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Bruno Theodoro Luciano; André  
Campos



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## SUPRANATIONALISM AS A TABOO: ANALYSING THE 30 YEARS OF MERCOSUR'S INSTITUTIONAL DEVELOPMENT

*Bruno Theodoro Luciano<sup>1</sup>; André Sanches Siqueira Campos<sup>2</sup>*

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**Abstract:** This article assesses the development of Mercosur's institutions across its 30 years of history. It aims to stress how the insertion of supranational instances in the bloc was historically disregarded by Member States, in the context of both right and left-wings governments. However, the creation of a Technical Secretariat, a Permanent Review Tribunal, and a regional parliament (Parlasur) institutionalized non-executive forums, which have become autonomous regional arenas, despite their marginalized position within the bloc's decision-making system. Although these bodies have never seriously challenged Mercosur's intergovernmental, and even interpresidential, institutional design, they have enabled the bloc to expand its agenda beyond the governments' priorities. Thus, this article aimed to unveil the causes of Mercosur's resistance to supranational institutional change. The qualitative methodological approach is based on specialized literature, but also draws on primary sources and the normative analysis of official documents and reports which have gone through a deductive assessment. First, the article will introduce the main institutional changes seen in Mercosur during its 30 years of existence. Secondly, we argue that these transformations have maintained Mercosur's intergovernmentalism as its main institutional feature, although additional non-executive bodies were set up in the 2000s. Afterwards, it reflects upon the current circumstances of the bloc, addressing whether future institutional reforms would alter Mercosur's structural configurations.

**Keywords:** Mercosur; Intergovernmentalism; Supranationalism; Institutional reforms; Technical Secretariat; Permanent Review Tribunal; Mercosur Parliament.

### O SUPRANACIONALISMO COMO TABU: ANALISANDO OS 30 ANOS DE DESENVOLVIMENTO INSTITUCIONAL DO MERCOSUL

**Resumo:** Este artigo avalia o desenvolvimento das instituições do Mercosul ao longo de seus 30 anos de história. O objetivo é ressaltar como a inserção de instâncias supranacionais no bloco foi historicamente desconsiderada pelos Estados membros, tanto no contexto de governos de direita como de esquerda. No entanto, a criação da Secretaria Técnica do Mercosul, do Tribunal Permanente de Revisão e de um parlamento regional (Parlasul)

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<sup>1</sup> Pesquisador Jovem Talento no Programa de Pós-Graduação em Relações Internacionais San Tiago Dantas (UNESP, UNICAMP, PUC-SP). Doutor em Ciência Política e Estudos Internacionais pela Universidade de Birmingham, com bolsa de doutorado pleno no exterior (CAPES). Email: [brutheodoro@hotmail.com](mailto:brutheodoro@hotmail.com)

<sup>2</sup> Visiting Researcher no Leuven Centre for Global Governance Studies da Universiteit Katholieke Leuven (KU Leuven), Jean Monnet Centre of Excellence, Bélgica (2020-2021). Doutorando em Relações Internacionais pelo Programa de Pós-Graduação San Tiago Dantas (UNESP, UNICAMP, PUC-SP). Mestre em Relações Internacionais pela UFU. Especialista em Direito Internacional pela Faculdade de Direito Damásio. Email: [andre\\_brazil44@hotmail.com](mailto:andre_brazil44@hotmail.com)

institucionalizaram fóruns não executivos, que se tornaram arenas regionais autônomas, apesar de sua posição marginalizada no processo decisório do bloco. Embora esses órgãos nunca tenham questionado seriamente o desenho institucional intergovernamental, e mesmo interpresidencial do Mercosul, eles permitiram ao bloco expandir sua agenda para além das prioridades dos governos. Este artigo buscou elucidar as causas da resistência à mudança institucional supranacional no Mercosul. A abordagem metodológica qualitativa empregada tem base na literatura especializada, mas também se baseia em fontes primárias, como a análise normativa de documentos oficiais e relatórios que passaram por uma avaliação dedutiva. Em primeiro lugar, o artigo apresentará as principais mudanças institucionais observadas no Mercosul ao longo de seus 30 anos de existência. Em segundo lugar, argumentamos que embora outros órgãos não-executivos tenham sido criados na década de 2000, essas transformações mantiveram o intergovernamentalismo do Mercosul como sua principal característica institucional. Por fim, refletiremos sobre as atuais circunstâncias do bloco, abordando se futuras reformas institucionais alterariam as configurações estruturais do Mercosul.

**Palavras-chave:** Mercosul; Intergovernamentalismo; Supranacionalismo; reformas institucionais; Secretaria Técnica do Mercosul; Tribunal Permanente de Revisão; Parlamento do Mercosul.

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## I. Introduction

When it comes to analyzing a regional integration project, one must take into consideration whether Member States decide to share, protect or renounce their sovereignty to regional institutions which may gain the competences and political legitimacy to undertake actions such as conduct external negotiations, mediate conflict resolutions, as well as lead cooperation and peacekeeping projects. In this sense, the literature has shown that regional integration in South America has been configured by a shallow integration model with traditional inclination to developing sovereign-protection mechanisms (Bouzas et al., 2002; Christensen, 2007; Kaltenthaler and Mora 2000; Vigevani and Ramanzini, 2010; Mariano and Ramanzini, 2011; Borzel and Risse, 2016). In fact, the Southern Common Market (Mercosur) is one of those intergovernmental institutions, whose institutional design is based on the low level of pooling and delegation<sup>3</sup> (Borzel and Risse, 2016).

