

**Designing Effective and Flexible RTAs to Address Pandemic Crises:
Analysis from MERCOSUR's GMC Resolution 49/2019**

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**Team report
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ABSTRACT: Crises pose several trade challenges within trade agreements. In a hyper connected world, well designed regional trade agreements (RTAs) may allow countries to overcome difficulties without severely harming trade flows. This report examines MERCOSUR's GMC Resolution 49/2019, which sets new rules for temporary actions in the face of shortages. The rule has provisions that at a first look would allow MERCOSUR's countries to fight against the COVID outbreak, but subject to stricter conditions than those offered by other alternatives. Moreover, the Resolution only came into force on 5 July 2020, due to the delay of MERCOSUR's Member States to incorporate it to their juridical systems. The research analyses in a comparative basis both the former GMC Resolution 08/2008 and the new one, GMC Resolution 49/2019, as well as the Montevideo Treaty. After this analysis, we conclude that the Resolution is a better way to deal with shortages imposed by health crises than that of the Montevideo Treaty, since a GMC Resolution demands a governance process in order to authorize the claimant to take measures to fight shortage outbreaks. At the end, the report draws some conclusions and presents suggestions for the development of more effective RTAs to deal with shortage outbreaks, enabling countries to quickly overcome pandemic crises.

EXECUTIVE SUMMARY

SUMMARY:[1. Introduction;](#) [2. Comparison between MERCOSUR'S statutes to fight COVID-19;](#) [3. Current panorama and some bottlenecks;](#)[4. Recommendations for efficiently address shortage outbreaks based on MERCOSUR's experience;](#) [5. Conclusion;](#) [6. References.](#)

MERCOSUR's GMC Resolution 49/2019 establishes some hypothesis for tariff cuts due to shortage crisis. It is an improvement from the former GMC Resolution 08/2008, simplifying the situations that may give cause to tariff cuts and also standardizing deadline periods.

Although the resolution's scope may give reason to its use to face shortages resulting from the COVID-19 outbreak, our analysis shows that in the particular case of Brazil the country has not yet applied it for this purpose. Instead, Brazil is resorting to a broader rule that enables member states to exempt rules imposed by the South American treaty: the Montevideo Treaty.

The Montevideo Treaty authorizes in its article 50(d) a country to exception the terms of the treaty in the case of health crises or some emergency that poses treat to human life in general. Notwithstanding, unlike the provisions established by MERCOSUR's resolutions on shortages, the Montevideo provision does not demand any previous authorization for the measure to be taken by a member state, being adopted unilaterally.

Given the fact that the rules that govern a regional trading bloc demand, in general, the observation of its provisions, the use of the exceptions of article 50(d) of the Montevideo Treaty would not be the best decision for MERCOSUR's partners to take.

On the other hand, although GMC Resolution 49/2019 brings the obligation of approval by a Commission, that characteristic may pose difficulties to countries in order to put its measures in practice when facing an emergency like the one of COVID-19.

Given that difficult, we conclude along the report that the Resolution's incorporation process took a long time to be concluded, with its final term after the incorporation by Paraguay.

Another difficult posed by the Resolution refers to its restricted scope, because contrary to what establishes the Montevideo Treaty, the resolution links the adoption of the tariff cuts to a shortage situation. That is to say, the Resolution ties the adoption of emergency measures to a specific situation, while the Montevideo Treaty allows member states to take measures to protect health independently of any particular problem.

Hence, unless shortage in the supply of some product is verified, there is no space for a member to claim the right to reduce its tariffs in order to face the scarcity of a determined product based on the text of GMC Resolution 49/2019.

The methodology that oriented the research was based exclusively on the investigation of primary sources, mainly regional trade rules applied to MERCOSUR. Thus, the studied was conducted on statutes already revoked and also in force, namely GMC Resolution 08/2008, GMC Resolution 49/2019, the Montevideo Treaty and the Protocol of Ouro Preto and also normative acts from the Foreign Trade Chamber of Brazil (CAMEX).

Related to secondary sources like the doctrine of International Trade, although it is recognized its relevance, there was no to resort to them, especially due to the empiric methodology adopted for this analysis.

Also, in order to better analyse the specificities of the MERCOSUR Resolution on shortage, the researches decided to focus on the Brazilian experience. This decision was taken especially because the fact that the new statute was not yet incorporated at the time of the beginning of the research, what would pose even more difficulties to draw some conclusions based on the experience of other countries.

However, we believe that the Brazilian experience reflects in some extent the way how other MERCOSUR members are dealing with the COVID-19 crisis and the application of the statutes on shortages.

