

**THE RELATIONSHIP BETWEEN THE PARLIAMENTS
AND COURTS OF JUSTICE OF REGIONAL BLOCS :
THE EUROPEAN UNION, THE ANDEAN COMMUNITY,
THE CENTRAL AMERICAN INTEGRATION SYSTEM
AND MERCOSUR**

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The creation of economic regional blocs, each of them with its own institutional structure, is a historical phenomenon of the last century. Some of these blocs, like the European Union, are equipped with an organisational chart that is strikingly close to what could be called a *political framework*, where organs work and interact in a very similar way to an Executive, a Legislative and a Judiciary Branch. In Latin America, blocs such as the Andean Community and the Central American Integration System, were created on the basis of the European model and also possess organs of a parliamentary nature. As for Mercosur, the economic bloc that gathers the countries of the Southern American Cone, it has traditionally avoided adopting a pre-federal structure, but is now preparing to inaugurate its own regional Parliament.

None of the parliamentary assemblies belonging to economic blocs is, however, capable of carrying out the four classical functions typical of a national parliament : legislation, representation, control and legitimization. Among the above mentioned parliaments, it is the European Parliament that best succeeded in resembling a national parliamentary body, but its legislative function and its function of control are still poor. For this reason, scholars studying European integration have identified what can be called a “democratic deficit” that seems to be inherent to the process.

This research studies the impact of decisions issued by the Courts of Justice created for the above mentioned regional blocs on the development of their parliamentary assemblies.

I. The European Parliament

In Western Europe, at the end of the Second World War, a historical process of political and economic reorganization took place, which drew together some of the main actors in the two World Wars. The institutions devised for this reorganization were structured in a way that resembled a political system, as it incorporated, although in an incipient manner, institutions commonly found in the public realm of the national State. Therefore, the founding fathers of the European Coal and Steel Community, established by the Treaty of Paris, signed on 18th April 1950¹, created an unprecedented institutional structure to manage the Community. Firstly, there was a multi-roled and independent High Authority, as according to some authors, it was simultaneously expert, banker, manager and referee². Secondly, a Council of Ministers was introduced, to represent the Member State governments. Finally, the Common Assembly (later European Parliament) and the Court of Justice were created as organs of democratic and judicial control, respectively. According to the two Rome Treaties, the High Authority was renamed Commission. It is not the objective of this work to examine in depth the functions performed by each of these institutions in the integration process. However, it is important to note that within the institutional structure of the Communities a dynamic was established whereby the Assembly, later European Parliament, would often resort to the Court's opinions and rulings in order to strengthen its own weak powers.

The Rome Treaties introduced a consultation procedure, granting the Common Assembly advisory powers, by means of a mechanism of formal parliamentary involvement in the Communities' decision-making processes. Thus, the Treaties established an obligation for the Council to consult the Assembly on proposals made under certain articles.

Although the Council was not obliged to take any notice of the opinions issued by the parliamentary assembly, in future this consultative function, associated to the election of Parliament members by universal suffrage in 1979, would give birth to a substantial increase in its powers. In this context, the rulings issued by the European Court

¹ Later the European Economic Community and the European Atomic Energy Community were established by the two Rome Treaties, signed on 25 March 1957.

² Martin Westlake, *A Modern Guide to the European Parliament*, London, Pinter Publishers Ltd, 1994, p. 11.

in favour of Parliament played a decisive role in the slow, but steady, evolution of the parliamentary functions within the Community's decision-making machinery. Thus, authors studying the evolution of the powers of the European Parliament are unanimous in identifying the famous 1980 ruling of the European Court on the case known as the "Isoglucose" case as a landmark in the evolution of parliamentary powers¹. After this ruling, the Parliament was clearly perceived as the representative body of the peoples of Europe.

According to this case, the Council had adopted an act, where consultation of the Parliament was obligatory, without waiting for Parliament to give its opinion. The Court upheld the right of Parliament to be consulted, defining consultation as "the means which allows the Parliament to play an actual part in the legislative process of the Community²". Moreover, the Court's ruling interpreted the institutional framework created by the negotiators of the Treaty of Paris and the two Treaties of Rome as replicating the balance present in the classic division of powers devised by Montesquieu. The Court ruled that "Such a power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void³".

