

# GLOBALIZATION, REGULATION AND CONSUMER LAW

*Ronaldo Porto Macedo Júnior<sup>1</sup>*

## 1. Globalization: beyond common-place

Nowadays, not only the word globalization has become common-place but this very observation has turned trivial in the academy and the media. These facts do not exempt us from the duty of defining the concept when we speak about globalization, regulation and consumer law. For the purposes of this paper one might define globalization in a provisory and preliminary manner as a process of an economic and political nature characterized by the following features: a) the expansion of international commerce and development of a global market based on a post-fordist (or post-industrial) production structure; b) the increasing homogeneity of cultural standards and standards of consumption; c) the weakening of the idea of Nation State for the benefit of economic agents of the new global market; d) development of commercial blocs.

These features should be understood with caution. As José Luiz Fiori points out, “the process of globalization is all but global, insofar as it is highly selective, dualism-conducive, and dependent of Nation States' political strategies that remain in full force”.<sup>2</sup> Globalization is, in the end, a contradictory and selective process, that gives each country a different perspective. In this sense, it is a mistake to believe that globalization is the exclusive result of market forces, thus neglecting the extremely relevant role played by the State to incentivize and regulate production and the consumer market itself. For this very reason, the belief that globalization promotes a peaceful and inevitable decrease in the sovereignty of the States is highly questionable. Finally, it is equally wrong to believe that globalization is a universal phenomenon, inclusive and homogenizing, and ignore the strong economic dualism and socio-economic exclusion to which it is related.

Two concepts have often been associated with globalization. The first one is, to use an expression by Lewis Carrol, a “portmanteau-word”, bearing multiple meanings and highly controversial: post-modernism. Without getting into another very complex debate, post-modernism may be defined as a new sensibility towards the world. It is in fact the creation of a new “way of life”, style of sociability, consumption standard and theoretical conception of the world.<sup>3</sup> Usually such a concept has been used to describe cultural and aesthetic differences of a globalized world. The second concept is “post-industrial society”, which has been employed to describe social and economic transformations of a globalized world.<sup>4</sup> There is however a large area of semantic intersection covered by the concepts of globalization, post-modernism and post-industrial society, whose definition would require an analytical effort that is beyond the scope of this paper.

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<sup>1</sup> Professor of Legal Philosophy at the Escola Paulista da Advocacia and School of Global Law (SP), Member of the board of CADE. Master in Philosophy and Doctor in Law by the University of Sao Paulo, Visiting Scholar at Harvard Law School (1994-1996).

<sup>2</sup> “O Papel do Estado na Globalização”, in *Os Moedeiros Falsos*, Vozes, Petrópolis, 1997, 2<sup>a</sup> ed., p. 236.

<sup>3</sup> Cf. David Harvey, *The Condition of Postmodernity. An Inquiry into the Origins of Cultural Change*, Cambridge, Massachusetts, Blackwell, 1990 e Fredric Jameson, *Postmodernism or the Cultural Logic of Late Capitalism*, Duke University Press, 1994.

<sup>4</sup> Following the works of Adorno and Horkheimer, authors like Habermas and Offe employ the concept of late capitalism to describe a similar phenomenon. For these conceptual issues, see Ash Amin, “Post-Fordism: Models, Fantasies and Phantoms of Transition”, in *Post-Fordism. A Reader*, edited by Ash Amin, Oxford, UK, Blackwell Publishers, 1994.

Globalization, thus understood, is not an unavoidable stage of a historical process, but rather a new phase of world capitalism, marked by the transformation of the pre-existing institutional (economic and political) arrangements, habits, culture and theoretical conceptions of the world. The initial definition was in fact tentative, and should be used only as a starting point for the proceeding reflection.

Important themes reveal the impact of globalization on regulation and consumer law. They are: a) changes in the production process and consumption market; b) transformation from a consumer goods society to a consumer service society; c) change in the contractual consumer practices and the growth of relational contracts; d) challenges to the fight against abusive practices created in a society with a dual economic structure; e) effects of post-modernity in legal culture and the crisis of the dominant legal paradigm; f) the development of regional markets and the risks of standardization; g) the new importance of regulatory agencies and the emerging challenges from the legal (the extent to which their legal design coincides with the tradition of Brazilian administrative law<sup>5</sup>), and political-institutional perspectives (how to associate flexibility, autonomy, and independence with democratic control and agencies' accountability; furthermore, how to ensure their efficiency and face the risks of capture). These are the themes that I will address in this paper.