At the end of the report, we make some recommendations to better explore the potential of GMC Resolution 49/2019, especially related to two aspects. First, it is important that state member be more diligent to incorporate international rules. That is even more appropriate given the sudden negative outcomes resulting from this pandemic crisis, which practically coincided with the approval of the Resolution. Second, it would be interesting if the Resolution had a provision allowing member states to take preventive measures related to yet not verified, but very probable of occurring, shortage problems.

1. Introduction

Coronavirus has provoked a rupture in global supply chains, especially due to the danger of products shortage in many markets. Given that scenario, countries tried to face this pandemic crisis by prohibiting exports from its territories while, on the other hand, they increased their demands for imported products, mainly those related to the health sector.

This scenario disconcerted the structure of the traditional international trade system, since countries that were highly demanders of imports were suddenly faced with the scarcity of goods necessary for their daily activities.

On the other hand, those that were highly dependent on exports faced two particular dilemmas. The first one refers to the fact that they had to implement more strict controls on their exports, in order to avoid shortage outbreaks posed by consumers in panic; the second dilemma has to do with the reduction of their exports because not of the scarcity of products on its internal market, but due to the restriction imposed by importer countries, which closed their borders aiming at guaranteeing the supply of products in their domestic market. In this sense, the COVID-19 crisis ended up revealing several problems in international trade, which had not been identified, or properly addressed, in past times of normality.

These flaws in the international trading system involve, among others, the recognition of global supply chains' fragility, with some particular characteristics: great dependency on some countries responsible for producing final goods; damage arising from arbitrary border closure; inability of national producers to meet an abrupt demand for products by the population (*e.g.* medical products); consequently, the inability of the international market, often with production highly dependent on few (or only one) countries, to be able to supply simultaneous demands from different nations; high technological and economic dependence on some (or only one) countries with know-how to produce instruments or to face a determined disease.

These are challenges for which countries were not adequately prepared. Likewise, international trade agreements commonly used to deal with international trade were also ineffective to fight such a global problem. As a consequence, in some concrete situations, it was clear the incapacity of international trade treaties to satisfactorily and timely respond to this COVID-19 crisis, in a way that would allow countries to overcome the challenges of trade regulation guided by a global health crisis.

Several regional trade blocs have in their treaties mechanisms that allow their Member States to adopt exceptional measures to face challenges imposed by crises that are impossible to predict. Some of them are follow stricter rules while in other there are broader flexibility for Member States to adopt unilateral measures when facing emergencies. For example, we can mention the article 28.3 of the European Union—

Canada Free Trade Agreement (FTA)¹ and the article 105(1) of the China-Singapore FTA².

Within the specific scope of MERCOSUR, the regional trade bloc has in its agreements some mechanisms oriented to allow its Member States to face crises and unforeseen situations, without implying a violation of the treaty.

On a more specific level, MERCOSUR adopted in 2019 a new resolution to face shortage crisis. This new rule is the GMC Resolution 49/2019, which consists in an improvement from a previous rule aimed at regulating trade in situations of shortage. The previous resolution was GMC Resolution 08/2008, now revoked by this new diploma.

GMC Resolution 49/09 presented significant advances in relation to the previous one, providing Member States with greater flexibility to face shortages in their markets. There was an increase in the scope of measures allowed to be taken by countries, both in terms of situations that could fall under the aforementioned standard, as well as in the number of tariff lines and duration of measures.

Notwithstanding, this team report found that contrary to what would be supposed to happen during this COVID-19 crisis, the shortage rule has not been fully applied to face the shortage of health products that is actually happening. Focused on the analysis of the Brazilian experience, we conclude that the new MERCOSUR Resolution is not explored on its full potential, given the fact that the country is using other MERCOSUR's legal mechanisms to address the current crisis.

Having that in mind, Brazil is adopting an exceptional mechanism established by the Montevideo Treaty that allows Member States to take unilateral actions when facing a sudden emergency that threat the country, like reducing or cutting its imports tariffs, without violating the treaties' rules.

The aforementioned mechanism is foreseen in article 50(d) of the Montevideo Treaty, which brings the possibility for MERCOSUR's members to take any necessary action to protect human life and the health of its citizens without having to negotiate of other bloc's members.

Although there is no illegality derived from the fact that Brazil is fighting COVID-19 supply bottlenecks by recurring to the Montevideo Treaty, the authors believe that this is not the best mechanism to address such an emergency, mainly because there is another rule that enables countries to cut tariffs with a more established mechanism of governance, especially related to the requirement of consultations before other Members.

Given that scenario, the report will seek to analyse the details of this regional legislation, which presents an underutilized intra-regional mechanism to allow countries

¹European Union. Official Journal of the European Union. Free Trade Agreement between the European Union and Canada. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2017:011:FULL&from=EN>.