The origins of Mercosur relate to the debates over the conformation of a regional economic market for Latin America. Regional integration blocs is a way of characterizing the

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<sup>3</sup>According to Hooghe and Marks (2015), pooling is the joint exercise of authority by Member States in a collective body, while delegation is a conditional grant of authority by Member States to an independent body: i.e. judicial delegation or political delegation.

security and economic architecture aspects of a region, attributing common social and political principles to a group of states, which influence the distribution of power, leading to a transformation of the international order (Hurrell, 2007). Regional dynamics in South America are responses to the economic marginalization of the Global South during the Cold War. Braga (2002) and Corazza (2006) argue that regional integration could be understood as the second best trade option vis-à-vis the multilateral level, contributing as an instrument for protecting national economies and strengthening their international competitiveness in less asymmetric conditions.

The Economic Commission for Latin America and the Caribbean (ECLAC) had also a significant influence on the thinking of Latin American regional integration initiatives, initially based on studies of Keynes and Prebisch, which focused on the model of inward-looking development. One of the first initiatives, the Latin American Free Trade Association (ALALC), dates back to the 1960s, which was succeeded by the Latin American Integration Association (ALADI) in the 1980s. Overall, regional integration processes were considered compatible with the principles of the General Agreement on Tariffs and Trade (GATT).

In 1985, Argentina and Brazil signed the Iguazu Declaration which established a bilateral commission followed by a series of trade agreements known as the Economic Integration and Cooperation Program (PICE) in 1986. This agreement between the two countries stimulated cooperation in preferential economic sectors and it was a framework for a productive integration model. In 1988, both countries signed the Integration, Cooperation and Development Treaty in the course of establishing a common market in which other Latin American countries could join in. Finally, Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asunción in 1991, an agreement that established the Southern Common Market (MERCOSUR), a trade alliance with the objective of fostering the regional economy, and the promotion of exchange of goods, people, workforce and capital among Member States.

In 1994, those countries signed an additional instrument to the Treaty of Asunción, known as the Protocol of Ouro Preto. This instrument provided an international legal personality to Mercosur and designed its institutional framework, setting out the *modus operandi* of the bloc. This protocol solidified a decision-making process based on consensus, the adoption of the Common External Tariff (TEC), besides other characteristics (Almeida, 1998; Oliveira, 2003; Mariano, 2007). In 1998, the four Member States in addition to Bolivia and Chile signed the Protocol of Ushuaia on Mercosur's Democratic Commitment, reaffirming the relevance of democratic institutions as an essential condition for the development of the regional integration among Member States.

In the 1990s, Mercosur was guided by the logic of Open Regionalism, aiming to overcome the economic and exchange crisis that plagued the region, but also looking for a better international insertion of the economies and the defense of democratic regimes. The first decades of the bloc were influenced by the effects of the globalization process and by the diffusion of the guidelines of the Washington Consensus in 1989, which characterized the neoliberal policies carried out by Latin American countries in the 1990s. In the 2000s, South America regional integration was carried out in coherence with the resumption of ECLAC's thinking introduced during the 1960s. Nonetheless, despite efforts of Mercosur's institutional changes in the political and social dimensions, regional integration in the 2000s did not detached itself from the logic of the neoliberalism, the predominant model of the 1990s (Dabène, 2012).

Although the signature of the Buenos Aires Consensus by Argentina and Brazil in 2003 symbolized the beginning of a developmentalist strategy, which criticized the Washington Consensus, some authors (Dabène, 2012, Quiliconi and Espinoza, 2016) pointed out that the bloc kept its economic liberalization commitments while including new social agendas, blending developmentalism and neoliberalism to foster regional integration. The expansion of Mercosur institutions in the 2000s aimed to strengthened regional integration by improving regulatory mechanisms that encouraged trade, political and social exchanges in the bloc. Nevertheless, neither in the 1990s nor in the 2000s Mercosur seemed to move towards a supranational path, which traditionally remained as a taboo for national governments and diplomats.

Considering this institutional trajectory, the aim of this article is to assess the development of Mercosur's institutions across its 30 years of history focusing on the analysis of how the insertion of supranational instances in the bloc was historically disregarded by Member States, in the context of both right and left-wings governments. The qualitative methodological approach employed is grounded on relevant specialized literature on Mercosur's institutional development, but also draws on primary sources and the normative analysis of official documents and reports which were assessed via a deductive approach. Therefore, the article is concerned with understanding the causes for the lack of supranational institutions in Mercosur and is organized as follows: The first section introduces some hypotheses and respective expectations regarding how Member States have resisted significant institutional changes in the creation of non-executive bodies of Mercosur such as a Technical Secretariat, a Permanent Review Tribunal, and a regional parliament (Mercosur Parliament - *Parlasur*), which are explored as the three case studies of this study. Finally, we

analyze some implications and difficulties to the deepening of the bloc towards supranationalism, pointing out some perspectives for the coming years of Mercosur institutional development.

## **II. Building hypotheses and argumentative elements for resistance to institutional changes in Mercosur**

This section develops a set of hypotheses and expectations which aim to explain the resistance from Member States to develop strong supranational institutions within Mercosur. By assessing concrete cases of institutional innovations such as the creation of a Technical Secretariat, a Permanent Review Tribunal (TPR), and a regional parliament (Parlasur), we argue that these organs have never seriously challenged Mercosur's intergovernmentalism as its main institutional feature. Those additional non-executive bodies were set up in the 2000s, enabling the bloc to expand its agenda beyond the government's priorities. Even though they have become autonomous regional arenas, they have consistently occupied a marginalized position within the bloc's decision-making process.

