

THE RELATIONSHIP BETWEEN THE LAWS
DERIVED FROM THE ORGANS OF MERCOSUR AND
THE LEGAL SYSTEMS OF THE COUNTRIES THAT
COMPRISE MERCOSUR

*Gabriel Albarracín**

Laura Aguzín

Selva Degiorgio

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I. SETTING FORTH THE PROBLEM

Starting from Ouro Preto's Protocol (O.P.P.) it is certain that Mercosur has international legal subjectivity,¹ becoming in this respect an intergovernmental organization with international legal subjectivity. In achievement of their quest, which is that of consolidating a common market and a free trade union among its members and possibly the associated States,² the O.P.P. endowed the Mercosur with diverse organs which are as follows: a) The Council of the Common Market; b) The Common Market Group; c) The Commission of the Trade of Mercosur; d) The Combined Parliamentary Commission; e) The Socio-Economic Advisory Forum; and f) The Administrative Secretary of the Mercosur.³ Of the organs mentioned, the first three have decisive capacity⁴ and their formal expressions of will, called respectively Decisions, Resolutions, and Directives, which are obligatory for the States,⁵ thereby becoming a legal right encompassing the States. This work seeks to analyze the validity and obligation for country members of the constituent norms of the Mercosur system, to elucidate if they conform a plexus of International Public Right or of Community Right; the necessity or not of previous internalization of the emanated dispositions of its organs whose execution is reputed as obligatory for the States regarding its application in the domestic environment of each one of them; and finally, the legal nature of that normative or law, everything by the light of the rules of the International Public Right that is applicable and, insofar as possible, to those of the internal right of its member countries, especially, those of the Argentinean Right.

II. TO WHAT LEGAL SYSTEM DOES THE MERCOSUR NORMATIVE CORRESPOND?

It is not a Community Right,⁶ because none of Mercosur's constituent instruments creates organs that are multinational. The Council of the Common Market, the Common Market Group and the Commission of Trade of the Mercosur, are intergovernmental organs that adopt decisions by consensus. The rules emanated by these organs link the

1. Ouro Preto's Protocol art. 34.

2. See generally Treaty of Asuncion, art. 5.

3. Ouro Preto's Protocol art. 1.

4. *Id.* art. 2.

5. *Id.* arts. 9, 15, & 20.

6. See generally HEBER ARBUET VIGNALI, *LAS RELACIONES ENTRE LA NORMATIVA DEL MERCOSUR Y LOS SISTEMAS INTERNOS DE SUS ESTADOS MIEMBROS* (1997).

countries in the international environment, carrying the responsibility for nonfulfilment, and possibly, according to the nature and content of the norm that it is, it can also generate an internal right for each State according to the dispositions of the legal system of each one of the countries. If it were a system of Community Right it would have its own organs which would possess attributes of multinationality with capacity of creating norms to watch over their execution and to sanction their offenders, becoming the obligatory decisions of the same ones for the States, prevailing over the internal norms and the immediate and direct execution.⁷

It is important to affirm here that the attribute of multinationality in the Argentinean legal system can not be presumed or detected tacitly. Article 75 clause 24 of the National Constitution, modified in 1994, authorizes the national government "to approve integration treaties that delegate competitions and jurisdiction to organizations that are multinational in conditions of reciprocity and equality, and they respect the democratic order and the human rights," adding that those norms have superior hierarchy to the laws.⁸ The second section of article 75, clause 24 establishes a need for a quantified majority of the members of each house of legislature for the approval of treaties of that nature.⁹ This disposition, that establishes taxative conditions for the recognition of the multinational status and determines a rigorous legislative procedure before the entrance in validity of the treaties that give life to organizations with such powers, does not leave any place for doubts that the multinationality status is an attribute that should be conferred formally and expressly.

