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THE COMMON MARKET OF THE SOUTH (MERCOSUR): MODELS AND QUALITATIVE MUTATIONS FOR CONSOLIDATING AN INTEGRATED ECONOMIC AREA

PAULO BORBA CASELLA*

“Since the signing of the Treaty, the common market aspect of the MERCOSUR project appears increasingly elusive. ... What is likely to emerge by mid-decade, however, is a MERCOSUR free trade zone. Many of the necessary steps for establishing such a free trade zone have already been taken, and the positive results that this process has already engendered ensure that progress in this area will continue.”¹

I. INTRODUCTION

Contemporary analysts tend to characterize economic integration and the consolidation of economic blocs as either as a solution or a threat, depending on their geographical position and intellectual perspective.

* Professor of Law, University of São Paulo Law School, Brazil. This paper was prepared in 2002 as a preliminary report to the Regional Economic Development Committee of the International Law Association, which Committee had Professor Jacqueline Dutheil de la Rochere as its chair and Professor Ryuichi Ida as its rapporteur. I served as co-rapporteur, along with Professors Maurice Kamto and Helen Hartnell.

1. Thomas A. O’Keefe, *An Analysis of the MERCOSUR Economic Integration Project from a Legal Perspective*, 28 INT’L LAW. 439, 440 (1994). O’Keefe clearly indicated the key role played by economic instability in this context, noting that “Brazil’s continuing economic instability makes it impossible to implement a goal considered crucial by the Treaty itself, namely coordinated macro-economic policies among the four member states.” *Id.*

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Whether a commentator is located within or outside of a particular bloc, there is a common tendency to identify the negative or positive consequences of integration in that geographic region, both for the countries immediately involved, as well as for world trade as a whole. My overarching perspective is that the MERCOSUR integration process does not suffer from conceptual vices. However, it contains gaps and faces obstacles that stem from implementation flaws.

Academic and policy debates about economic integration express uncertainty regarding the most effective path and methods to construct, maintain, and consolidate development. They also question the viability of such construction and maintenance, be it through integration, be it for economic independence, more or less driven, for the most diverse reasons, without intending to reach the final degree of such a model. Any country, should it feel inclined towards autarchy, in view of the evidence that policies based on the principle of economic self-sufficiency are increasingly less viable in the present world, nowadays, will face the opposition of concepts so readily evoked as badly situated, usually addressed without taking into consideration a specific content or dimension.

Politics – the art of the possible² – must be oriented by practice. Thus, we should not accept theoretical models without first being aware of the

2. This oft-quoted statement was first made by Bismarck. See OTTO FÜRST VON BISMARCK, *DIE KUNST DES MÖGLICHEN* (Uwe Greve ed., 1981). See also OTTO FÜRST VON BISMARCK, *GEDANKEN UND ERINNERUNGEN* (2d ed., 1982). From the mercantilist era, we have inherited a large number of consequences, some hidden behind subtly or drastically modified terminology and appearances, some even disguised, utilizing nationalistic slogans or calling for the protection of “national interest”. Vague slogans and easily manipulated political messages become more impossible, the more they are to be universally applied. Notwithstanding recommendations intended by the International Monetary Fund (IMF) to serve as panaceas for the economies of indebted countries experiencing crisis, it is physically impossible to implement – simultaneously and in a growing number of countries – models that encourage exports and restrict imports. Were each country indeed to export more and import less, at some point in the not too distant future, the mechanism would break down and the system would suffer short of coming to a full stop. If this model is no longer viable, a mutation will result. It was precisely the insight into the insufficiency of the classic mercantile model that led to the realization that trade treaties – such as the classic “friendship, commerce, and navigation” treaties known since the earliest historical records and increasingly widespread since the second half of the 19th century and the beginning of the 20th century – were also inadequate. This understanding paved the way for the emergence of different modes and degrees of institutionalizing trade relations, built upon more or less stable bases, under more or less institutionalized configurations, yet all of which recognize the need for cooperation among States that remain sovereign and autonomous in all other matters. These understandings have brought us to our current situation, where setting up an integrated economic area is possible, be it a common market, a single market, or even an economic and monetary union. And yet, understanding the obsolescence of the Nation State in the face of contemporary challenges, does not sweeten the taste of the large number of adjustments that are needed to adapt the existence, role, scope, and performance of the State to this new context. New institutional, economic and political configurations are needed, if the objective of building and maintaining a homogeneous economically

implementation requirements and adjustments that can be expected to follow therefrom. This interaction will inevitably come to light, and is both healthy and necessary. It is not viable simply to replicate models in different contexts, but nor should we ignore the existence of conceptual similarities and requirements in different geographical and historical contexts. Experimentation will allow for the assessment of positive results, and thus for the sharing of common experiences. When a new attempt is made at economic integration in an Inter-American sub-regional context, we must begin by drawing lessons from our own past. Our first step must therefore be to refrain from repeating past mistakes, as suggested by the rhetorical inheritance of the LAFTA-LAIA model. Second, we must determine the extent to which we can borrow from other integration experiences, such as that of the European Union (EU), notwithstanding the existence of significant conceptual and contextual differences.