The establishment of these regional bodies was selected due to the fact that they represent political events where non-executive bodies carried out policies and proposed debates in which they could have initiated some movement within the bloc towards supranationalism. However, we argue that there has never been a strong defense of such propositions, especially by representative of national governments. Hence, hypotheses are built in order to unveil what would be the reasons behind tensions between those non-executive bodies of Mercosur and executive resistance to change Mercosur's intergovernmental/interpresidential institutional design.

This article not only takes into consideration assumptions from specialized literature on the topic, but also draws on primary sources and the normative analysis of official documents, reports of executive meetings, sectoral councils and propositions of those non-executive bodies of Mercosur. As secondary sources, such research hinges on a deductive analysis based on the solid existing literature on regional integration in South America (Almeida, 1998; Dabène, 2012; Hirst and Lima, 2010; Hurrell, 2007; Lafer, 2002; Lima and Santos, 2008; Malamud, 2010; Mariano and Ramanzini, 2012; Nolte, 2010; Saraiva, 2011; Vigevani and Cepaluni, 2011; Vigevani and Ramanzini, 2010; 2014; just to mention a few). Based on these sources and research strategy, the article seeks to contribute to the literature on Mercosur integration by researching the following overarching question: *Why have*

*supranational institutions never been created in Mercosur?* Based on this research question, this article set out three preliminary hypotheses marked as *H1*, *H2* and *H3* in order to unveil the causes of resistance to supranational institutional change in Mercosur:

(*H1*) The bloc's political traditions or the presidential system imposes difficulties or generates greater resistance to institutional changes.

Interpresidentialism, an exacerbated version of the notion of intergovernmentalism, is often seen as one of Mercosur's main institutional feature. According to Malamud (2003, p.69), "Mercosur differs widely from the European Union in that the former does not present a pattern of increasing institutionalization at a supranational level, but progresses through inter-governmental mechanisms, in a more politicized, as opposed to institutionalized, shape". Therefore, *H1* focused on how South American presidentialism has shaped Mercosur's institutions and have constrained over time any development of supranational institutions in the bloc, which would ultimately contain the foreign policy autonomy of the Presidents of Mercosur countries.

(*H2*) The paymaster country is not interested in or has no willingness to support the bloc's institutional change process.

This expectation is grounded on the strategy of state behavior which Mattli (1990) defined as *paymaster*, i.e. when one or some countries in the region with sufficient material capabilities assume the economic and political costs of regional integration. In the case of Mercosur, Brazil – alone or alongside Argentina – is the likely country with enough resources to play a paymaster role. However, Mariano and Ramanzini (2012) and Vigevani and Cepaluni (2007) have argued that the intergovernmental profile of the South American bloc is characterized by a "MERCOSUR contained in Brazilian foreign policy", which means regional institutions must be compatible with Brazilian major objectives of development and autonomy, which imposes limitations to any deepening of the regional bloc, in particular towards supranational institutions. Brazil's intention within Mercosur is to preserve the level of autonomy of Member States (especially itself), allowing the country with greater regional preponderance to intervene in political strategies for regional integration and, at the same time, keep pursuing its own global ambitions.

(H3) Non-executive institutions of the bloc have limited influence to shape the regional decision-making processes.

H3 assumes that non-executive bodies may display relevant agency in becoming stronger regional instances, but also highlights the ‘institutional trap’ in which they have been inserted since their establishment. Given their original marginalized and advisory role within Mercosur’s decision-making process, these bodies have never possessed significant institutional means to demand or gain additional competences over time, which have in practice hindered the transformation of these non-executive institutions into supranational bodies. Although decisions taken by non-executive bodies have influence within the scope of their technical and specialized competence, they have not led to a change of Mercosur’s overall intergovernmental institutional design (Mariano, 2011).

In order to test the set of hypotheses above, we will examine in the next section three case studies, which have been seen as Mercosur’s main institutional reforms of the 2000s, namely (a) the transformation of the Mercosur Administrative Secretariat into a Technical Secretariat, (b) the creation of Mercosur’s Permanent Review Tribunal (TPR), and (c) the establishment of the Mercosur Parliament (Parlasur). The empirical analysis is organized into three case studies (George and Bennett, 2005; Yin, 2015), which were selected by taking into consideration their political and institutional relevance as non-executive and autonomous institutions of Mercosur.

### **III. Case Studies**

#### *III.1. Mercosur Technical Secretariat*

Mercosur constitutive documents of the 1990s stipulated the creation of an Administrative Secretariat in Montevideo, Uruguay, responsible for cataloging Mercosur official documents and supporting the activities of the Common Market Group. However, one of the first institutional reforms seen within Mercosur in the 2000s refers to the bloc’s Secretariat, which gained a more operational and technical dimension with the selection an independent group of experts to provide technical assistance to Mercosur executive institutions

The creation, within the Secretariat, of a Technical Assistance Sector (SAT), with the recruitment of four high level experts on a merit basis, served the



purpose of forming a space of common reflection on the development and consolidation of the integration process (Dabène, 2012, p.54).