Another favourable consequence for Parliament was that it finally left its traditional position of isolation within the Community's institutional structure, and was integrated into its legal system⁴.

However, the Court also established the principle whereby the Parliament, although representing, within the Community system, the much cherished democratic ideal, is still limited by the Treaties, as stated in the Treaty of the European Union, Article 4 : "each institution shall act within the limits of the powers conferred upon it by this Treaty⁵". Thus, in spite of the fact that Parliament was elected by

¹ See, for example, Westlake, *op.cit.* ; and Richard Corbett, Francis Jacobs ; Michael Shackleton, *The European Parliament*, London, John Harper Publishing, 4th Edition, 2000.

² Westlake, *op.cit.*, p. 24.

³ *Apud* Corbett, *op.cit.*, p. 191. See also Sionaidh Douglas-Scott, *Constitutional Law of the European Union*, London, Longman, 2002, p. 90.

⁴ See Westlake, *op. cit.*, p. 44.

⁵ *Ibid*, p. 45.

universal suffrage, and therefore enjoyed a new level of independence and legitimacy, the Court ruled “that the Community was a Community of law and that the Parliament was therefore subject to it and hence to the Court’s rulings¹”.

The Court does not always decide in favour of Parliament. In its 1986 ruling on the legality of the 1986 Budget, the Court found that Parliament’s President had not validly declared the budget to having been adopted because Parliament’s action had ignored political differences with the Council that still remained, being thus unilateral, and therefore illegal. The Court then ordered the Council and the Parliament to look for political agreement before they could adopt the budget².

In its 1988 ruling on the Comitology dispute, the Court reminded Parliament of its powers and pointed out that it could exercise political control over the Commission by means of the debates it held on specific questions, by the adoption of motions on the policies followed by the Council or the Commission and to censure the latter³.

Authors such as Martin Westlake, Olivier Costa⁴ and Richard Corbett et al. agree that the Court’s rulings were effective in so far as its jurisprudence influenced many of the provisions of the Maastricht Treaty, particularly in what concerns the position of Parliament as a litigant.

The Maastricht Treaty (1992) represents, therefore, a clear advancement in what regards the position of Parliament within the Community system, as Article 173, later Article 230, explicitly establishes the Court’s competence to consider actions brought by the European Parliament for the purpose of protecting its prerogatives. Later, the Nice Treaty, by amending paragraphs 2° and 3° of Article 230, accorded the Parliament a standing before the Court equal to that of the Member States, the Council and Commission⁵. Under the treaty

¹ *Idem*, p. 44.

² See Corbett, *op. cit.*, p. 262.

³ See Westlake, *op. cit.*, p. 45.

⁴ See Westlake, *op. cit.*, Olivier Costa, *Le Parlement européen, assemblée délibérante*. Bruxelles, éditions de l’Université de Bruxelles, 2001, and Corbett, *op. cit.*

⁵ Under the Treaty of Nice, paragraphs 2° and 3° of Article 230 read : “It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council of the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application or misuse of powers. The Court of

of the European Constitution, the provisions mentioned above were repeated in Article III – 365, paragraphs 1^o and 2^o.

This evolution shows that, in the case of the European Union, the rulings of the Court of Justice were effective to strengthen the functions performed by the Parliament in the Community legislative process ; and that the Parliament's repeated demands¹ to be given the same *locus standi* before the Court and the judicial process as the Commission and the Council were finally met, under the Nice Treaty and the Treaty of the European Constitution.

In 2004, the Parliament went before the Court to ask for its opinion on the legality of a proposal concerning a Council Decision on the conclusion of an agreement between the European Community and the United States of America on the processing and transfer of passenger data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection. The Parliament had not approved the proposal and had called on the Council to refrain from concluding this agreement until the Court of Justice had delivered its opinion on the compatibility with the Treaty (Article 300(6) of the EC Treaty)². As a result of Parliament's action, the Court annulled the Council Decision³.