In regard to integration, it is particularly important that a fair balance be achieved between theory and practice, a synthesis of doctrinaire approaches and concrete experiences. In the Inter-American integration process, Vacchino³ among others has stressed the need to avoid both extremes: extreme empiricism that rejects any and every theoretical abstract statement, and rejection of experimentation in the name of abstract models, without regard for whether they can be adjusted to fit reality. The happy medium is hard to reach in practice and must be done on a case-by-case basis.

These difficulties are compounded by a dilemma. On the one hand, it is not possible to solve every problem before starting implementation. Yet on the other hand, integration cannot be implemented without first having defined its parameters. The evident variation in models and paths illustrates the vital relevance to the success of integration of factors that go beyond strictly economic and legal ones, notably the key role of political will, its stability and capacity to reflect national interest.

integrated area is to be achieved. Technical matters must be reckoned with, as well as the capacity to accept the necessary changes. Models differ in regard to their capacity to react and adapt to the latest needs presented by the international economic context. We must evaluate different types of economic areas according to the level of political keenness, as well as the firmness and flexibility needed to ensure proper implementation.

3. See JUAN MARIO VACCHINO, *INTEGRACIÓN ECONÓMICA REGIONAL* (1981); *INTEGRACIÓN LATINOAMERICANA: DE LA ALALC A LA ALADI* (1983). See also Juan Mario Vacchino, *El Proceso de Integración Económica en América Latina: Enfoques Doctrinarios y Experiencias Concretas*, OEA/CJI, XII CURSO DE DERECHO INTERNACIONAL (1986); *LA DIMENSIÓN PARLAMENTARIA DE LOS PROCESOS DE INTEGRACIÓN REGIONAL (BID-INTAL)* (1990).

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Since political will is both volatile and voluble, stability must be constructed through the institutionalization of processes and mechanisms to safeguard it from individual whims and the interests that may prevail at a specific moment in time. This makes possible the continuity of the institutional system, both towards the internal legal order, and also towards the mechanisms for institutionalizing and making integration viable.

The oscillation between expectations and uncertainties can be debilitating. Argentina and Brazil, for example, are marked by so many and such serious contrasts and inequalities, problems and injustice, that it is nearly impossible to assign mid- and long-term projects to people, parties or national administration organs. Paraguay and Uruguay, on the other hand, can state their respective claims and wishes, but both remain not crucial to ensure *per se* the outcome of the MERCOSUR regional integration process.⁴ The disruption does not even depend on expiring mandates, but results from regrettable (but predictable) changes of people or associations, simply *changing directions of the wind*, which leaves efforts discontinued halfway through. This imposes well-known costs and wear and tear on individuals and on nations, and renders them less likely to be motivated or confident when future occasions arise. The present condition of Argentine finance and exchange only exacerbates the current uncertainty. While political consistency has been a rare virtue lately in Brazil among other countries, excessive *consistency* is drowning Argentina in bankruptcy.

These circumstances help us to evaluate more clearly the current project to construct a Common Market of the South – MERCOSUR. This project seems to be in jeopardy, not least by the lack of an institutional structure. At the same time, however, it is being attached to new efforts of an uncertain configuration and even more remote chances of viable implementation. For example, MERCOSUR has been linked to discussions of the so-called Amazon Initiative, as well as in connection with discussions about another incarnation of the LAFTA-LAIA⁵ pattern, i.e., the South American Free Trade Association (“SAFTA”). As early as 1994, the Brazilian government proposed negotiations between

4. MERCOSUR was established pursuant to the Treaty of Asunción, done on 26 March 1991.

5. LAFTA, which refers to the Latin America Free Trade Association, was established in 1960 by the Treaty of Montevideo, for the purpose of removing trade barriers among the Member States over the course of a 12-year transition period. By the late 1970s, the 11 signatories undertook to restructure LAFTA. These efforts resulted in the 1980 Treaty of Montevideo, which established LAIA – the Latin America Integration Association – was set up as the successor to LAFTA. The current LAIA members are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela. The Spanish acronyms for LAFTA and LAIA are ALALC and ALADI, respectively.

MERCOSUR countries and the Andean Community, that were to end by 1999 and lead to the establishment of a free trade area as of 1 January 2000. With the benefit of hindsight, we recognize that this ambitious task was unrealistic, if not altogether impossible, and has been abandoned.

This is not to say that the objective of creating SAFTA has been entirely abandoned. Indeed, it might eventually be implemented, within the next decade. But this project would not escape the central problems that plague MERCOSUR. My concerns do not go to the viability of the project, but rather to the insufficient institutional framework and the failure to implement the measures already agreed. This remains true, if not yet immediately feasible.

In my view, the MERCOSUR integration process is and remains valid. It does not suffer from *a priori* conceptual vices, but suffers instead from the gaps and obstacles that result from flawed implementation. The result is not only ineffective, but also counterproductive, insofar as it substitutes this project for others, even less clearly configured. Taking a long-term view, integration is closely related to the adoption of models that are stable and viable in the long run, but also ensure that national interests are adequately promoted and protected. A pragmatic approach is essential. Rather than seeking to ascertain the undeniable validity and applicability of one or another theoretical conception of integration, we should insist that all actions required by the adopted line of action – whether intergovernmental or supranational – be taken in order to pursuit of the objective of organizing the economic area. Once it has been launched, an initiative should be carried out, which makes the political will to do so next in importance to the integration model that has been selected.