The insertion of new agents with technical expertise on regional integration issues and a strong pro-integration commitment could bring new dynamics to Mercosur's integration project if they truly become relevant policy entrepreneurs over time. The first years of the new SAT saw a proactivism of these actors, who seized the context of reformulation of the bloc to push towards the development of supranational institutions. In a moment when the bloc was discussing institutional reforms after 10 years of the Ouro Preto Protocol, members of the SAT independently organized preparatory workshops to reflect on the future transformations of Mercosur (Dabène, 2005).

The SAT soon proved to be an active entrepreneur of integration. The four experts were academics defending the general interest of MERCOSUR, and pressing for the process to deepen. During its first year of existence, the SAT clashed several times with some diplomats, and in particular the Director of the Secretariat, keen to secure its control over the integration process and preserve its strictly intergovernmental dimension (Dabène, 2012, p.54).

However, the intergovernmental/interpresidential logic of the bloc (H1) has restrained further activism of SAT members. Diplomatic representatives of Member States were able to halt the more ambitious proposals of experts reducing – or even annulling – decision-making competencies of new regional bodies. At the same time, the recurrent institutional battles lost by the SAT led to the marginalization of this body and the loss of its initial impetus for institutional change. Eventually, its members have either left their position at the Mercosur Secretariat or assumed a low profile in the following years, accepting Mercosur's intergovernmental fate.

Another reason that reinforced the maintenance of intergovernmental features is Brazil's regional and global ambitions in the 2000s: "Despite many declarations of intention, the fact of the matter is that Lula prioritized multilateral diplomacy over his regional commitments, and in the region favored South America over MERCOSUR" (Dabène, 2012, p.55). In fact, the country has traditionally seen regionalism as an instrument to securing regional stability and a positive international reputation, without necessarily assuming significant leadership costs (Lazarou and Luciano, 2015). As Mercosur's decisions are consensus-based, Itamaraty (Brazilian Foreign Ministry) could in practice exert a veto-power over any increased role of the Technical Secretariat (H2).

In fact, the case study of the SAT's reform showed the limited influence of non-executive institutions of Mercosur (H3) even in a juncture of institutional reforms. The

independence, proactivity and expertise of members of the SAT were not sufficient conditions to alter the structures of Mercosur's institutions towards supranationalism.

### *III.2. Permanent Review Tribunal (TPR)*

The launch of Mercosur in 1991 represented a new legal framework system to be incorporated by the Member States. Giupponi (2010) affirms that the sources of law in Mercosur include not only the founding treaties, but also the norms that integrate secondary law. The Treaty of Asunción established a new legislative order, in which the development of Mercosur is related to the level of commitment of the Member States expressed in accordance with law established at the regional level, with international law practices and the harmonization of domestic laws. Therefore, according to Giupponi (2010), a supranational legal system in Mercosur was not set with the creation of the bloc.

In 1991, the Protocol of Brasilia on dispute resolution was signed during the 1st Meeting of the Common Market Council. According to Martins (2006), the protocol establishes a legal framework under which certain governments or private agents were appointed by another agent (public or private) for noncompliance with rules established within Mercosur<sup>4</sup>. The Protocol of Brasilia provides that disputes resolution settlement of Mercosur's can be brought to the World Trade Organization (WTO) system, allowing them to be resolved both through regional and multilateral instances.

We have identified in Almeida (2008) that the negotiation process for the stages of the Mercosur customs union focused since the beginning on eliminating the obstacles that prevented the development of the process of regional integration between the four countries. At the time, negotiations already considered the process of legal harmonization in the bloc.

The transition period was more focused on removing the most diverse obstacles to the free movement of goods, capital and productive factors between the territories of the four member countries than on the creation of political and economic structures of a community type. In other words, the tasks focused on eliminating obstacles and barriers to intra-zone free trade, identifying sectoral and institutional asymmetries that hindered fluidity in exchange, correcting or harmonizing legal rules (some of an institutional nature) and administrative measures that prevented or hindered the freedom of trade, as well as in the adoption of common regulations and procedures to facilitate the achievement of the fixed objective of the customs union (Almeida, 1998, p. 52-53).

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<sup>4</sup>The dispute settlement in MERCOSUR is based on the following phases: 1) Direct negotiations between the parties to the dispute, carried out within 15 days; 2) Intervention by the Common Market Group (GMC), carried out within 30 days; 3) *Ad Hoc* Arbitral Tribunal, carried out within 60 to 90 days (Martins, 2006).

In 2002, the review of the disputes resolution settlement foreseen by the Brasilia Protocol led Mercosur Member States to take a step further and agreed to approve the Protocol of Olivos. It was a legal framework within the bloc that launched the Permanent Review Tribunal, a non-executive body that came into effect in 2004. Member States were in commitment with the need to ensure the correct interpretation, application and compliance of Protocol of Olivos with the fundamental instruments of regional integration and Mercosur normative set in a consistent and systematic manner.

When it comes to Mercosur integration, the primary source of law consists of the founding treaties ratified by the Member States which have the nature of public international law rules and impose obligations on them. The secondary norms of Mercosur<sup>5</sup> need to be internalized in the constitutional law. It means they need to be transformed into national legislation in order to be adopted by the Member States (Giupponi, 2010). As the bloc is characterized as an intergovernmental organization, Guipponi (2010) points out that the most problematic issue is related to the lack of supremacy of Mercosur laws since we cannot observe the delegation of sovereignty which reinforces the argument of bloc based on sovereignty-protection and a shallow integration model pointed out at the introduction section.

