ANTI-COMPETITIVE PRACTICES BY PRIVATE UNDERTAKINGS IN ANCOM AND MERCOSUR: AN ANALYSIS FROM THE PERSPECTIVE OF EC LAW

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I. INTRODUCTION

THE 1990s have been characterised by the globalisation of markets and the internationalisation of trade. Countries seem to be more interested than ever in creating new trading blocs and strengthening existing ones. As perhaps the most developed integration group in the world, the European Union[1] has been used by framers of many other integration processes as a model on which to design their own institutional and legal structures.

This article will focus on two Latin American integration processes which have followed the European legal pattern of integration, namely the Andean Community[2] and the Southern Common Market or Mercosur.[3] The particular area of analysis in this article is competition law and the equivalent provisions of Article 85 of the EC Treaty in Ancom and Mercosur.

Even though the legal order of the European Community includes substantive provisions concerning competition in the EC Treaty itself, these provisions have been complemented by further protocols and treaties,[4] by the acts of the institutions and by the extensive case law of the European Court of Justice. A striking fact is that Ancom and Mercosur have used the different sources of EC law (the whole *acquis communautaire*) in order to design their own provisions. Since this is a relevant issue that deserves a separate analysis and due to the limitations of space, I will not discuss here the theoretical implications of the way in which the framers of the Ancom and Mercosur systems have mixed and used that *acquis* to draft their own competition provisions.

A final point needs to be made. Apart from the lack of publications concerning the area of competition in Ancom and Mercosur, the practice of the supranational authorities has been almost non-existent. This means

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1. Established through the Treaty of Rome, signed 25 Mar. 1957; hereafter EC Treaty.
2. Also referred to as Andean Pact, Andean Group, ANCOM and GRAN. Hereafter Ancom.
3. From its Spanish wording "*Mercado Común del Sur*".
4. Single European Act (SEA), signed by the EC heads of government on 17 and 28 Feb. 1986, on institutional reform and Treaty on European Union (TEU) signed in Maastricht on 7 Feb. 1992.

that there is still no case law available to provide a better understanding of the behaviour of the institutions when faced with anti-competitive practices. Neither is there any research or study at a regional level that will identify the most frequent anti-competitive practices from private (or public) undertakings. This explains the limited reference to Latin American cases throughout this article.

Since reference will be made to the various legal texts of Ancom and Mercosur in the course of this article, Table 1 sets out a comparative outline of the main treaties, agreements, protocols and other legal texts that form part of the legal order of the groups studied.

Table 1. *Main legal texts of the EC, Ancom and Mercosur*

Legal text	*EC*	*Ancom*	*Mercosur*
Treaty or framework agreement	Treaty of Rome (25/3/1957)	Agreement of Cartagena (28/6/69)	Treaty of Asuncion (26/3/91)
Protocols/succeeding treaties	Single European Act (1986) Treaty on European Union (1992)	Treaty creating the Andean Court of Justice (1979) Treaty creating the Andean Parliament (1979) Protocols of: Lima (1976) Arequipa (1978) Cartagena (1983) Quito (1987) Cartagena (1991) Trujillo (1996) among others	Protocols of: Brasilia (1991) Ouro Preto (1994) Colonia (1994) Fortaleza (1996) among others
Secondary legislation in the form of regulations, directives and decisions. Recommendations and opinions are of persuasive force only.			

II. THE TWO LATIN AMERICAN INTEGRATION GROUPS

A. *The Andean Community (Ancom)*

Ancom[5] was created through the Agreement of Cartagena[6] and is now

5. For a detailed history of Ancom see D. Morawetz, *The Andean Group: A Case Study in Economic Integration Among Developing Countries* (1974).

6. Cartagena Agreement or Treaty of Andean Subregional Integration (hereafter Cartagena Agreement), originally signed on 28 May 1969 and codified by Decision 236 of the Cartagena Agreement Commission on 26 May 1979 in Bogotá (Colombia).

formed by Bolivia, Colombia, Ecuador, Peru and Venezuela.[7] Despite severe economic and practical difficulties faced by the system, Ancom is still acknowledged by legal commentators as the most important, complete and comprehensive integration model in Latin America.[8]

As a result of the eighth Andean presidential meeting held in Trujillo, Peru in March 1996, amendments were introduced to the Cartagena Agreement. The idea of an "Andean Community" was introduced and new powers were given to the political bodies of the group such as the Andean Presidential Council, the Council of Foreign Affairs Ministers and the Andean Commission. On the other hand, the powers of the former "Board of the Cartagena Agreement", now named "General Secretariat", have been limited and this independent body now works as a technical organ for the support of the aforesaid institutions. The Andean Court of Justice and the Andean Parliament maintain their judicial and deliberative characters respectively.

B. The Southern Common Market (Mercosur)

The countries of the southern cone of South America (Brazil, Argentina, Uruguay and Paraguay[9]) have recently begun to develop their own model of integration which, along with that of Ancom, covers practically the whole geography of South America. In 1991 the Treaty of Asuncion was signed and, for the first time, the name of Mercosur (southern common market) was introduced. The Treaty was the result of many other prior negotiations, especially between Brazil and Argentina.[10]

Following Article 18 of the Asuncion Treaty,[11] the Protocol of Ouro Preto was signed on 17 December 1994. Unlike the European Community and Ancom, which created powerful supranational institutions, Mercosur established administrative bodies to co-ordinate implementation of treaty provisions among member States leaving the national administrations to co-ordinate and prepare negotiations.

It has been argued[12] that while Argentina has often cited the European Union as a model, Brazil insists that Mercosur should be a union of nation

7. Chile was a member originally but withdrew in 1976.

8. See e.g. C. A. Zelada (1993) 196:18 INTAL 56; J. M. Vacchino (1992) 185:17 INTAL 3; D. W. Kisic (1992) 186: 17 INTAL 13; E. Ferris (1991) 32 Virginia J. Int. L. 271; Avery (1972) 11 J. Common Market Studies 85; Ch. R. Barros (1993) 196:18 INTAL 30.

9. Chile is an associate member.

10. The history of Mercosur can be traced back to the Iguazú Act of 1985 where Argentina developed the idea of a "preferential association" with Brazil. In 1986 the Declaration of Buenos Aires was signed for Argentinean–Brazilian integration and a broader treaty was signed on 6 July 1990. For a detailed explanation of the history of the creation of Mercosur see M. Hains-Ferrari, "Mercosur: A New Model of Latin American Economic Integration?" (1993) 25 Case W. Res. J.I.L. 413.

11. Providing that "before 31 Dec. 1994, Member States will determine the definite institutional structure and decision-making system of Mercosur".