The creative instruments of the Mercosur system are norms of International Public Right, coinciding our opinion with those that think that it constitutes a special system inside of it. For the legal system of Mercosur, we should understand the sources mentioned by article 41 of the O.P.P.,¹⁰ and they are composed of Asunción's Treaty, their protocols or

7. Dr. Elías Bluth, mentioned in JORGE PÉREZ OTERMIN'S MERCADO COMÚN DEL SUR refers to the thought of Dr. Eduardo Jiménez of Aréchaga in the sense that the *direct application* does not constitute an exclusive and novel attribute of the community right and citing it textually states that this "direct application to the individuals and societies of norms of conventional origin, is admitted in the International Right and is consecrated in an advisory opinion of the Permanent Court of International Justice that dates from 1923. Since then it is accepted by most of the doctrine (except for the dualist authors) and for the international practice that the treaties can force directly by themselves people with physical and judicial individuality, whenever the treaty possesses the necessary concretion degree." *Id.* (Editorial note: translated from Spanish).

8. ARG. CONST. art. 75, cl. 24.

9. *Id.*

10. Ouro Preto's Protocol art. 41.

additional or complementary instruments, the complementary agreements taking place in their jurisdiction and their protocols and the decisions of the Council, the resolutions of the Group and the directives of the Commission.¹¹

Article 42, 2nd Part of the O.P.P.,¹² after pointing out that the organs with power of decision inside the system are intergovernmental, establishes that their obligatory decisions will be incorporated into the national legal system by the procedures foreseen in the legislation of each country, provided this is necessary. This demonstrates that the process of incorporation of the Mercosur norms is that of the International Public Right with some peculiarities that we will analyze in this work. The uniform practice of the States that have approved incorporation according to the procedure regulated by their own legal systems for the approval of the treaties, the Treaty of Asunción, the Protocol of Brasilia and the O.P.P., is consistent with our evaluation of the system as one based on an International Public Right. Article 40 of the O.P.P.¹³ leaves very clear the non-community nature of the right generated by the Mercosur organs, establishing that the necessary measures to incorporate it into the internal systems will be known by the Administrative Secretary of the organization.

III. THE FOUNDATION OF THE VALIDITY OF MERCOSUR LAWS FOR THE MEMBER STATES

According to the General International Public Right to which they are linked, Argentina, Uruguay and Paraguay have expressed their consent (ratification) in being obligated by the dispositions of the Convention of Vienna on the *Right of Treaties*, signed March 23, 1969, admitting the general principle of responsibility for nonfulfillment established by article 27, with the limitation of article 46 of the same Convention.

Brazil has not ratified The Convention of Vienna on the *Right of Treaties*. Yet having celebrated Asunción's Treaty and expressed its consent validly in being linked by the same, Brazil can not ignore its obligatory nature nor ignore the normative inherent in its consequence

11. We consider important to clarify in this point that in our opinion, the fundamental right of a community and constituent system of their organs, should not be conceptualized as *original community right*. We understand that this denomination is misleading because the fact that a community system is constituted by an international treaty does not make the community system lose its intrinsic nature as a source of international public right.

12. Ouro Preto's Protocol art. 42, § 2.

13. *Id.* art. 40.

without violating the principle of good faith and of non-contradiction and without incurring international responsibility.¹⁴

According to the internal right of the States contracting, the Magna Cartas of the four States comprising the Mercosur system recognize the international treaties as formal sources of their own legal systems. They are identified as follows: Constitution of Brazil article 102; Constitution of Paraguay articles 137 clause 1 and 141; Constitution of Uruguay articles 6 and 85 clause 7; and the Constitution of Argentina article 31 and article 75, clauses 22 and 24.

However, the coincidence among the fundamental norms of the domestic legal systems of the contracting countries of Asunción's Treaty about the individualization of the treaties as a source of their own legal right, is nevertheless not symmetrical to the constitutional laws of each one of them regarding the hierarchical location of the treaties in relation to the rest of the sources of the local legal order. Indeed, while the Constitutions of Argentina and Paraguay grant prevalence to treaties over their own national laws,¹⁵ the constitutions of Brazil and Uruguay do not mention anything in this respect, thereby always leaving this point open to the interpretation of the highest tribunals in each State, which to the present have always exhibited an erratic jurisprudence.¹⁶