Therefore, Mercosur law can be classified in the specialized category of international public law of integration or “community law in status nascendi” (Guipponi (2010, p. 64). This means that it is possible to identify elements that reinforce the progressive affirmation of an autonomous community law in the bloc, such as in the WTO/DS332/AB/R (2007) decision in the case of the Importation of Retreaded Tires from Uruguay (2005). In this case, the provisions established in Mercosur law prevailed. The Permanent Review Tribunal understood that the norms of international law included in the Protocol of Olivos have subsidiary application. This situation illustrates the operational potential of TPR in leading Mercosur to a condition of supranationality in the future.

However, Cezar (2002) draws attention to the fact that Mercosur should move forward with the adoption of Community Law mechanisms instead of using a legal system that frequently finds obstructions of international law and requires (re)analysis of cases through domestic legislation. Although institutional advances in the Mercosur legal framework in the 2000s strengthened the regional integration process, the stage of Integration Law status

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<sup>5</sup> Secondary norms of Mercosur are produced through the attribution of legislative powers shared by different bodies, according to the Protocol of Ouro Preto (1994): Common Market Council (CCM); Common Market Group (GMC); and Mercosur Trade Commission (MTC) (Guipponi, 2010).

continues to reinforce the absence of supranationality in the bloc and do not challenge institutional change once the norms must be incorporated into the national legislation of Member States.

However, the internalization process is only carried out after the approval of the national executive body, centered on the figure of the President. This means that institutional changes in the Mercosur are limited to the political will of the Presidents, which reinforces the argument raised by H1. Malamud (2003, p. 64) complements this interpretation by stating that there is an element “omnipresent throughout the history of Mercosur, the high profile of national presidents”. Presidential diplomacy responds to the region’s own logic of integration and provides greater flexibility in negotiation, whose political motivations are related to the understanding of the cyclical difficulties of the Member States. It supports the idea of Mercosur being guided more by a political logic than a legal logic of integration, undermining judicial activism in the bloc.

The article 19 of the Brasília Protocol (1991) for Dispute Settlement and the article 34 of the Applicable Law of the Protocol of Olivos emphasize that the TPR must apply the norms of public international law, in accordance with the Mercosur legal system:

Article 19 - The Arbitral Tribunal shall decide the dispute on the basis of the provisions of the Treaty of Asunción, the agreements concluded within the scope of the same, the decisions of the Common Market Council, the resolutions of the Common Market Group, as well as the principles and provisions of applicable international law. in the matter. 2. This provision does not restrict the power of the Arbitral Tribunal to decide a dispute *ex aequo et bono*, if the parties so agree (Brasília Protocol, 1991, translation of the author).<sup>6</sup>

and

Article 34 - The *Ad Hoc* Arbitral Tribunals and the Permanent Review Tribunal shall decide the dispute settlement based on the Treaty of Asunción, the Protocol of Ouro Preto, the protocols and agreements concluded within the framework of the Treaty of Asuncion, the Decisions of the Common Market Council, the Resolutions of the Common Market Group and in the Directives of the Mercosur Trade Commission, as well as in the principles and provisions of International Law applicable to the matter. 2 - This provision does not restrict the option of the *Ad Hoc* Arbitral Tribunals or that of the Permanent Review Tribunal, when acting as a direct and sole body in accordance with the provisions of article 23, to decide the dispute *ex*

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<sup>6</sup> Original version of Article 19 of the Protocol of Brasilia: Artigo 19 - O Tribunal Arbitral decidirá a controvérsia com base nas disposições do Tratado de Assunção, nos acordos celebrados no âmbito do mesmo, nas decisões do Conselho do Mercado Comum, nas resoluções do Grupo Mercado Comum, bem como nos princípios e disposições de direito internacional aplicáveis na matéria. 2. A presente disposição não restringe a faculdade do Tribunal Arbitral de decidir uma controvérsia *ex aequo et bono*, se as partes assim o convierem (Protocolo de Brasília, 1991).

*aequo et bono*, if the parties so agree (Protocol of Olivos, 2004, translation of the author).<sup>7</sup>

The creation of the Permanent Review Tribunal, on the one hand, provides the bloc with a consistent interpretation of the Mercosur law. On the other hand, a permanent judicial body within the institutional framework of Mercosur is also an element that imposes difficulties to the bloc due to the absence of a uniform application of the Mercosur norms in the constitutional law towards a Community law adopted by Member States. Norms that do not require legislative approval are internalized through normative acts (resolutions, ordinances, etc.). There is no international obligation to enforce the norms issued by Mercosur by Member States. International norms with intergovernmental bodies are subject to the process of incorporation into national legal systems, in the manner defined by national constitutions. As Mercosur's countries are grounded in Presidential systems, this means that the national executives, and particularly the Presidents, are responsible for signing international treaties and starting the internationalization process of Mercosur norms by submitting them to legislative ratification (H1).

Mercosur also lacks a jurisprudential framework that is capable of standardizing the existing jurisprudence in national tribunals, regarding the enforcement of the bloc's norms and the hierarchical character of those norms<sup>8</sup>. Member States attribute different interpretations and regimes to the validity of international law at the domestic level which is defined by either monism or dualism constitutionalist theories. These norms can add a complicated element to the advance of regional integration towards supranationality and also could lead Member States to an inevitable conflict during dispute settlements.

