



Judicial Diplomacy: The Role of the Supreme Courts in Mercosur Legal Integration

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The progress and future trend of the Common Market of the South (Mercosur) are under debate in political, economic, and commercial realms, among others. Less known, however, is the role of the Supreme Courts of Mercosur Member States¹ in discussing and strengthening the bloc's legal core in order to promote a region that is "politically stable, socially equal and economically prosperous."²

I. ALTERNATE INTERPRETATIONS OF JUDICIAL DIPLOMACY

Before discussing the Mercosur experience, it is important to first define the concept of judicial diplomacy. In the United States, the term has been used to mean several related things. Judicial diplomacy can be seen as the use of reasoned persuasion by judges to pacify social turmoil or conciliate divergent legal arguments. Judge Gerald Bard Tjoflat demonstrated this tactful brand of judicial diplomacy when integrating schools in Jacksonville, Florida, after *Brown v. Board of Education*.³ Judicial

¹ The State Members of Mercosur are Argentina, Brazil, Paraguay, and Uruguay. Venezuela is undergoing the membership application process. The Associate States of Mercosur are Bolivia, Chile, Colombia, Ecuador, and Peru.

² Brazilian Minister of Foreign Affairs Celso Amorim, Remarks at the Opening Ceremony to the Second Meeting of Supreme Courts of Mercosur Member and Associate States (Nov. 28, 2004), *available at* http://www.stf.gov.br/encontro2/imagens/pdf/degravacao_mercosul.pdf.

³ 347 U.S. 483 (1954). While pressuring school-board members to proceed with integration, Judge Tjoflat deftly soothed public opinion in the courthouse and through the media. *See* John E. Fennelly, Book Review, 37 AM. J. LEGAL HIST. 91, 92 (1993) (reviewing KERMIT L. HALL AND ERIC W. RISE, FROM LOCAL COURTS TO NATIONAL TRIBUNALS: THE FEDERAL DISTRICT COURTS OF FLORIDA, 1821-1990 (1991)). Judge Tjoflat's performance is

diplomacy can also be described as the interactions and relations between domestic and foreign courts. Questions of power and docket involved in the federal transfer of cases under the doctrine of *forum non conveniens* illustrate domestic courts' interactions,⁴ while the enforcement of foreign judgments under the doctrine of comity portrays the relations of courts of different countries.⁵ Finally, the interpretation most applicable to Mercosur defines judicial diplomacy as collaborative action and communication among national courts, usually the highest judicial bodies, toward regional legal integration. The most famous example of this type of judicial diplomacy occurred in Europe, where the interaction of national judges played an important role in European integration.⁶

Judicial diplomacy of this latter kind does not imply that judiciaries will generate autonomous foreign relations policies. The executive branch retains exclusive power to conduct international affairs. In Mercosur, at least, judicial diplomacy between Supreme Court judges from different countries did not lead to divergent policy-making. Rather, it supported executive efforts toward regional integration.

II. JUDICIAL DIPLOMACY IN MERCOSUR

Judicial diplomacy within the Mercosur framework has manifested itself in primarily two ways: (1) through dialogue and information exchange among judges, lawyers, and law schools regarding legal issues relevant to Latin American integration; and (2) through the collaborative activity of national Supreme Courts in developing

described as a masterpiece of judicial diplomacy). *See also* Paul M. Pruitt, Jr., Book Note, 11 *LAW & HIST. REV.* 462, 463 (1993); William F. Jung, *The Last Unlikely Hero: Gerald Bard Tjoflat and the Jacksonville Desegregation Crisis – 35 Years Later*, 24 *DUKE L. MAG.* 47, 48 (2006).

⁴ Current Legislation and Decisions, Comment, *Federal Transfer: Problems of Multiple Litigation and the Inapplicability of Stare Decisis*, 34 *J. AIR L. & COM.* 621, 629 (1968).

⁵ *See Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 *YALE L. J.* 612, 627 n.91 (1978). *See, e.g.,* *Porisini v. Petricca*, 456 N.Y.S.2d 888 (App. Div. 1982).