14. If an abstraction was made of the principle of good faith, the international right would fall from its base since it constitutes the inspiring nucleus of what Kelsen denominated the fundamental hypothetical norm, and with this reach it considers its repeated jurisprudence of the International Court of Justice, among which will mention for its clarity, the one seated in the case of Namibia, 1971 in the one that sustained on this matter: "One of the basic principles that govern the creation and execution of judicial obligations, be it whatever source, it is the good faith. The reciprocal trust is an inherent condition to the international cooperation, especially in a time that cooperation is more and more indispensable." (Editorial note: translated from Spanish). For the concrete case of Brazil it should also be noted that this State is a member of the UN and of the OAS, and that principle results in an obligatory imposition of article 2, clause 2 and 3 (c) of the respective constituent letters of those international organizations, without forgetting that Resolution 2625 A.G. of the UN leaves clear that the same one not only links in relation to the obligations obtained from the letter, but to all international obligation. As for the possibility of exempting from the execution of an international obligation foreseen by article 46 of the Vienna Convention of 1969 on the right of the treaties, it is generally admitted that the State that refutes the validity of a treaty or its norms for constitutional reasons can only invoke those that are patent or absolutely evident for the other States, and in the same sense resolves the question the Constitution of Argentina according to the interpretation of article 27 of their text in that it formalizes the failure of the National Supreme Court of Justice in the case of *Café la Virginia*, which determines that the constitutional norms that have *principles of public right* prevail over those of the international treaties that are in contrast.

15. Ouro Preto's Protocol art. 75, § 22; art. 137, § 1.

16. See generally VIGNALI, *supra* note 6, in his work that we have mentioned previously, tells us that the Uruguayan jurisprudence sustained the equality in rank between the treaty and the law up to 1970 and during the decade of the 90's; and the supremacy of the treaty over the law during the decade of the 70's and in some recent shortcomings. Brazil in general sustained

IV. THE ORGANS OF MERCOSUR

A. *Legal Nature*

Concomitantly with what we have presented already, since Mercosur is an intergovernmental international organization with legal international subjectivity, we must conclude that their organs with power of decision, the Council, the Group and the Commission of Trade, are intergovernmental according to articles 2, 3, 4, 11, and 17 of O.P.P.¹⁷ It is necessary to highlight in this topic that among the organs with decisive power, the council distinguishes itself as being the organ that has the corresponding legal representation of the whole system.¹⁸

B. *Competencies*

The Mercosur organs have competencies attributed to them specifically by the O.P.P. and they are determined in what concerns the Council by articles 3 and 8, in what it refers to the Group, by articles 10 and 14 and in what it concerns the Commission, by articles 16, 19, and 21.

C. *The Legal Nature and Hierarchical Order of the Norms Emanated from the Mercosur Organs*

We reiterate that we share the opinion of those that think that the norms generated by activity of the Mercosur organs (Decisions, Resolutions and Directives) constitute a source of Special International Public Right, of positive nature, whose distinctive characteristic note is its consent genesis among the representatives of the States according to the organ from which they come.¹⁹ In this point, we need to mention that the contracting parties have inscribed to Asunción's Treaty in the ALADI as a partial agreement number 18, ratifying the legal nature of International Public Right of the normative of Mercosur.²⁰

In what relates to the question of the hierarchical order among the derived norms of the different organs, we understand that in practical

equality in rank between the treaty and the law; that is to say that the latter prevails over the previous one, although more recently its jurisprudence sustained that the law does not abolish the treaty but rather it only suspends its application.

17. See generally Jorge Pérez Otermin, *El Mercado Común del Sur. Desde Asunción a Ouro Preto. Aspectos Jurídico-Institucionales*, DE FUNDACIÓN DE CULTURA UNIVERSITARIA DE MONTEVIDEO (1995).

18. Ouro Preto's Protocol art. 8, cl. 3.

19. *Id.* art. 37.