These considerations suggest that we cannot really expect successful construction of a viable and lasting economic area unless and until the two fundamental prerequisites are satisfied: selection of a proper model to organize the economic area, and sufficient political will (guided by national interest) to ensure adequate implementation. Discussions about integration cannot afford to ignore or leave aside the crucial matter of adopting mechanisms to ensure implementation. These prerequisites need not be completely synchronous, but both must exist to some extent, if the task of integration is to succeed.

Another feature that seriously jeopardizes the stability and viability of an integration process, together with the durability of its results, is the extent to which automatically applicable exit mechanisms apply. Brazil,

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for its part, aims to become a regional power, to ensure its independence while internationally inserting itself in an adequate and competitive manner.⁶ Brazil's hesitation and apprehension are understandable, since the costs and benefits involved in any integration process need to be balanced. The exit mechanism is the necessary price to be paid. Brazil commits itself to the stability of the entire process, but only to the extent it is possible to reach for the exit door at any time.

The crucial question for Brazil is, what is the best way to ensure effective integration, given (as previously argued) that this is the best way to foster national interest? The protection and fulfillment of national interest is the flag that everyone waves, the cause that everyone embraces, yet no one cares to describe. While we can make a plea for good sense and conscience from each person individually, we must also attend to history, and seek national examples where possible.⁷

While it is not possible to resolve here the acrimonious and interminable debates over how to ascertain the national interest, it is necessary to address the issue in the context of economic integration. A.C.R. de Andrade set the parameters for the debate over interests when he observed, in his 24 April 1840 speech in Parliament, that "[n]ot everyone ignores the divisions of interests; there are private interests, there are interests of the great masses, there are interests among professionals, there are interests between the power that rules and the subjects that obey, there are interests between the nation and the foreign nations."⁸

6. This may be premature, if undertaken before having properly solved basic problems pertaining to its social, political and economic internal structure.

7. Antonio Paim, *Significado da Noção de Interesse para os Liberais Brasileiros* 9 (1995). During the first two decades after Brazil's independence in 1822, thinkers and politicians had the vision to discern, out of the bleak framework of absolutist monarchy, the fundamentals of democratic representation. This has allowed us to enjoy the longest period of institutional and political stability in the history of Brazil. "In that dramatic context of the first two decades of independence, the doctrine diffused by S. Ferreira (1769-1846), and the pre-eminence it reached within the new elite in formation, would be the key for the success subsequently achieved in the conception and implementation of the institutions of the representative system. Correspondingly the abandoning of that doctrine during the Republic is closely related to the fact that we were not able to organize political parties and adopt apt electoral mechanisms to ensure the representation of the system." *Id.* Paim also recalled "that significant work, a cornerstone of liberalism" -- the Citizen's Handbook for a Representative Government that was written and published in Paris in three volumes in 1834. See Silvestre Pinheiro Ferreira, *Manual do Cidadão em um Governo Representativo*, in *IDÉIAS POLÍTICAS* (PUC-CFC, Documentário, 1976). See also S.P. FERREIRA, *PRELEÇÕES FILOSÓFICAS* (2nd ed. 1970); VICENTE BARRETTO, *A IDEOLOGIA LIBERAL NO PROCESSO DA INDEPENDÊNCIA DO BRASIL* (1972).

8. A.C.R. DE ANDRADE, *GRANDES DISCURSOS* 5-16 (Walter Costa Porto ed., Fundação Tancredo Neves, 1988). He spoke in the context of a debate between the Senate and the House of Representatives over budgetary power. His conclusion that the Senate was "not within its jurisdiction to modify the budget drawn up by the House of Representatives" was based on his estimation of "the nature of the representative system, on the nature of taxes, on the interests

Although the dividing lines are not as clear as we might want them to be, we need not share the full measure of skepticism expressed by von Mises, for whom “political events are the inevitable consequence of the change of economic policies.”⁹ He continues:

The ideas that guided statesmen, philosophers and legal scholars which, in the 18th century and beginning of the 19th, elaborated the basis of the new political system, stemmed from the presupposition that, in a nation, all honest citizens share the same final goal. This final goal which all decent men were to pursue is the well-being of the entire nation, as well as the well-being of the other nations. Those moral and political leaders were, therefore, firmly convinced that a free nation is not interested in conquest. They judged partisan politics as something simply natural, since it seemed totally normal to them the existence of different opinions in relation to the best way of guiding the affairs of the state. ... [T]he statesman of the 18th century thought that the legislators had specific ideas on common well-being. Nowadays, however, is manifest, in the reality of political life – basically in that of all the countries in the world where a communist dictatorship does not rule (1958) – a situation where authentic political parties no longer exist, in the old classic sense of the word, but merely pressure groups.¹⁰

We can share von Mises’ brilliant insight that “man is not a being that has, on the one side, an economic dimension, and on the other, a political one, separated one from the other. In reality, that which is commonly denominated deterioration of freedom, constitutional government, and representative institutions, is nothing but the consequence of the radical change of political and economic ideas.”¹¹

Substituting the action of pressure groups for the genuine search for national interest distorts the performance of political representation and jeopardizes the legitimacy of the entire system. The very determination of what is the national interest and which is the most efficient means to

represented by the three parts that represent the general interests and besides this on the Constitution.” *Id.*

9. Ludwig von Mises, *Economic Policy: Thoughts for Today and Tomorrow*, in AS SEIS LIÇÕES 86-98 (Maria Luiza X. de A. Borges transl., José Olympio/Instituto Liberal, 2nd ed., 1986).