⁶ *See* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 *AM. J. COMP. L.* 125, 138 n.36 (2005) (citing KAREN ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001)). *See also* Alec Stone Sweet, *European Integration and the Legal System*, in *POLITICAL SCI. SERIES* 101, at 1, 8 (2005). Stone Sweet explains that

[t]he Member States did not design the [European Union] legal system that ultimately emerged. Legal elites (lawyers activated by their clients, and judges activated by lawyers) had to figure out how to use European law, to make it work in their interests. A modicum of consistency in the Court's constitutional case law helped, but it also forced national judges to confront complicated problems concerning the nature and enforcement of EC law, standing requirements, and remedies. Hardly passive, national judiciaries negotiated their relationship to the European Court of Justice within a set of multidimensional, intra-judicial, "constitutional dialogues". The system, built by judicial lawmaking, evolved through use, not by institutional design.

working procedures for Mercosur's dispute resolution system. Through these forms of judicial diplomacy, legal actors of various nationalities have helped to generate a common understanding of the laws of the bloc, their application, and consequent legal certainty.

A. Judicial Dialogue and the Exchange of Ideas

Access to proper knowledge and understanding facilitates processes of integration. Sharing information makes room for the exchange of beneficial ideas, the exploration and surmounting of differences, the strengthening of relationships, and the fostering of mutual confidence and agreement.

Judicial diplomacy within Mercosur is defined by the dialogue among Supreme Courts of Member States on legal matters relevant to Latin American integration.⁷ Such a dialogue has been taking place for over a decade; within the last ten years, the Presidents of Supreme Courts in the Southern Cone have met on different occasions,⁸ with the object of promoting activities to motivate awareness and familiarize member States with the legal systems of their fellow members. The meetings began to take on a certain regularity in 2003, in Montevideo, Uruguay. Soon after, in 2004, they were formally consolidated through the Charter of Brasília,⁹ which established the "Permanent Forum of Supreme Courts of Mercosur countries for judicial matters relevant to Latin-American integration, with a specific emphasis on Mercosur."¹⁰

⁷ *See* Declaração do 3º Encontro de Cortes Supremas do Mercosul e Associados [Declaration of the Third Meeting of Supreme Courts of Mercosur and Associate Countries], Nov. 22, 2005, available at http://www.stf.gov.br/encontro4/documentos/declaracao_do_3_encontro_de_cortes_supremas_do_mercosul.pdf. *See also* Adriana Dreyzin de Klor, *El 3º Encuentro de Cortes Supremas de MERCOSUR y Estados Asociados* [The Third Meeting of the Supreme Courts of Mercosur Member and Associate States], 3 DERECHO DEL COMERCIO INTERNACIONAL, TEMAS Y ACTUALIDADES (DECITA) 733, 735-36 (2006).

⁸ In 1996, for example, the Supreme Federal Court of Brazil, under the presidency of Justice Sepúlveda Pertence, promoted the Fifth Meeting of Presidents of Supreme Courts of the Southern Cone, the first such occurrence on Brazilian soil, in Ouro Preto, Minas Gerais.

⁹ CARTA DE BRASÍLIA [CHARTER OF BRASÍLIA], Nov. 30, 2004, available at http://www.stf.gov.br/encontro4/documentos/carta_de_brasilia_de_30_11_2004.pdf. The primary purpose of the Charter of Brasília, a statement signed by the Presidents of Mercosur countries' Supreme Courts, is to institutionalize the "Permanent Forum of Supreme Courts of Mercosur countries for judicial matters relevant to Latin-American integration, with a specific emphasis on Mercosur." The Charter creates the Permanent Forum on the grounds that the national judiciaries are essential for the functional structure of Mercosur, since (a) they are to apply Mercosur rules within their respective domestic jurisdictions and (b) the integration process is a State commitment and as such, all government branches should be involved.

¹⁰ Each Mercosur Member State Supreme Court annually appoints its President and one other Justice to serve as representatives at the Permanent Forum. While the Forum has no chair, the Brazilian Supreme Court hosts the yearly meetings and has undertaken various tasks, such as drafting proposals and proposing regulations for the Permanent Forum secretariat. *See* CHARTER OF BRASÍLIA, *supra* note 9.

This declaration, which made Brasília, Brazil, the headquarters of the Permanent Forum, communicated a clear intent to consistently deepen the Mercosur bloc through judicial diplomacy, or more specifically, through yearly and ad-hoc preparatory meetings among national Mercosur Member State Supreme Court Presidents.¹¹ Permanent Forum meetings might seem like bureaucratic fanfare to the unlearned reader, who may dismiss them as much talk and little action. However, much to the contrary, the firm, steady, and swift action of Mercosur Member and Associate State Supreme Courts has been of paramount importance in constructing common legal understanding and proximity among constituent countries.¹² Some particularly promising initiatives include the organization of legal debates among judges of Mercosur countries, as well as an exchange program for law students, faculty, and even judges. These ideas, launched during the 2006 meeting of the Permanent Forum, led to the signing of a Protocol of Intentions.¹³ In the Protocol, the Brazilian Supreme Court committed itself to drafting the program's rules regarding law schools and judges for potential approval at the 2007 meeting. The Supreme Courts of Member and Associate States further agreed to foster and make available useful information, as well as facilitate relevant personal and institutional contacts in their respective countries.