20. Cafés la Virginia C.J.S.N. (1992).

terms it is difficult because of the different attributes and functions assigned to them, and because the O.P.P. does not contain any applicable rule in this respect, it is reasonable to argue that a degree of preference between them exists, the Decisions, being the source of more hierarchy, continued in second and third order by the Resolutions and Directives. Given the quality of the political-institutional representation that each State has in the Mersosur Council (Ministers of R. E. and of Economy) and the functions and attributions that it assigns article 8 of the O.P.P., especially the one of exercising the legal ownership of the system, there are no doubts that the resulting norms of their activity occupy a higher hierarchy among those that originate through the Organs of the Mercosur. In turn, it is logical that the Directives have less hierarchy than the Resolutions because the Commission is an organ in charge of assisting the Common Market Group.²¹

V. APPLICATION OF THE GENERATED NORMS BY THE MERCOSUR ORGANS IN THE INTERNAL LEGAL ENVIRONMENT OF EACH MEMBER STATE

According to article 42 of the O.P.P., "the emanated norms of the organs of Mercosur foreseen in article 2 of this Protocol will have obligatory character and, when it is necessary, they will be incorporated into the national legal systems by means of the procedures foreseen by the legislation of each country."²² The Decisions, Resolutions and Directives being sources of international rights for the particular States that are part of the system, their incorporation and applicability in the internal environment will be in principle conditioned by the previous improvement of the approval procedure or internalization foreseen by the classification of each one of them. It is logical to reason that in attention to their nature and reach, it would not be appropriate to demand for all the normative derived from the Mercosur organs, the approval according to the domestic procedures used to incorporate international treaties, since the traditional legislative delays in these steps would convert a good part of the normative into an inopportune and inadequate law. The inscription of Asunción's Treaty in the framework of the ALADI partially reached agreement No. 18 demonstrates that the member States have been internationalized by Mercosur norms because that legal framing emanates the possibility to incorporate the right gestated by the organs of the system by acts of the

21. Ouro Preto's Protocol art. 16.

22. *Id.* art. 42.

Executive Powers as agreements in simplified form of execution of a treaty that has already drawn the respective internal steps of approval.²³

What has been exposed here, by the general principle arrived at on this topic, sustains that the Mercosur normative should be incorporated into the legal classification particular to each State, if it is demanded in this way, and following the procedure for them foreseen according to the nature and importance of the Mercosur dispositions to internalize.²⁴ We believe that to incorporate into the internal right the derived norms of the Mercosur organs in an opportune and effective way, it is a legal duty of the member States, turning out to be as such a specific content of the generic duty of completing a treaty in good faith, and it forces them already as a positive right contained in article 26 of the Treaty of Vienna on the right of the Treaties (in Argentina's, Uruguay's and Paraguay's case), or a norm of general international right (in Brazil's case who did not ratify the aforementioned Convention).

It seems clear that article 42 of the O.P.P., when conditioning the duty of each state to incorporate into their own legal classification by means of the procedures foreseen by the legislation of each country, to the fact that *it is necessary*, it admits the possibility of the direct application of these norms to the legal order particular to some of the States that allows it this way. However, it is necessary to wonder if suppositions exist in that the Mercosur norms that can be directly applicable without executing the incorporation step ruled previously by the internal right of each State. Assisting the objective and end of Asunción's Treaty, the necessary consent so that the organs of the system generate norms and the obligation the States recognize such as same, we think that this supposition of immediate and direct application exists and that it can become from the expressed convention to this respect regarding the representatives of the States that are contracting, or of the factual circumstance in that they contain at least the following requirements:

1. That the norm regulates a matter of the Mercosur organ unequivocally with decisive capacity of which it emanates;

23. See VIGNALI, *supra* note 16; see also *supra* note 6.

24. None of the constitutions of the States provide the agreements in a simplified form. The Jurisprudence of Argentina admitted the applicability of the agreements in simplified form of the execution of a mark treaty in the case of Café la Virginia C.J.S.N (1992) and in the expression of the vote separated by Minister Antonio Boggiano that said: "Although the consent of the State was shown in simplified form, without any intervention of the Congress, this took place previously by means of the legislative approval of the Tratado of Montevideo 1980 (law 22.354) that allows the concentration of this type of agreements." (citation omitted) (Editorial note: translated from Spanish).