10. *Id.* He offers the following definitions: “A pressure group is a group of people eager to obtain a privilege at expense of the rest of the nation. This privilege could consist of a tariff on competitive imports; it could be laws that restrain competition. However it may be, it grants a special position to the members of a group. It gives them something which is denied, or should be denied -- according to the aims of the pressure group -- to other groups.” *Id.*

11. *Id.*

obtain it remains vague. The discrepancy between official priorities and hesitation, behind the arrogant and optimistic sermons, mirrors the lack of definition of the paths to follow in a world that is increasingly divided into trading blocs. Brazil faces a choice between, on the one hand, independence and, on the other, co-operation or integration strategies.¹²

II. MODELS OF ECONOMIC INTEGRATION

MERCOSUR's adoption of the term *common market* to designate its integration project immediately raises a question about the appropriateness of the model that term implicitly invokes. Since this is not the place to review extensively the leading literature on the theory of economic integration,¹³ let it suffice to say that there is a gradual procession that can be followed, in terms of the forms and requirements imposed upon the participants, when pursuing economic co-operation and integration. The free trade area is the least complex modality of economic integration, which implies the elimination of tariff or quantitative barriers among the members. A customs union, on the other hand, aggregates to the free trade area model a uniform system, combining a common regime for rules of origin¹⁴ and a common external tariff (CET), that is imposed upon imports coming from third countries. A common market moves beyond a customs union by adding the free flow of the main factors of economic production – encompassing people and services, goods and capital – and a certain indispensable degree of co-ordination and harmonization of national economic policies.

Economic and monetary union represents an even more ample kind of economic integration, constituting an organically integrated whole. An

12. VERA THORSTENSEN, YOSHIAKI NAKANO, CAMILA DE FARIA LIMA & CLÁUDIO SEIJI SATO (EDS), *O BRASIL FRENTE A UM MUNDO DIVIDIDO EM BLOCOS* (Nobel, 1994); JOSÉ ANGELO ESTRELLA FARIA, *O MERCOSUL: PRINCÍPIOS, FINALIDADE E ALCANCE DO TRATADO DE ASSUNÇÃO* (MRE/SGIE/NAT, 1993); JAIME CÉSAR LIPOVETZKY & DANIEL ANDRÉS LIPOVETZKY, *MERCOSUL: ESTRATÉGIAS PARA A INTEGRAÇÃO/ MERCOSUR: ESTRATEGIAS PARA LA INTEGRACIÓN / MERCADO COMUM OU ZONA DE LIVRE COMÉRCIO / ANÁLISES E PERSPECTIVAS DO TRATADO DE ASSUNÇÃO* (LTr ed., 1994); José Eduardo Faria, *Integração e política: o Brasil no MERCOSUL*, in *DIREITO E COMÉRCIO INTERNACIONAL; TENDÊNCIAS E PERSPECTIVAS* 478-496 (LTr Ed., 1994).

13. Albeit subject to controversy, the classic doctrine in matters of economic integration theory includes the following: B. BALASSA, *THE THEORY OF ECONOMIC INTEGRATION* (Allen & Unwin, 1962); C. CARRARO ET AL. (EDS), *INTERNATIONAL ECONOMIC POLICY CO-ORDINATION* (Basil Blackwell Ltd., 1991); G. LIPSEY, *THE THEORY OF CUSTOMS UNIONS: A GENERAL EQUILIBRIUM ANALYSIS* (Weidenfeld & Nicholson, 1970); P. MAILLET & PH. ROLLET, *INTÉGRATION ÉCONOMIQUE EUROPÉENNE: THÉORIE ET PRATIQUE* (Nathan, 1991); W. Röpke, *Economic Order and International Law*, RCADI, 1954-II, vol. 86, pp. 203-273, T. SCITOVSKY, *ECONOMIC THEORY AND WESTERN EUROPEAN INTEGRATION* (Allen & Unwin, 1958); J. VINER, *THE CUSTOMS UNION ISSUE* (Carnegie, 1950).

14. MARTHA LÚCIA OLIVAR-JIMENEZ, VANESSA CALEFFI & DANIELA BENJAMIN, *O REGIME COMUM DE ORIGEM NO MERCOSUL* (Brasília, Senado/ABEI, Estudos da Integração, vol. 3, 1993).

economic and monetary union surpasses a common market insofar as it substitutes for national economic policies a host of common policies, including but not limited to currency, common administration and budgets. Thus, for example, an economic and monetary union could provide the foundation for a political union, in which, to all the elements of economic and institutional character already mentioned, a political model is added, under the denomination of confederation or federation of States.