## **2. Changes in the Productive Structure and in the Market**

The globalization affects consumer law and regulation in many ways. First, it reinforces and is stimulated by a powerful movement of productive restructuring in modern capitalism, thus having a direct impact in consumer society.

As of the end of the XIX century, capitalist industrial production has acquired new characteristics, especially in economically emerging countries of the period like the United States. The then dominant form of production, the so-called manufacture or craftwork production was replaced by mass production (or fordism). Other dynamic capitalist economies of the period - then fragmented in local markets - developed national markets following the example of the United States. The process of integration of industrial production into the national markets occurred slowly and was accompanied by the growth in offers of post office services, railroads, and other channels of communication, without which the integration would have been impossible.<sup>6</sup>

In that period, successful producers acquired advantages in the market by their ability to respond in a prompt and flexible way to signs given by the competitive market. In the face of the first threats of competition with regard to price, quality, demand and delivery, the producers best adapted to the new form of production sought to become able to readjust and reformulate their productive processes in order to reach or surpass the demands and variations of the market. Such ability of prompt reformulation relied on an industrial strategy based on the use of a type of machinery able to handle multiple and diversified processes in an industrial plant that allowed the production of small quantities of merchandise.

The manufacturing production displayed, with regard to the organizational forms of production that preceded it, the following general characteristics: a) low rates of production and productivity; b) big inventiveness; c) high costs with direct labor and d) production of

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<sup>5</sup> Jerry Mashaw's writings are particularly relevant to this issue, see e.g. *Conflict and Compromise among models of Administrative Justice*, 1981 Duke Law Journal. Thus far there is no analysis of the novelties introduced by administrative adjudication in the Brazilian Legal System. Nonetheless, these questions have been dealt with in courts, as the recent decisions by CADE illustrate. See e.g., Pedido de Reconsideração na Impugnação ao Auto de Infração, n.º: 0080/2000.

<sup>6</sup> Here I follow Michael Piore and Charles Sabel, *The Second Industrial Divide Possibilities for Prosperity*, NY, Basic Books, 1984 and Alfred D. Chandler, *The Visible Hand. The Managerial Revolution in American Business*, Cambridge, Massachusetts, Harvard University, 1977.

expensive and low quality goods. On the other hand, it offered to the market a wide variety of swiftly specialized products, with a reduced time of production and low investment costs.<sup>7</sup>

At the beginning of the XX century the development of national markets and the introduction of new technologies to the production process provided other opportunities to the market, causing the incorporation of a new industrial strategy. The companies committed to mass production came to dominate the market little by little due to their ability to offer large quantities of standardized low-cost goods to the national markets. That was made possible by the introduction of lines of production and the implementation of new forms of production management. At the same time, those companies also started to dominate emerging markets, whose economies of scale discouraged entry of new competitors. The mass production required specific machinery and a fixed plan of production.

The mass producers had to maintain the lines of production operating a full capacity in order to ensure the return of their investments. By virtue of the demand for big startup investment, the production of large volumes could not undergo interruptions or sudden reductions without causing large losses for the capitalist entrepreneur. The mass production required a mass consumer market to stabilize it. Thus, long-term industrial planning sought to foresee and create techniques to stabilize the markets of supplies and goods in levels that would ensure the total use of the line of production implemented.

In sum, one can affirm that mass production made it possible to reach higher levels of production, productivity and industrial quality, involving less labor, but requiring instead larger long-term investments, which would entail more planning, stability and long term contractual relations. Since then, one of the basic tasks of planning has been to ensure the optimum level of adjustment between inputs, productive capacity and consumption of goods by the market.