While in its initial phase, this joint effort affirms the Permanent Forum's regular and constant exercise of judicial diplomacy to strengthen legal ties within the bloc. Moreover, a project promoting interchange among students and professionals within the bloc will help forge deeper connections among legal communities. Through academic interaction, present and future generations will come to better know the national systems of other member countries, laying the groundwork for greater

¹¹ The Internal Rules of the Permanent Forum prescribe that the Forum will convene in its headquarters (Brasília) the second semester of every year, but may hold extraordinary meetings anytime it considers necessary in any of Member or Associated States. All South American Supreme Courts are invited to attend the yearly meeting; however, only the four Mercosur State Member Supreme Courts participate in the ad-hoc preparatory meetings. *See* Regimento Interno do Fórum dos Tribunais e Cortes Supremas do Mercosul e Associados [Internal Rules of the Forum of Supreme Courts of Mercosur and Associates], art. 6, Nov. 22, 2005, available at http://www.stf.gov.br/encontro4/documentos/regimento_interno_do_forum_de_cortes_supremas_mercosul.pdf.

¹² The work of the Permanent Forum is particularly notable given that judiciaries are usually reluctant to take actions traditionally associated with other branches' responsibilities in terms of generating policies outside the courtroom.

¹³ The Protocol of Intentions 1/2006 was undersigned by representatives of the following courts: Supreme Federal Court of Brazil, Supreme Court of Justice of Argentina, Supreme Court of Justice of Paraguay, Supreme Court of Justice of Uruguay, Supreme Court of Justice of Bolivia, Constitutional Court of Chile, Supreme Court of Justice of Venezuela and Supreme Court of Justice of Colombia. Protocolo de Intenções de Cooperação e Mobilidade na Área Jurídica 1/2006 [Protocol of Intentions of Legal Cooperation and Mobility 1/2006], Nov. 24, 2006, available at http://www.stf.gov.br/encontro4/documentos/28_11/protocolo_de_intencoes.doc.

comprehension, dialogue, and agreement that will help overcome challenges that arise among the diverse legal systems of Mercosur countries.

B. Judicial Diplomacy in Action: Refining Mercosur's Dispute Resolution System

In addition to its work in the areas of legal education and debate, the Permanent Forum also reached a historic benchmark in November 2006, when sustained judicial diplomacy among Supreme Courts resulted in significant contributions to Mercosur's dispute settlement system.

The Mercosur system is currently defined by the Olivos Protocol for Dispute Settlement.¹⁴ Disputes may be solved by direct negotiation between the Member States, with an optional intervention of the Common Market Group (CMG).¹⁵ If direct negotiations prove unsuccessful, an ad hoc arbitration panel is established. These panels, known as "ad hoc arbitration courts," are composed of three arbitrators selected from a list provided by the Mercosur Secretariat. In order to ensure uniform interpretation of Mercosur integration law, the Olivos Protocol created the Permanent Review Court, or PRC [*Tribunal Permanente de Revisión*], an arbitration court to which a losing party may appeal against an award issued by an ad hoc arbitration panel. Each Member State appoints one arbitrator to the PRC for a two-year mandate.

The PRC aims to provide a consistent interpretation of Mercosur rules. Other than reviewing arbitral awards, the PRC also issues advisory opinions on legal issues involving Mercosur regulations. Advisory opinions may be requested by Mercosur States, Mercosur bodies with decision-making capacity, and Member States' Superior Courts of Justice. Advisory opinions can be particularly useful for national judiciaries facing litigation involving the interpretation of Mercosur rules, in that PRC advice helps to prevent divergent rulings in different countries on the same legal issue. Thus far, one advisory opinion has been requested of the PRC.¹⁶

¹⁴ Protocolo de Olivos para la Solución de Controversias en el Mercosul [Olivos Protocol for Dispute Settlement in Mercosur], Feb. 18, 2002. The Protocol, which entered into force on January 2004, was signed by Argentina, Brazil, Paraguay, and Uruguay. *See also Decisions Adopted at CMC's Third Extraordinary Meeting*, 67 INTAL MONTHLY NEWSLETTER (Inst. for Integration of Latin America and the Caribbean, Buenos Aires, Arg.), at 6, Feb. 2002, available at http://www.iadb.org/intal/aplicaciones/uploads/publicaciones/i_cartaINTAL_67.pdf.