This lack of regulation led the Mercosur Group to issue the Resolution/GMC No. 91/93, which was later supplemented by Resolution/GMC No. 23/98. It was determined that the competent authorities would be in charge of taking the necessary measures to ensure its implementation internally. The Protocol of Ouro Preto, in its article 40, determined that

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<sup>7</sup> Original version of Article 34 of the Protocol of Olivos: Artigo 34- Os Tribunais Arbitrais Ad Hoc e o Tribunal Permanente de Revisão decidirão a controvérsia com base no Tratado de Assunção, no Protocolo de Ouro Preto, nos protocolos e acordos celebrados no marco do Tratado de Assunção, nas Decisões do Conselho do Mercado Comum, nas Resoluções do Grupo Mercado Comum e nas Diretrizes da Comissão de Comércio do Mercosul, bem como nos princípios e disposições de Direito Internacional aplicáveis à matéria. 2 - A presente disposição não restringe a faculdade dos Tribunais Arbitrais Ad Hoc ou a do Tribunal Permanente de Revisão, quando atue como instância direta e única conforme o disposto no artigo 23, de decidir a controvérsia *ex aequo et bono*, se as partes assim acordarem (Protocolo de Olivos, 2004)

<sup>8</sup> Monism and Dualism regimes of Mercosur Member States: Argentina – Monism; Brazil – Dualism; Paraguay - Supremacy of International Treaties (Article 137 of the National Constitution of Paraguay), Mercosur norms: Constitutional or Supralegal norm; Uruguay - There is no provision for the hierarchical position of MERCOSUR norms in the internal legal system, Article 239 states the Constitution is the supreme law. Venezuela - Mixed system: Monism and Dualism. The Law of Mercosur (2010).

Mercosur norms will enter into force simultaneously in all Member States after thirty days from the communication on the procedure of internalization to the Mercosur Technical Secretariat. This could prevent norms from taking effect on different dates in the Member States, which could generate instability in the bloc.

The expansion of Mercosur institutions introduced to the bloc in the 2000s could be seen as an attempt to improve the bloc's legal system. We can conclude that the Mercosur legal system is still intergovernmental, since the Member States have not yet shared or delegated sovereign powers. Neither the Protocol of Ouro Preto nor the Protocol of Olivos have established a supranational law and conferred supranational powers to the Permanent Review Tribunal (H1) or to any other body of Mercosur. Mariano (2011) reinforces our argument by stating that although the bloc advocates for a deepening of integration, the institutional logic remains strictly intergovernmental, with no willingness on the part of negotiators to give more autonomy to regional bodies.

Contrary to European Union experience, which set over time the Primacy of Community Law, the norms of Mercosur have the legal nature of general international law which is not endowed with supranationality. The issue of Mercosur's international legal personality is based on the fact that Mercosur's bodies are committed to the intergovernmental structure of the Member States or to the Presidentialism model (Malamud, 2003), reflecting national interests, and devoiding any decision-making capacity to regional bodies (H1). This became clearer with Decision/CMC No. 23/00 issued at the beginning of the 2000s, which stated that Mercosur norms should be incorporated in the national legal systems through procedures indicated by the legislation of each country.

However, according to the item 3 "MERCOSUR Institutional" of CMC Decision 26 of 2003 (*Programa de Trabalho do Mercosul 2004-2006*), there was a concern with the democratic strengthening of the bloc that could be achieved by improving legislative and judiciary institutions in regional integration, which referred respectively to Parlasur and the Permanent Review Tribunal<sup>9</sup>. As mentioned, the case of the Prohibition of Importing Retreaded Tires from Uruguay (2005) demonstrates a path for the institutional improvement of the bloc's judicial power and reinforces greater autonomy in relation to international law. Nonetheless, although regional institutions were attempting to become more autonomous to some degree, they were not sufficient to change the regional decision-making process (H3).

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<sup>9</sup> MERCOSUL/CMC/DEC. N.26/03. Retrieved from:  
<http://www.sice.oas.org/trade/mrcsrs/decisions/dec2603p.asp>. Accessed 06 May 2021.

Mercosur is an international organization characterized by an intergovernmental model. Nonetheless, once the Member States ratified the Protocol of Ouro Preto and the Protocol of Olivos, they should not have discretion of incorporating or not the norms, but the opposite, Member States should have an obligation to incorporate the norms of Mercosur, respecting their legal internalization process. According to Guipponi (2010, p. 69), “the Permanent Review Tribunal has as its main function to guarantee the uniform interpretation of MERCOSUR law”. According to the decisions of the TPR as well as the legal opinions of scholars (Kleinheisterkamp, 2000; Giupponi, 2010; Jerabek, 2016), we understand that the harmonization process and the uniform interpretation of norms could contribute to Mercosur moving forward to develop a Community Law and grant the Permanent Review Tribunal more autonomy to enforce law, engage and strengthen Mercosur integration.

Giupponi (2012) also drew attention to the Advisory Opinion 1/2008<sup>10</sup> (MERCOSUR 2008), which emphasized the primacy of Mercosur community law over domestic legislation and international law. The institutional improvement of the Mercosur legal framework is related to the increase of economic integration. The Permanent Review Tribunal must adapt its legislation and follow closer the development of regional integration in order to be able to respond to the bloc’s current challenges. However, the weak response of the TPR to cases of non-compliance with the legal system and the bloc's intergovernmental profile weaken the bloc's attempts of institutional changes that could lead Mercosur to a supranational model (H3).