II. Latin American Parliaments : the Andean Parliament, the Central American Parliament and the Parliament of Mercosur

A. The Andean Parliament

The Andean Community, founded in 1969 by the Cartagena Agreement, rests on a supranational basis and utilizes the community method, according to its founding treaties. It now comprises four countries, after the recent withdrawal of Venezuela⁴ : Bolivia, Colombia, Ecuador and Peru.

Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.”

¹ See, for example, Parliament's resolution 9.2.94, *apud* Westlake, *op.cit.*, p. 46.

² http://www.europarl.europa.eu/omk/sipade3?SAME_LEVEL=1&LEVEL=1&NAV=S&LSTDOC=Y&DETAIL=&PUBREF=-//EP//TEXT+REPORT+A5-2004-0271+0+DOC+XML+V0//EN, last visited on 11 August 2006.

³ See Press Release N° 46/06 of 30 May 2006 in <http://curia.europa.eu>, last visited on 11 January 2007.

⁴ April 2006.

Unlike the European Coal and Steel Community the institutional structure devised by the Agreement to manage the integration process did not, at first, include a Court of Justice and a Parliament, therefore not resembling the public space of a national State.

Indeed, if one considers the European paradigm, seeking to use its categories for the analysis of the institutional framework of the Andean integration, one's attention is drawn to the fact that the two great pillars for the exercise of democratic control, the Court and the Parliament, were absent from the process during its whole first decade.

According to some authors, there was, on the part of the governments of the region, a certain zeal in avoiding the "politization" of the then Andean Group. In these authors' view the fact that, for a long period of time, military governments dominated the scene in three Andean countries, that is, Bolivia, Ecuador and Peru, prevented the mechanisms of democracy from being incorporated into the instruments of integration¹.

In fact, ten years had already passed after the signing of the Cartagena Agreement when the Treaty creating a Court of Justice for the Andean Group was signed (May 28, 1979). It was later modified by the Protocol of Cochabamba of May 28, 1996, that gave it its present name, that is, Court of Justice of the Andean Community. Likewise, the Constitutive Treaty of the Andean Parliament was signed on 25 of October, 1979, in La Paz, and later amended by an Additional Protocol, concluded in Sucre, on 23rd April, 1997. These two organs were effectively incorporated into the institutional structure of the Andean Community by the Trujillo Protocol of 10 March 1996, which modified the Cartagena Agreement and created the Andean Integration System².

However, the Andean Parliament lacks the legislative competence (co-decision) and the power to effectively control the organs of the integration.

As far as the power of control is concerned, Article 12, clause "b", of the 1997 Additional Protocol to the Treaty Establishing the Andean Parliament provides that the Parliament will examine the progress of the Andean Integration and the fulfillment of its objectives

¹ See Jorge Octavio Londoño Sánchez, "Las elecciones directas en los Parlamentos regionales: el caso del Parlamento Andino" in *Integración Latinoamericana*, Buenos Aires, Instituto para la Integración de la América Latina (INTAL), junio-julio 1989, año 14, n° 146-147, p. 28.

² See http://www.comunidadandina.org/ingles/sai/inicio_sai.html, last visited on 13 August 2006.

by requesting periodic information for that purpose from the bodies and institutions of the Andean Integration System. According to clause “c” Parliament may formulate recommendations on the Draft Annual Budgets of the bodies and institutions of the Andean Integration System that are financed through the direct contributions of the Member Countries. In this connection, the Rules of Procedure of the Parliament provide for sanctions against those organs of the Andean System that refuse to present reports or information, as requested by the Parliament. Article 118 of the Rules of Procedure allow Parliament to file a complaint before the Andean Presidential Council or to resort to the diplomatic or legal actions that it deems adequate. However, it is important to note that the Parliament’s function in that respect is limited to making non-binding recommendations on the proposed budget.

We turn now to the Andean Court of Justice. Its sphere of jurisdiction comprises, according to the treaty amended by the Cochabamba Protocol, Nullity Actions (Article 17), Actions to declare Noncompliance (Article 23), and Actions due to Omission or Inactivity (Article 37).