The most evident effect of this new form of production for the consumer market was the offer of standardized products, mass produced and sold by means of contracts of adhesion. According to David Harvey, “post-war fordism should be seen less as a mere system of mass production and more as a complete lifestyle. Mass production meant product as well as mass consumption standardization; and this meant a whole new aesthetic and culture mercantilization.”<sup>8</sup>

Since the mid 70's, the internationalization of product markets and their saturation, the introduction of new technologies of production and information, the new techniques of management and the changes in the demand for consumption created the opportunity for a new industrial strategy ("flexible specialization") and dynamic of contractual relations. We are closer to the turning point towards what we today call globalization.

The flexible specialization strategy (or post-fordism) seeks essentially to obtain advantages in the market, offering a product with unique technology, unique quality or supported by a unique service. The offer of a unique good allows the creation of a niche, which in turn permits the maintenance of the high level of profitability and commercial stability. This, however, demands the constant change of the product, the combination of innovation with flexible forms of production.

The short-term flexibility is obtained by the strategy of using machinery in group working plants that produce medium quantities of specialized products. The machinery employed permits multiple uses in different tasks, which allows a swift shift from one product to another, according to signs of market demands. The organization of machines by working groups, which means, groups of people that perform the production tasks, and not by

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<sup>7</sup>. A. Chandler, *The Visible Hand*, ob. cit., pp. 13-75.

<sup>8</sup>. David Harvey, cit., p. 135. [transl. note: all quotes from this book have been translated directly from the Portuguese and may not match its original wording in English]

function, allows the diversification of production for different products and different clients. Each part of this "productive group" operates as an autonomous unit capable of offering unique products to special clients.

In general, one can say that the flexible specialization strategy seeks to keep the full use of the productive capacity, and at the same time to quickly react (through the innovation of the product) to constant changes in the market and production plan. Both characteristics are obtained through long-term planning which is, however, reviewed daily. Thus, on one hand, the production is planned with a view to its maintenance for large periods, thus assuming continuity of the exchange relations. An example of this type of strategy can be found in the association of companies in productive networks for the production of goods in the textile, technology information or automobile industry. Such a strategy of production will demand increasing efforts of economic cooperation and solidarity of strategic interests.<sup>9</sup> On the other hand, the long-term strategic planning is constantly reviewed and rectified, in order to accompany the changes imposed by the rapid dynamic of the market. The use of non-rigid production plants and qualified labor force, which can easily be relocated and is able to perform different tasks after a quick retraining, as well as productive machinery of diversified use, allows the continuing and fast review of production. This is also made possible by new information technologies, like fast means of communication and computing. Many examples of this type of strategy of flexible specialization can be found in companies that currently control the industrial markets of computing, automobile and pharmaceutical industry.

The flexible specialization, on one side, presents higher costs than manufacture, for it involves automation, high level of technological development and information. On the other side though, and in contrast with the mass production, it allows the production of medium quantities of a variety of non-standardized products, singled out according to the market and consumers.

This new form of structuring the economy, stimulated by the noticeable expansion of global markets, will also affect the habits and practices of consumption. The mass market will give place to a market devoted to the unique, the distinguished and the singular. The market will be characterized by the coexistence of products of mass consumption (fordism) and more unique products and services, addressed to sophisticated consumption niches (post-fordism or flexible specialization).

According to David Harvey, "the flexible (or post-fordist) accumulation was accompanied, on the consumer side, by a much greater attention to the fast changes of fashion and by the mobilization of every artifice to induce need and cultural transformation it involves. The relatively static aesthetics of fordist modernism gave way to the instability and short-lived qualities of post-modern aesthetics that celebrate difference, the ephemeral, the fashionable and the mercantilization of cultural forms".<sup>10</sup>

### **3. The services society and the consumer**

One of the most important consequences of these transformations in the consumption market is the replacement of the consumer goods society by a "services society". Ever more

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<sup>9</sup> There is a large economic and sociological literature about comparative forms of organization based on goodwill among companies and employees. Empirical data may be obtained in Ronald Dore, "Goodwill and the Spirit of Market Capitalism", in Mark Granovetter and Richard Swedberg (eds.), *The Sociology of Economic Life*, cit. and *Flexible Rigidities: Industrial Policy and Structural Adjustment in the Japanese Economy 1970-1980*, Stanford, Stanford University, 1986; Charles Sabel, "Studied Trust: Building New Forms of Co-operation in a Volatile Economy", in *Industrial Districts and Local Economic Regeneration*, Geneva, International Institute for Labour Studies, 1992; Oliver E. Williamson, *Markets and Hierarchies, Analysis and Antitrust Implications: A Study in the Economics of Internal Organization*, New York, Free Press, 1975; Edward H. Lorenz, "Neither Friends nor Strangers: Informal Networks of Subcontracting in French Industry", in Diego Gambetta (editor), *Trust. Making and Breaking Cooperative Relations*, Basil Blackwell, Great Britain, 1988.