According to Martins (2006), the changes in the dispute settlement system adopted by the Protocol of Olivos follow the arbitration model, despite discussions that pointed to the adoption of a supranational legal order, as seen in the European Union, which ensures uniform interpretation and application of norms. Mercosur’s dispute settlement system remains built on the principles of pragmatism, realism and gradualism. These characteristics have provided greater flexibility to the system, favoring a negotiated solution in a region with political and economic instability. Thus, the TPR does not yet provide a basis of legal security to advance towards a supranational South American regional integration process. As reminded by Jerabek (2016), Mercosur institutional framework was not inspired by the EU, despite the exchange of experiences between those regional institutions.

### *III.3. Mercosur Parliament (Parlasur)*

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<sup>10</sup> MERCOSUR. Tribunal Permanente de Revisión. Advisory Opinion 1/2008. Retrieved from [https://www.tprmercursosur.org/es/docum/opin/OpinCon\\_01\\_2008\\_es.pdf](https://www.tprmercursosur.org/es/docum/opin/OpinCon_01_2008_es.pdf)

Another significant institutional change seen in Mercosur during the 2000s was the establishment of the Mercosur Parliament (Parlasur), which replaced the Joint Parliamentary Commission (JPC) originally set out in the Asunción Treaty. Within the juncture of Mercosur's reformulation of the 2000s towards further social and participatory regionalism, the creation of a regional parliament would increase the democratic legitimacy of the bloc by bringing parliamentary elites and political parties closer to regional integration policies. What is more, the proposal of composing the parliament with direct-elected parliamentarians with an exclusive regional mandate would potentially unleash new political dynamics within the bloc (Mariano, 2011).

In this respect, members of the JPC led the process of drafting Parlasur's Constitutive Protocol, which could become a significant moment for parliamentarians to influence the regional decision-making process in their favor. However, parliamentary capabilities to exert further influence in the bloc's institutional features were once again unable to result in concrete institutional change (H3):

Following the latter the CPC recruited a number of independent experts. Some ambitious parts of the initial drafts, such as the parliamentary power of control over the whole MERCOSUR budget or the power to appoint the director of the MERCOSUR Technical Secretariat, were removed by the representatives of the member states (Gardini, 2011, p.693).

Thus, one can observe that the establishment of Parlasur has not developed a supranational legislature. Likewise the original JPC, Parlasur has remained as a consultative assembly, without clear decision-making and control competences at Mercosur level (Gardini, 2011). Besides, not even relevant achievements of Parlasur's Constitutive Protocol such as the provision of direct elections in all Member States were fully implemented: elections were held only in Argentina and Paraguay, but in 2019 Member States' Foreign Ministers decided to indefinitely interrupt the direct elections of Mercosur's parliamentarians. Once again, the intergovernmental structures of the bloc (H1) have resisted institutional deepening towards the creation of a supranational body responsible for scrutinizing the executives. In fact, "Parlasur is the ultimate example of the reluctance of Mercosur national authorities to share sovereignty and delegate power. In spite of the rhetoric surrounding it, the Executives did not empower an agency that could challenge their power" (Malamud and Dri, 2013, p.234). Likewise the reform of Mercosur's Secretariat, the creation of Parlasur has not led to any dynamics of sovereignty-sharing (Dabène, 2007).



Moreover, Parlasur's Constitutive Document set out a proportional criterion for the composition of the parliament, which granted to the most populated countries, in particular Brazil, a larger parliamentary delegation (Drummond, 2009; Luciano, 2012). Nonetheless, this proposition has not necessarily led to an increased Brazilian parliamentary leadership nor Brazil showed any willingness to assume more responsibilities for integration costs (H2). In fact, the country has never approved the direct elections of its own parliamentarians, in contrast to Argentina and Paraguay, which meant that only few committed members of the Brazilian parliamentary delegation – usually restrained to its President and Vice-President, who were also members of Parlasur's Executive Board – were regularly involved in Parlasur's activities, while most of the members of the Brazilian parliamentary delegation were majorly concerned with their national mandates as Federal Senators or Deputies.

#### **IV. Discussion and comparative assessment**

The regional initiatives of the 2000s demonstrated the efforts of Mercosur countries to establish a bloc that could go beyond its economic dimensions. Deepening and strengthening of political and social aspects of the bloc resulted in the reform of the Mercosur Administrative Secretariat into a Mercosur Technical Secretariat, and in the launch of the Permanent Review Tribunal (TPR) and the Mercosur Parliament (Parlasur).

This article aimed to assess why these institutional changes seen in the 2000s have not led to the development of supranational institutions in Mercosur, setting out three hypotheses which highlight likely explanations of why supranationality remains a taboo in the bloc. Firstly, our case studies confirmed that the national profile of centralized decision-making processes of Member States or as Malamud (2003) stated, a concentrated subtype of presidentialism based on a historical model and traditions (H1), weakened the prospects for a deepening of the bloc.

For instance, despite the institutional improvements and new institutions emerged in the 2000s, we noted that the decision of the Common Market Council n° 27/03 which refers to Structural Funds, despite recalling the “need to provide MERCOSUR with instruments that enable the effective use of the opportunities generated by the integration process, especially regarding the available resources, the improvement of physical connectivity, industrial complementation of different sectors of the economy based on the principles of gradualism, flexibility and balance” (MERCOSUR. CMC 27/03), did not mention any initiative regarding legislative cohesion, as we see in the European Union's structural funds. We also noticed that

the term flexibility within Mercosur seems to denote the political will to maintain the autonomy and discretion of Member States.