If Member Countries, or the organs of integration enact or agree upon decisions in violation of the legal system of the Andean Community, its decision-making organs, Member Countries, or individuals or legal entities whose rights or interests are affected are entitled to bringing a Nullity Action before the Court. Therefore, a Nullity Action can be brought by Parliament before the Court in case any of the organs of the Andean Integration System fails to present its draft budget for the Parliament’s recommendations, in violation of Article 12, (c), of the Sucre Additional Protocol to the Treaty Creating the Parliament¹, and of Article 43, (c), of the Cartagena Agreement.

As far as the Actions to declare Noncompliance are concerned, the General Secretariat submits its observations to the Member Country that, according to the former, has failed to comply with its obligations under the legal system of the Andean Community. If the General Secretariat decides that the Member Country has failed to comply with its obligations and it persists in the same behavior, the former shall

¹ According to Article 12, (c), it is a function of the Parliament “To formulate recommendations on the Draft Annual Budgets of the bodies and institutions of the Andean Integration System that are financed through the direct contributions of the Member Countries”.

See http://www.comunidadandina.org/ingles/normativa/ande_trie5.htm, last visited on 15 August 2006.

request a decision from the Court as soon as possible. Under Article 25, natural or legal persons whose rights have been affected by the failure of a Member Country to fulfill its obligations may appeal to the General Secretariat and to the Court for non-compliance.

This provision allows Parliament, as a legal entity, to bring an action before the Court, for example against those Member Countries who fail to comply with the Transitional Provision of the “Additional Protocol to the Treaty Establishing the Andean Parliament” and with Article 1 of the “Additional Protocol to the Treaty Creating the Andean Parliament, Regarding the Direct and Universal Election of Its Representatives¹”, both signed in Sucre, in 1997, which established a period of five years for each Member Country to hold the election of the Representatives to the Andean Parliament by universal and direct vote. To this day, three member countries have effectively complied with the above mentioned provisions, i.e., Ecuador, Peru and Venezuela².

However only once did the Andean Parliament, as a legal entity, try to resort to the Court via General Secretariat on grounds of non-compliance. The then President of the Parliament, Deputy Andrés Reggiardo Sayán, its Vice-President, Deputy Hugo Márquez Moreno and the representatives of the Venezuelan parliamentary group asked, on 13 January 2000, that the General Secretariat should adopt a declaration of non-compliance, by the Venezuelan government, with the obligations issuing from the Community’s legal system. Under article 10 of a National Decree, the government of Venezuela had stipulated the cessation of the mandates of the directly elected Venezuelan representatives to the Parliament, and had decided to appoint, provisionally, new representatives, until new elections were held³.

The Parliament requested the General-Secretariat that it should demand the Venezuelan Constitutional Assembly to derogate such a provision, and asked the Court to issue a precautionary action in order

¹ See http://www.comunidadandina.org/ingles/normativa/andean_protocol5.htm, last visited on 15 August, 2006.

² Following the withdrawal of Venezuela from the Community, a Declaration was adopted by the Andean Parliament on 19 May, 2006, whereby the Parliament recognizes the presence of the elected representatives of Venezuela until their situation has been duly evaluated and defined by the competent organ of the Community.

³ “Decreto de Régimen de Transición del Poder Público” of 27 December 1999.

to avoid the appointment of new representatives by the Venezuelan government.

The General-Secretariat, in its decision¹, considered that Article 1 of the Treaty Establishing the Court of Justice of the Andean Community does not mention the Treaty Establishing the Andean Parliament as part of the Andean legal system, and that therefore it could not issue an opinion on a member country's non-compliance with a Treaty that is not part of community law, and so it found the claim to be invalid.

The surprising contents of this ruling may well have discouraged the Parliament from resorting to the Andean system of conflict resolution for the defense of its interests and prerogatives.

B. The Central American Parliament (PARLACEN)

The Constitutive Treaty of PARLACEN and other political bodies was signed in 1987 by Guatemala, Honduras, El Salvador, Nicaragua and Costa Rica, at a time when Central America was torn by military conflict.

The emphasis, as regards the Parliament's functions, was placed on the promotion of peace and democracy rather than on the traditional parliamentary functions. At that moment, the Central American Parliament embodied the symbol of freedom and independence and of the reconciliation desired in Central America². So the Parliament appears, not as an organ created to legitimize decisions taken in the context of a regional bloc, but rather as an element for the promotion and spreading of democratic values in the region and as a forum to articulate peace initiatives in Central America. The signatory governments stressed that Central America was in need of a permanent political instance that would enable the Central American people, themselves, to analyze the issues and problems of their region³.