¹⁵ The Common Market Group (CMG) is the executive body of Mercosur. It is responsible for negotiations with third parties on behalf of Mercosur under express mandate of the Common Market Council. It is constituted by representatives of the ministries of foreign affairs and of economy, as well of the central banks of the State Parties.

¹⁶ *See* Opinión Consultiva n. 01/07 [Advisory Opinion n. 01/07], Norte S.A. Imp. Exp. c/ Laboratorios Northia Sociedad Anónima, Comercial, Industrial, Financiera, Inmobiliaria y Agropecuaria s/ Indemnización de Daños y Perjuicios y Lucro Cesante, available at <http://www.mercosur.int/msweb/portal%20intermediario/PrimeraOpinionConsultiva-Versionfinal.pdf>.

The Regulation of the Olivos Protocol¹⁷ describes the advisory opinion request procedures for Mercosur executive bodies and countries only. The Protocol Regulation does not prescribe procedures for requests from Superior Courts of Justice. Article 4 of the Regulation of the Olivos Protocol establishes only the following:

Article 4. Procedure on requests from Member States' Superior Courts of Justice

1. The PRC may issue advisory opinions if these are requested by the Superior Courts of Justice of Member States with national jurisdiction. In this case, advisory opinions shall refer exclusively to the legal interpretation of Mercosur norms mentioned in article 3, paragraph 1, of this regulation, whenever linked to pending cases before the judiciary of the requesting State.

2. The procedure on requests for advisory opinions to PRC, established in the present article, will be regulated after consultation with the Superior Courts of Justice of the Member States.¹⁸

In 2005, in consideration of the above article, the Permanent Forum decided to draft a proposal for a mechanism of request for PRC advisory opinions by Mercosur member Supreme Courts.¹⁹ The Supreme Courts took the initiative in this matter, acting to fill this gap before they were ever approached by the Common Market Council (CMC) of Mercosur.²⁰

First, Ellen Gracie Northfleet, President of the Supreme Federal Court of Brazil, created a working group responsible for sketching the draft of the proposal.²¹ Then,

¹⁷ Mercosur Common Market Council Decision 37/03 of Dec. 15, 2003, regulating Olivos Protocol, available at http://www.salvador.edu.ar/vrid/di/r_prog_arm_rev_leg_prot-05-b.htm [hereinafter "Regulation of the Olivos Protocol"]. As per Article 47 of the Olivos Protocol for Dispute Settlement in Mercosur, the protocol's regulations were assigned to the Common Market Council. Through Decision MERCOSUL/CMC/DEC. N° 37/03, the Common Market Council approved the Regulation of the Olivos Protocol for Controversy Solution on December 15, 2003.

¹⁸ Regulation of the Olivos Protocol, *supra* note 17, at art. 4.

¹⁹ See Declaration of the Third Meeting of Supreme Courts of Mercosur and Associate Countries, *supra* note 7.

²⁰ "The CMC is comprised of the ministers of Foreign Affairs and of the Economy of the four countries. It is the highest-level organization in charge of MERCOSUR's decision-making and it is responsible for overseeing compliance with the strategic objectives laid out in the Asunción Treaty and the Ouro Preto Protocol. The Council meets twice a year, in two-stage sessions: the first involves only the ministers that make up the CMC, and the second includes the presence of the countries' presidents." Celina Pena & Ricardo Rozemberg, *Mercosur: A Different Approach to Institutional Development*, FOCAL Policy Paper (Canadian Found. for the Americas, Ottawa, Can.), Mar. 2005, at 2, available at <http://www.focal.ca/pdf/mercosur.pdf>.

²¹ Justice Ellen Northfleet has fostered international judicial diplomacy in several ways. She organized the First Meeting of Constitutional Courts of the Community of Portuguese Speaking Countries (*Cortes Constitucionais da Comunidade dos Países de Língua Portuguesa – CPLP*) in Brasília in November 2006. At this occasion, under a proposal made by President Northfleet, these Courts agreed to create a common electronic database of constitutional cases (hosted by

in November 2006, representatives of the Supreme Courts of Mercosur States, after having discussed the matter extensively, reached a consensus on the proposal at the Permanent Forum. Upon the approval of the final draft, the Courts sent the proposal for the Procedures on Requests for Advisory Opinions by Superior Courts of Justice to the CMC of Mercosur.²² This proposal reaffirmed that advisory opinions are restricted to the interpretation of Mercosur rules and are to be requested in response to pending litigation before any of the Member States' judiciaries. The proposal provided the Supreme Courts of Member States with exclusive standing to request advisory opinions of the PRC. Under the proposal, requests directly transmitted from other courts would not be admitted; rather, Supreme Courts would establish their own domestic rules concerning the admissibility of advisory opinion requests made by local judges and verify the procedural admissibility of such requests.