12. *The Economist*, 12 Oct. 1996, p.9.

States, with a minimum of supranational institutions, and decisions taken by consensus. In practice, Mercosur is mainly composed of a Common Market Council and a Common Market Group which set the guidelines of the integration process and issue legal norms which are implemented and monitored by a Trade Commission. So far, the process has in practice been guided directly by the consensus of the four heads of State, among whom Brazil and Argentina clearly show a dominant position. There is also a Joint Parliamentary Commission with similar functions to that of the Andean Parliament but the system lacks a judicial independent organ and controversies are ultimately resolved at an arbitration level.

Even though the acts of the institutions, apart from recommendations and opinions, in the three models under discussion are binding on the member States, the acts emanating from the organs of Mercosur are limited by two provisions of the Ouro Preto Protocol. First, Article 2 invests the institutions with "decision-making powers of an inter-governmental nature". Second, Article 42 provides:

> The provisions emanating from the organs of Mercosur established in Article 2 of this Protocol will have a binding character and, when necessary, shall be incorporated in the national legal orders through the procedures established by the law of each member State.

Article 42 appears to imply that, even though the acts of Mercosur's institutions are binding on the member States, for them to have legal effect and confer rights and obligations on individuals it would first be necessary to implement them in each of the member States through domestic procedures. Unlike Mercosur, the legislative acts of Ancom institutions have a supranational character similar to that of the EC institutions, thus permitting a more dynamic development of the group's legal order.

III. COMPETITION POLICY AND TRADE STRUCTURE

IN EC law it has been widely acknowledged[13] that there are two separate aspects to be considered as far as the role of competition policy is concerned. On the one hand, competition policy seeks to protect and promote an effective market mechanism. On the other, it seeks to ensure that unification of the internal market is achieved and maintained.

As a result, competition instruments in the Community have been designed to regulate increasingly complex economic transactions that cause market segmentation within the Community while providing adequate protection for free competition. Two sectors also protected by

13. See in general the textbooks by Steiner, *Textbook on EC Law*, London, 4th edn, Blackstone Press Ltd, 1995; Wyatt and Dashwood, *EC Law*, London, Sweet & Maxwell, 1993; Goyder, *op.cit. infra* n.40; Whish, *op.cit. infra* n.23; and in particular Furse, "The Role of Competition Policy: A Survey" (1996) 4 E.C.L.R. 254 and Ehlermann, "The Contribution of EC Competition Policy to the Single Market" (1992) 29 C.M.L.Rev. 261.

EC competition policy as weaker parties in the competition process are consumers and small and medium-sized undertakings.

Competition has only recently become an issue in Latin America and its policy is still under development. Until the 1980s most countries in the region were pursuing import-substitution policies. Trade was only partly liberalised between member countries and, therefore, integration groups did not lead to trade competition.[14] After the economic crises and the severe balance of payments problems suffered by most Latin American countries in the 1980s, a rapid political and economic transformation took place in the early 1990s. The governments in Latin America have made remarkable efforts to open their economies to international trade and to support strongly the development of democratic institutions.[15]

As far as integration arrangements are concerned, the two main issues considered by the drafters of competition rules in the region have been the need to increase trade and the objective of establishing a unified market. After trade stagnation within the region in the 1980s, Ancom's major concern when discussing the development of a competition policy was the need to introduce flexible rules that will foster a substantial increase in international and intra-regional trade. As the General Secretariat of the Cartagena Agreement put it:[16]

> the principal objective of the trade strategy [in the region] is the expansion and diversification of Andean trade through the perfecting of the common market, the establishment of adequate competition rules, the promotion of competitive advantages, the development of new forms of trade and the agreement of common commercial action with relation to third countries.

The unification of the market also constitutes an important aspect of competition policy in Ancom, especially since the Trujillo Protocol, in which the Andean heads of State confirmed their political will to establish a common market in the region.

Similarly, among the objectives set forth in Article 1 of the Treaty of Asuncion creating Mercosur is "the co-ordination of macro-economic and sector policies of member States in order to ensure free competition between them".

Unlike the countries of Ancom, the economies of Mercosur are more developed and trade within the region and with third countries is more dynamic. As in the case of the European Community, competition policy

14. Nogués, "The Roles of Trade Arrangements in the Formation of Developing Countries' Trade Policies" (1991) 25 J. World Trade 41, 46.

15. M. Hains-Farrari, "Mercosur: A New Model of Latin American Economic Integration? (1993) 25 Case W. Pres. J.I.L. 531, 532.

16. General Secretariat of the Cartagena Agreement, *El Grupo Andino en Transición: un nuevo estilo de integración*, (Lima, 1985), p.142.

in Mercosur seeks to ensure free competition while supporting the unification of the market.

Nonetheless, the structure of the Latin American market is going through a period of transition and other elements have to be considered when analysing its competition rules. First, the market still consists of few competitors with large market shares, many of which are still State-owned enterprises. Apart from these oligopoly-type organisations, the remaining part of the market is divided between local family-owned industries which are keen on forming cartels in order to compete as a bloc with other dominant corporations in the market.

Second, there are differences in the level of the member States' industrial development that conflict with the goal of "harmonious development" established in the treaties. For instance, the Cartagena Agreement embraces the basic principle of controlling the market up to a certain point in order to avoid imbalances among countries[17] but, in reality, the problems of unbalanced conditions within the group are still severe.

A. The Control of Restrictive Practices in Ancom

The Agreement of Cartagena dedicates Chapter VIII to "commercial competition". Article 75 gives the Commission the power to establish, upon a proposal by the General Secretariat, the rules necessary to prevent or correct the practices that may distort competition within the region. Article 75 also entrusts the General Secretariat with the responsibility of monitoring the application of competition rules in particular cases that are reported and lists the following as distorting practices: "dumping, price manipulation, procedures aimed at distorting the normal supply of raw materials and other procedures of equivalent effect". This is not an exhaustive list and it has usually been interpreted as merely illustrative. For example, Rioseco[18] and Cárdenas[19] have stated that this Article also applies to State aids and to any other practice that "may distort the conditions of competition within the region".

Therefore, competition rules in the case of Ancom are not established as primary law. The first secondary legislation adopted by Ancom with respect to competition was the Commission's Decision 45, which contained the "provisions to prevent or correct practices that may distort competition within the region".[20] The preamble to this Decision shows the

17. E.g. the Agreement includes provisions establishing a preferential treatment for the less developed economies of the group, Bolivia and Ecuador.