¹ See Resolution n° 341 SG, de 20/01/2000. In : <<http://www.comunidadandina.org/normativa/res/R341SG.htm>>. Last visited on 16, August, 2006.

² See "Acuerdos de Paz de Esquipulas II", document issued by the II Summit of Presidents from Central-America, in Guatemala City, on 7th August 1987. See in : <<http://www.sgsica.org/cumbres/index.php>>. Last visited on 27, jan. 2005.

³ In effect, besides the actions undertaken by groups of Latin American countries, such as the Contadora and its Support Group – which contributed immensely to the efforts towards the solution of the serious conflicts taking place in Central America, also the great world powers tried to intervene in the conflicts, by subordinating the

The only two instances whereby a function of control over the other organs of integration is devised for Parliament are provided by Article 5, “c” ; and Article 29. These two articles were later suspended by means of Article 4, clauses (1) and (2) of the First Protocol to the Constitutive Treaty of the Central American Parliament and Other Political Bodies, signed in Guatemala City, on 15 September, 1989¹.

In effect, Article 5 “c” stipulated that Parliament should elect, nominate and remove the official occupying the highest function in the present or future organs created by the Member States for the integration. A list of candidates for the functions mentioned above should be submitted to Parliament by the authorities of the said bodies.

Article 29 established that the Parliament should receive an annual report concerning the activities developed by each one of the Central American integration institutions.

However, Article 4 of the 1989 First Protocol to the Constitutive Treaty of the Central American Parliament and Other Political Bodies, suspended these powers, stipulating that those provisions would come into force upon the deposit of the fifth instrument of ratification to the Treaty, which was expected to come from Costa Rica, since it had not yet ratified it.

But, surprisingly enough, the fifth instrument of ratification came, instead, from Panama.

In 1991, the Tegucigalpa Protocol, that created the Central American Integration System was signed, and its Article 12 provided for a Central American Court of Justice. However, under the Tegucigalpa Protocol neither Parliament nor the Court were counted among the integration’s main organs. Possibly for that reason, the two institutions have, historically, been allies. Under Art. 22, (e), of its Statute, signed in 1992, the Court acts as a consultative organ of the institutions of the Central American Integration System, for the interpretation and application of the Treaties².

In 1999, the Parliament went before the Court, under Art. 22, seeking to recover the powers regarding the nominations of authorities

distressing situation in Central America to an approach based on Cold War considerations.

¹ See “Protocolo al Tratado Constitutivo del Parlamento Centroamericano y Otras Instancias Políticas”, in Parlamento Centroamericano, *Tratado Constitutivo del Parlamento Centroamericano y Otras Instancias Políticas*, p. 26.

² The Tegucigalpa Protocol on reforms to the Charter of the Organization of Central American States (ODECA) and the complementary instruments and acts deriving thereof.

that Art. 4 of the Protocol to the Constitutive Treaty had suspended until the deposit of the fifth instrument of ratification. As Panama had ratified the Treaty and deposited its instrument of ratification in 1994, the Parliament asked the Court for an Obligatory Consultative Opinion regarding the full enforcement of the Treaty, that is to say, if the deposit of the instrument of ratification by the Republic of Panama would correspond to the fifth instrument referred to by the Additional Protocol. In its ruling of 14 February 2000, the Court was of the opinion that the Constitutive Treaty had acquired full applicability since the deposit of the fifth instrument by the Republic of Panama, and therefore the effects of the special and provisional situation established by the First Additional Protocol should cease¹. But the Member States did not comply with the Court's ruling, and the Parliament still lacks the powers that were conferred to it by the original Treaty.

In spite of the fact that the Parliament's initiative did not show any concrete results, Parliament seemed to perceive the Court as a firm ally, and decided to press the governmental authorities of Guatemala, Costa Rica and Panama to become parties to the Court's Treaty. However, up to this day, only three Member Countries have ratified the Statute of the Court and accept its jurisdiction : Nicaragua, Honduras and El Salvador, but it should be noted that Honduras withdrew temporarily in May of 2004².

