

MERCOSUL AND SUPRANATIONALITY — HOW TO OVERCOME BRAZILIAN CONSTITUTIONAL OBSTACLES^(*)

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INTRODUCTION

Recent years have seen great expansion in the international trade market. Indeed, as a result of globalization, many economic blocs have been newly created worldwide. For countries to form these powerful alliances they must integrate in various sorts of institutional arrangements, which can assume the form of a free trade area, customs union, common market or economic union. The higher the form of integration, the higher the institutional demands to be fulfilled.

The Common Market of the South Cone, MERCOSUL, a customs union since 1995, is comprised of four partners — Brazil, Argentina, Paraguay, and Uruguay — and two associate members, Bolivia and Chile. The natural consequence of the evolution of its economic process is to become a common market with the creation of supranational institutions such as a MERCOSUL Court of justice.

Currently, there are several tensions between Brazil and its partners of MERCOSUL. Many of those could be easily eliminated if there were supranational organs to interpret and enforce MERCOSUL's rules. However, in the Brazilian legal system, there are a number of constitutional obstacles to the creation of these supranational organs.

This paper is an attempt to give an overview of these legal obstacles and to offer some suggestions about how to overcome them. *Chapter I* presents a brief history of the economic integration process in Latin America and the creation of MERCOSUL. *Chapter II* describes the different stages of economic integration, ranging from the simplest institutional scheme of free trade area to the most complex system of economic union. *Chapter III*

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deals with the current legal status of MERCOSUL as a customs union, while *Chapter IV* engages into the legal paths of intergovernmentability and supranationality. *Chapter V* points out the main legal obstacles about incorporation of international norms and creation of supranational organs vis-à-vis the Brazilian Constitution. The last Chapter generates suggestions about how to overcome these legal problems through possible alternatives concentrating on changes to the Brazilian Constitution.

I — A BRIEF HISTORY OF THE INTEGRATION PROCESS IN LATIN AMERICA AND MERCOSUL

The economic integration process in Latin America began after the middle of this century, more precisely in 1960, when the Treaty of Montevideo established the Latin America Free Trade Association (Associação Latino Americana de Livre Comércio). This Association was conceived to create an area where there would be free circulation of goods negotiated one by one in regular sessions, and enrolled in a list of products to be liberalized. Argentina, Brazil, Mexico, Paraguay, Peru and Uruguay were the first countries to sign the Treaty⁽¹⁾ that would be joined, in the following years, by Bolivia, Colombia, Ecuador and Venezuela⁽²⁾. The main objective of this Association was to remove trade barriers among member countries over a period of 12 years (soon extended to 20 years).

But this association was not successful and, in 1980 ALALC was replaced by ALADI — Latin-American Association for Integration (Associação Latino-Americana de Integração) which redefined the objectives of the integration process in a more realistic way, emphasizing the bilateralism of the relations among member countries through partial agreements, where there would be no need to extend the accorded benefits to the other members of the organization. This way, although ALADI's treaty does not expressly mention the creation of common markets, it has clauses that allow their creation. That is the reason why we may say that MERCOSUL is one of the positive results of the application of the principles praised by ALADI.

In the context of increasing bilateral relations, Brazil and Argentina started conversations for greater regional cooperation that were formalized at *Declaração de Iguazu*, in 1985. In 1988, these conversations became in effect with the signing of PICE — Program of Economic Integration and Cooperation between Brazil and Argentina (Programa de Integração e Cooperação Econômica entre Brasil e Argentina). In PICE, Brazil and Argentina outlined as their objective the creation of a common economic area. This area would be gradually established, within ten years, through step by step negotiations of Additional Protocols to the Partial Reach Agreement, respecting the principles of gradualism, flexibility, balance, and symmetry. They also continued the integration process through the

(1) Those countries signed the Treaty of Montevideo on Feb. 16, 1960.

(2) Colombia and Ecuador joined in 1961, Venezuela in 1966 and Bolivia in 1967.

Agreement of Economic Complementation number fourteen, firmed within ALADI in 1990. By this Agreement, both countries engaged in facilitating the creation of necessary conditions to establish a common market, promote economic complementation, and stimulate investments.

The first step to reach this goal (creation of a Common Market) was taken in 1991 when Argentina, Brazil, Paraguay and Uruguay, by signing the *Asuncion Treaty*, agreed to form a Customs Union named *Southern Common Market*, commonly known as MERCOSUL⁽³⁾. This union created an integrated regional market whose members were committed to "strengthening the economic integration process by making the most efficient use of available resources, preserving the environment, improving physical links, coordinating macroeconomic policies and complementing the different sectors of the economy, based on the principles of gradualism, flexibility and balance"⁽⁴⁾.

The Treaty of Asuncion, usually referred as MERCOSUL's "Treaty Framework", provided the underlying elements for the creation of the Common Market. The implications of such agreement were the following:

— *Free movement of goods, services, and factors of production*⁽⁵⁾, by means of, among others, elimination of customs duties and non-tariff restrictions on movement of goods.

— *The establishment of a Common External Tariff (CET) and the undertaking of union trade policy vis-à-vis third States*, as well as coordination of positions in economic, trade, regional and international forums.

— *The coordination of macroeconomic and sectorial policies among member States* in areas of: foreign trade, agriculture, industry, fiscal and monetary issues, foreign exchange and capital, services, customs, transport and communications as well as others that are agreed upon, in order to assure conditions of competitiveness amongst member States.

— *The commitment among member States to harmonize their legislation* on the relevant matters in order to strengthen the integration process.

