal System" (YEL, 3.1983, pp. 169/237).


(11) Joachim von ARNIM, "Aktuelle Entwicklung der Außenbeziehungen der EG" (Saarbrücken, VRBEI, No. 293, 1993); Jean BOULOIS, "La jurisprudence de la

(12) F. MOUGIN, "Les accords externes de la CEE: essai d'une typologie" (Bruxelles, IEE-ULB, 1980); Pierre PESCATORE, "Les techniques des relations extérieures de la CEE" (Nancy, Centre Européen Universitaire, session 1979-80).


Rubens A. BARBOSA, "América latina em perspectiva: a integração regional, da retórica à realidade" (São Paulo, Aduaneiras, 1991) provides the figures quoted (pp. 35/36).

Rubens A. BARBOSA, in his already mentioned América latina em perspectiva: a integração regional, da retórica à realidade (São Paulo, Aduaneiras, 1991), notwithstanding the institutional optimism he is bound to present as an Officer of the Ministry of Foreign Affairs, even when making statements in his personal name, reckons with the dwindling role played by "Latin America" in general and specifically Brazil vis-à-vis the E.C., behind ACP countries, Mediterranean countries, such as Turkey, Cyprus and Malta, the countries of the Maghreb and the Persian Gulf Area and Central European countries, although the E.C. remains the major market for Brazilian exports: USD 9,300 millions in 1988 and USD 10,000 millions in 1989 (F.O.B. prices respectively).


M. ALLAIS, "L'Europe unie: route de la prosperity" (Paris, Calmann-Lévy, 1960); Karl SCHMID, "Europa zwischen Ideologie und Verwirklichung" (Stuttgart, Artemis Verl., 1966); M. BYE, "Les problèmes économiques européens" (Paris, Cujas,


(26) Rubens A. BARBOSA (op. cit., 1991, also quoting Manfred MOLS, of Mainz University in a lecture allegedly held in Montevideo, in 1990).

(27) R. A. BARBOSA (op. cit.; pp. 37/38).

(28) José Angelo ESTRELLA FARIA, in his paper "Integração econômica na América Latina: sairemos do discurso?" (RDM, no. 79, Jul.-Sep. 1990, pp. 63/83), conveys his mood with a quotation from W. SHAKESPEARE’s Hamlet, Act II: "What do you read, my lord? words, words, words".
Constitutional reform in Brazil could be a chapter by itself, not to be reviewed hereunder. Just one reference could be Diego de Figueiredo MOREIRA NETO, "Constituição e revisão: temas de direito político e constitucional" (Rio, Forense, 1991).
This matter is being extensively dealt with in Brazil, such as e.g., José CRETELLA Jr., "Comentários à Constituição de 1988" (S.Paulo, Forense Univ., 9 vols., 1993).
Specifically in connection with constitutional reform and economic integration, see my paper, in the seminar "Revisão constitucional e MERCOSUL", dealing with "Integração econômica e harmonização jurídica" (in prep.), as well as Luiz Olavo BAPTISTA, "O impacto do MERCOSUL sobre a legislação" (Rev. da Indústria, new series. 1.1992, pp. 144/157).

Vicente MAROTTA RANGEL, "Solução pacífica de controvérsias no MERCOSUL: estudo preliminar" (Lecture held at the ILAM, S.Paulo, June 1993; in printing; quoted hereinafter).

Lord McNAIR, Q.C., "The general principles of law recognized by civilized nations" (BYIL, 33.1957, pp. 1/19); Francis A. MANN, "Reflections on a Commercial Law of Nations" (BYIL, 33.1957, pp. 20/51).

V. MAROTTA RANGEL (paper quoted above, 1993, pp. 6/7).


Some references have already been made in connection with the European Community. Extensive references would be redundant.

(35) Martin HEIDEGGER, Holzwege (Frankfurt a/M, Vittorio Klostermann Verl., (c) 1950, 6. durchgesehene Aufl., 1980):


(36) Arthur Henry ROBERTSON, "The Council of Europe: its structure, functions and achievements" (London, Stevens & Sons Ltd., 1956); "Legal problems of European Integration" (RCADI, 1957-I, vol. 91, pp. 105/211); "European Institutions - Co-operation: Integration: Unification" (London, Stevens & Sons Ltd., 1959), as well as in articles and notes such as: "The European Political Community" (BYIL, 29.1952, pp. 383/401); "The Council of Europe as an organ of inter-governmental co-operation" (in Les Institutions Internationales Européennes, Univ. of Strasbourg, 1952); "Different approaches to European Unity" (AJCL, 1954); "The creation of Western European Union" (Eur. Yb., 2.1956).