Again in July of 2002, the Parliament stands by the Court, and strongly condemns an amendment to the Tegucigalpa Protocol which created a mechanism for conflict resolution parallel to the instruments provided for by the Court's Statute³.

Altogether, Parliament went before the Court nine times to ask for consultative opinions.

¹ See "Resolución sobre Solicitud de Opinión Consultiva Obligatoria del Parlamento Centroamericano, on respecto a la Plena Vigencia del Tratado Constitutivo del PARLACEN y Otras Instancias Políticas". In : <<http://www.ccj.org.ni>>. Last visited on 27, April, 2005.

² See "Resolución AP/2-LXXII-97 Sobre el Pleno Funcionamiento de la Corte Centroamericana de Justicia" of 28th January, 1997. In : <<http://www.parlacen.org.gt>>. Last visited on 1st Feb. 2005.

³ See "Resolución AP/6-CXLII-2002 en Respaldo a la Integridad de las Atribuciones de la Honorable Corte Centroamericana de Justicia y en Prevención de la Ilegalidad de la Enmienda Suscrita en Managua, el 27 de Febrero del 2002, que Pretende la Reforma del Artículo 35 del Protocolo de Tegucigalpa a la Carta de la Organización de los Estados Centroamericanos" of 3rd July 2002. In : <<http://www.parlacen.org.gt>>. Last visited on 1st Feb. 2006.

In 2002, it asked the Court for an opinion on the powers Parliament might have regarding the adoption of a regulation providing for the suspension of the immunities of its members¹. The Court's opinion was that the Parliament was entitled to adopt an internal procedure whereby it could suspend the immunities of those members facing criminal charges. The Court added that the General Assembly of the Parliament could, by simple majority, suspend the immunities of the accused member, without declaring his or her guilt, which can only be done by a jurisdictional organ. So, in January 2003, the Parliament decided to suspend the immunity of a member from Honduras, caught by the Nicaraguan authorities while trafficking drugs².

While traditionally the Parliament has consistently upheld the Court's positions, in recent years the situation seemed to change, in the wake of a Court's ruling (March 29 2005) whereby it condemned the Nicaraguan National Assembly for violating the law of the Central American Integration System and more specifically the Tegucigalpa Protocol to the Charter of the Central American States Organization of 13 December of 1991 and the Treaty for Democratic Security in Central America, signed on 15 December 1995. The National Assembly had approved constitutional reforms in November 2004, that, according to the Court's ruling, had intended to subordinate the Executive Power to the Assembly, thus violating the principle of independence, equality and balance of Powers. The Court found itself competent to judge the claim brought by the President of the Republic of Nicaragua, Enrique Bolanos Geyer, against the Nicaraguan National Assembly, under Article 22, (f), of its Statute, whereby it may resolve the conflicts that may rise between the Powers or the fundamental organs of the State Parties.

In response to the Court's decision, the Parliament adopted Resolution AP/2 – 172/2005 “For the Institutional Preservation of the Central American Court of Justice³”, introduced by the Nicaraguan members of Parliament, in favour of the Nicaraguan National Assembly's position and remarking that the Court's competence to issue rulings was limited exclusively to the context of Central

¹ See “Solicitud de Opinión Consultiva por Lic. Rodrigo Samayoa Rivas, Presidente del PARLACEN”. In : <<http://www.ccej.org.ni>>. Last visited on 27th April, 2006.

² See “Resolución nº APE/1-01-2003”. In : <<http://www.parlacen.org.gt>>. Last visited on 3rd Feb. 2006.

³ See in <http://www.parlacen.org/index.php?mod=cont&idcontenido=150>. Last visited on 19 August 2006.

American integration and that the Court was intervening in the domestic affairs of Nicaragua.

The grave and frequent accusations against members of the Central American Parliament, of corruption, money laundering and other crimes, together with the withdrawal of Honduras from the Court, encouraged the Presidents of the Member Countries to adopt a series of measures to reform the Treaties, that, once enacted, would weaken extraordinarily these two organs, not only by curtailing their powers, but also by eliminating direct elections of the members of Parliament, thus limiting the legitimacy of the parliamentary assembly. So, instead of the small steps forward the Parliament could give with the help of the Court, it now faces a hard struggle for its own survival.