The Treaty of Asuncion (TA) also provided for a *transitional period*⁽⁶⁾ during which the member States were to adopt, in order to facilitate the formation of the common market, general rules of origin as well as a system for the settlement of disputes and safeguard clauses. The main instruments to reach those goals were the following: (see Art. 5 of the TA)

(3) Although most of the international literature refers to this economic market by its Spanish expression "MERCOSUR" (Mercado Común del Sur) I shall adopt, for the purposes of this study, its Portuguese version "MERCOSUL" (Mercado Comum do Sul).

(4) See Preamble of Treaty in Asuncion.

(5) Note that, unlike the Treaty of Rome (art.3, c) which established the European Economic Community (EEC) in 1957, the Treaty of Asuncion does not include the term "free movement of people", although it is generally recognized that the expression "factors of production" refers to capital and labor (see Art. 1 of TA).

(6) According to Art. 3 of the Asuncion Treaty, the transitional period was supposed to last until Dec. 31, 1994.

— *Trade Liberalization Program*: The Program to liberalize trade established a progressive, linear, automatic and across-the-board tariff reduction along with the elimination of non-tariff restrictions or equivalent measures in order to achieve a zero duty without non-tariff restrictions by December 31, 1994.

— *Gradual Coordination of macroeconomic policies* that will be gradually undertaken and converge with the program of tariff reductions and the elimination of non-tariff restrictions.

— *A Common External Tariff (CET)* to encourage member States competitiveness.

— *Adoption of sectorial agreements* to optimize the use and mobility of factors of production and to achieve efficient scales of operation.

After the Treaty of Asuncion (TA), the next step in the integration process happened when the Protocol of Ouro Preto was signed in 1994. This Protocol amended TA with regard to the institutional structures of the economic bloc, transforming MERCOSUL from a Free Trade Area to a Customs Union. For a better understanding of the level of integration currently in force within MERCOSUL, it is important to first clarify the various stages of economic integration, and then analyze innovations brought by the Protocol of Ouro Preto.

IT — THE DIFFERENT STAGES OF ECONOMIC INTEGRATION

As a rule, the economic stages of integration vary according to the institutional arrangements adopted. The higher the form of integration chosen, the higher the institutional demands to be fulfilled. According to the Balassa's classical work, the different forms of integration may be described as follows:

Free Trade Area: In the free-trade area (FTA), all such trade impediments as import duties and quantitative restrictions are abolished among partners. Internal goods traffic is then free, but each country can apply its own customs tariff with respect to third countries. In order to avoid trade deflection (e.g. goods entering the FTA through the country with lowest external tariff) internationally trade goods must be accompanied by so-called "certificates of origin" indicating in which country the good has been manufactured.

Customs Union: In customs union (CU) as in the free-trade area, all obstacles to free traffic of goods among partner countries are removed. Moreover, one common external tariff is agreed upon, which does away with the certificates of origin at internal borders. Once a good has been admitted anywhere to the customs union, it may circulate freely.

Common Market: The common market is a customs union in which the production factors, such as capital and labor, may move freely within its borders. In this scheme, there are options as to the relation with third countries. There can be different national regulations (comparable to the FTA) or only one common regulation (comparable to the CU).

Economic Union (EU): The EU implies not only a common market but also a high degree of coordination or even unification of the most important areas of economic policy, market regulation as well as macroeconomic, monetary and income redistribution policies. Not only is a common trade policy pursued towards third countries, but external policies concerning production factors and economic sectors are also developed.

Note that all of the abovementioned stages reflect transfers of powers from national to union institutions. Each step towards integration makes the government from each member state less powerful with regard to their policy-making decisions. In the Free Trade Area, for example, countries are bound to abolish import duties among themselves but they may still decide to establish their own external tariffs with regard to third countries. Accordingly, if they decide to take a step further and become a Common Market, the same countries, besides giving up the prerogative to set up external tariffs, may no longer interfere in the movement of goods, capital nor persons within their borders. This is how the dynamics work. The decision to renounce the State's sovereignty is usually taken when a certain country expects more economic advantages than that of a simple free trade area. These rewards can be in form of market efficiency or specialized production.

III — MERCOSUL'S CURRENT STAGE OF INTEGRATION: INNOVATIONS BROUGHT BY THE PROTOCOL OF OURO PRETO

Once clarified the different stages of economic integration, we may now analyze the current structures presented within MERCOSUL's legal framework.

In a general overview, we may say that the integration process of MERCOSUL took, after the signing of Protocol of Ouro Preto, in 1994, an important step towards the creation of a real Common Market in South America. In fact, with the profile of a Customs Union, MERCOSUL gets a safer institutional structure for the integration process and for the increment of its negotiations with third party countries.

Although the Treaty of Asuncion had foreseen, in its article 18, the deadline of December 31, 1994 for the determination of the final institutional structure of administrative organs of MERCOSUL, the Protocol of Ouro Preto silenced about it. In fact, instead of establishing a definitive organization, the Protocol, in its article 47, foresees a revision of its institutional structures, which allows member States, whenever they see fit, the possibility of summoning a diplomatic conference for such objective.

This change in the understanding about the permanent nature of the bloc's structure is explained by the dynamics the integrationist process took after the creation of MERCOSUL. In the beginning, the majority of policy makers thought that a faster pace in the integration process would allow the fixation, before December 31, 1994, of an unchangeable and decisive structure with regard to institutions of MERCOSUL. However, due to

economic and political facts, that process did not have the initially expected success, leading to the option of a more flexible and open definition in relation to the bloc's organic composition.

In reference to institutional aspects, the Protocol innovated in some points, but in general, it kept a lot of the principles established by the Treaty of Asuncion. In short, the innovations brought by the protocol of Ouro Preto may be resumed as follows:

1) On the creation of a Common External Tariff (CET)⁽⁷⁾:

The creation of a Common External Tariff (CET) for the entire bloc means that products imported from third party countries (those that do not belong to the bloc), in order to enter in MERCOSUL, have to pay this tariff (CET)⁽⁸⁾. Some authors, such as Ligia Maura Costa⁽⁹⁾, say that at this stage the economic integration would be at the level of a "Customs Community".