²World Trade Organization. Free Trade Agreement between China and Singapore. Available on: <https://www.enterprisesg.gov.sg/non-financial-assistance/for-singapore-companies/free-trade-agreements/ftas/singapore-ftas/-/media/ESG/Files/Non-Financial-Assistance/For-Companies/Free-Trade-Agreements/CSFTA/CSFTA>.

to go through periods of product shortages in their domestic markets. Taking into account the severity of this crisis caused by COVID-19, which produced the rupture of global supply chains and the consequent shortage of goods in several countries, as well as the revealed insufficiency of trade agreements mechanisms to face crises of this magnitude, we can visualize the potential offered by MERCOSUR's GMC Resolution 49/2009.

The research was based on primary resources, mainly MERCOSUR's resolutions on shortages (former and in force), the Montevideo Treaty and the Protocol of Ouro Preto. There was also the investigation of Brazilian normative acts, like Portaria CAMEX nº 17/2020.

Though, we suggest some improvements for the Resolution to be more attractive to Member States, which encompass an easier approval process as well as the possibility of resorting preventively to the Resolution, in other words, before the shortage happens.

As a contribution, the report brings some critics to this Resolution's underestimation, including the time taken between its signature and the incorporation by MERCOSUR's Member States. We also try to formulate some recommendations for a better application of rules already elaborated, as well as for the design of resolutions that can be at the same time easier to address health crisis and simpler on its application.

At the end, we conclude that the Resolution is a well-drafted text, but yet needs better incentives in order to be more attractive for its application by Member States. During times of crises like the one that the whole world is facing, it is important for regional trade partners not to relegate to the background existing rules that might appropriately address problems caused by shortages, without resorting to exceptions that lack more consolidated governance mechanisms in the scope of Regional Trade Agreements (RTAs).

2. Comparison between MERCOSUR'S statutes to fight COVID-19

In this topic we compare the improvements obtained from the new GMC Resolution 49/2019 and analyse the use of Montevideo Treaty's exceptions, focused on the experience of Brazil, to address the new Coronavirus crisis. The comparison will allow us to draw some conclusions and present a few recommendations on the topics ahead.

The new GMC Resolution n. 49/2009 adopted by MERCOSUR to face shortage of products intra and extra regional block is not actually a new rule. This new Resolution arises as an improvement of another resolution that had the same objective, which was to enable MERCOSUR's State Members to face shortage crises through the reduction or cut of the block's consolidated tariffs³.

The mentioned revoked resolution is GMC Resolution 08/2008, which brought in its text 5 hypothesis for the reduction of tariffs due to shortage difficulties. The conditions

³ The consolidated tariff adopted by MERCOSUR's countries is the Common External Tariff (CET), also known as TEC in Portuguese (Tarifa Externa Comum) and as AEC in Spanish (Arancel Externo Común).

necessary to enable a member to reduce its tariffs due to shortages were foreseen in article 2 of the Annex of GMC Resolution 08/2008, in the following terms:

Art. 2 - The measures provided for in this Resolution will be applied to imports of goods that are proven to fall into any of the following situations:

1. Impossibility of normal and fluid supply in the region, resulting from imbalances in supply and demand.
2. Existence of regional production of the good, but the characteristics of the production process and / or the quantities requested do not economically justify the expansion of production.
3. Existence of regional production of the good, but the producing State Party does not have sufficient exportable surpluses to meet the demanded needs.
4. Existence of regional production of a similar good, but it does not have the characteristics required by the production process of the industry of the requesting country.
5. Shortage of regional production of a raw material for a given input, even if there is regional production of another raw material for a similar input through an alternative production line.

In addition, the revoked Resolution established that any member would not be able to reduce its external tariff to a baseline lower than 2%. In the case a country needed an even lower baseline, that demand should be analysed, case by case, and exceptionally, by the Common Market Council (CMC).

Moreover, the former rule had a very limited number of products subject to such measures. Its article 3 (of the Annex) foresaw the possibility of having only 15 MERCOSUR Common Nomenclature (MCN) simultaneously in force for those cases related to the “impossibility of normal and fluid supply in the region” (Annex - article 2, number 1) and 30 MCN for cases identified with hypothesis established by article 2, numbers 2, 3, 4 and 5 of its Annex.

Besides that, one last point regarding GMC Resolution 08/2008 that is worth noticing refers to the period of application of the measures. As in the case of the number of products subject to such measures, the validity period of them is divided in two possibilities. For those cases related to article 2, number 1 of the Annex, the measures could be applied for the maximum period of 12 months, being able to extend them for a total period of 24 consecutive months.