Even leaving aside the rhetoric for or against integration, MERCOSUR's choice of the *common market* model invokes a very concrete idea. A *common market* refers to a wide array of specific requirements, whose content and unfolding must be known and applied, to avoid running the risk of deflating the scope of the theoretically adopted model. Though some results may be obtained, and even some progress may be made towards economic co-operation, this does not in and of itself suffice to construct a *common market*.

The Party States of MERCOSUR committee themselves, since the end of the transition period on 31 December 1994, to build a *common market* on the basis of reciprocity and in accordance with the provisions of the 1991 Treaty of Asunción. Yet MERCOSUR seems to be running just the risk identified above, that is, of stopping short of fulfilling all the potential of that Treaty and living up to the chosen theoretical model of *common market*. According to Article I of the Treaty of Asunción, the Party States are obligated to provide for the following:

- free movement of goods, services and other factors of production, *inter alia* through elimination of custom duties and non-custom restrictions on the flow of goods, as well as any other measures having equivalent effect;
- the establishment of a common external tariff and the adoption of a common trade policy in regard to third States or groups of States, together with the co-ordination of positions in regional and international economic fora;
- the coordination of macro-economic and sectoral policies among Party States – in the fields of foreign trade, agriculture, industry, taxation, monetary, exchange and capital, services, customs, transport, communications, and others that may be agreed upon – in order to ensure adequate conditions for competition among the Party States; and

- a commitment to harmonize Party State legislation, in the relevant areas, in order to achieve and strengthen the integration process.¹⁵

In order to understand fully the *common market* concept in the context of MERCOSUR, we must consider the 1957 Treaty Establishing the European Economic Community, as amended, which founded and still provides the legal basis for the European Community (EC).¹⁶ This provides a baseline against which we can determine the content and objectives of MERCOSUR. While some native rhetoric insists on the unique features of Inter-American integration, it is unwise to ignore the similarities between MERCOSUR and the EC, insofar as they exist, or to deny the fact that much has been *borrowed*, more or less directly, from the European model. The fact of borrowing is amply illustrated by a careful comparison between the objectives of the 1991 Treaty of Asunción and the Rome Treaty.

The EC Treaty, much like the later Treaty of Asunción, calls for establishing a common market and forging a closer co-ordination of economic policies. This serves to remind us of the importance of considering the connection between the economic bases and the legal concepts employed to achieve particular ends. The consolidated base of a *common market* is considered to be an essential and complementary stage, a different and more advanced stage of the European construction emerged, aimed at the creation of an economic and monetary union.

Article 3 of the EC Treaty offers a benchmark for ascertaining the content and objectives of the *common market*. This *functional definition*¹⁷ presents the common market as a common economic area among the Member States that constitute the European Community (and now also the European Union or EU). This economic area exists in order that economic agents can act freely, can exercise the rights conferred on

15. Article I, Treaty of Asunción.

16. The 1957 Treaty, best known as the Rome Treaty, has been amended many times in the past decades, most recently by the Nice Treaty, which took effect in February 2003. References to pre-Maastricht treaty language -- i.e., to versions of the Rome Treaty that preceded the significant changes introduced by the Treaty on European Union, or TEU, which was concluded in 1992 and entered into effect in 1994 -- will be to the ROME TREATY. All other references in this article will be to the current and consolidated version of the Treaty Establishing the European Community, which shall be designated "EC TREATY" in order to mark this distinction.

17. ALFONSO MATTERA, *LE MARCHÉ UNIQUE EUROPÉEN: SES RÈGLES, SON FONCTIONNEMENT* 12-15 (2d ed. 1990) (referring to EC TREATY, articles 2, 3 & 4). See also E. Piontek, *European Integration and International Law of Economic Interdependence*, 9-125 RCADI, 1992-V, vol. 236; E. Piontek, *The Principles of Equality and Reciprocity in International Economic Law: Mere Concepts or Legal Reality?*, in *INTERNATIONAL ECONOMIC LAW AND DEVELOPING STATES: SOME ASPECTS* 79-111 (Fox ed., 1988).

them by the Treaty itself (or by measures based on the Treaty's provisions), and can exercise the EC's four fundamental freedoms (i.e., free flow of goods, people, services and capital).

The European *common market* aims not only at abolishing barriers to the free exercise of such liberties (e.g., customs and physical barriers to movement, state subsidies affecting affect trade, etc.), but also at abolishing restrictive practices that divide markets or otherwise interfere with economic integration. In this regard, the EC's *common market* moves beyond mere liberalization of trade within the integrated economic area, and pursues larger goals intended to further the integration process. Thus, for example, the EC prohibits anti-competitive practices adopted by companies that might undermine liberalization, and aims to formulate common policies and harmonized regulations in a wide range of economic, social and other sectors. The ultimate goal is to reach the stage where the flow of goods, capital, services and capital among the EU Member States is similar to that which takes place within the confines of a national territory. The European Court of Justice (ECJ) has observed that "the notion of a common market ... aims at the elimination of all obstacles to intra-regional trade, aiming at uniting the national markets into a single market, equivalent, as close as well as possible to the conditions of a real internal market."¹⁸

To the extent that the common market has been progressively established and organized, new common policies have become indispensable to ensure its adequate performance. These policies have gradually expanded over time, covering fields ranging from the environment to culture, from energy to the latest technology, and from social to regional dimensions of integration, not to mention external policy.¹⁹

From the 1986 Single European Act, to the 1992 Treaty on European Union, the 1997 Amsterdam Treaty and the 2000 Nice Treaty, the *common market* notion has been upgraded to the notion of a *single market*. The *single market* implies the elimination of any kind of obstacle to the free exercise of its fundamental liberties, though it still

18. Case 15/81, *Schul v. Invoerrechten*, 1982 ECR 1409, 3 C.M.L.R. 229 (1982); see also MATTERA, *supra* note 17, at 12-13.