2) On Organs of MERCOSUL (Art. 1):

2.a) Were maintained:

- The Council of the common market (CCM) and
- The Common Market Group (CMG).

2.b) Were expressly created⁽¹⁰⁾:

- The MERCOSUL Trade Commission (TC);
- The Joint Parliamentary Commission (JPC);
- The Economic and Social Consultative Forum (ESCF) and
- The MERCOSUL Administrative Secretariat (AS).

3) On the legal nature of the organs (Art. 2):

The organic structure was maintained *intergovernmental*, as established by the Treaty of Asuncion.

(7) Common External Tariff (CET) results of Art.1 combined with Art. 2 of Annex 1 (about Trade Liberalization Program) of Treaty of Asuncion, where it is foreseen "the elimination of customs rights and any other measures of equivalent effect... that may fall upon MERCOSUL's foreign trade".

(8) The Common External Tariff is composed of a list of goods coded accordingly with the common nomenclature of MERCOSUL. It contains the tariff aliquots applicable to goods from third party countries, except those in the List of Exceptions. According to the electronic data provided by the U.S. Department of Commerce (www.mac.gov/ota/Mercosur/mgi/mercosus.htm), as for June 1999, the Common External Tariff covered 85% of all trade of goods in Mercosul, with the average of 11.3% and 11 different tiers between 0% and 20%.

(9) In "Mercosul: seus efeitos jurídicos, econômicos e políticos nos Estados-Membros". Porto Alegre: Liv. do Advogado, 1995, pág. 143.

(10) The Protocol of Ouro Preto also provided for the creation of auxiliary organs that would become necessary for the attaining of the objectives of the integration process.

4) On the legal status (Art. 35):

MERCOSUL as an International Legal Entity was recognized, which means that it provides the bloc with the capacity of acquisition of rights and the submission to obligations as a legal person apart from the countries that form it.

5) On the decision making system (Art. 37):

The consensual system of decision-making adopted by all organs of MERCOSUL was maintained.

6) On the relations of MERCOSUL's norms with the domestic Laws of the member countries (Art. 42):

It was maintained the system of mandatory incorporation of MERCOSUL's norms in the juridical organization of the countries through procedures domestically defined. This means that the norms of MERCOSUL do not yet have direct application upon the member states.

7) On the system of solving controversies (Art. 43):

The mechanism established by Protocol of Brasilia for MERCOSUL's Controversies firmid in 12/17/95 was maintained.

Thus, in view of the abovementioned innovations, we see that the most important novelty brought by Ouro Preto Protocol was the creation of a common external tariff. In reality, in becoming a Customs Union, MERCOSUL is no longer a system limited to the reciprocal elimination of restrictions upon trade (a free trade area characteristic). Now, it also incorporates uniform trade policies, as well as common customs agenda regarding the non-member countries (a customs union attribute).

In a more accurate analysis, however, we can also say that the Protocol of Ouro Preto did not bring to reality many expectations that surrounded it. The truth is that, although CET represented a novelty within the structure of MERCOSUL, the Protocol did not present anything new on its institutional nature, for it kept untouched the intergovernmental characteristic of this economic bloc.

As consequence, MERCOSUL remains submitted to the ruling of Public International Law, where treaties are governed by the domestic constitutions of each country. Both the form the treaties are applied by national courts (Monist or Dualist Theories) and the possibility for individuals to evoke or not the norms contained in the Treaties continue to depend on the juridical treatment that each member State provides in reference to international norms.

Thus, after analyzing MERCOSUL's historical development and its current structures, we may now face what are the problems of having intergovernmental (instead of supranational) institutions in this economic bloc.

IV — INTERGOVERNAMENTABILITY VS. SUPRANATIONALITY: WHAT LEGAL PATH SHOULD MERCOSUL ADOPT?

The best way of analyzing MERCOSUL's intergovernmental scheme is through the examination of its structural organs and the nature of its deliberations. In general, we may say that the institutional organs in an intergovernmental system are not independent vis-à-vis national governments. Its organs decisions, on the contrary, are essentially compromised with the political will of each Member State. Hence, the classic Dallari's expression, which says that "*with the present structure of MERCOSUL, the deliberations originated from its jurisdiction are not juridical norms in the strict sense, but political determinations that bound the party States to adequate their respective domestic juridical order.*"

Brazilian authors diverge with regard to the legal status that MERCOSUL should adopt in the near future. On one side are the defenders of intergovernmentability⁽¹¹⁾ whose ideas are based on the old conception of State sovereignty. On the other side, there are those who consider supranationality an essential and indispensable element not only to guarantee the continuity of integration process but also to diminish the current institutional fragility of MERCOSUL, whose future goes along with the winds of the political wishes of the member countries.

Not considering the authors who deal with the subject⁽¹²⁾, the principal defenders of intergovernmentability in Brazil are in the Judiciary, which, upon adopting an extreme corporative view, does not like the idea of the creation of supranational organisms within MERCOSUL. Indeed, the judges of Brazil's highest Court see intergovernmentability as an efficient "legal shield" that protects them of any form of subtraction of their jurisdictional powers.

In contrast to that view, we find some authors who defend supranationality as a necessary element for the development of MERCOSUL. As warned by Faria⁽¹³⁾, there are innumerable authors who support the need of a supranational element for the continuity of the economic development, since its absence creates an institutional difficulty for the integration of the "South Cone". The difficulty would be the lack of credibility in the integration process, absence of a uniform interpretation and application of MERCOSUL's norms.