On the other hand, for situations related to hypothesis of article 2, numbers 2, 3, 4 and 5 of its Annex, the measures could be applied for an initial period of up to 24 months, renewed for successively periods of up to 12 months.

After a period of more than a decade of GMC Resolution 08/2008 application, MERCOSUR's members decided that the rule was not in accordance with the needs of his countries to face more effectively crisis related to shortages. The Resolution had its limitations to effectively address challenges imposed by the scarcity of products in one Member State's market and the consequent recognition of other Members to effectively be able to supply the country facing the shortage crisis.

It was though recognized that some improvements were needed to better enable countries to regularly supply their local markets, without depending exclusively on other MERCOSUR's partners.

Due to this recognition, MERCOSUR's members passed the new GMC Resolution 49/2019, which simplified the hypothesis to demand tariff reductions and also increased the number of products subject to tariff cuts. It also harmonized the period of efficacy of such measures adopted by all products subject to the Resolution's provisions.

As a starting point of comparison between both Resolutions (the former and the new one), the current rule reduced the hypothesis for adopting shortage measures to a total of three. Article 2 of the Resolution's Annex is written as following:

Art. 2 - The measures that the CCM approves, in accordance with the present mechanism, will be applied to imports of goods, in cases of impossibility of normal and fluid supply in the region, resulting from imbalances between supply and demand, due to:

1. Temporary absence of regional production of the good;
2. Existence of regional production of the good, but the producing State Party does not have enough supply to meet the quantities demanded;
3. Existence of regional production of a similar good, but it does not have the characteristics required by the production process of the industry of the requesting State Party.

Some outcomes may be deducted from this change. What was then considered article 2, number 1 of the prior Resolution's Annex is now part of the main article (*itscaput*), setting a general prescription of the adoption of measures to face shortage crisis. Due to that change, what in GMC Resolution 08/2008 was one of the situations able to validate a shortage measure, turned out to be now the main hypothesis to give rise to the recognition of a shortage crisis and, consequently, the right to require measures based on the Resolution's provisions.

As a result, the situations that, according to the main hypothesis – “in cases of impossibility of normal and fluid supply in the region, resulting from imbalances between supply and demand” -, are those, in general terms, (i) related to temporary absence of production in the region; (ii) although there is regional production, the producer is incapable of supplying it to other partners; and (iii) although there is regional production, this does not match the industry's requirements of the importer.

These new situations are simpler than those of the revoked Resolution, what makes it easier to claim and justify, as well as to put in practice, especially taking into account the general rules to govern a regional trade agreements, which demand the observation of the rules agreed between the Member States.

Furthermore, there were a convergence regarding the number of products subject to those shortage measures made in article 5 of the Resolution's Annex. Within GMC Resolution 49/2019 the total MCN lines correspond now to a total of 100 codes, independently of the situation that gave reason to its adoption.

Also, article 10 of the new Resolution's Annex established a common period of duration of the adopted measure. It corresponds now to a total of 365 days, with the

possibility of extension. In this point the new Resolution does not bring a precise extension time, being laconic.

In our opinion this time lapse does not bring any prejudice for the adoption of the extension needed, as far as the country be able to concretely demonstrate the persistence of the situation. In addition, in this very aspect it is possible that the National Coordination of the MERCOSUR Trade Commission (MTC) decides, at least on an initial decision, to adopt the same extension period from the former Resolution for situations of article 2, numbers 2, 3, 4 and 5, which is a 12 month extension. In that respect, the Commission could make an analogic interpretation of the new rule based on what the revoked Resolution prescribed.

In order to better illustrate the changes between both Resolutions, the table below summarizes the main differences between them:

Main provisions	GMC Resolution 08/08	GMC Resolution 49/19
Requirements for measure adoption	1. Impossibility of normal and fluid supply in the region due to imbalances in supply and demand; 2. Existence of regional production of good, but the characteristics of productive process and / or quantities requested do not economically justify the expansion of production; 3. Existence of regional production good, but the State Party producer does not have exportable surpluses enough to meet demanded needs; 4. Existence of regional production similar good, but this does not has the required characteristics by the productive process of requesting country; 5. Shortage of production of a raw material for a given input, still that there is regional production of another raw material for input similar through a line of alternative production.	<ul style="list-style-type: none"> • Impossibility of normal and fluid supply in the region due to imbalances in supply and demand due to: <ul style="list-style-type: none"> a. Temporary absence of regional production of the good; b b. Existence of production regional well, but the EP producer does not have an offer enough to meet quantities demanded; c. Existence of production of a similar good, but this one doesn't have the characteristics required by industry production process of the requesting EP.
Quantitative authorization limits	The tariff reductions in force in each EP cannot overcome simultaneously: I. Due to imbalances between supply and demand (Art. 2nd inc. 1.): 15 NCM code.	The tariff reductions in force in each EP cannot be applied simultaneously to more than 100 NCM codes. The limit foreseen for the adoption of measures of character urgent:

	II. For the remaining causes (Art. 2 Inc. 2,3, 4 and 5): 30 NCM code. Urgent measures: 5 NCM codes per EP within the general limit of 45 NCM codes	10 NCM codes per EP within the general limit
Reduction rates	The same regulation is maintained. General: 2% and 0% For requests from Paraguay: 0%	
Approved deadlines	I. Due to imbalances between supply and demand (Art. 2 ° Inc. 1.): 12 renewable months, without exceeding 24 months. II. For the remaining causes (Art. 2 °. Inc. 2,3,4, and 5): 24 months, extendable by time renewable for up to 12 months.	Maximum term: 365 days, counting from from the date of entry into force of the Directive that approves it. • The reduction in the rate will remain in force for the term approved independently of the quota has been exhausted enabled. • The beneficiary P can apply the measured prior to simultaneous entry into force of the Directive, complying with its incorporation into planning internal legal system, and communicating fact to SM.

Source: Prepared by the authors, based on: MERCOSUR. Relatório Semestral da Secretaria do MERCOSUL. 28 ed. Abril/2020.

After analysing the table above, it is possible to affirm that the new Resolution removes the requirement made by the previous rule that the justification to adopt the measures be attached to other variables, such as the products level of production, exportable sufficient surpluses, and supply of raw materials to the production of inputs⁴.

Also, the new GMC Resolution 49/2019 reduced the possibility of tariff cut to a 0% of the bloc consolidated duty, what express the intention of the Member States to actually permit countries facing shortages crises to really fight them. In that case, the possibility of reduction of the MERCOSUR CET to a zero percentage is a good mechanism to manage crises like the one imposed by COVID-19, when the national industry face extremely atypical shortages and need some incentives to rapidly supply its demands, what a reset on tariff percentage may be a stimulus.

3. Current panorama and some bottlenecks

GMC Resolution 49/2019 entered into force on last 5 July 2020. As an international normative diploma, it has its validity dependent on the incorporation by all MERCOSUR'S members, accordingly to the regional bloc's rules.

⁴ MERCOSUR. Relatório Semestral da Secretaria do MERCOSUL. 28 ed. Abril/2020. Available on: <https://www.mercosur.int/pt-br/documento/relatorio-semestral-da-secretaria-do-mercosul-sm/>.

This requirement is established by the Ouro Preto Protocol, signed in the Brazilian city of Ouro Preto, on 17 December 1994, a statute directly related to the Asunción Treaty. The Protocol function as an “Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR”.

Its article 40 state the following:

Article 40

In order to ensure the simultaneous entry into force in the States Parties of the decisions adopted by the Mercosul organs provided for in Article 2 of this Protocol, the following procedure must be followed:

I. Once the decision has been adopted, the States Parties shall take the necessary measures to incorporate it in their domestic legal system and inform the Mercosul Administrative Secretariat.

II. When all the States Parties have reported incorporation in their respective domestic legal systems, the Mercosul Administrative Secretariat shall inform each State Party accordingly.

III. The decisions shall enter into force simultaneously in the States Parties 30 days after the date of the communication made by the Mercosul Administrative Secretariat, under the terms of the preceding subparagraph. To this end, the States Parties shall, within the time-limit mentioned, publish the entry into force of the decisions in question in their respective official journals⁵.

Argentina was the first member to incorporate the rule, through Decree n. 415/1991. The country was followed by Brazil, which incorporated the rule to its legal system with the edition of the Decree n. 10.291, edited in 24 March 2020⁶. Uruguay incorporated it by Decree PE n. 73/2020, and Paraguay remained the last to do so, incorporating the rule only in 26 May 2020, through Decree n. 3631/2020⁷.

It is important to notice that the text of GMC Resolution 49/2019 established on article 17 of its Annex a period in which the Resolution should be approved by all MERCOSUR members. It settled that the rule should be incorporated no longer than 60 days after its approval, what means that by 7 January 2020 all MERCOSUR members should have the text incorporated to their legal systems.

However, MERCOSUR's members took too long to incorporate the rule to its legal order, what, in the face of COVID-19 pandemics, may have posed some difficulties to better address some problems generated by this pandemic.