C. The Parliament of Mercosur

Created by the Treaty of Asunción in 1991, and now comprising five countries after the recent admission of Venezuela, Mercosur is the youngest among the Latin American regional blocs.

It has never intended, so far, to adopt the “community method”, although some sort of eventual advancement beyond the intergovernmental model, toward some sort of supranationality, is starting to be discussed. Mercosur’s rationale, according to the negotiators, can be described in the following manner: institutions shall be created as required by the advancement of the integration process.

In December 2004, by means of Decision N° 49/04 issued by the Common Market Council, the governments of the Member States decided to create a Parliament of Mercosur and entrusted the Joint Parliamentary Committee of Mercosur, comprised of members of the parliaments of the State Parties, with the task of drafting a Protocol to create the new organ. The technical group nominated by the Committee members produced a document which, once approved by the parliamentarians, was placed under the consideration of the Council, which finally approved it in December 2005 by means of its Decision 23/05.

Drawing from the experience of existing parliaments of regional blocs, the technical group, composed of officials from the Mercosur Secretariat, and experts from the universities and national parliaments of the State Parties, decided to insert a provision in Article 13 of the draft Protocol expressly granting the Parliament of Mercosur *locus*

standi to act before the Permanent Revision Court of Mercosur, to defend its powers and interests¹.

When reviewing the draft Protocol, the governmental negotiators introduced changes to Article 13, suppressing the expression “to act in defence of its powers and direct interests”, and limiting Parliament’s right to resort to the jurisdictional organ only to demand consultative opinions, and not as a litigant. If on the one hand, Parliament is not entitled to act as a claimant, on the other hand, however, by suppressing the expression “to act in defence of its powers and direct interests” the governmental negotiators enlarged Parliament’s possibilities to resort to the Court in search of consultative opinions on other issues besides Parliament’s own powers and direct interests².

The Permanent Revisional Court³, established by the Olivos Protocol, signed on 18 February 2002, is part of the conflict resolution system of Mercosur, which also comprises an *ad hoc* Arbitral Court, first created under the Brasilia Protocol, signed in December 1991. Among the Revisional Court’s competences is the power to issue consultative opinions as requested by the decision-making organs of Mercosur, that is, the Common Market Council, the Common Market Group and the Mercosur Trade Commission⁴. This provision would seem to exclude Parliament’s access to the Court. In spite of this, jurists have reasoned that the Parliament’s *locus standi* before the Court has been stipulated by a Protocol, which is a norm hierarchically superior to the Rules of Procedure of the Court, established by means of a Decision adopted by the Common Market Council of Mercosur⁵. It is

¹ See Annex I of Disposition CPC N° 07/05 of 18 June 2005 ; Proceedings of the XXV Plenary Meeting of the Parliamentary Joint Commission, Asunción, June 18, 2005. Administrative Secretariat of the Parliamentary Joint Commission, Montevideo, Uruguay.

² See Alejandro Perotti, “Por qué cabe incluir al Parlamento del Mercosur en el régimen de las Opiniones Consultivas ante el Tribunal Permanente de Revisión?”, in *Mercosur Parlamentario: La Nueva Institucionalidad del Mercosur*, Buenos Aires, Joint Parliamentary Commission of Mercosur – Argentinian Section, 2006, p. 24.

³ The Court is located in the city of Asunción, Paraguay.

⁴ See Articles 2 and 3 of the “Rules of Procedure of the Olivos Protocol for Conflict Resolution in Mercosur” signed in Montevideo, 15 December 2003. In Representação Brasileira na comissão parlamentar conjunta do Mercosul e ministério das relações exteriores (orgs) *Mercosul: Legislação e Textos Básicos*. Brasília, Gráfica do Senado Federal, 2005, p. 152.

⁵ See Alejandro Perotti, *op. cit.*, p. 26.

also argued that denying Parliament the possibility to request consultative opinions to the Court would amount to placing the best qualified organ from the point of view of democratic legitimacy in a lesser position within the institutional framework of Mercosur, as compared to the decision-making organs.