19. See generally COMUNIDADE EUROPÉIA E SEU ORDENAMENTO JURÍDICO 421-619 (LTr Ed., 1994).

permits the maintenance of internal borders, although relaxed in regard to their structure and prerogatives.²⁰

The central importance of economic aspects is unquestionable in the construction of an integration process. And yet the overall success of the integration process will depend precisely on the extent to which, subsequent to the establishment of a homogeneous and integrated economic area, the process began can be continued, as in the EU. The European integration model suggests the key role of legal connections in consolidating economic integration, and illustrates how political inclination both completes and augments the scope of the task. Obviously the EU experience does not offer perfect parameters for MERCOSUR in this latter sense.

Nothing obliges us to adopt foreign models in the Inter-American context. And yet, insofar as similarities exist in the guiding principles, we cannot neglect the indispensable mechanisms of implementation that are needed to make such abstract *formulae* become a reality. Precisely to the extent that a consolidation of an economic integrated area takes place, through the adoption of a model, it will make subsequent qualitative changes, from the full implementation of successive levels of economic integration. It is wise to remember the key role played by successful customs unions in the process of state formation, as in the case of Germany (*Zollverein*) and Italy.

Yet we cannot jump too quickly from economic to political integration. *National identity* can be very closely connected to external affairs, in the sense of a reaction against external threats or other perceived need to take a stand in relation to foreign affairs. Indeed, such occasions often aid a national identity to “find itself” and propel the political unification process leading up to the consolidation of a new state. Such “identity” cannot be “found” except as an urge or ideal to be constructed in cases such as the European Community or, to a lesser degree, in the case of BENELUX. In the context of Inter-American integration, absent a *national identity*, some efforts have been made to establish a supranational conception. These efforts are more fragile, or at least more *theoretical* and tenuous than the invocation of the notion of a *motherland*, which reaches from political discourse into the heart of the average citizen. This is why Inter-American the integration process

20. MATTERA, *supra* note 17, at 15 (“Le marché unique de 1993 sera donc un espace authentiquement unifié, parce que désormais définitivement affranchi des douanes intérieures qui divisent les pays de la Communauté et des ‘servitudes’ techniques, fiscales, physiques, monétaires qu’elles ont pour tâche de faire respecter.”).

places the primary emphasis on economic aspects. There are good prospects of building consensus around the idea of economic integration, of bringing together the most able team, of grouping common vital economic and strategic interests, submitting them to unified management disciplined by shared norms, within an institutionally and legally harmonious environment.

The weakness of concepts such as *supranational*, *international* or *transnational* is evident, except for a small intellectual minority permeated by humanistic conceptions, where similarities are observed among human beings, besides and beyond the neighborhood gossip or the faithful followers of a football team, to others more concrete, but not necessarily easier to overcome, of identity, culture or national language and State sovereignty, from the protection of the identity to a nationalistic and xenophobic vision of natural interests.

Referring once again to the European experience, the ongoing adaptation of the model to current needs is evidenced by the way that the European rejection of direct political unification proposals in the 1950s, led to the adoption of the indirect economic path towards achieving those same objectives. Once the key pieces of economic unification were in place, at least technically by the end of the transition period (1958-1968), discussions could – and in 1972 did – return to the topic of political union. This process inaugurated a steady progression of treaty revisions that have moved Europe towards that “ever closer union” proclaimed in the opening lines of the EC Treaty as the overarching goal of integration.

These examples show that the fundamental urge remains, even if manifested through apparently diversified *phenomena*. It is evident that there is still a lot to be done to reach the definite political structure of the European Union. The EU is adept at visualizing the aspects already taken into account, more than going beyond the possible unfolding, in the sense of being able to, in a not so distant future, have solidly established an economic and monetary union, with its internal dimensions, in social as well as external matters, including defense and common external policies.

The EU’s integration process has been achieved (and continues to move forward) by using the economic aspect as the main propeller of integration. It was the construction of an economically integrated area that allowed the process of perfectibility of the models and their qualitative mutations. However, precisely from (or together with) this economic aspect is the key that gives the integration process its continuity, i.e., *through the adoption of common norms and institutions*.