18. A. Rioseco, *El dúmping y las subvenciones en el marco de la ALALC y del Pacto Andino*, (1979), p.84.

19. M. J. Cárdenas, "Legislación sobre competencia en el Acuerdo de Cartagena" (1993) 196:18 INTAL 23.

20. 18 Dec. 1971.

extremely limited experience of the member States in this area at that time. In fact, the Commission mentions that, at that time, member States lacked legislation on competition and that it was necessary to accumulate experience of restrictive practices in order to define precisely those practices and establish the corresponding measures for each particular case in the future. Moreover, Decision 45 did not deal with restrictive practices from private companies. It referred only to practices between member States as such within the region and between member States and third countries. Decision 45 was replaced by Decision 230,[21] which basically followed the same line established by Decision 45 in the sense that it dealt only with State practices.[22]

Finally, the Andean Commission replaced Decision 230 with a series of more specific provisions contained in Decisions 283, 284 and 285 in March 1991. Similarly, in 1992 the Commission issued Decisions 323, 324 and 330. Decision 284 concerns the prevention or correction of quantitative restrictions on exports and measures having equivalent effect. Decisions 283, 324 and 330 relate to dumping and subsidies. Even though Decision 323 creates a high-level Competition Commission to oversee and control anti-competitive practices, that Commission has not yet begun its functions. Finally, Decision 285 sets out the rules concerning restrictive practices by undertakings. These decisions, along with the resolutions issued by the General Secretariat and the general provisions of the Cartagena Agreement, constitute the only existing legal framework concerning the field of competition in Ancom. From the above-mentioned legislation, this article will refer only to Decision 285, which corresponds to the text of Article 85 of the EC Treaty.

B. The Control of Restrictive Practices in Mercosur

Substantive guidelines in relation to competition are found in Decision No.21/94 of the Common Market Council. Those guidelines provide a fairly broad set of objectives and practices involving both conduct and structure to which member countries should adhere. Nonetheless, discussions are still under way on the adoption of a protocol on competition policy.

This study will focus on Decision 21/94, which deals with the defence of competition and, to a certain extent, also constitutes the equivalent of Articles 85 and 86 of the EC Treaty and is the first body of law relating to anti-competitive behaviour of private parties in Mercosur. Even though other related decisions fall outside the scope of this study, I shall mention them for the sake of completeness. These are contained in the Common

21. Commission of the CA, Lima, 11 Dec. 1987.
22. For an analysis of Decision 230 see Cárdenas, *op. cit. supra* n.19.

Market Council's Decision 3/92, which established a transitional procedure to resolve claims and references about unfair trade practices in relation to dumping and subsidies. Additionally, Decision 20/94 deals with public policies that may distort competition.

IV. ARTICLE 85 OF THE EC TREATY AND THE CORRESPONDING LAWS IN ANCOM AND MERCOSUR

A. Undertakings

In the context of EC law, the term "undertaking" is not defined in the EC Treaty and, hence, has been extremely broadly construed by both the practice of the European Commission and the case law of the European Court of Justice.[23]

Among the parties included in the term "undertaking" are: "FIFA and the Italian football association, agricultural co-operatives, trade associations, state-owned corporations, an ex-employee who carries on an independent business, an international referral service established between accountancy firms and individuals in the professions (e.g. lawyers), among others".[24] The European Court, however, excluded from the notion of "undertaking" parties whose work does not have an "economic element" and whose tasks are mainly in the public interest.[25]

Largely inspired by the EC Treaty, Article 3(1) of the Andean Commission's Decision 285/91 defines restrictive practices as "agreements, parallel actions or concerted practices between undertakings[26], which have or may have as their effect the restriction, prevention or distortion of competition". Under Article 3(2), "agreements" are defined as including "vertical and horizontal agreements concluded among the undertakings' related parties".

Similarly, Article 3 of Mercosur's Decision 21/94 states:

> All agreements and concerted practices between economic agents, and decisions by associations of undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition *or*[27] of free access to the production, processing, distribution or marketing of goods and services, within the common market, shall be prohibited.

23. For a detailed analysis of Art.85 EC see R. Whish, *Competition Law* (3rd edn, 1993), p.187, and Jo Shaw, "A Review of Recent Cases on Articles 85 and 86 EC: Issues of Substantive Law" (1995) 20 E.L.R. 66.

24. Bellamy and Child, *Common Market Law of Competition* (4th edn, 1993), para.2–003.

25. Case C–364/92 [1994] E.C.R. I–43.

26. The original Art. in Spanish uses the word "*empresa*" which is usually identified as meaning "company or enterprise". However, Spanish–English dictionaries define the word "*empresa*" as "enterprise, undertaking, company, firm". Due to the similarities in the wording of Art.3 and Art.85 EC I will use the word "undertaking" as the translation of "*empresa*".

27. Even though the literal translation of the Art. from Portuguese would be "and", the word "or" has been used to preserve the intended meaning of the Art.

Neither Mercosur's—where Decision 21/94 has not yet been used in practice—nor Ancom's practice or case law provides evidence about the interpretation given to the terms "economic agents" and "undertaking". However, if the European Community serves as an example, this would be developed on a case-by-case basis. In the Andean case, although the issue has never expressly been addressed, the resolutions of the General Secretariat have in general involved private companies which fall unquestionably within the scope of Article 3. A broad construction such as that developed by the European Commission and Court may be a good mechanism to encourage a wider application of competition rules in the region.

B. The "Economic Entity" Doctrine

In the Latin American context, however, the question arises whether Ancom and Mercosur would be prepared to apply the notion of "economic entity" used in the European Community for parent and subsidiary companies with economic dependence.

Under EC law, the "economic entity" doctrine was developed by the European Court of Justice in the *Dyestuffs*[28] case and is now a well-established part of the EC legal order. Three non-EC undertakings had illegally fixed prices within the Community through the medium of subsidiary companies located in the Community but under their control. The European Court took the view that, notwithstanding the legal image of the parent–subsidiary relationship, in reality those undertakings were one sole economic entity and competition rules were to apply accordingly. Similar views were taken in the Commission's decision in *Polypropylene*,[29] where it declared that the concept of an undertaking " is not identical with the question of legal personality for the purposes of company law", and that it may refer "to any entity engaged in commercial activities"; and in *Hydrotherm Geratebau* v. *Andreoli*,[30] where the Court applied Article 85 of the EC Treaty to a whole economic group consisting of two firms which had legal personality but which were owned by an Italian individual. A further development of this doctrine in the EC case is the agreement signed by the European Commission and the government of the United States[31] regarding co-operation in the application of competition laws.