The Council of Europe is basically an organ of inter-governmental co-operation, with the addition of a parliamentary organ of a consultative character. Though its distinguishing characteristic is the existence of the Consultative Assembly, which is a parliamentary and not a governmental body, any international action of the Council must be taken by the Committee of Ministers, which is an inter-governmental organ on traditional lines. Cf. A.H. ROBERTSON, "The Council of Europe as an organ of inter-governmental co-operation" (cit., Strasbourg, 1952) as well as his "The European Political Community" (1952, p. 383, note 1).


Lord DENNING, M.R., "The discipline of Law" (London, Butterworths, 1979, pp. 17/19; quoting his decision BULMER Ltd. vs. BOLLINGER S/A, 1974; 4Ch 401 at 411):

"How different is this Treaty! It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by Regulations or directives. It is the European way ... ."

G. RESS, G. LÜKE & M.R. WILL, (Hrsg.), Gedächtnisschrift für CONSTANTINI-NESCO (op. cit., Cologne. C. Heymann Verl., 1983; particularly the contributions


(45) Economic integration inevitably interplays with legal harmonization and unification.
These comprise an entire subject, raising many complex issues, to be dealt with separately.
Some of these aspects have been mentioned in item 10.3 "harmonização das legislações nacionais" in my Comunidade Européia e seu ordenamento jurídico (S.Paulo, 1993, in printing, pp. 771/781 as well as bibliographical references, pp. 804/809 and 847/849).
4. **Final Remarks**

This attempt at a comparative approach to competition law, taking as its parameters the E.C. and the MERCOSUL, has aimed to stress some common and some particular features of the two distinct integration processes. This is and is to remain within the boundaries of a lecture: meaning that both as regards the time frame as well as the contents its limits are strictly defined. Total freedom has been granted to me, concerning the choice of the subject, its approach and extension, but there should not be an abuse of such liberty. Along the way there were references to other extremely interesting and attractive topics I would be willing to discuss in further detail with you, but we should not overload today's effort. Let's try to keep it informative while also critically reasonable.

Some of the choices in either case may be interchangeable, according to requirements and specific conditions of the attempt undertaken, and these specificities are not possibly directly transposable to a different context. But the relevance of the comparative approach is to sort out what is generally valid and applicable outside the specificities of each case. This is the reason for the choice of competition law and its application by an independent, supranational Court, as a field of crucial relevance for building an internal market where free circulation of goods, persons, services and capital is completed by a comprehensive array of market regulatory guidelines.

The body of E.C. Competition Law has doubtless been effective to achieve its aims and purposes, notwithstanding conceptual shortcomings or implementation distortions which might be pointed out - this is not the point of this exercise - but as a whole, this set of principles with complementary regulations and concurrent case-law has been an effective tool for ensuring that competition within the E.C. is not distorted, turning this project into a reality.

Along a similar line of analysis we could envisage the MERCOSUL as one of many attempts at regional economic integration, undertaken within an unfavorable context, such as unimpressive historical record for former attempts and internal problems for each, especially the two largest, of the countries involved, namely Brazil and Argentina, which are not positioned to proceed, combined with the uncertainties and hesitations that have become so clear in just two years.
Therefore, notwithstanding the broad perspectives this new attempt at regional economic integration might encompass, some issues may not be neglected without jeopardizing the entire process and its eventual outcome: among them, without mentioning internal problems necessarily to be settled before any integration with a neighbouring or any country can possibly be reached, from social iniquities to bureaucratic gigantism, from abusive levels of taxation to the ensuing unavoidable phenomena of tax evasion with combined capital flight, are also the devices chosen for implementing such integration. In this sense a coherent and comprehensive body of competition law and its mechanisms for implementation may not be neglected.

The requirement of a comprehensive body of competition law and its mechanisms for implementation have not been neglected in the E.C., and has been successful for past needs and uses - needless to undertake extensive quotations in connection therewith - but now at least, no similar device is to be found in the MERCOSUL. The issue at stake is that such a lack of a comprehensive body of competition law and its mechanisms of implementation might be fatal for the implementation of the MERCOSUL.

The ways and means of attaining such a comprehensive body of competition law and its mechanisms of implementation may vary, but the basic lines of the contents are more or less clearly defined, and not subject to relevant conceptual variations: restriction of concerted practices, abuse of dominant position, dumping and state subsidies both from within, i.e., among member-states, as partners in such a venture as well as adopting protective measures to avoid the extraterritorial projections of such phenomena from the outside, as far as fair market conditions have to be preserved and may not be distorted by the unregulated action of economic agents concentrating a relevant share of markets concerned.