It is instructive to track the progressive establishment of “ever closer union” among the peoples of Europe, and to notice the extent to which integration has gradually encompassed aspects that move further and further from strictly economic matters. Recent years have seen increasing emphasis on the human side and on the social dimensions of integration. The Treaty of European Union (1992) and the Amsterdam Treaty (1997) broadened the EU’s mandate to pursue sustainable development and social rights, in the context of building an area without internal borders. Key issues on the EU’s current agenda include: reinforcing economic and social cohesion; establishing economic and monetary union; confirming a common European identity in the international scene, through the execution of a common foreign and security policy, including the progressive framing of a common defence policy; reinforcing the national rights and interests of the Member States through the institution of Union citizenship; developing close judicial co-operation; maintaining and developing the entire communitarian achievement (i.e., the so-called *acquis communautaire*); and reviewing policies and forms of co-operation, with the objective of guaranteeing the efficiency of the mechanisms and institutions of the Community.

It bears mention that EU Member States pursue all these activities (and many others) while simultaneously observing the principle of subsidiarity, which limits the activities of Community institutions in accordance with the parameters established by Article 5 of the EC Treaty. Within the areas of its exclusive competence, the Community may act “only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”²¹ Community action is further constrained by the requirement that “[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives” of the EC Treaty.²² These limitations show that fears are exaggerated about the difficulty of maintaining national sovereignty in the context of economic integration. It is not until political union has been attained that Member States stand to lose their status as subjects of international law. Yet, as the experience of federal states shows, even extensive integration still leaves untouched areas within the exclusive competence of the States, even though other vital matters are managed in an integrated manner.

Qualitative changes are taking place in Europe, where progressive integration gradually transcends mere economic aspects, even though

21. EC TREATY, article 5.

22. EC TREATY, article 5.

economic integration has played, and continues to play a fundamental role. The corresponding institutional adjustments include not only the widely discussed economic and monetary union that is now underway, but also innovations in fields such as Union citizenship and the *constitutional* obligation to observe respect for human rights and fundamental liberties, in accordance with Article 6 of the Treaty on European Union, which incorporates safeguards on the rights of man and fundamental liberties to the EU's legal order.²³

The EU's institutional evolution is well along the path of integration and, notwithstanding occasional setbacks, may in many aspects be considered irreversible. The most interesting aspect of the EU's experience in consolidating an economic integrated area and achieving qualitative change, from the legal point of view that is my focus, is the role played by Community law and institutions in the formation of European identity. Though this is not the time or place to reopen the question of European identity,²⁴ it is important to note the role and scope of legal questions that have surfaced in connection with the consolidation of an economic integrated area.

The entire integration process, both logically and inevitably, is not a one-way street, nor is it free from controversy. This means that antagonistic forces pointing in opposing directions will come to face each other: on the one side, the political and monetary union, perhaps based on a federal model, and on the other, a decentralized vision, perhaps structured as a *Europe of regions*. Paradoxically, either one of these two forces, taken to its logical conclusion, would reduce the meaning of that integrated entity which, in international law as well as in people's conscience, has for a long time been the organizing focus of the European identity -- the Nation State.²⁵ P. Villard and J. Charpentier share this point of view, both in regard to its geographical scope, as well as its political structure.²⁶

23. Article 6(2) of the Treaty on European Union provides that the "Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." See generally COMUNIDADE EUROPÉIA, *supra* note 19, at 592-604.

24. This question has been a burning topic for at least six hundred years. See generally JOHN HALE, *THE CIVILIZATION OF EUROPE IN THE RENAISSANCE* (1994); FERNAND BRAUDEL, *CIVILIZATION & CAPITALISM 15TH-18TH CENTURY* (Sian Reynolds transl., 1984). See also COMUNIDADE EUROPÉIA, *supra* note 19, at 49-197.

25. Bernard S. Jackson, *Legal Visions of the New Europe: Ius Gentium, Ius Commune, European Law*, in *LEGAL VISIONS OF THE NEW EUROPE* 3-35 (Jackson & McGoldrick eds., 1993).

26. Pierre Villard, *État, Nation, Région: Observations sur l'unité des États Européens Depuis Deux Siècles*, VRBEI, vol. 305 (Saarbrücken, 1994); Jean Charpentier, *La Notion d'État à la Lumière des Transformations de la Société Internationale*, VRBEI, vol. 305 (Saarbrücken, 1994), available at <http://eirewi.jura.uni-sb.de/euin/schrift/index.html>.

Notwithstanding the economic and institutional progress, a *European law science* still, to a large extent, remains to be created, as Carl Schmitt pointed out in 1944-45.²⁷

It is possible to efficient results, on the American continent as well as in other sub-regional groupings, by starting with economic integration and using similar patterns. Yet the success of such efforts ultimately depends on the strength of the involved countries' commitment to overcome backward and limited conceptions, such as State independence and sovereignty, and to elaborate a vision in which similarities can prevail over the differences. Success will depend on rejecting short-term views and partisan approaches, as well as rejecting market protection and mental bias, such as that paradoxically illustrated by the nationalism-sovereignty dyad. The real dimension of patriotism, the pursuit of the higher interests of the motherland, calls upon us to have the courage to start something new and effective with our MERCOSUR partners.

The extent to which we are able to accomplish this, together with the ability of managing institutional problems and social as well as regional inequalities, while also keeping a close eye on the democratic parameters of performance, will be the test by which future generations evaluate us. They will justified to ask whether, with the passage of time, we have managed to visualize and to build something new, or whether we simply repeated loud but hollow concepts, whether we proclaimed grand solidarity and community interests, while simultaneously failing to provide for their efficient implementation.