In addressing those problems, Mario Lucio Quintão Soares points out that a Supranational Court of Justice in MERCOSUL "will be a determinant factor for the development and consecution of the basic principles for the

(11) They are a minority group.

(12) Authors such as: ALMEIDA, Elizabeth Accioly Pinto de. "Mercosul & União Europeia", Curitiba, 1996; GUIMARAES, Samuel Pinheiro. "Aspectos Economicos do Mercosul", Revista Brasileira de Política Internacional, Brasília, 1996 and BAPTISTA, Luiz Olavo. As Instituições do Mercosul: comparações e prospectiva. "O Mercosul em Movimento", 1995.

(13) In O Mercosul em Movimento II. Coord. de Adair da Silva Ilha e Deyse de Freitas Lima Ventura. Porto Alegre: Livraria do Advogado, 1999, pág. 24.

evolution of the South Cone integrationist process, guaranteeing the enforceability of the community norms as well as the respect to obligations undertaken by member States in their constitutive treaties".⁽¹⁴⁾

On the same line of thought, jurist Leonardo Greco affirms "It is necessary to have control over competencies and over the applicable law within MERCOSUL and that it is necessary to have a uniform interpretation of these norms within the entire space of the countries in the integration process. In this view, the equality of treatment among the citizens of the four countries (Argentina, Brazil, Paraguay and Uruguay), requires, therefore, the existence of an organ that maintains this uniformity".⁽¹⁵⁾

In a general overview, we may say that the Brazilian literature is right to waver over these two positions. This is true because, when we analyze the Treaty of Asuncion we see that, although it is expressed that the objectives to be reached will demand an integration effort with uniform rights, nothing has been presented ever since as a compromise around a clear supranational agenda. In fact, some of its dispositions point in the direction opposite of the supranationality paradigm. Furthermore, the vague and imprecise language of the Treaty of Asuncion leads many to believe that it corresponds, in fact, to the Brazilian *political ambiguity* towards the full integration of the MERCOSUL's countries.

In a critical analysis, however, I believe that the Brazilian authors have had a very passive behavior when it comes to presenting concrete and effective solutions for the juridical problems within MERCOSUL. In fact, I see that the biggest problem is the lack of jurisprudence dealing directly with the construction of a real Common Market. One of the least mentioned questions refers, for example, to the legal obstacles for the creation of supranational organisms. Frequently, most of the authors who deal with matters related to MERCOSUL produce merely descriptive works. Instead of facing the *substance* of the legal problems, most of the authors limit themselves to just presenting a historic evolution of the past experiences regarding Latin American economic process. Beyond this point the debate is over: behind the mere description of facts, the *constructive criticism* responsible for elaborating ideas is silent; and the future of 220 million⁽¹⁶⁾ people becomes a juridical drift in this revolving sea caused by the economic globalization.

As previously mentioned, my objective in this paper is to diagnose the main constitutional obstacles Brazil will face with the creation of supranational organisms (i.e. MERCOSUL's Court of Justice). My goal is to propose alternatives and stimulate the debate over such an important subject for the future of the integrationist process of South America. That is what is done in the following paragraphs:

(14) Mercosul em Mov. II, pág. 27.

(15) "Idem" Footnote 12, pág. 28.

(16) See electronic data of the U.S. Department of Commerce at www.mac.gov/ola/mercosul/mgij/mercosus.htm.

V — SUPRANATIONALITY IN MERCOSUL VIS-À-VIS BRAZILIAN CONSTITUTION

a) Legal Obstacles regarding the Incorporation of International Norms

The mechanism adopted by the Federal Constitution follows the Dualist Theory regarding the incorporation of international norms. According to this theory, to be incorporated to the domestic law the international Treaties need to be approved by the Legislature (Federal Constitution, Art. 49, I) and then to be ratified and published by the Executive (Federal Constitution, Art. 84, VITI).

The approval by the House of Representatives must be made through absolute majority of votes (Federal Constitution, Art. 47) and be followed by a project of Legislative Decree to be sent to the Senate, which will approve or reject it. If approved without amendments, the President of the Senate publishes the Legislative Decree (Senate Internal Ruling IX, chapter IV, art. 48, item 28). If amended, it returns to the House which has to decide if it accepts amendments or maintains its project. The President of the Senate is the one who will publish the Legislative Decree in any event.

In view of the above, we realize that pursuant to the Brazilian Magna Carta, the execution of international treaties and their incorporation into the domestic juridical order is a consequence of subjectively complex acts. It results from the connection of two homogenous political wishes: that of National Congress (that ultimately decides, via Legislative Decree, over the treaties, accords or international acts — Federal Constitution, art. 49, I) and that of the President who, besides the power to celebrate these acts of international law (Federal Constitution, art. 84, VIII), has also the power to publish them through Executive Decree. After the fulfillment of these procedures, treaties become part of the Brazilian's legal system, hence having the effect of Law.

After the phase of incorporation of these international norms, the problem is the positioning of these rules into the hierarchy of domestic law. This raises many concerns because, once the international norms are inserted in the domestic body of laws, their position is inferior to the Federal Constitution, therefore subject to the control of constitutionality by the judicial review.

This control of constitutionality is committed to the Federal Supreme Court, which has the sole power to solve conflicts between the Brazilian Constitution and the norms embodied in an international treaty (Art. 102, III, b).

Unfortunately this model brings a lot of disadvantages for the perfecting of the integration process. That is so because the norms emanated from MERCOSUL's organs do not *directly* apply to Brazil. Its norms need domestic normative acts (Legislative and Executive Decrees) which, in case of conflict with the domestic Legislation, may be abolished or altered. In fact, since the application of its norms will always be subject — later on — to the scrutiny

of the Federal Supreme Court, it is easy to imagine the enormous juridical instability that may arise from the conflicts of interpretation and uniform application of MERCOSUL's rules.