<sup>10</sup> David Harvey, cit., p. 156.

the consumer market is a market of services. According to the same author: "These changes on the side of the consumer, linked to changes in production, collection of information and finance, seem to highlight a remarkable proportional growth in services since the 70's".<sup>11</sup>

The implications of the "services society" for consumer law and regulation are manifold. The consumption contract acquires an ever more relational dimension.<sup>12</sup> Consumer service relations are more relational transactions as concerns the purchase and sale of products. This phenomenon, in turn, generates two clear changes in the contractual practice of a globalized world. On one hand, it affects the principles of existing contract law. Neoclassical microeconomic assumptions, deeply rooted in classic contractual doctrine, begin to be strongly opposed by the new economic order. On the other hand, traditional mechanisms of consumers' protection, through either individual or collective litigation, are proven to be insufficient to prevent abuses. The relational nature of this type of legal relation presents new and hard challenges for the traditional consumer law.

For this reason, there is an increasing need for regulatory and monitoring administrative agencies, in particular to control abuses committed in areas of clearly relational consumer services such as health care, insurance, bank services, social security or control of quality of products that involve high technology, such as pharmaceutical products, cosmetics, electronics, etc. In this sense, the consumer law in a globalized and post-industrial world indicates the increasing need and relevance of agencies such as CADE (Administrative Council of Economic Defense<sup>13</sup>), ANATEL (National Telecommunications Agency<sup>14</sup>), ANEEL (National Electric Energy Agency<sup>15</sup>), SUSEP (Private Insurance Superintendence), ANVISA (National Sanitary Vigilance Agency<sup>16</sup>), ANS (National Health Agency<sup>17</sup>), ANA (National Waters Agency)<sup>18</sup>, ANP (National Oil Agency<sup>19</sup>) and others. The future of the consumer law, in this perspective, moves towards the strengthening of these regulatory agencies and of the Managerial State. This tendency apparently conflicts with the more simplistic and elated view of globalization mentioned in the beginning of this paper and, to a

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<sup>11</sup> David Harvey, cit., p. 156. According to the OECD Labour Force Studies, the number of workers employed in the services sector (compared to those in agriculture and industry) raised from 58.1% in 1960 to 62.6% in 1973 and 66.4% in 1981. In the same period, these data in France were 39.8%, 48.9% and 56.2%, in Japan 41.3%, 49.3% and 54.7% and the average in industrialized countries changed from 43.0% to 51.5% and 56.3%.

<sup>12</sup> The main difference between autonomous or discontinuous contracts (e.g. sale and purchase of non-durable consumer goods) and relational or long-term contracts can be summarized in the following way. First, it is impossible to fully determine relational contracts with regard to their price, quantity and delivery, given its constant changeability. Second, given constant changes in product and design, it is impossible to foresee every future contingency and the terms of adjustment of relational contracts. Right now, the very feasibility of defining an objective standard for readjustment, as defined by neoclassical theory, proves deficient given the increased contingency and variation of contractual relations. The contract thus acquires a procedural nature (beyond what neoclassical theory could admit or incorporate), and displays features of a reflexive game that produces *in fieri* its reasonableness and fairness. Third, relational contracts replace adjustment clauses by clauses determining institutional procedures in which terms of exchange and adjustment are determined during the performance of the contract. Thus relational contracts do more than regulate exchange of merchandise and its adjustment. They establish a procedure for interorganizational cooperation in the production and management structure. The natural balance in consumer relations is no longer regulated upon the assumption of wealth maximizing individualist contractors but rather upon principles of cooperation and solidarity. I have discussed these issues in detail in *Contratos Relacionais e Defesa do Consumidor*, Max Limonad, São Paulo, 1998.