This matter comprises many different aspects, as far as economic and political issues are at stake, as well as legal aspects stretching along different areas of law, economic and constitutional, coupled with traditional private international and law harmonization under different appearances, thus adding to its intrinsic complexity.

From the very beginning I stated that a final word on these matters should not be expected. I hope, nevertheless, that the way these issues have been handled may spark some comparative insights and contribute to a more comprehensive view of a comprehensive body of competition law and its mechanisms of implementation not only as a specific
feature within the E.C., but as a requirement for the construction of a true "common"
market, not stopping at the preliminary stages of its building, pretending to have achieved
what is essential but having missed the very essence of economic integration: broader,
more efficient and more competitive markets.
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Published legal articles: "A instabilidade econômica e cambial ameaça o futuro da Europa integrada" (S. Paulo, Diário do Comércio e Indústria, ed. 20 Nov. 1992); "Droit de la concurrence dans la CEE et le MERCOSUL: essai d'une approche comparative" (Lettre du Brésil, Rio, Sep. 1992, no. 165, pp. 6/7); "O desgaste do Partido Socialista e o plebiscito francês" (Semana Internacional, S. Paulo, Dep. Pol. Int. & Comp., no. 16, 15-21 Sep. 92, p. 3); "Enfoque comparativo do direito da concorrência na CEE e no MERCOSUL" (Atualidades Jurídicas, CCFB, S. Paulo, no. XXXIII, 1992/6, passim); "Arbitragem internacional e boa-fé das partes contratantes: cláusula compromissória em contrato internacional" (Revista dos Tribunais, S. Paulo, 80.1991, vol. 668, Jun., pp. 239/241); "Contratos internacionais, a guerra do Golfo e a noção de hardship" (em co-autoria com J. Renato C. FREIRE; Gazeta Mercantil, 26 Feb. 1991, p. 5); "Negociação e formação de contratos internacionais: em direito inglês e francês" (Rev. Fadusp, S. Paulo, LXXXIV/LXXXV. 1989/90, pp. 124/171); "O fenômeno da franquia: da regulamentação
comunitária à prática brasileira" (RIL, Brasília, 26.1989, no. 103, Jul.-Sep., pp. 341/356);
"New Tax on Corporate Profits Faces Legal Challenge" (Brazil Watch, Brasília, 12-26 Dec. 1988, pp. 16/17); "Twelve Percent Interest Rate Constitutional Provision dies an Early Death" (Brazil Watch, Brasília, 14-28 Nov. 1988, p. 18); "Investissement étranger et modalités d'implantation au Brésil" (CJFE, CFCE, Paris, IX.1988, no. 3, pp. 701/723);
"Brazil's new regulations on debt-equity swaps" (RDAI/Int'l. Bus. Law Journal, FEDUCI, Paris, 1988/6, pp. 844/847); "Refugiados: panorama mundial" (Rev. de Direito, FMU, S.Paulo, 2.1988, pp. 83/92); "Imposto sobre grandes fortunas e as lições do extinto tributo francês" (Atualidades jurídicas, CCFB, S. Paulo, Aug.-Sep. 1988); "Consules honorários" (Rev. Fadusp, S. Paulo, LXXXII. 1987, pp. 148/158); "Reconnaissance et exécution des sentences arbitrales étrangères au Brésil" (CJFE, CFCE, Paris, VIII. 1987, no. 3, pp. 699/722);
"Aspectos legais do dinheiro" (in Direito Moderno em Foco, by Irineu STRENGER, S. Paulo, Ed. RT, 1986, pp. 126/138); "Pirataria aérea e o papel do direito internacional" (Rev. de Direito, FMU, S. Paulo, 1.1986, pp. 47/54); "Presença de Francisco de Vitoria" (Rev. Fadusp, S. Paulo, vol LXXX, 1985, pp. 355/369); "Nicolau de Cusa" (Rev. Liturgia e Vida, Rio, XXXII.1985, no. 191, Nov.-Dec., pp. 18/31);
"Imunidades Diplomáticas" (Rev. Fadusp, S. Paulo, LXXIX.1984, pp. 247/253); "Refugiados" (RIL, Brasília, 21.1984, no. 84, Oct.-Dec., pp. 251/260); "Crise financeira da ONU" (Rev. Fadusp, S. Paulo, LXXVIII. 1983, pp. 209/216);