Therefore, there will be an increasing need to provide MERCOSUL with an institutional structure invested with the powers and attributions to ensure the good function of this economic bloc. In fact, this is the most harmonic interpretation upon the reading of the Brazilian constitutional text in the light of the current stage of world economic integration.

The main constitutional provision dealing with this subject is Article 4, sole paragraph that, under the chapter "ON FUNDAMENTAL PRINCIPLES" of the Federal Constitution determines the following:

"Article 4 — The international relations of the Federative Republic of Brazil are governed by the following principles.

Same Paragraph — The Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the peoples of Latin America, viewing the formation of a Latin-American community of nations".

As we can see, the finalistic characteristic of this constitutional norm encourages the *formation* of a Latin American community of nations. This community of nations, obviously, would not be the one already existent at the time of the elaboration of the constitution, for, if that were the case, the sole paragraph of Article 4 would represent legislation over nothing.

Some writers, such as Celso Ribeiro and Ives Gandra Martins support nonetheless, that the current constitutional text does not expressly clarify if the form of this integration must respect the classical principles of sovereignty or if it brings the possibility of integration through the creation of supranational organisms. Others, however, believe that this constitutional provision (Art. 4, sole paragraph) do not have direct applicability, but a *pragmatic* efficacy, meaning that it lacks further norms (infra-constitutional legislation) to produce those desirable effects.

My opinion is that, given the historic context surrounding the elaboration of the Brazilian Constitution, there were no uncertainties at that time as the real intention of the constituent legislator. During the time the Brazilian Constitution was promulgated (end of the 80's⁽¹⁷⁾), Europe had already and for a long time experienced the reality of a Common Market and the transition to a community with no borders. At that juncture, the doctrinaire debates deal very clearly with the juridical implications of creation of a communitarian Europe. In fact, a year before the promulgation of the Federal Constitution/1988, ore precisely in July of 1987, the Single European Act⁽¹⁸⁾ came in force and brought to the international scenario a great discussion about the legal and procedural steps that should be taken to implement the European Union.

(17) The Brazilian Federal Constitution was promulgated on October 5, 1988.

(18) The Single European Act of 1987 amended the Treaty of Rome (1957) to initiate a campaign for a Community without internal frontiers by 1993.

Therefore, to suppose that the Brazilian constituent legislator was not aware that the community integration would necessarily involve the abdication of part of the State's sovereignty is only to use this argument as a legal artifice to disguise reality. In fact, it is only to use a mistaken literal interpretation of the constitutional text to disrespect all studies that at that time enlightened the world about the European integrationist process and the juridical consequences hence resulting.

Perhaps, one may say that the lack of clearness of the constitutional text reflects, in truth, the imprecise legislative technique on the part of the Brazilian legislator and not his original will to constitute a community of nations in Latin America with all the legal effects it would originate. Nevertheless, even if the constitutional text lacked clarity, its interpretation should not mislead one to incoherent and illogical conclusions. Indeed, Alberto Amaral Junior reflects this argument when stating that *"the definitive implementation of an integrationist process will demand the creation of institutions with communitarian and supranational characteristics. It is not logical that the work of a free trade zone, the establishment of a common foreign tariff and the harmonization of macroeconomic policies may be carried out giving up the existence of organs in charge of its elaboration and execution"*.⁽¹⁹⁾

In support of such view, Elizabeth Accioly Pinto de Almeida goes even further to express that *"the existence of a supranational Court of Justice is an essential element in a integration process. The system of delegation of competencies it bears has attached the guarantee that the States will respect it both by the institutions and by their members States. Subordination to common rules implies that the uniformity of their application is maintained, for if, in a community of States the community norms were controlled by the domestic tribunals, they would be interpreted and applied differently in each one of them. The uniform application of Community Law would, consequently, be challenged"*.⁽²⁰⁾

In view of the above, I would like to offer some legal alternatives to make possible the creation of these supranational organisms. Before doing so, I will further identify the constitutional obstacles that currently exist in the Brazilian legal order.

b) Legal Obstacles regarding the creation of Supranational organs

The Brazilian Constitution presents a series of constitutional obstacles to the creation of supranational organisms. The limitations contained therein may be classified in three forms: *circumstantial, formal and material*.

Circumstantial limitations are rare in Brazilian constitutional history. As an example we might mention the prohibition to amend the constitution under federal intervention, state of defense or state of siege. (art. 60, par. 1)

(19) In (1994) (in Mercosul em Mov., págs. 25-26).

(20) In Elizabeth Accioly Pinto de Almeida, Mercosul & União Européia — estrutura jurídico-institucional. Editora Juruá, 2ª edição, 1998, pág. 144.

Formal limitations are related to the reform process. They refer to the specific organ responsible to reform the Constitution (in this case, the National Congress), the reserved initiative to propose a constitutional amendment (Federal Constitution, art. 60. 1. II. III) and the special process of its elaboration (Federal Constitution, art. 60, paragraphs 2, 3 and 5). These limitations require Congress to proceed in strict terms expressly stated in the constitution, in the contrary it will be subject to invalidation by the judicial review of the Brazilian Supreme Court.