In the case of Ancom and Mercosur, the possibility of applying an "economic entity" doctrine poses difficulties. First, a large number of undertakings with substantial market shares in Latin America are in fact subsidiaries of international companies, located mainly in the United States and Europe. Second, due to the very nature of Latin American

28. Case 48/69, *ICI* v. *Commission* [1972] E.C.R. 619.
29. (1986) O.J. L230/1, para.99.
30. Case 170/83 [1984] E.C.R. 2999, para.11.
31. (1995) O.J. L95/45 (27 Apr.).

developing economies, there is an obvious interest in attracting foreign investment and technology transfer from industrialised countries. Therefore, extending the competence of Ancom and Mercosur competition authorities and the Andean Court of Justice to those undertakings apparently operating from outside the region could have negative economic implications. Even though an important lesson can be learned from the EC experience, it is unlikely that either Ancom or Mercosur competition authorities will be prepared to go as far as the European Court went in *Dyestuffs*. In order to avoid future difficulties in controlling restrictive practices by local subsidiaries which merely follow the orders of powerful multinational companies, it is suggested that a strong political decision to support the "economic entity" doctrine is taken by the institutions and clearer rules are introduced accordingly.

C. *Agreements, Decisions and Concerted Practices*

As in the case of the term "undertaking", in EC law "the concept of a concerted practice is so broad that it will apply to many informal understandings which semantically one might hesitate to term agreements".[32] In fact, in *ACF Chemiefarma* v. *Commission*[33] the European Court established that a gentlemen's agreement could fall within the definition of "agreement" and therefore be caught by Article 85. Similarly, in *Sandoz*[34] invoices for the supply of pharmaceuticals used by this producer bearing the words "export prohibited" were held by the Court to be part of an agreement of which the words endorsed were the documentary evidence.

Even though the wording of Article 85 is copied almost identically in Ancom's Decision 285/91, Article 3 does not mention the concept of "practices of associations of undertakings" in the wording of the Decision. It is not clear whether this exclusion was intended or whether it was just an omission in the belief that restrictive practices by those associations could be included in a broad construction of the term "*empresa*". The question then arises whether Decision 285 would apply to a case where a decision taken by an association of undertakings prevents, restricts or distorts competition. In the EC context such a case would clearly be caught by Article 85(1).[35] In Ancom the same effect could be obtained if a broad construction is given by the General Secretariat and the Andean Court of Justice to the term "undertaking", even if the wording of Decision 285 does not

32. Whish, *op. cit. supra* n.23, at p.191.

33. Cases 41, 44 and 45/69, *ACF Chemiefarma* v. *Commission* [1970] E.C.R. 661.

34. Case 227/87, *Sandoz* [1990] E.C.R. 145.

35. See e.g. Case 45/85, *Verband des Sachversicheres* v. *Commission* [1987] E.C.R. 405, where a group of companies set up a non-profit association in order to co-ordinate aspects of their activities and use it for anti-competitive purposes such as deciding to give special benefits to the association members. Under EC law such a case was indeed held to fall under Art.85(1) by the Commission.

expressly mention the possibility of undertakings forming an association for the distortion of competition.

As far as concerted practices are concerned, in EC law the concept was clarified by the European Court in *Ahlstrom Oy* v. *Commission* (*Wood Pulp*),[36] where the Court ruled that:

> parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article 85 of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors.

The rules of both Mercosur and Ancom include the term "concerted practices". However, the latter also mention the term "parallel acts". Based on EC experience, which has actually defined concerted practices as parallel behaviour, the inclusion of the term in the Andean Decision would seem to be redundant, especially since no definitions are provided to differentiate the two terms.

As a result, in EC law two stages can be identified: the first stage, where a concerted practice was determined by simply looking at factual hints of parallelism; a second stage, beginning with *Wood Pulp*, where the Court uses a much more sophisticated form of economic analysis, taking into account the intentions of the parties.

D. Oligopolistic Interdependence

As a result of the development of the concept of concerted practices in EC law, Article 85 of the EC Treaty is no longer applied to cases where undertakings naturally adapt themselves to the behaviour of their competitors and, therefore, a concerted practice does not necessarily exist. This is called the "oligopolistic interdependence" theory and, in the EC case, its development has been the result of highly technical assessments and investigations carried out by the European Commission.

As far as Ancom and Mercosur are concerned, some conclusions can be drawn with regard to this theory. First, due to the size of the Latin American market and the existence of relatively few competitors for each product market, it is highly likely that the oligopolistic interdependence phenomenon will frequently occur.

Second, the General Secretariat, which is the technical body of Ancom, lacks specialised personnel and resources to carry out sophisticated economic analysis. In Mercosur the Common Market Commission is also ill-equipped to undertake such a task. Therefore, the experience of the Euro-

36. Case C-89/85, *Ahlstrom Oy* v. *Commission* [1993] 4 C.M.L.R. 407, para.64.

pean Community as far as the definition of a concerted practice is concerned could be useful to develop a model in order to achieve a better control of non-obvious concerted practices.

E. May Affect Trade Between Member States

A vital condition for a restrictive practice to be caught by Article 85 of the EC Treaty is that it may affect trade between member States. As the words "may affect" suggest, for a practice to be caught as affecting intra-Community trade it will be enough that the agreement, decision or practice may have "an influence, direct or indirect, actual or potential, on the pattern of trade between member States".[37]

Under Article 3 of Mercosur's Decision 21/94, an identical condition to that of Article 85(1) can be found. Likewise, Article 2 of Ancom's Decision 285/91 expressly excludes from the scope of Decision 285 "practices carried out by one or more undertakings located in only one Member State but having no effects in the region". In that case, Article 2 states that such practices will be regulated by the corresponding domestic legislation.

F. De Minimis *Exception*

Under EC law some agreements which affect competition within the terms of Article 85(1) may nevertheless not be caught because they do not have an appreciable impact either on competition or on inter-State trade.[38] This doctrine, called *de minimis*, was first formulated by the European Court in *Volk* v. *Vervaecke*,[39] where it ruled that, in principle, insignificant agreements would not fall under Article 85 since it was essential to be able to show a reasonably probable expectation that the agreement would exercise an influence, direct or indirect, actual or potential, on trade trends between member States to an extent that would harm the attainment of the objectives of a single market between States.[40]

Decision 285/91 has followed the *de minimis* doctrine in so far as Article 2 gives domestic authorities jurisdiction over purely local practices. However, no minimum/maximum threshold or any other form of measurement has been established by Ancom rules. This leaves the General Secretariat with freedom to apply any criteria deemed fit to determine whether or not an undertaking may fall under the *de minimis* doctrine.