What this paper shows is, in sum, the history of a seemingly unending strife that takes place between the organs created for securing the democratic legitimacy of regional blocs and the institutions representing the governments of the State Parties.

In some cases, as exemplified by the evolution of the European Parliament, the European Court of Justice consistently supported Parliament's democratic role and prerogatives, although not all of its rulings were in favour of Parliament. The Court, according to Martin Westlake, "(...) has consistently followed its primary vocation of ensuring respect for the treaties¹." And the founding treaties of the European Union have, from the very beginning, sought to assure the institutional balance in the communities, stating that "each institution shall act within the limits of the powers conferred upon it by this Treaty²".

It is important to note that the Court's case law position was adopted by the subsequent treaties, and a major development for the Parliament is the provision contained in Article 173 of the Treaty on the European Union, that explicitly allows Parliament to bring actions before the Court to protect its initiatives.

As far as the Latin American Parliaments are concerned, the research produced very different results. It emerged, essentially, that in spite of the fact that the Member States of both the Andean Community and the Central American Integration System decided to create jurisdictional organs endowed with supranational powers for their respective blocs, there does not appear to exist enough political will from the State Parties to confer to the regional system a "constitutional" dimension.

This becomes quite clear in view of the decision issued by the Secretariat – General of the Andean Community which considered that the legal instrument creating the Andean Parliament was not part of the legal system of the Andean Community. The fact that the Parliament never went before the Court to bring an action for noncompliance

¹ Martin Westlake, *op. cit.*, p. 45.

² Treaty of the European Union, Article 4.

against the countries who did not comply with Article 1 of the 1997 “Additional Protocol to the Treaty Creating the Andean Parliament, Regarding the Direct and Universal Election Of Its Representatives¹”, which established a period of five years for each Member Country to hold the elections of the Representatives to the Andean Parliament by universal and direct vote, is also a symptom.

As for the Central American Parliament, it has gone for many times before the Court, to seek for consultative opinions, and it has traditionally upheld the Court’s position before the rest of the organs of the Central American Integration System. However, the Court has never been able to count on the Member States’ support, as only three of them have ratified its Statute. Moreover, the situation of the Parliament is weakened by the reforms proposed by the Presidents of the Member States to the Tegucigalpa Protocol in December 2004².

It should be noted, however, that the situation of the Court and of the Parliament within the Central American Integration System seemed to have developed positively during the year 2006, thanks to the work enacted by the Secretary General with a view to including these two organs in the Ad Hoc Commission in charge of formulating a proposal for the reform of the Central American institutional framework.

A Declaration of the “Commission of Communitarian Institutions of the Central American Integration System”, comprised of the Court of Justice, the Parliament and the Secretariat-General, issued on 8 August 2006 in San Salvador, expressed their satisfaction for the inclusion of the Parliament and the Court of Justice in the Ad Hoc Commission for the reform of the Central American institutions, as agreed on the occasion of the XXVIII Summit of Heads of State and Government in Panama, in July 2006. It is interesting to note that in an earlier document, dated 8 June 2006, the Commission referred to the II Vienna Summit between the European Union and Central America which marked the beginning of negotiations for an Inter-regional Association agreement which, according to the document, will result in the deepening of integration in Central America. The document further

¹ See http://www.comunidadandina.org/ingles/normativa/ande_ trie5.htm, last visited on 15 August, 2006.

² See http://www.sica.int/busqueda/busqueda_basica.aspx?idCat=&idMod=3&IdEnt=1&Pag=2, last visited on 22 August 2006.

points out the “favorable political moment for Central American integration¹”.

As concerns the Parliament of Mercosur, article 13 of its Protocol may lead one to suppose that perhaps the bloc was born better equipped than its European and Latin American counterparts. However, it remains to be seen whether it will make good use of its prerogative to ask for consultative opinions from the Court, on one hand, and on the other, whether Member Countries will really comply with eventual opinions issued by the Court in favour of Parliament.

¹ See <http://www.cj.org.ni/> <http://www.cj.org.ni/>. Last visited on 22 August 2006.

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