That is a probability because until it entered into force, actions to fight shortage crisis had to be made based on the rules of the previous regulation (GMC Resolution 08/2008), which, as said before, was a more limited rule and with fewer products subject

⁵ Organization of American States. Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR. Available on: http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp.

⁶ Brasil. Decreto nº 10.291, de 24 de março de 2020. Available on: <http://www.in.gov.br/en/web/dou/-/decreto-n-10.291-de-24-de-marco-de-2020-249621689>.

⁷MERCOSUR. Ações pontuais no âmbito tarifário por razões de abastecimento (revogação da Resolução GMC nº 08/08 de acordo com a diretriz da CCM nº 04/11. Available on: <https://www.mercosur.int/pt-br/documentos-e-normativa/normativa/>.

to tariff reduction or cuts. As an example, the Brazilian government took several measures regarding shortage problems, and from a total of 48 products, 25 of them were included on the shortage requirements established by the former GMC Resolution 08/2008⁸.

Given the scenario that until the beginning of last July GMC Resolution 49/2019 was not in force, MERCOSUR's countries had two options to try to address the current pandemic crisis due to shortages: (i) applying GMC Resolution 08/2008, with its restrictiveness; or (ii) applying the Montevideo Treaty, which establishes some exceptionalities and due to that allows the adoption of unilateral decisions without the consultation of other State Members.

The application of GMC Resolution 08/2008 poses some limitations for countries to adequately fight a pandemic such as the one of COVID-19. Besides the limitation of products subject to cut or tariff reduction, the previous Resolution established different periods for the duration of such measures, according to the hypothesis used to justify the tariff reduction. This procedure poses some difficulties to fight against health crises, which demand timely measures, not subject to government bureaucracy.

Given those difficulties posed by GMC Resolution 08/2008, MERCOSUR's members are using other legal instrument to face COVID-19. In the case of Brazil, the country is taking its measures based on the Montevideo Treaty, specifically article 50(d) of the Treaty.

The provision of the treaty above states that:

Article 50

No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding:

[omissis]

d) Protection of human, animal and plant life and health⁹.

As can be interpreted, the provision of the Montevideo Treaty allows Member States to quickly adopt measures to safeguard human life and health in general. That is very different from the procedure foreseen by GMC Resolution 08/2008 (and also by the new one, GMC Resolution 49/2019), which can be said to be slow and, maybe, not adequate to face a pandemic like the one posed by COVID-19.

In this sense, the resolutions, either the previous or the new one, demand that the measure be linked to an impossibility of normal and regular supply in the region, to be proven before the MERCOSUR's Trade Commission. This impossibility must be derived from imbalance between demand and supply¹⁰.

⁸ Câmara de Comércio Exterior. Lista de produtos brasileiros com medidas em vigor. Available on: <http://www.camex.gov.br/tarifa-externa-comum-tec/alteracoes-tarifarias/98-assuntos/24-resolucao-gmc-n-49-19-casos-de-desabastecimento>.

⁹ Latin American Integration Association. Montevideo Treaty. Available on: http://www2.aladi.org/biblioteca/Publicaciones/ALADI/Secretaria_General/Documentos_Sin_Codigos/Caja_062_001_en.pdf.

¹⁰ MERCOSUR. Relatório Semestral da Secretaria do MERCOSUL. 28 ed. Abril/2020. Available on: <https://www.mercosur.int/pt-br/documento/relatorio-semestral-da-secretaria-do-mercosul-sm/>.

Taking into account the Brazilian preference to make use of the exceptionality from article 50(d) of the Montevideo Treaty, the country has issued the CAMEX Resolution 17/2020 (Resolução CAMEX) establishing the temporary reduction of import duties. This Resolution is been updated since then in order to include other health products.

That is to say, Brazil, through its Foreign Trade Chamber, issued a Resolution to exempt from the MERCOSUR's Common External Tariff several health products on the basis of the article 50 of the Montevideo Treaty. Although the government recognises the fact that it is a temporary measure, imposed by a severe health crisis, it is important to mention that it was taken without consulting other MERCOSUR's members.

Two observations about the rule are important. First, it expressly mention the article 50(d) of the Montevideo Treaty as its legal basis. That means that the Brazilian government option to not even trying to resorting to the resolutions related to shortage problems, even though we have to recognize the probability that the CAMEX Resolution 17/2020 was issued due to some kind of product scarcity. Second, it links its objective to the fight against the COVID-19 pandemic without explicitly mentioning medical products, what would leave space, although unlikely, to try to include other kinds of merchandises¹¹.

So, that is the current status of how the COVID-19 crisis is been handled by Brazil, specifically, and probably at the same manner by other MERCOSUR members. To our opinion, that is not the best way to address such a relevant issue inside an RTA, mainly when there are other options to be considered first.