Article 5 of Mercosur's Decision 21/94 provides for a sort of *de minimis* provision by stating that practices under review would be those that prod-

37. This was held in Case 56/65, *Société Technique Minière* v. *Maschinenbau Ulm* [1966] E.C.R. 235, para.249.

38. Whish, *op. cit. supra* n.23, at p.223.

39. Case 5/69, *Volk* v. *Vervaecke* [1969] E.C.R. 295.

40. D. G. Goyder, *EC Competition Law* (2nd edn, 1995), p.109.

uce anti-competitive effects in the whole or part of Mercosur and those that "imply an economic concentration equal or superior to 20%; of the relevant market". This provision establishes the jurisdictional line between the cases with a community dimension and those that would fall within a mere domestic scope and it also serves as a *de minimis* rule in order to determine how appreciable the impact of a practice is in the Mercosur community. Due to the Mercosur Trade Commission's current lack of supranational powers, all practices are investigated and decided at a national level. Therefore, unlike the case of Ancom, the threshold of 20 per cent established by Decision 21/94 will be useful to achieve a uniform and harmonised control of restrictive practices in the member States. In the EC context the Notice on Agreements of Minor Importance[41] adopted by the European Commission sets forth quantitative criteria to determine what an "appreciable" effect in intra-Community trade is. As the Commission explains:

> by setting quantitative criteria and by explaining their application, [the Commission] has given a sufficiently concrete meaning to the concept "appreciable" for undertakings to be able to judge for themselves whether the agreements they have concluded with other undertakings, being of minor importance, do not fall under Article 85(1).

The rationale behind the Commission's Notice is that Community law and all the technical machinery of the Commission should be devoted primarily to practices with a clear and high impact on intra-Community trade. That will also help an overworked Commission to avoid having to decide on cases involving undertakings not satisfying the established threshold.

The Notice establishes two conditions necessary for an agreement not to be caught under Article 85. First:

> the goods or services which are the subject of the agreement together with the participating undertakings' other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use, do not represent more than 5% of the total market for such goods or services ... in the area of the common market affected by the agreement.

Second, "the aggregate annual turnover of the participating undertakings does not exceed 300 million ECU".

By and large the European Commission shows a trend toward increasing the thresholds necessary for a practice not to be considered of minor importance. However, that trend is clearly the result of many years of experience where the Commission has been able to draw a line between what is and what is not an appreciable effect. In the case of Ancom and

41. Notice on Agreements of Minor Importance (1986) O.J. C231/2, as amended (1994) O.J. C368/20.

Mercosur, the General Secretariat and the Trade Commission respectively need to develop a practice before determining the parameters of what falls under agreements of minor importance and what does not. By investigating more undertakings under community law, national authorities would have to deal with a lesser number of cases under domestic law and the Commission would be given the opportunity to develop community competition law according to the region's realities and market structure.

G. *Object or Effect*

Under Article 85(1) of the EC Treaty, practices, the "object or effect" of which is to restrict competition, are prohibited. In the European Community this wording raised the question whether there is an analytical difference between the treatment of agreements whose object is to prevent competition and those the effect of which might be to do so.[42] The case law of the European Court[43] has established that the words are to be read disjunctively. The current interpretation is that only if the anti-competitive object of the agreement is not clear would it be necessary to consider whether it might have the effect of harming competition. As Goyder[44] explains, the agreement must either be intended to have an anti-competitive result or, regardless of the parties' intentions, actually does have.

The broad approach of the Court and of Article 85(2) of automatically declaring void these sort of practices which, even though they have not had an anti-competitive effect, have had an anti-competitive object or intention can be justified only by the existence of Article 85(3). Article 85(3) allows the Commission to exempt from the application of Article 85 those practices which, even though are prohibited *per se* under Article 85(1), can be of benefit and can have a competitive effect.

This interpretation can prove to be useful in the case of Mercosur's Decision 21/94, where wording identical to that of Article 85(1) can be found. However, in that case the same justification cannot apply because Decision 21 does not provide for the possibility of granting exemptions. Therefore, mere intentions under the competition system of Mercosur would eventually be prohibited *per se*, and would not be exempted, even though they would eventually produce a pro-competitive effect.

Therefore, unlike the European Court's case law, the words "object and effect" of Article 3 of Decision 21/94 should be read jointly and the practice should be prohibited only in so far as it produces an actual anti-competitive effect. This interpretation seems to be supported, in a way, by Von

42. Whish, *op. cit. supra* n.23, at p.203.
43. See *Maschinenbau Ulm, supra* n.37; *VdS, supra* n.35.
44. Goyder, *op. cit. supra* n.40, at p.119.

Bael and Bellis,[45] who suggest that, as a practical matter, it is at least to some extent necessary to verify the effect of an agreement or practice, even if its purpose would be clearly anti-competitive. The same interpretation can operate in the reverse situation and in this case the Court has indeed ruled that even if an agreement does not have the object of restricting competition within the meaning of Article 85(1), it is nevertheless necessary to ascertain whether it has the effect of restricting competition.[46]

A further solution to the existing lack of an exemptions system in Ancom and Mercosur would be the introduction of a rule-of-reason approach in the application of Article 3. The term comes from the US anti-trust practice, whereby "agreements which are not *per se* illegal under the Sherman Act are analysed and considered in their market context in order to ascertain whether they restrain trade".[47] In the EC context, the question whether a rule of reason ought to be read in the Court's case law[48] under Article 85 is still a controversial issue under discussion.[49]

H. Prohibited Agreements

Due to the almost identical wording of Article 85(1) of the EC Treaty, Article 4 of Decision 285/91 and Article 3 of Decision 21/94, I will refer only to the differences that can be found in the wording of the provisions under discussion. First, Article 4(c) of Decision 285 emphasises as anti-competitive the practice of sharing sources of supply "and especially distorting the normal supply of raw materials". This provision, not found in the EC case, reflects the fact that most developing countries in the region are keen on protecting this area specifically because they are mere exporters of raw materials, that being one of the most important sources of income for the member States.

Second, Decision 285 adds "other [practices] of equivalent effect" to the list of restrictive practices caught by the Decision. This means that the list is not exhaustive and that the General Secretariat therefore has ample powers to add other practices considered anti-competitive by it and to prohibit them accordingly. Such a provision entails a degree of uncertainty between traders which appears not to correspond with the general goal of attracting foreign investment and ensuring free competition.

45. Von Bael and Bellis, *Competition Law of the European Community*, 3 edn, CCH Europe, 1994, 44.

46. Case C-234/89, *Delimitis* v. *Henninger Brau* [1992] 5 C.M.L.R. 210.

47. Whish, *op. cit. supra* n.23, at p.207.

48. See e.g. Case 26/76 *Metro* [1977] E.C.R. 1875; Case 161/84 *Pronuptia* [1986] C.M.L.R. 414; Case 42/84 *Remia* [1987] 1 C.M.L.R. 1; Case 258/78 *Nungesser (Maize Seeds)* [1983] 1 C.M.L.R. 278.