The *material* limitations refer to the *substance* (the content of values) of certain rights, freedoms and guarantees that cannot, in any event, be violated.⁽²¹⁾ It is exactly in reference to this third form of constitutional limitation that the subject of supranationality becomes more delicate. In fact, the most difficult point is to outline the material limits of this "Reform Power" that would be in charge for the creation of supranational organisms. That is because the Brazilian Constitution has an "unchangeable nucleus", which is expressly excluded of any legal reform. These unchangeable provisions, despite its restricted number, (4 clauses in Art. 60), have an extremely ample content, since its abstract concepts (e.g. individual rights and guarantees) spread themselves throughout the entire constitutional text. The Brazilian Doctrine calls the provisions as "Cláusulas Pétreas"⁽²²⁾ which contains limitations that forbid not only the proposals to amend but also any deliberation with the tendency to abolish:

- I — the federative form of State,*
- II — the direct, secret, universal and periodic vote,*
- III — the separation of Governmental Powers;*
- IV — individual rights and guarantees.*⁽²³⁾

In face of such material limitations, we see that through this mechanism, the Brazilian Magna Carta tried to keep away from the power to reform an "essential core" of rights, freedoms and guarantees that cannot even be object of congressional deliberation, meaning that a proposal of constitutional amendment can not even be processed by the Congress.

In reference to clauses II and III abovementioned, we see that the constitutional text is very clear in its definition. Both its objectives and its protection values may be easily identified. With regard to clause II, for example, it is evident that the text explicitly forbids amendments that expressly declare the cancellation of the universal vote. In relation to clause III, it is equally visible that is voided the change in the allocation of any power that the Constitution delegates with exclusivity to a specific Government Branch.

(21) J. J. Gomes Canotilho, "Direito Constitucional", Lisboa, 1993, pág. 618.

(22) The noun 'pétreas' comes from the latin term *petra*, ae that means "stones as a symbol of immutability".

(23) See Brazilian Constitution (Art. 60, IV).

However, although clauses II and III are easy to interpret, clauses I and IV are very hard to understand for its contents are extremely volatile and extensive. For example, *what is the object of protection of the federative form of the State predicted in clause I?* To what extension the original constituent meant the concept "individual rights and guarantees" (see in clause IV) vis-à-vis the principle of economic integration enunciated in Art. 4, sole paragraph?

And in reference to clause I, what is the precise object of protection of the "federative form of State"? On one hand, we may see that it refers to the autonomy of the Brazilian State, to its capacity of self-organization, self-rule and self-determination. On the other hand, however, we may wonder whether an amendment that took part of this capacities, even if very tiny, would be considered unconstitutional.

In fact, we could legitimately ask ourselves: did the legislative constituents of 1988⁽²⁴⁾ have in mind the idea of absolute sovereignty, based in Jean Bodin's conception from the 18th century? Or did they envision a new State authority, based on a 21st century and modern concept of European sovereignty?

As previously mentioned, I believe that the real paradigm adopted by the Brazilian legislator was to follow the model inspired on the European experience. There, the member States did not lose their sovereignty, but shared them amongst themselves. Therefore, sovereignty was not given nor destroyed, but revised, revitalized and matured. This is the great institutional innovation that must guide the Brazilian Constitutional interpretation.

As for the rights and individual guarantees mentioned in insert IV I believe that only a few can be considered fundamental as to deserve a total and unrestricted constitutional protection⁽²⁵⁾.

If we compare the Brazilian Constitution with those of other countries, we will see a real "inflation of rights"⁽²⁶⁾ on the part of the original Brazilian constituent that besides creating an extensive hall of individual rights (see Art. 5), listed them under the title of "Fundamental Rights" (see Title II of the Brazilian Constitution). Indeed, when we analyze Germany, for example; one of the most advanced democracies of the Western hemisphere, and Brazil, world champion of social inequalities, we see that the European country, in its Constitution, sets on 20 the number of fundamental rights while the south American one has a 4 times larger number (approximately

(24) Year of the promulgation of Brazilian Constitution.

(25) As warned by *Manoel Gonçalves Ferreira Filho*, "The exam of fundamental rights listed in 1988 brings us the questions if many of them are really fundamental. Unless we downgrade the meaning of "fundamental", turning it not the equivalent of "essential" but merely "important". (cited by Brazilian Supreme Court Justice, *Velloso*, in "10 anos de Constituição: uma análise", coordenação Instituto Brasileiro de Direito Constitucional — IBDC — Sao Paulo: Celso Bastos Editor, 1998, pág. 233)

(26) See Brazilian Supreme Court Justice, *Carlos M. Velloso*, in "10 anos de Constituição: uma análise", coordenação Instituto Brasileiro de Direito Constitucional — IBDC — Sao Paulo: Celso Bastos Editor, 1998, pág. 234.

86 fundamental rights). In view of that, must all individual rights be respected if we wish to reform the Brazilian Constitution and create a supranational organism within MERCOSUL? Are all these rights fundamental that cannot be modified to the natural adjustments of History's evolution?

To help clarify this subject, it is worth emphasizing the thought of Maurice Crasston⁽²⁷⁾, who informs us about the criteria for a right to be considered *fundamental*. According to this author, "a fundamental right, by definition, is a universal moral right, something that all men, everywhere, at all times, must have, something that no one can be deprived from without grave offense to justice, something that is inherent to all human beings simply by being a human being."⁽²⁸⁾

Another contribution is also given by F. G. Jacobs who frames two relevant criteria for a right to be considered fundamental. They are: 1) the right must be universal in the two senses — that it is universal or very widely known and that it is granted to all, and 2) the right must have been formulated precisely enough to give room for the obligations of the State and not only to establish a standard of behavior.

In addition, it is worth remembering that certain concepts take a different connotation depending on the historic time they are evoked. In the U.S., for example, the Constitution has been the same for over 200 years, yet its content has been adjusted accordingly with the historic and economic evolution. Its text was written using abstract concepts, capable of being fulfilled with the values in effect at a certain time. Amendment XIV (1868) to the American Constitution, which established due process restrictions to the American States and which has become the real clause to protect freedom, life and property in that country, was designed with the objective to "lead to a choice of language capable of growth" (see Bickel, in *Constitutional Law*, Gerald Gunther and Kathleen M. Sullivan, p. 678, Foundation Press, 1997). This flexible structure explains how the same Constitution interpreted racial segregation as unconstitutional in 1896 (*Plessy vs. Ferguson*) and later in 1954 considered it unconstitutional (*Brown vs. Board of Education*), without the need to alter any clause of the American Constitution (Alexander Bickel, in *Least Dangerous Branch* (1962), said: "Brown is just the beginning. The beginning not only of substantive changes in the American Social Structure but also in the nature and expectations of how the Supreme Court interpreted the Constitution".)