It is not too much to recognize the problems posed by measures without the consultation of other RTA members, being possible to speculate even about a future dispute settlement between members of a regional trade bloc.

4.Recommendations for efficiently address shortage outbreaks based on MERCOSUR's experience

GMC Resolution 49/2019 has not yet been used to deal with the current Coronavirus outbreak. It is true that some of the Resolution's specificities make it harder to quickly respond to crisis such this one of COVID-19, but in our opinion the potential of the Resolution is underestimated.

Initially, the rule that disciplines shortages hypothesis is a better instrument to preserve the regional bloc's logic, since it demands for its operation the accomplishment of some pre-conditions, what, on the contrary, is not demanded by the Montevideo Treaty.

Contrary to the GMC Resolution 49/2019 logic, the exceptions made available by the Montevideo Treaty do not demand more specific requirements, being enough for its implementation that the Member State claims that the pandemic imposes some threat to human life or public health.

¹¹ Câmara de Comércio Exterior. Resolução nº 17, de 20 de março de 2020. Available on: <http://www.camex.gov.br/component/content/article/resolucoes-camex-e-outros-normativos/58-resolucoes-da-camex/2670-resolucao-n-17-de-17-de-marco-de-2020>.

Having that in mind, we can notice that GMC Resolutions (both the former and the new one) demand a more institutionalized procedure for a decision related to cuts or tariff reduction, which is in accordance with the objectives of any regional trade agreement. The GMC Resolutions have the merit to allow a Member State to fight a specific crisis without, on the other hand, incurring on the potential risk of harming other State Members and, lastly, probably incurring on a treaty breach.

Nonetheless, even though there is a better governance established by GMC Resolution 49/2019, the dilemma rests on a supposedly rigidity of the consultation (confirmation) mechanism demanded from other members, since those kind of measures (to tackle shortage outbreaks) demand quick approval to adequately address the crisis.

Having that in mind, some recommendations can be made in order to make thosetypes of resolutions more easily applicable, what reflexively might foster the adoption of measures based on them. Even those measures granted as more urgent could be managed by rules like those established by GCM Resolution 49/2019, but they would demand a more fast analysis procedure by other members.

First, it is important to consider the time of incorporation of trade agreements by State Members. That observation is necessary because, in the case of GMC Resolution 49/2019 there were a difference of half a year to that rule come into force, what concurred with the COVID-19 outbreak.

As previously described, the former GMC Resolution 08/2008 posed more limitations for the adoption of tariff reductions due to shortage crisis, and the slowness to incorporate the rule made it impossible for MERCOSUR's members to even speculate to use GMC Resolution 49/2019 provisions.

In times of normality the delay on incorporating international rules may not cause serious losses. On the contrary, when the world is facing a crisis such the one of COVID-19, characterized by a massive restraint in trade flows, especially those used on health treatments, the delay at incorporating these kind of resolutions may pose harms to economies and to the regular trade flow between countries, especially considering the hypothesis that underlies the resolution, which is the scarcity of products.

It is important to mention that the GMC Resolution 49/2019's text settled a 60 day deadline to MERCOSUR's members incorporate this international rule, what was disregarded by all members.

Second, it is worthy also noticing the general hypothesis capable of permitting MERCOSUR's State Members to take advantage of the GMC Resolution 49/2019 terms. In general the rule demands the finding of a concrete shortage to support the adoption of measures described by the Resolution.

Nonetheless, we are of the opinion that it would be more adequate to also establish a provision making it possible for countries to anticipate to a probable shortage. Although the resolution allows countries to adopt measures without consent of other members, such adoption demands the occurrence of the shortage crisis.

So, it would be interesting if GMC Resolution 49/2019 brought a provision permitting State Members to claim the right to adopt an anticipated measure, even before the emergence of a shortage outbreak, what surely would be an incentive for members to take measures under the scope of this Resolution, which is, as said before, more in line with the aims of the regional trade agreements' rules.

That is to say, trade agreements are formulated taking into account the desire of its members to regulate the relations between them, making the provisions the more predictable as possible. Of course there are situations that demand a more flexible approach, and that is the reason why every RTA bring in its texts the possibility to adopt exceptional measures, usually without demanding approval of its member states.

Regardless of that, those are situations deemed as exceptional, normally with no provision to regulate a particular issue. The case of the current COVID crisis is different, since there are some rules that might be considered firts by State Members in order to fight the pandemic.

Of course we do not envisage the need to always adopt such rules, but should MERCOSUR's members at least resort to its provisions, showing some deference to what was previously established by the same countries that approved the rule and, moreover, to the rules that govern the regional bloc.