49. For an analysis of the rule of reason under EC law see R. Whish and B. Sufrin (1987) 7 Ox. Y.E.L. 29.

Third, Decision 21/94 also adds as anti-competitive and prohibited the practice of agreeing or co-ordinating actions that "affect or may affect competition in tenders, auctions or public bids". This provision, not found in the EC Treaty or Decision 285, is unique and seems to be aimed at ensuring that free competition is respected when commercial transactions with the State are involved.

V. CONSEQUENCES OF BREACH AND EXEMPTIONS

A. Consequences under Ancom's Decision 285/91

The equivalent of Article 85 of the EC Treaty in Ancom's Decision 285 does not consider the practices listed under Article 4 illegal *per se*. On the contrary, it establishes a "case by case" procedure highly influenced by the wording of EC Regulation 17/62,[50] which implements Articles 85 and 86.

1. Who is entitled to apply

Under Article 6 of Decision 285 those entitled to make application are:

(1) member States through their liaison organs; and
(2) natural or legal persons who claim a legitimate interest, to the extent permitted by national law.

Even though Article 6 resembles to a large extent the rule in Article 3(2) of EC Regulation 17/62, the Andean Decision includes two important differences. First, it establishes that member States shall act only through their liaison organs. Second, it introduces a restriction on natural or legal persons' ability to act since they may do so only *as far as* their domestic legislation allows such action. This is a very vague provision because it is not clear whether the national law must have similar or identical legislation to that of Decision 285 in order to allow those persons to act; or whether such national laws are to exist independently and establish rules whereby they indicate when and under which circumstances natural or legal persons are to have a "legitimate interest".

2. Conditions for a practice to be prohibited

Article 12 of Decision 285 provides

> In order to reach a decision, the General Secretariat shall have to consider the existence of positive evidence with regard to:
> (a) the restrictive practices to free competition;
> (b) the threat of prejudice or prejudice; and
> (c) the cause–effect relationship between the practices and the threat of prejudice or prejudice.

50. Reg.17/62 implementing Arts. 85 and 86 EC, (1959–62) O.J. Sp.Ed. p.87; as last amended by the 1985 Act of Accession.

This is a unique provision not found in any of the EC legal texts. According to Ibarra:[51]

> the condition that a practice has necessarily to cause harm in order to be prohibited, strongly limits the scope of application of the provision because all those practices which are still of an anti-competitive nature but do not particularly harm the industry, such as those having anti-competitive effects for the interest of the consumers and small and medium size undertakings, will fall outside Decision 285.

This point needs to be clarified further in order to understand the real sense of Decision 285. In the first place, the text of Article 12 does not establish the sole condition of actually causing harm or prejudice as Ibarra seems to believe. It also includes the possibility of a practice being sanctioned when it *threatens* to cause that harm. This means that, eventually, the General Secretariat would be able to interpret the provision broadly and prohibit practices that have not actually caused harm but might, in its view, be likely to do so.

Second, it is true that Ancom must try to protect the development of small and medium-sized undertakings, which are at a clear disadvantage, especially against multinational firms that have the economic and technological support of powerful international undertakings. The EC competition policy has been drafted with this in mind and it is a good example to be taken into account. As Goyder[52] explains, from the EC viewpoint, small and medium-sized undertakings are regarded by both the Commission and European Parliament as potentially the main providers of new employment for the future.

Third, it is also true that the protection of consumers is one of the basic objectives of competition policy. Whish[53] explains how the protection of consumers in the European Community is aimed at safeguarding individuals against the power of monopolists or the anti-competitive agreements made by independent firms. Nonetheless he also states that "the obsession with protecting the consumer can be considered short-sighted since, in the longer run, the producer might choose to abandon the market altogether rather than comply with an unreasonable competition law".

While the position of the European Community has been well defined towards the protection of the above-mentioned sectors, neither the Cartagena Agreement nor Decision 285 has a similar approach. On the contrary, the preamble to Decision 285 clearly states that the objectives of integration in the region are to make competition rules "effective mechanisms" to prevent distortions of competition. The position of the framers of Decision 285 shows how the protection of consumers and small and

51. P. G. Ibarra, (1993) 196: 18 INTAL 48.
52. Goyder *op. cit. supra* n.40, at p.13.
53. Whish, *op. cit. supra* n.23, at p.13.

medium-sized undertakings is not an issue, at least as far as the legal texts are concerned. This is due to an overriding policy, which is also, to a certain extent, the underlying justification for the existence of competition rules in Ancom and in the systems of most developing countries. That policy is the need to attract foreign capital and technology and, thus, the need to guarantee investors a safe and competitive environment. Accordingly, other considerations outside the free-market-orientated approach appear to have a much more limited protection under the Andean integration system.

3. *Powers*

Once the General Secretariat has decided that the practice in question meets the three conditions established under Article 12, it has discretionary powers to apply any measure it considers fit to the case. Section III of Decision 285 relates to the "measures" available to the General Secretariat and the member States. From reading Articles 16 and 17 of Decision 285 it can be said that, when faced with an anti-competitive practice falling under Articles 3 and 4, the General Secretariat has the following four alternatives.

(a) It can deliver a "declaration of prohibition". Article 16 does not define a "*declaración de prohibición*". From the text of the provision, it seems that the General Secretariat will issue a decision declaring that the practice in question is prohibited. This contrasts with Article 85(1) and (2) of the EC Treaty, where the practices are prohibited *per se* and are automatically void. Moreover, Article 1 of Regulation 17/62 confirms that practices caught by the Article "shall be prohibited, no prior decision to that effect being required".

On the other hand, Article 16 resembles the provision of Article 3(1) of Regulation 17/62, which states: "Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end." The text of the first paragraph of Article 16 is ambiguous because the "prohibiting declaration" cannot be considered a measure in itself. It is precisely just a declaration of an infringement and, therefore, such a declaration should be inherent in the nature of the practice and could not in itself be a measure within the context given to it under Article 16. A provision like that of Article 3(1) of Regulation 17 would be clearer since it gives the Commission the power to require the undertakings involved to bring the anti-competitive practice to an end.

(b) It can determine the application of measures in order to eliminate or attenuate the distortions subject to the claim. Article 16 also gives the member States the power to adopt the measures necessary to stop the

effects of the anti-competitive practice in question. However, Article 77 of the Cartagena Agreement states that member States "may not adopt corrective measures without the prior authorisation of the General Secretariat". Since Decision 285 does not give an exhaustive list of what sort of "measures" can be adopted by the General Secretariat and the member States, this provision could and should be broadly construed. Accordingly, the General Secretariat would eventually be able to declare that a particular agreement is void (as in the case of Article 85(2) of the EC Treaty), to impose fines and, in principle, also to order the modification of certain agreements or practices so as to "attenuate" or "eliminate" an anti-competitive practice. This broad interpretation contrasts with the narrow interpretation followed by Ibarra,[54] whereby the powers of the General Secretariat would be limited to prohibiting the practice without any power either to impose fines or to declare that a particular agreement is void.