As a result of this comparative analysis, we may say that the concept of individual rights and guarantees must be adjusted along the times. Its values, secular as they may be, must evolve with History. In general, it is understandable that each legislative constituent, when elaborating a

(27) Cited by Brazilian Supreme Court Justice, *Carlos M. Velloso*, in "10 anos de Constituição: uma análise", coordenação Instituto Brasileiro de Direito Constitucional — IBDC — São Paulo: Celso Bastos Editor, 1998, pág. 234.

(28) Cited by Brazilian Supreme Court Justice, *Carlos M. Velloso*, in "10 anos de Constituição: uma análise", coordenação Instituto Brasileiro de Direito Constitucional — IBDC — São Paulo: Celso Bastos Editor, 1998, pág. 234.

Constitution, has the legitimate right to exclude some subjects or contents from the incidence of constitutional amendments. Yet, in the case of Brazil, this exclusion takes extravagant proportions that end up paralyzing the entire juridical system and all possible structural renovations. As a result, Brazil becomes prevented from developing an institutional experimentalism which could lead this country to a faster and more efficient development.

In face of this situation, what should be done, then? What legal alternatives do we have? How do we overcome the legal obstacles presented in the Brazilian Constitution in order to allow the creation of supranational institutions within MERCOSUL?

VI — SUGGESTIONS TO OVERCOME CURRENT LEGAL OBSTACLES

In trying to answer the abovementioned questions, I would like first to pinpoint some general principles that should be the guidelines of the adjustment of the Brazilian Law to the future Community Law. Then, I will describe some specific suggestions to face the constitutional problems that will certainly arise if a supranational legislation is implemented within MERCOSUL.

a) General Principles to be adopted

The problems involving relations between Community Law and domestic rights are very complex and diverse. As previously observed, there are both in the literature and in jurisprudence, an uncountable number of these proposing solutions for the problems that affect the juridical-institutional structures of MERCOSUL. In this chapter, I try to present the most important principles among these theories for, then, pinpoint some alternatives for the adaptation of the Brazilian Law to the future community legal system in MERCOSUL.

First, it is necessary to make clear the relations between domestic and supranational orders. Here, the most important aspect is that the relation between Community Law and member states laws cannot be compared to that existent between international law and the domestic law of each country. In effect, while in International Law the relationship between the international and domestic order is substantially a relation of "coordination" between two juridical systems reciprocally autonomous, in supranationality the relationship is the opposite, thus configuring a matter of legal "integration", where the Community order and the order of the States tend to integrate.

Once established the difference between the nature of the relations between International Law and Community Law, I may show, secondly, some general principles that must be obeyed in the relations between these two juridical orders for the effective operation of a Common Market:

a.1) Principle of autonomy of Community Law vis-à-vis Member State's Legal order:

This principle constitutes the foundation of validity in the Community Legal Order, indispensable to preserve the specificity of Common Law facing the various domestic rights. On one side, this principle corresponds to a specification of supranational rights for the solution of conflicts within the community area and, on the other, the guarantee of submission to the domestic law of each member State, according to the domestic rules of each country.

a.2) Principle of Supremacy of Community Law:

It is closely connected to the first principle. While the principle of autonomy of the community Law establishes the differentiation and the existence of two systems, this system determines the exclusivity of the Community Law over questions and litigations within the community. Indeed, it is an indispensable and fundamental quality for the existence of community legal order itself and, indirectly, for the operation of a supranational tribunal to apply it.

a.3) Principle of Direct Effect of Community Law in National Legal orders:

This principle⁽²⁹⁾ guarantees that Community law shall have general application as well as direct applicability in all of the Member States. This means that if Community provision grants a right, it will come into effect without any further executive or legislative action by the Member States.⁽³⁰⁾

a.4) Principle of Complementation:

According to this principle, the Community Order and the one of the States do not overlap, but intertwine, while they regulate real, distinct and specific situations.

(29) It was as early as 1963 that the European Court of justice (ECJ) established the concept of direct effect in the Community Legal order. The most important case regarding this principle is *Van Gend en Loos* (ECJ Case 26/62) in which ECJ stated that: "the objectives of EEC Treaty... implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states... Community constitutes a new legal order of international law for benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community Law therefore not only imposes obligation on individuals but is also intended to confer on them rights which becomes part of their legal heritage." (emphasis added)

(30) Unfortunately, the terminology of the European Court of Justice (ECJ) and of many of the European National Courts has been inconsistent with regard to the "Direct Effect" expression. Particularly in the early years of the Community, the two terms ("direct applicability" and "direct effect") tended to be used interchangeably. Most often, the ECJ has used the term "direct applicability" when the sense of the expression meant that the community provision gave rise to rights enforceable by individuals before it National Courts. This individual right, however, is usually known as "direct effect." (for details see James HANLON, in *European Community Law, first edition, London, Sweet & Maxwell, 1998, pág. 81*)

b) Specific suggestions for the creation at a Supranational Court of Justice:

Alongside with the necessary general principles above listed, I believe that some dispositions must be introduced in the Brazilian Constitution in order to permit the effective insertion of Brazil in a future Common Market, with supranational institutions.