Furthermore, it is important to call attention to article 17 of the GMC Resolution 49/2019 (Final Dispositions), that statute a 60 days deadline for the incorporation of the rule. It states the following:

Art. 17 - The term for incorporation into the legal system of the beneficiary State Party established in the Guideline that may be adopted under the protection of this mechanism may not exceed sixty (60) days from the date of its approval¹².

Even though the fact that MERCOSUR members did not incorporate the rule at the time accorded, and the existence of some controversy about the applicability of such law without formal incorporation by the doctrine, it is true that the delay generates juridical insecurity inside the regional trade bloc.

In addition, although the GMC Resolution 49/2019 has the merit to apparently authorize a broad scope for measures justifications, based on the general clause "shortage", at least in the case of Brazil it has not demonstrated its importance. The Brazilian Foreign Trade Chamber, a body responsible for analysing and approving claims for tariff reductions, has a list of only seven medical/health products approved so far¹³. Moreover, all the approvals were made under the GMC Resolution 08/2008, due the fact that at the time of solicitations the new rule were not yet in force.

¹²MERCOSUR. Resolutions from the Common Market Group. Availableon: <https://www.mercosur.int/pt-br/documentos-e-normativa/normativa/>.

¹³ Câmara de Comércio Exterior do Brasil. Resolução GMC 49/2019 (Casos de desabastecimento). Availableon: <http://www.camex.gov.br/tarifa-externa-comum-tec/alteracoes-tarifarias/98-assuntos/24-resolucao-gmc-n-49-19-casos-de-desabastecimento>.

Because of this finding, it is worth asking what would be the benefit of such a resolution in the context of pandemics. Would it be useful only on those cases that require shortages? What about the cases that the country does not face a lack of products to deal with a crisis, but need to increase the quantity of some product to face a health crisis, would that not be important to be addressed by a rule of that nature?

As an alternative to those limitations posed by GMC Resolution 49/2019, Brazil is using the exception provision from the Montevideo Treaty to address the COVID crisis. Under the scope of that treaty, Brazil has issued, and updated, a so-called “Lista COVID”, in which figures to date around 548 medical/health products¹⁴.

Notice must be made to the fact that the justification for resorting to article 50(d) of the Montevideo Treaty is vague, especially because it does not require the occurrence of a concrete problem to be alleged, being enough that the claimant only argues vaguely that there is an ongoing health crisis.

As said before, in our understanding the choice to resort to the article 50(d) of the Montevideo Treaty is not the best way to address this issue in the context of a regional trade agreement. This kind of decision lacks the scrutiny of other trade members, what is the opposite of what is expected of trading partners, that is, to avoid taking unilateral measures that may pose harm to other economies.

This situation may be attributed to the easiness of eliminating tariffs without the previous consent of other members. It constitutes then a kind of “fast track” for tariff elimination, even though in opposition to a more formal procedure established by shortage resolutions.

Given that, it is important to improve some points regarding GMC Resolution 49/2019 in order to make it more appealing to MERCOSUR’s members and, even more important, to really be useful and capable of promptly addressing shortage outbreaks, what includes pandemics crisis.

5. Conclusion

The delay at incorporating the GMC Resolution 49/2019 makes it difficult to draw concrete conclusions about its efficacy, at least to this moment. However, the analysis of the application of the former Resolution and that of the Montevideo Treaty combined with a legal analysis of the new Resolution allow us to draw some conclusions and, furthermore, present some recommendations for the improvement of regional trade rules to properly fight pandemics like the one of COVID-19.

In general, the text of the GMC Resolution 49/2019 is a well drafted one and has the intention to allow MERCOSUR’s Member States to overcome shortage outbreaks. Despite that, practice has revealed the temptation of member states to resort to more direct and broad texts to face health crisis, as it happens with the application of the Montevideo Treaty exceptions.

¹⁴ Câmara de Comércio Exterior do Brasil. Resolução GMC 49/2019 (Casos de desabastecimento). Available on: <http://www.camex.gov.br/tarifa-externa-comum-tec/listacovid>.

In order to turn the GMC Resolution 49/2019 more appealing to MERCOSUR's members, we suggest that its text be reformulated to consider the possibility of adoption of temporary measures in the case a country foresees the high probability of occurrence of an imminent shortage outbreak, which is not yet occurring.

Moreover, we reinforce the importance of a quick incorporation of regional trade agreements' texts, especially for the consolidation of the rule recently approved by member states. The slowness to incorporate rules like the one of GMC Resolution 49/2019 may signal a lack of compromise with what was approved and, especially in the case of this health crisis, may turn the rule even more unappealing to application.

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