(c) It can authorise the member States where the affected undertakings are located to apply preferential tariffs to the imports of the products affected by the anti-competitive practice. According to the second paragraph of Article 16, the corrective measures to be adopted by the General Secretariat "may consist" of this authorisation. If the narrow view is adopted, it would mean that the General Secretariat does not have any power to ensure that the prohibited practice is eliminated because the alternative of applying a preferential tariff is a sort of benefit to the affected undertaking but does not deal with the actions of the infringing party. Moreover, the remedy, i.e. applying a preferential tariff, would itself constitute an administrative restriction to trade and, thus, be against the goals of the common market.

(d) If there is an evident threat to cause harm or actual harm is caused, the General Secretariat may "direct recommendations aimed at ending the practice". This provision is contained in Article 17, which also states that the General Secretariat can deliver the said recommendations in the course of the investigation. This is an extremely weak measure. There is no provision in Decision 285 establishing a duty on the infringing undertaking to accept such recommendation nor is there any real coercive mechanism to ensure its attainment.

From the text of the provision it seems that the drafters of Decision 285 intended to establish a similar norm to that of Article 3(3) of Regulation 17/62, which states: "Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under paragraph 1, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement."

54. *Op. cit. supra* n.51, at pp.48–50.

Nonetheless, while the EC provision is clear and precise in the sense that it states that the delivery of recommendations by the Commission is "without prejudice" to other provisions of the Regulation (e.g. provisions with coercive force), Article 17 of Decision 285 does not include that wording. Hence, the provision of Article 17 produces confusion as to whether, if the General Secretariat considers it fit, the delivery of recommendations would eventually be the only measure to be adopted in case of infringement.

As discussed above, neither Decision 285/91 nor Decision 21/94 provides for the possibility of granting exemptions envisaged under Article 85(3) of the EC Treaty. In the Community the Commission enjoys a wide margin of discretion in exempting agreements, decisions or concerted practices that bring beneficial effects to the market such as improving production and distribution of goods, promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, etc.[55]

B. Consequences under Mercosur's Decision 21/94

The equivalent of Article 85 of the EC Treaty in Mercosur provides that agreements and concerted practices are "prohibited", thus establishing a "*per se*" illegality similar to that of Article 85(1). However, unlike Article 85(2), Decision 21/94 does not establish sanctions or rules concerning the consequence of an anti-competitive practice. Chapter II merely confers on the Commission the duty to ensure that Decision 21/94 is complied with and insists on co-operation and co-ordination among member States in order to ensure timely and adequate application of competition rules.

Additionally, Article 7 provides for a co-ordination system between the competition authorities of member States and the Commission in order to prevent eventual anti-competitive practices. Article 4 of Decision 21/94 states only that the Trade Commission will supervise the duration of domestic procedures against anti-competitive practices. This means that member States are left with ample powers to regulate other procedural aspects and sanctions to be applied in cases of breach of Decision 21/94. Such an approach results in the lack of legal certainty for those undertakings, especially those coming from a system like the European Union, which will have to file a different complaint in each member State, thus resulting eventually in different approaches, procedures and sanctions.

Nevertheless, it is expected that the systems set up for co-ordination among member States will, in practice, provide a homogeneous treatment in the whole community. Additionally, Article 4(c) of Decision 21/94 states that, in case anti-competitive practices persist within Mercosur even

55. J.-Y. Art and D. Van Liedekerke (1995) 31 C.M.L. Rev. 936.

after a sanction has been imposed by a member State, it would still be possible to accede to the procedure established in the Annex to the Ouro Preto Protocol, or directly to the arbitration process established in Chapter IV of the Protocol of Brasilia.

1. The procedure under Ouro Preto

The Annex to the Ouro Preto Protocol establishes the general procedure for natural or legal persons to file claims before Mercosur's Trade Commission. All claims have to be filed through the national sections of the Trade Commission and, thus, it is really the member State directly (and not the parties) which appears as claimant before the Commission. Consequently, the procedure is converted into an inter-governmental negotiation which becomes cumbersome due to the new parties involved and their purely political character.

The procedure formally begins with the claim being discussed and included in the agenda of the next meeting of the Commission, which then delivers a decision. If it does not do so, a Technical Committee prepares and issues a joint decision which is taken into account by the Commission when deciding the case. Under Article 5 of the Annex, if the Commission does not reach a consensus, it will pass the file to the Common Market Group for it to adopt a decision within 30 days.

Article 6 provides that, if consensus is reached, the member State against which the claim was filed should adopt the measures approved either by the Commission or by the Common Market Group. If the member State does not comply with the decision adopted by the Commission or the Common Market Group, the applicant member State can resort to the arbitration procedure established in Chapter IV of the Brasilia Protocol.

2. Arbitration procedure under the Protocol of Brasilia

In case of non-compliance by a member State with the measures established under the Ouro Preto procedure, the claiming member State can inform the Administrative Secretary of Mercosur in order to begin an arbitration procedure.

Article 8 states that the parties to the claim agree, *ipso facto* and compulsorily, to submit to the jurisdiction of the Arbitration Court (consisting of three members, one appointed by each member State and the third by the other two members). The Arbitration Court establishes its own procedural rules in each case.

Under Article 16, the member States subject to the arbitration procedure have the opportunity to inform the Arbitration Court about the previous developments of the case and to make a brief presentation of their positions.

Article 18 gives the Arbitration Court the power to grant appropriate interim measures in case the practice in question causes serious and irreparable damage to one of the parties. The Arbitration Court will then decide the question taking into account the provisions of Mercosur and general principles of international law applicable to the issue (Article 19).

The decision of the Arbitration Court is not subject to appeal and is binding on the parties involved in the procedure as from the date of notification (Article 21). The parties, however, can ask for clarification of the decision and for an interpretation of the way the decision should be implemented (Article 22).

Finally, under Article 23, if a member State does not comply with the Arbitration Court's decision within 30 days, the other member States involved may adopt compensatory measures, such as the suspension of concessions or other measures of equivalent effect, in order to obtain compliance.