My suggestion on the revision or reinterpretation of the constitutional clauses aims precisely to overcome the legal problems that will certainly arise in the Brazilian Constitution if supranational organisms are created in MERCOSUL. Due to the nature of this study, I shall not list all possible solutions, but indeed only some related to the establishment of supranational Court of Justice within this economic bloc.

b.1) Suggestion 1:

In relation to the creation of a Court of Justice, the first point worth mentioning is the one referring to articles 5^o XXXV of the Brazilian Constitution, which is considered by most of the Brazilian doctrine as the main constitutional obstacle for the appearance of such supranational institution. This provision provides the following:

"Art. 5 — All persons are equal before the law, without any distinction whatsoever. Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

XXXV — the law shall not exclude any injury of threat to a right from the consideration of the Judicial Power".

Most people consider this provision as one of the best protective clauses of the Constitution. They argue that this is a fundamental right, which guarantees to Brazilian citizens that any harm done to their individual rights must always be submitted, even when dealing with Community Law, to the domestic Court of Justice, that is, to the Brazilian Supreme Court.

Notwithstanding the opinion of several constitutionalists that share this opinion, it is impossible to accept their interpretation. While this understanding seems unbeatable concerning the conflicts in domestic law, the same cannot be said in relation to conflicts derived from Community Law. That is because the rule contained in Art. 5 of the Constitution aims to declare the access to justice as a *fundamental* guarantee to all Brazilian citizens. This is the right to access a Jurisdictional Organ and the right to have any demands resulting from harm or threat to a right examined and decided by a Court of Law.

Therefore, aiming the effective Brazilian integration to MERCOSUL, there should be a provision, along the list of fundamental rights, where it would be established the competency of a supranational tribunal for the solution of conflicts arising from the relations between individuals and between member States.

Accordingly, I would suggest, for example, the complementation of Art. 5, XXXV in order for this disposition to have the following text:

"Art. 5, XXXV — the law shall not exclude any injury of threat to a right from the consideration of the Judicial Power, EXCEPT in matters related with MERCOSUL 's community legislation, which will belong exclusively to the Community Court of Justice."

In this context, the Community Law would only be triggered when related with matters and questions arising from the interpretation of MERCOSUL's body of laws.

As a result, the Brazilian Judiciary would remain competent to verify whether the legal formalities of a given case were attended to, yet not allowed to enter the merits of the decisions reached by the supranational Court of Justice.

Consequently, we may conclude that the insertion of this complementary rule would not result in any restriction to the right of all Brazilians to appeal to the Judiciary nor to have a legal decision imposed by the Rule of Law.

In reality, the practical results would be that the appreciation of matters related to MERCOSUL would be transferred to a *specialized* Court (indeed a *supranational* court), which would be responsible for the stability and uniform application of the Community Legislation.

In addition to the above provision, it would also be necessary to insert, into the section of the Federal Supreme Court's allocation of powers (section II, chapter III, title IV) of the Federal Constitution, an identical rule transferring part of its competence to the future Community Court.

b.2) Suggestion 2:

The second suggestion refers to the preference of the Community Law over the domestic Law of each Member State.

To implement this principle, it would be necessary to introduce a rule, perhaps as paragraph 2 in Article 4 of the Constitution. This rule would provide that the Community Law is *supreme* as the idea of a MERCOSUL legal order can only exist if there are *unity, uniformity* and *efficacy* with regard to the application of its supranational legislation.

b.3) Suggestion 3:

The third and last suggestion recommends for a delegation of powers from the Legislative to the Executive Branch. In such scheme, the Brazilian National Congress would delegate the competence of granting *direct effect* to International Treaties to the President, similarly to the "fast track" legal scheme presented in the American system.

Additionally, such legal measure would definitely speed up the integrationist process, since the strengthening and development of international agreements are closely connected with an agile and unified positioning of all branches of Government.

As a balance political check and as a safeguard to the harmony and independence among the Powers of the Republic, the institution of *popular veto* device would also be used. This additional legal instrument, particularly if used after a period of the adoption of any international agreement or treaty, would indeed constitute a mature democratic way to grant greater legitimacy to the decisions made by the Executive.

VII — CONCLUSION

As seen along this study, there are several positive aspects in the existence of supranational institutions. In MERCOSUL, the creation of a supranational Court of Justice would contribute for a greater institutional balance between the Member States, since it would demand from all of them a direct subordination to the rules of the future Community Legislation. Moreover, a supranational Court would ensure a uniform interpretation of the law and a more legal stability for all members within the boarders of the Common Market.

In a short-term view, many believe that the creation of a Court of Justice is not interesting for Brazil now, as its great economic power has large influence on the current political decisions about the interpretation and application of MERCOSUL's laws. The main argument behind this position is that the creation of supranational institutions within the bloc would lead to a "judicialization" of the political and diplomatic "game" in which Brazil is the major player.

In a long-term view, however, this political attitude of delaying the establishment of a true Common Market in MERCOSUL is of small strategic value for Brazil. That is because, due to the growing globalization of the world economy, commerce in the future will be greater between economic blocs than among isolated countries. Consequently, the nations that unite earlier to form strong economic blocs will be advantaged in the global trade, for, once grouped, countries will have greater bargain power in the international trade arena.

In consideration of the above, one may ask how can this integration process be accelerated and who, after all, would be in charge of leading the job. I understand that, besides the public actors who are greatly responsible for defining the Brazilian political will, such role should also be played by the academia, which is equally responsible for the elaboration of ideas and solutions that affect the economic integration process in Latin America.

Indeed, I based this study on that belief in order to offer just a small contribution to the debate over the creation of supranational institutions within MERCOSUL. By presenting some suggestions on how to overcome some

of the legal obstacles in the Brazilian Constitution, I hope I have fulfilled part of that belief. Hopefully, other contributions will emerge soon, moved by the same desire to advance the discussion and establishment of better institutions for the next generation of South Americans.

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