<sup>13</sup> - The Brazilian Antitrust Agency. It belongs to the Brazilian System for Defense of the Competition, which also comprises the Secretariat for Economic Monitoring (SEAE), related to the Ministry of Finance and the Secretariat of Economic Law (SDE), related to the Ministry of Justice. Even though CADE has more than 40 years, its new functions, powers and importance were established in the New Antitrust Statute (Lei no. 8.884/94).

<sup>14</sup> Statute n. 9.295, 19th July, 1996.

<sup>15</sup> Statute n. 9.427, 26th December, 1996.

<sup>16</sup> Statute 9.782, 26th January, 1999.

<sup>17</sup> Statute 9.961, 28th January, 2000.

<sup>18</sup> Statute 9.984, 17th July, 2000.

<sup>19</sup> Statute 9.478, 6th August, 1997.

large extent, consolidated in the set of economic policy receipts known as the Washington Consensus.<sup>20</sup>

It is still not clear though what the impact of these new agencies in the legal world will be, given their countless innovations with regard to: a)- the definition of rulemaking function and the liberal legal tradition still attached to a rigid view of the separation of powers;<sup>21</sup> b)- the limits of judicial control of the regulatory function; c)- the definition of the very adjudicatory-administrative nature of some agencies and CADE;<sup>22</sup> d)- the form of articulation and coordination of regulatory agencies<sup>23</sup> (a theme called in the USA “primary jurisdictions”) e)- the existence of overlapping competence in areas such as consumer defense as well as competition between new administrative agents and the judicial power f)- the lack of a clear definition of the transparency duties and *accountability* of these agencies.<sup>24</sup>

#### 4. Legal post-modernism, relational contracts and economic dualism

The industrial and social changes created by globalization modify the epistemological grounds of contemporary law and influence the organization of legal principles.<sup>25</sup> Those changes have been frequently treated under the label of legal post-modernism.<sup>26</sup> In general, legal post-modernism has been characterized by a skeptical aptitude towards attempts to create a universal and complete theory of the legal phenomenon. In this sense, it represents a rejection of legal theories that believe in the possibility of systematization of legal knowledge in a coherent manner by means of verifiable logical propositions about the nature of the law and techniques of legal decision-making. A paradigmatic example of this modern conception of law (against which the post-modernism rebels) is the legal positivism of Kelsen. Legal post-modernism, in its multiple formulations, offers topical alternatives and pluralist legal discourses applicable to different social contexts. It is beyond the scope of this paper to discuss the deepest meaning of these changes in the epistemological approach of the law. We must however state that these changes in the manner of conceiving legal knowledge will affect directly the consumer law, one of the most dynamic poles of the paradigmatic crisis experienced by the modern law.<sup>27</sup>

In the field of contracts, the main symptom of these changes is the relational contracts. These changes will not rise immediately in the courts or in the behavior of legal professionals. Thus far there is no serious challenge to the hegemony of the orthodoxy of the neoclassic contractual law, especially in Brazil. It is worth noting, nonetheless, that maintenance of the neoclassic contractual paradigm in the courts and also in the legal

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<sup>20</sup> - The theoretical assumptions of the Washington Consensus can be thus summarized: a) new fiscal policy ; b) prioritization of public expenditures; c) tax reform; d) financial liberalization; e) strengthening of the exchange system; f) commercial liberalization; g) incentive to direct foreign investment; h) privatization; i) deregulation; j) new regime of intellectual property.

<sup>21</sup> - This has started to be discussed in Brazil. See, in particular, José Eduardo Faria (org.), *Regulação, Direito e Democracia*, Editora Perseu Abramo, São Paulo, 2002; *Direito Administrativo Econômico*, Carlos Ari Sundfeld (org), Malheiros, São Paulo, 2000 and Calixto Salomão Filho, *Regulação da Atividade econômica – princípios e fundamentos*. São Paulo. Malheiros Editores, 2001.

<sup>22</sup> - Cf. note 5 above.