Sooner or later Mercosur will have to establish a stronger supranational framework to make the system more effective. As it stands, it can only be described as a multilateral effort towards uniformity of general provisions. The same effect could also be achieved by signing an international agreement and without going through the pain of establishing a "watchdog" without actual powers, such as has been done in the case of the Commission. Moreover, the arbitration procedure can have the virtue of gathering together a number of experts in the field of competition in order to decide a particular case. This will allow a higher degree of specialisation and would thus avoid the problems caused by having judges deciding all sorts of issues as in the case of the European Court and Court of First Instance. On the other hand, the whole system does not seem to be as dynamic as is required in the field of competition, where literally "time is money". Additionally, since the members of the Arbitration Court can be different in each case, similar cases would eventually be decided in different ways thus leading to legal uncertainty and duplication of efforts by the Arbitration Court.

VI. CONCLUSION

THE study of a common market involves simultaneously the awareness of political, economic and legal developments.[56] In the case of Latin American integration groups, political and economic factors have had a paramount weight in the shaping of their supranational legislative process. The preceding discussion has illustrated how the legal and institutional framework of the European Community has also been decisive in the structuring of Ancom and Mercosur legal systems.

56. S. Horton (1982) 17 Texas Int.L.J. 39.

From the beginning, Ancom and Mercosur have partly used the European integration model as an example for doctrinal and legal development. To apply a foreign model of integration to systems with different realities and legal backgrounds raises questions as to whether Latin American countries are prepared to apply and develop a supranational legal order within the EC parameters.

Their institutional structures are heavily politicised and the supranational powers given to the independent organs are weak. After the amendments introduced by the Protocol of Trujillo, Ancom gave the Andean Presidential Council, the Commission and the Council of Ministers a major role to play in the legal shaping of the process. Nonetheless, by converting the independent supranational organ into a secretariat without legislative powers, the process has been shifted to a political playground subject to governmental pressures. As far as Mercosur is concerned, both the Treaty of Asuncion and the Ouro Preto Protocol were drafted to give only limited powers to the institutions. Therefore, decision-making powers in the system are primarily in the hands of the governments of the member States and, so far, in the direct hands of the four heads of State.

The experience of Ancom and Mercosur so far shows that the legal instruments of both systems are still ill-equipped successfully to control anti-competitive practices while ensuring free competition and the completion of a common market. The fact that competition rules were not included in the text of the framework agreements as in the case of the EC Treaty implies that the institutions are left with the difficult task of introducing those rules through secondary legislation. Member States have frequently failed to comply with their obligations directly to apply Andean Community law and to implement Mercosur law at national level. This has produced a heterogeneous application of the rules emanating from the institutions.

Yet the need for effective and clear competition rules at a regional level is unquestionable. Trade within the region has increased impressively and foreign investment from large international undertakings is promoting an increasingly competitive market. Oligopolies, cartels and other restrictive practices will soon disseminate throughout the region unless the existing competition rules are correctly enforced at supranational level.

Based on the preceding analysis, the following are some recommendations and possible actions that, if followed, might improve the current situation. They would also contribute to the development of a more dynamic system for the uniform application of Decisions 285/91 and 21/94.

(1) To convert Article 75 of the Cartagena Agreement into two separate Articles. As it is, dumping practices are listed jointly with restrictive practices, thus confusing the inter-State character of dumping with restrictive practices by private undertakings.

(2) To include the provisions of Articles 3, 4, 6 and 12 of Decision 285 in the main text of the Agreement of Cartagena, thus ensuring their application as primary law.

(3) To construe the term "undertaking" as broadly as it has been developed by the European Court in order to promote a wider application of competition rules in the region.

(4) In order to avoid future difficulties in controlling restrictive practices by local subsidiaries which merely follow the orders of powerful multinational companies, it is suggested that a strong political decision to support the "economic entity" doctrine is taken by the institutions and clearer rules introduced accordingly.

(5) To give the General Secretariat and Mercosur Trade Commission strong powers to open investigations on their own initiative and upon application by third parties.

(6) Either to introduce a rule-of-reason approach as a mechanism to balance the existing lack of a system of exemptions, or to create a system of exemptions, at least individual exemptions, based on the pro-competitive conditions set forth in Article 85(3) of the EC Treaty.

(7) To develop an effective co-operation system between the Commission and the member States in order to include more specific and attainable provisions towards legal certainty and uniformity. In this sense, a useful example might be the European Commission's recently delivered draft notice on co-operation between national competition authorities and the Commission in handling cases falling within the scope of Article 85 or 86 of the EC Treaty.[57] Even though the way the notice allocates competition cases between the Commission and national authorities cannot be applied in a non-supranational structure such as that of Mercosur, the general principles and methods of co-operation found in the notice could be of relevance for the Southern Common Market.

In the case of Mercosur, it is necessary to ensure that the application of competition law in the member States complies with community policies and guidelines. Due to the dynamic character of competition, the way national authorities treat and decide each particular case could have important consequences in the whole region's competitive structure. Therefore, the practice of national authorities has to be monitored and supervised by the Commission, which would also serve as a sort of liaison

57. (1996) O.J. C262/5 (10 Sept.).

organ through which national officials from different member States would be able to share information and approaches, thus avoiding the existence of conflicting decisions in relation to the same case.

(8) To establish procedural guidelines to be transferred to domestic legislation, including the existence of interim measures at national level in order to prevent the continuation of an anti-competitive practice pending resolution of a case.

During the meeting of Mercosur's Trade Commission held in Fortaleza in December 1996, the Commission decided to submit a proposal to the Common Market Group in order to add to Decision 21/94 an article concerning State aids. However, no other issues concerning this Decision were discussed; neither was there any indication as to when a definitive protocol for the defence of competition would be signed. Considerable clarification is still needed in terms of both the substance of the scope of the protocol and the institutional arrangements for its enforcement.

The future of Ancom and Mercosur and the way the systems develop will depend on many political and economic circumstances. Nonetheless, the development of an adequate legal framework will be decisive for achieving a common market with a balanced system of rights and obligations. Mercosur is now shaping its legal order and has plenty to learn both from the experience of the European Community and from the failures of Ancom. The fact that Ancom has more than 20 years of legal development towards the Andean process of integration, and the recent relaunched campaign to strengthen the process, open a new path to improving the credibility of the group.

Currently the Andean Community is holding direct talks on a free trade agreement with Mercosur. At a meeting of the Council of Foreign Affairs Ministers in September 1996, it was agreed that an approach to Mercosur should be made as a bloc and not individually by member States. Moreover, there has been a worldwide favourable reaction to the idea of establishing a Free Trade Area of the South (SAFTA), which would involve the merging of the Andean Community with Mercosur. It would be interesting to analyse how two such different institutional structures with different legal mechanisms manage to integrate themselves. If successful, this enterprise would form a powerful trading bloc and this, in turn, would have a significant impact on international trade.