2. That the norm is self-sufficient and operative, understanding from this that all subjects are explicit and clear in what it reaches and the content of the right or the obligation that it consecrates; and
3. That there are no national norms preexisting that regulate the same matter.

It is appropriate to question what would happen in the event that a State omits to incorporate the Mercosur normative in absence of disposition that it determines a certain term to make. It seems that this is a topic not resolved by the O.P.P. and we think that the appropriate conclusion should be of qualifying the behavior illegal, in common with what was held by the Supreme Court of Argentina in the case "Ekmedjian" C.J.S.N. (1992) in opinion 16 of the vote for the majority that textually says "[t]he violation of an international treaty can happen so much for the establishment of internal norms that they prescribe a behavior professedly contrary, as much as for the omission of establishing dispositions that make possible its execution. Both situations are contradictory with the previous international ratification of the treaty" ²⁵

VI. THE POSSIBILITY OF DIRECT APPLICATION OF THE MERCOSUR NORMS IN THE ARGENTINEAN LEGAL SYSTEM

The reforms introduced to the National Constitution in 1994 through the text of the new article 75, clauses 22 and 24, that grant to the international treaties and the agreements superior hierarchy to that of the law, seems to open the door to the possibility that the Mercosur are of direct and immediate application in the Argentinean legal system. Indeed when constituting the Mercosur normative regarding the Special International Public Right of identical nature to that of the agreements of partial reach inscribed in ALADI, it would be directly applicable for the Argentinean judges and with primacy over the national laws according to

25. In equal sense, although saving distances, the Tribunal of the CE in the case Francovich established that a State member can not oppose other states because of a nonfulfilment of a directive, be it for an action or omission. It is a supposition of direct application, since although the directive can not be invoked to demand the execution of the State or of a third State, it can be made to claim the repair of the damages suffered by the omission of sanctioning norms.

According to the European doctrine, the essential characteristic of the directives, community norms of harmonization, is the existence of a certain term for their incorporation, otherwise, they base, the State could invoke its freedom of election of the moment of execution. Although it is certain that the granted terms give certainty and judicial security, we do not believe that its absence grants indiscriminate liberty. The limit to liberty from incorporating the normative of the Mercosur that arises of the juridical duty of making it, is given by the necessity of the incorporation of the norm is opportune and effective.

the jurisprudence sustained by the Supreme Court of Justice of the Nation in the case *Cafe La Virginia*, C.J.S.N. (1994) (*appeal denied*). It is important to conclude in practice and in the Argentinean legal system, that it would be demandable by the parties involved in the application of the emanated norms of the Mercosur organs on behalf of the national judges, without caring if they have or have not mediated formal acts of incorporation to the national laws.

We consider appropriate to mention here that the primacy of the Mercosur norms over the laws does not involve the National Constitution, and that in the event of normative opposition, it should be proceeded to conform to the principle settled down by article 27 of same, whose correct interpretation takes to maintain the primacy of the constitutional norm which is a safeguard or receipt of a principle of Public Right, a circumstance which will always be of legal definitive value. This interpretation conforms with the acceptable exception to be subtracted from the execution of an emanated international obligation of a treaty by opposition with fundamental norms of the legal system internally foreseen by article 46 of the Convention of Vienna on the Right of Treaties of 1969.

We think that among the principles of Public Right that are contained in the constitutional norms, article 121 stands out (clause of Reservation), which establishes that the States conserve all the power not delegated by the Constitution to the Federal Government, therefore the application of the Mercosur norms that regulate matters of exclusive incumbency of the States, should have previously relied on the formal and expressed adhesion to its content for a legislative State act, like it has happened recently at times when the Federal Argentinean government has proposed normative unification in the whole national territory of laws that involve unequivocal stately abilities, those mentioned are the Federal Fiscal Pact and the new National Law of Traffic that matched their validity in the jurisdictions of states to the previous approval of local law.