On January 18, 2007, the CMC approved the Rules of Procedure on Requests for Advisory Opinions by the Superior Courts of Justice through Decision MERCOSUL/CMC/DEC. N° 02/07.²³ The final rules were based heavily on the proposal the Permanent Forum presented.²⁴ Other than minor changes to the writing and structure of the original text, the only significant modification made by the CMC concerned the payment of costs incurred by the issuance of advisory opinions, including fees and transport costs of the arbitrators of the PRC.²⁵ This alteration, being largely managerial, in no way changed the substance of the original proposal.

the Brazilian Supreme Court) with search tools to select cases on the same subject from these Courts. Her administration also published summaries of the most significant Brazilian Supreme Court cases of the past ten years in English, French, and Spanish on the Court's webpage. In addition, she created the Permanent Study Group on the Convention on Civil Aspects of International Child Abduction, composed by representatives of the judiciary, the foreign affairs ministry, the State attorney's office, as well as a Study Group for the Internalization and Application of Mercosur Norms.

²² See Declaração do 4º Encontro de Cortes Supremas do Mercosul e Associados [Declaration of the Fourth Meeting of Supreme Courts of Mercosur and Associate Countries], Nov. 24, 2006, available at <http://www.stf.gov.br/encontro4/documentos.htm>. See also Anteprojeto de Regulamento da Tramitação de Solicitação de Opiniões Consultivas encaminhadas por Tribunais Superiores de Justiça dos Estados Partes [Proposal for Regulation of Requests for Advisory Opinions by High Courts of Member States], Nov. 24, 2006, available at <http://www.stf.gov.br/encontro4/documentos.htm>.

²³ Regulamento do Procedimento para Solicitação de Opiniões Consultivas ao Tribunal Permanente de Revisão Pelos Tribunais Superiores de Justiça dos Estados Partes Do Mercosul [Rules of Procedure on Requests for Advisory Opinions by the Superior Courts of Justice], MERCOSUL/CMC/DEC. N° 02/07, Jan. 18, 2007, available at http://www.mercosur.int/msweb/Normas/normas_web/Decisiones/PT/2007/DEC%20002-2007_PT_Opini%F5es%20Consultivas.pdf [hereinafter "Rules of Procedure"].

²⁴ The courts that may request advisory opinions to the PRC are: the Supreme Court of Justice of the Nation of Argentina; the Supreme Federal Court of Brazil; the Supreme Court of Justice of Paraguay; the Supreme Court of Justice and the Tribunal of Administrative Court of Uruguay.

²⁵ The CMC decided to create a "Special Account for Advisory Opinions" within the Special Fund on Controversy. See Rules of Procedure, *supra* note 23, at art. 12.

In summary, the proactive stance of member nations' Supreme Courts toward developing Mercosur's dispute resolution system led to their proposal's ready acceptance by the CMC. Through firm and organized judicial diplomacy, the Permanent Forum demonstrated "its commitment to greatly contribute to the institutional evolution of the integration process, especially in relation to the strengthening and improvement of the bloc's legal network."²⁶

III. CONCLUSION

As these examples of innovation and enterprise show, judicial diplomacy among Mercosur Member and Associate States work to advance legal integration under a framework negotiated by their respective executive powers. Judicial diplomacy on the part of Supreme Courts in Mercosur nations entail concrete actions, working groups, and deadlines to establish an "inter-institutional dialogue to sustain the efforts of [Executive] negotiations toward consolidating regional integration on behalf of development and peoples' well being."²⁷

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²⁶ Declaration of the Third Meeting of Supreme Courts of Mercosur and Associate Countries, *supra* note 7.

²⁷ Justice Ellen Gracie Northfleet, Address at the Closing Session of the Second Meeting of Supreme Courts of Mercosur Member and Associate States (Nov. 30th, 2004), *available at* http://www.stf.gov.br/encontro2/imagens/pdf/degravacao_mercosul.pdf.