Keeping in mind the present characterization of political will, as going beyond economic and legal aspects, the full analysis of its configuration is beyond the scope of this work, which limits itself to examining the requirements and perspectives for MERCOSUR, from a Brazilian perspective. While mindful of the multiple unfoldings and interesting repercussions of the Inter-American integration process, that was unleashed in the past and is now steered by the 1991 Treaty of Asunción, we cannot deny a certain sense of frustration. The possibility of achieving a real *common market*, as illustrated by the 1994 Ouro Preto Protocol, seems increasingly elusive. Does this mean that it is not even possible to achieve a *free trade area* among the Southern Cone countries in the coming years, supported by ample legal, financial, economic and political changes in the region? This may be the implication of

27. Carl Schmitt, *La Situation de la Science Européenne du Droit*, in 14 L'EUROPE ET LE DROIT 115-140 (Michel Scalici transl., Revue Française de Théorie Juridique, 1991).

Samtleben's and Salomão's description of "the MERCOSUR Treaty as a project."²⁸

The MERCOSUR project, right from the start, in the terms of the 6 July 1990 Buenos Aires Act, aimed to create a Brazil-Argentina Common Market by 1995,²⁹ which was incorporated to the pre-existing LAIA agreements, in accordance with the terms of the 14/90 Economic Complementary Agreement.³⁰ Uruguay and Paraguay decided to join, due to reasonable fears that they would otherwise be excluded from the markets of their two main commercial partners, which led to the 1991 Treaty of Asunción. The 1991 Treaty, which was ratified by all four national Parliaments, was also incorporated to the pre-existing LAIA agreements, in accordance with the terms of the 18/91 Economic Complementary Agreement.³¹

To wonder why the *common market* model was chosen, whose evolution is confirming the remote possibility of being reached, at least in the phase in course at the moment, is as questionable as useless. The project is turning out to be too ambitious and beyond the political and institutional reach that leaders are able to handle under current conditions. We can only hope that by the end of the second convergence period for implementation of the common external tariff in 2005, that a more adequate and stable institutional structure can be put into place, in order to guide and support the integration process.

III. CONCLUSION

Beautiful speeches, hollow in content and deprived of practical consequences, have been familiar to us for decades, with small modifications in form and nothing new in terms of content. It remains to be seen whether we can build something that is useful and lasting in terms of integration, whether we are really prepared and willing to follow such a path, and whether we can lead ourselves towards an efficient common market.

We cherish the hope, for better or worse, that it is possible to consolidate an integrated economic area, despite the lack of vision and functionality

28. Jürgen Samtleben & Calixto Salomão Filho, *O Mercado Comum Sul-Americano: Uma Análise Jurídica do MERCOSUL*, in *CONTRATOS INTERNACIONAIS* 239-277 (João G. Rodas ed., 2d ed. 1995). That article is a translated and updated version of *Der Südamerikanische Gemeinsame Markt: eine rechtliche Analyse der MERCOSUR* (1992) WERTPAPIER MITTEILUNGEN 1345-1385 (referring to the Asunción Treaty as an "Entwurf" or draft or project).

29. Act of Buenos Aires, 6 July 1990, in *15 INTEGRACIÓN LATINOAMERICANA* 67 (1990).

30. Acordo de Complementação Econômica (ACE) n. 14 (ALADI, signed in December 1990).

31. Acordo de Complementação Econômica (ACE) n. 18 (ALADI, signed in November 1991).

of the holders of power. Private sector initiative is slowly making come true that which, for decades, government officials have repeated in the abstract.

I would like to conclude by sounding an optimistic note about what can be accomplished, despite the lack of action and vision at the governmental level. Keeping the Brazilian case in mind, the words of Thomas B. Macaulay on social history ring out from the past, even though we must take his optimistic vision with a grain of salt:

In every experimental science there is a tendency towards perfection. In every human being, there is a wish to ameliorate his own condition. These two principles have often sufficed, even when counteracted by great public calamities and by bad institutions, to carry civilization rapidly forward. No ordinary misfortune, no ordinary misgovernment, will do so much to make a nation wretched, as the constant progress of physical knowledge and the constant effort of every man to better himself will do to make a nation prosperous. It has often been found that profuse expenditure, heavy taxation, absurd commercial restrictions, corrupt tribunals, disastrous wars, seditions, persecutions, conflagrations, inundations, have not been able to destroy capital so fast as the exertions of private citizens have been able to create it. It can be easily proved that, in our own land, the national wealth has, during at least six centuries, been almost uninterruptedly increasing ... This progress, having continued during many ages, became at length about the middle of the eighteenth century, portentously rapid, and has proceeded, during the nineteenth, with accelerated velocity.³²

I believe that we can draw a parallel between Macaulay's passage and the current state of regional integration within MERCOSUR. Provided that governments do not excessively interfere and limit the continuity of the process, the trend towards integration is set and is being maintained.

32. Thomas Babington & Baron Macaulay, *History of England*, in THE WORKS OF LORD MACAULAY (Lady Trevelyan ed., 2d ed., 1871).