<sup>23</sup> - This topic was at the core of decision in the Merger Review Process (Ato de Concentração) nº 08012.006762/2000-09, concerning the competence to analyze compliance to competition laws in the financial services industry. See also Jean Paul Veiga da Rocha, *Defesa da Concorrência no Sistema Financeiro: um modelo para o Brasil*, Revista da Faculdade de Direito da USP, São Paulo, 2002.

<sup>24</sup> Cf. Paulo Mattos Todescan, *Agências Reguladoras e Democracia: Participação Pública e Legitimidade*, mimeo, 2002.

<sup>25</sup> Cf. José Eduardo Faria, *O Direito na Economia Globalizada*, Malheiros, São Paulo, 1999.

<sup>26</sup> Cf. Carlos Alberto Ghersi, *La Posmodernidad Jurídica*, Ediciones Gowa, Buenos Aires, 1995 e Gary Minda, *Postmodern Legal Movements. Law and Jurisprudence at Century's End*, New York University Press, 1995.

<sup>27</sup> Cf. *Contratos Relacionais e Defesa do Consumidor*, ob. cit., especially chapters 1 and 2. Regarding this same topic, see also François Ewald, *Foucault. A Norma e o Direito*, Lisboa, Vega, 1993 and *L'État Providence*, Paris, Grasset, 1986.

doctrine does not mean that there are no important, albeit punctual, debates concerning its internal logic. Such debates are indeed eroding the foundations of such theory little by little. In order to understand this phenomenon we need to keep in mind that the paradigm shift is accomplished from transformations that occur inside the very dominant paradigm.

The mutability of production that entails continued transactions over small units of goods changes in accordance to the pace of the market. The market of inputs and consumer products become more and more competitive and internationalized (globalized). The maintenance of productive niches of exchange that permits companies to reach certain stability starts to demand an ongoing, progressive and intense innovation of this production as well as aggressive strategies of advertising in the consumer market. It is not surprising thus that advertisement became one of the most developed areas in recent years. Unfortunately, in Brazil, this growth has not been matched by the protection of consumers, who are often found wronged by abusive or misleading advertisement practices.

Since innovation is the basis of competition, there needs to be continuing interactions between sellers and buyers, suppliers and accountants, engineers and engineering operators, with a view to the product and productive innovations. These changes affect, in a generalized manner, almost all types of modern contractual relations, fostering long-term relations based on cooperation. For this reason Seminars of Corporate and Advertising Management of consumer markets focus on the "fidelity of the consumer", especially when the target is the more sophisticated consumer, with more acquisitive power.

It is important to note that the forms of production sketched above are not exclusive of each other, neither in time nor in space. For this reason, even during the high times of mass production, the manufacture did not disappear completely. Also during the period of flexible specialization, mass production and manufacture survive and are responsible for a substantial part of the productive activity. What changes, however, is the strategic position of the dominant productive form, which starts to direct and coordinate the exchanges and the macroeconomic regulation. This means that old challenges to consumer law remain. We face, however, new challenges that request innovative solutions.

In addition, the economic dualism<sup>28</sup> allows the coexistence, in a single consumer market, of highly sophisticated consumers, "special clients" of special products and services, and mass consumers, constantly more unprotected and more vulnerable than their "global market colleagues". This coexistence has produced discriminatory differentiation in the consumption markets in favor of consumers with more economic social or political power. When we analyze what occurs in the market of private pensions or bank services, or even health care services, we can notice that the standard of respect for consumers' rights varies greatly according to the type of consumer to whom the service is provided. In addition, discrimination is made not only upon a contractual basis, but frequently through commercial practices more severe or tolerant. In other words, in many cases the difference in treatment is informed more by differentiated performance of the contract than by different provisions of the consumer contracts. After all, the language of the contract often does not display considerable differences.

One of the most important challenges for consumer law today is to prevent such abusive and discriminatory practices – practices themselves reinforced by a dual society and economy, which the globalization process tends to aggravate.