Secondly, we identified according to H2 a significant link between the interest of Brazil on South American regional integration (Dabène, 2012), which collaborated to establishing a neo-developmental paradigm and providing the country with the resources to induce national development. It meant that Brazilian political transition and foreign policy preferences in the 2000s at the time moved towards a more interconnected integration, signaling the country's rehearsal of taking up a paymaster role. However, our case studies have not shown any Brazilian formal commitment to pay the leadership costs and to grant powers to regional authorities, avoiding further institutional changes in the bloc.

In this sense, we conclude that H1 and H2 of this article were confirmed in the three case studies, as the institutional features of Mercosur reflect the structural limits of its intergovernmental model and is clearly associated with the objectives of Brazilian foreign policy, since Brazil as a significant regional power is often seen as the regional leader or the potential paymaster (Mariano and Ramanzini, 2012). However, Brazil has not led Mercosur towards supranational changes, regardless of whether other Mercosur Member States have identified any potential leadership in Brazil. It means that Mercosur's limited institutional changes are also constrained by the low commitment of its potential paymaster.

According to H2, the deepening of the bloc would imply the rupture of the principle of national autonomy, which would require from Brazil to make stronger commitments to regional mechanisms of a supranational character instituted in Mercosur. The Brazilian development policy would be partially linked to the needs to overcome the underdeveloped condition of the region and to the guidelines of the dominant political and economic groups which implicate a greater degree of commitment from Brasilia. However, our case studies have demonstrated the inexistence of any strong intention from Brazil to develop supranational institutions within Mercosur. In fact, proposals of developing a more political Secretariat and regional parliament with legislative competences were rejected by the Brazilian diplomacy. In addition, even though proportional representation criteria of Parlasur would transform the Brazilian delegation into the largest and most influential one, the fact that Brazil has never held direct elections for its own Mercosur parliamentarians, in contrast to Argentina and Paraguay, highlights how Brazilian political actors have not seen the regional parliament as a relevant institutional arena for the country.

As reminded by Lafer (1993) and raised by H2, the bloc's current intergovernmental model allows greater political freedom for Brazil in the process of its international insertion,

which is reflected in the country's participation in international fora, in the cooperation with other developing countries, in the coordination of South-South cooperation, as well as in the process of expanding the export markets for Brazilian goods and services. Given that the intergovernmental model of the Mercosur is instrumentalized as a platform of international insertion for Brazil, the South America regional integration processes does not require a shared long term vision of development with other Member States.

Dabène (2012) mentioned a tendency towards integration “*à la carte*”, a flexible model in which each country endorses its level of commitment to integration agreements. Brazil's distance from Mercosur, as by far the largest country of South America and the least dependent on Mercosur intra-regional trade, is a result of an instrumental rationality that defines the Nation-State as a central factor in international relations. When acting from the logic of self-interest, regional asymmetries in the bloc tend to increase.

Finally, as we have seen in the case studies and highlighted by the H3, our results confirm that the expansion of Mercosur's institutions analyzed within the scope of non-executive bodies (Mercosur Technical Secretariat, Permanent Review Tribunal, and Parlasur) have encountered structural limitations. This means that the three regional bodies created/reformed in the 2000s have not been able to surpass the flexible and intergovernmental model of Mercosur integration. Besides, non-executive limited activism faced the lack of political willingness or interest, especially from Brazil as highlighted by the H2, in supporting a deepening integration process that would imply sovereignty-sharing and, consequently, the reduction of national autonomy.

## V. Conclusion

There is a common assumption in part of the literature on Latin American regionalism that an "adequate" or “successful” regional integration process should move towards a level of institutionalization similar to the EU. This assumption does not consider that regional integration elsewhere in the world could develop under favorable conditions without necessarily having the same level of the EU's institutionalization. Nevertheless, the objective of this article is to provide some explanatory elements that contribute to understanding some of the reasons why propositions on supranationality have never been seriously considered by Mercosur's Member States, making a supranational model of regional integration a taboo in the Southern Cone. Meanwhile, we also aimed to shed some light on how non-executive

bodies have not demonstrated enough capability to bring about deeper institutional changes in order to challenge the current intergovernmental feature of Mercosur.

Throughout its 30 years of history, Mercosur has been challenged by the international order in transformation and by many other circumstances that have been impacting world politics, such as the 2008 financial crisis; fragmentation regional initiatives; the emergence of China; the rise of nationalisms; government and democratic instability; and most recently the Covid-19 pandemic. Besides, changes in the region's political leadership also affected the performance of regional organizations and led to the institutional paralysis of certain agendas of Mercosur.

Although these many challenges have impacted Mercosur performance over the past years, they were not sufficient to undermine Mercosur's initial regional integration commitments, evidencing the resilience of Mercosur institutions despite their loose characteristics. Another challenge imposed to Mercosur is on its capability to converge national and external agendas. This could contribute to the deepening political cooperation among Member States and to strengthening of the role of Mercosur's non-executive bodies. In sum, the objective of this article was to discuss some of the elements that might constrain institutional changes of Mercosur towards a supranational path, focusing on the initiatives of reforms of the 2000s, and to contribute to the literature on Mercosur's institutional development by providing a set of hypotheses and cases studies which enable us to reflect over interconnected and existing challenges in South American regionalism.

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