Lectures: "Guerra interna e direito internacional" (in the seminar "Proteção internacional dos direitos humanos"; Institute of International Law & Relations, International Red Cross and United Nations High Commission for Refugees, S. Paulo, 12 Nov. 1992);
"Legal aspects of integration and transport in the MERCOSUL" (Braz.-Argent. Chamber of Commerce, S. Paulo, 29 Oct. 1992); "O advogado brasileiro e o desafio da internacionalização na prestação de serviços" (in the seminar "O advogado na Alemanha, seu papel na sociedade e a internacionalização dos serviços"; Brazilian Bar Association, Konrad Adenauer Stiftung, German Chamber of Commerce and German General Consulate, S. Paulo, 25 Sep. 1992); "A experiência da Comunidade Européia: a solução de controvérsias e o papel do Tribunal de Justiça" (in the seminar "Integração econômica e solução de controvérsias: perspectivas do MERCOSUL", S. Paulo, 18-20 Aug. 1992);
"European Competition Law and economic integration in the MERCOSUL" (S. Paulo, Mar., Apr. and Jul. 1992; German Chambers of Commerce for Asunción, Buenos Aires, Montevideo, Porto Alegre and Rio de Janeiro, Jul. 1992); "Enfoque comparativo do direito da concorrência na C.E. e no MERCOSUL" (Legal Commission CCFB, S. Paulo, 28 Apr. 1992); "O direito da concorrência na C.E. e no MERCOSUL" (in the seminar "As
tendências de integração e globalização dos sistemas jurídicos e o direito brasileiro: algumas influências e perspectivas", S. Paulo Lawyers Association, 19 Mar. 1992); "Direito comunitário, direito internacional público e direito internacional privado" (in the seminar "Formas de integração comunitária", U.S.P. Law School, S. Paulo, 13 Mar. 1992); "Legal aspects of foreign investment in Brazil" (Joseph Lauder Institute, University of Pennsylvania, external post-graduate program in Brazil, 1989, 1990, 1992); "Formação dos contratos internacionais, cartas de intenção e pré-contrato" (in the seminar "Os contratos internacionais no direito internacional privado", UNESP, Franca, 25-26 Oct. 1990); "Brasilianische Durchführungsbestimmungen bezüglich der Umwandlung von Schulden in Investitionen" (in the seminar "Debt-equity swaps", HDI, Hannover-Lahe, Sep. 1988); "International Legal Aspects of Terrorism: special rules for areas not under national jurisdiction and the Achille Lauro Affair" (Center of Studies and Research in International Law and Relations, Academy of International Law, The Hague, 14 Aug. - 9 Sep. 1988); "Aspectos jurídicos do terrorismo internacional" (Mauá Engineering School, in the course Estudo de Problemas Brasileiros, S. Paulo, 1985);

Book reviews and translations: "A Dívida Externa Brasileira: solução pela via arbitral" by J. DOLINGER (S. Paulo, Nova Fronteira, 1988) (RDCRI, 1989/1); "Ordem pública transnacional e arbitragem internacional: conteúdo e realidade da ordem pública transnacional na prática arbitral" by P. LALIVE (RDCRI, 1989/1, pp. 25/69); "Do Acto Unico à nova fronteira para a Europa" by M. C. LOPES PORTO (Coimbra, Fac. Direito, 1988) (RDCRI, 1992/3; in printing); "Direito Comunitário" by J. Mota de CAMPOS (Lisboa, Fund. C. Gulbenkian, 2nd. ed., 1988, 2 vols.) (RDCRI, 1992/3; in printing); "Aspectos jurídicos da arbitragem comercial no Brasil" by P.B. MARTINS (Rio, Lumen Juris, 1990) (RDCRI, 1992/3; in printing); "Contratos internacionais" by C.R. BASTOS & Eduardo A.G. KISS (S. Paulo, Saraiva, 1990) (RDCRI, 1992/3; in printing); "Convenção de Viena sobre relações diplomáticas" by G.E. do NASCIMENTO E SILVA (Rio/S. Paulo, Forense Univ., 1989) (RDCRI, 1992/3, in printing); reviews by the General Editor (RDCRI, "Revista das Revistas", pp. 128/129 on articles "L'investissement au Brésil" (CJFE, Paris, CFCE, 1988/3), "New tax on corporate profits faces legal challenge" and "Twelve percent interest rate constitutional provision dies an early death" (Brazil Watch, Brasília, vol. 5, 1988, nos. 23 and 25);

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