In the field of economic administrative law, in particular as concerns regulatory agencies, the conflict of paradigms takes place with the introduction of a new model of administrative law, more flexible, dynamic and pragmatic, that erodes some of the sacrosanct principles of the classical administrative law, traditionally concerned with police power or

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<sup>28</sup>. Cf. Michael Piore and Suzanne Berger, *Dualism and Discontinuity in Industrial Societies*, Cambridge, Cambridge University, 1980.

direct intervention in the private sphere. To a large extent, the new regulation means the shift from a paradigm of direct intervention and direct public administration, to another with more independent and flexible entities that have rulemaking and adjudicatory power.

## 5. Regional markets (Mercosur)

From the standpoint of international geopolitics, post-fordism caused the transnationalization of markets and the creation of a geopolitical system predominantly controlled by the United States and, to a lesser degree, by industrialized countries and the Soviet Republic. As a consequence and reaction to this process, new economic blocs developed in all continents. The growth of a global market and the development of economic blocs demand new strategies of commerce and consumers protection. For the Brazilians, one clear example is the Mercosur, which has encouraged the entry of several products in the Brazilian market, often below standards of safety and quality required by the Brazilian Statutes. Such phenomenon has led to the standardization of the consumer law, through protocols and treaties.

It is not difficult to foresee that today's trend is parallel to the process occurred in the European Community, in which directives were implemented aiming at the standardization of the consumer law of the member countries<sup>29</sup>.

It seems that here and there the major challenges are the same. How can we standardize the protection of the consumer's rights without weakening the existing guarantees to the consumer? In short, how can we avoid a decrease in the existing standards of consumer protection as a result of this standardization process?<sup>30</sup> This is another challenge that the globalization brings to the consumer protection, and its outcome is still uncertain. The geopolitics and dynamics of regional economy of the Mercosur, as well as the ability and intentions of the negotiators, is what will shape this next, new and important, stage of consumer law in a world that is ever more globalized.

In the field of regulation, the challenges are similar. How to create regulatory entities that act in a coordinated and coherent manner? How is it possible to create institutional identities (design, profile and competences) and coherent methodologies, criteria and parameters (following the example of European Union directives)?

This challenge becomes even more complex and urgent due to the development of ALCA. The complexity and reach of the topic, however, is beyond the scope of this paper.

## 6. Conclusion

We may conclude that globalization raises new and important challenges for regulation and consumer law. These challenges are related to the deep changes in the dominant productive structure, the consumption markets, the new processes of social and economic exclusion – brought about by the dualism of the modern capitalism and its impacts on the contemporary legal knowledge. The major challenge is not to accept globalization as a homogeneous process, imposed by a necessary historical logic, but as a moment of the modern capitalism, that offers new perspectives for alternative institutional arrangements. We

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<sup>29</sup> I believe such a tendency can be perceived in spite of the difficulties and delays in the Mercosur schedule, particularly in recent years.

<sup>30</sup> For the European debate about risks of uniformization of legal protection of the consumer, see Norbert Reich and Hans Micklitz, *Consumer Legislation in the E.C. Countries: A Comparative Analysis*, New York, Van Nostrand Reinhold Co., 1980; Roelf H. Stutterheim, "Consumer Law in the Year 1992 in Europe and the Netherlands: Law for the Consumer or Law for the Market?", in *Perspectives of Critical Contract Law*, Thomas Wilhelmsson (org.), England, Dartmouth Publishing Co., 1993.; Thomas Wilhelmsson, "Control of Unfair Contract Terms and Social Values: EC and Nordic Approaches", in *Twelve Essays on Consumer Law and Policy*, Helsinki, Publications of the Department of Private Law of the University of Helsinki, 1996, pp. 244-266. For the Brazilian debate, see *A Proteção do Consumidor no Brasil e no Mercosul*, Claudia Lima Marques (org.), Livraria do Advogado, Porto Alegre, RS, 1994.

have to trust the institutional and legal imagination of Brazilian lawyers to design efficient legal instruments for the protection of consumers against old and new threats. As much as the consumer service society creates new problems, it also demands innovative solutions. The existence of strong regulatory agencies, the standardization of the law in Mercosur (and eventually in ALCA) and a new understanding of the nature of modern contracting are part of the challenges of new regulation and consumer protection. Within the repertoire of alternatives available today, it is worth thinking which will best adapt to the Brazilian reality, within a global context. We must refuse the doubtful assumption that there is a single way to think about these transformations.