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International Law and Sources of Law in MERCOSUR: An Analysis of a 20-Year Relationship

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Abstract
The Treaty of Asunción in 1991 gave rise to the Common Market of the Southern Cone (MERCOSUR) as a promising economic integration process. Over the past 20 years, as the legal personality of MERCOSUR was reinforced, there were also important changes in its legal system. International law and international economic law played a fundamental role in the development of MERCOSUR law. The main aim of this article is to provide some insights into the current stage of MERCOSUR law, taking into account the evolution of the legal system, the dispute settlement mechanism, and the relationship with international law. In order to do so, the author examines various turning points in the case law of the arbitration tribunals constituted so far and the Permanent Review Tribunal established by the Olivos Protocol.

Key words
international dispute settlement; international economic law; MERCOSUR law; regional integration; sources of international law

1. Introduction

The Treaty of Asunción (hereinafter TA) in 1991 gave rise to the Common Market of the Southern Cone (MERCOSUR)[1] as a promising economic integration process in Latin America, including the basis for the establishment of a new legislative order.[2] The initial legal architecture was adapted to the dynamic of a pragmatic and inter-governmental integration process. As the legal personality of MERCOSUR was reinforced, there were also important changes in the law. International law and international economic law played a fundamental role in the development of MERCOSUR law as a new integration process.

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1 The Common Market of the Southern Cone (Mercado Comúm del Sur in Spanish, Mercado Comun do Sul in Portuguese) was created by the Treaty of Asunción signed by Argentina, Brazil, Paraguay, and Uruguay on 26 March 1991 (hereafter, 'MERCOSUR').

2 See J. A. Vervaele, 'Mercosur and Regional Integration in South America', (2005) 54 ICLQ 387.

Since then, the improvements in MERCOSUR law have been (and still are) closely linked to the evolution of economic integration. The development of this legal system depended to some extent upon the deepening of the integration and the achievement of the MERCOSUR common market.[3] Indeed, the evolution of MERCOSUR law shows the attempts of the member states to adjust it to each period of integration.

During the first phase, called the 'period of transition', which ran from the signature of the Treaty of Asunción (1991) until the entry into force of the Ouro Preto Protocol (1994), the sources of law in MERCOSUR were defined by the Treaty of Asunción. With the redefinition of the institutional setting operated by the Ouro Preto Protocol (OPP),[4] the MERCOSUR legal order was also modified. The OPP reformed not only the whole institutional set-up, but also the MERCOSUR legal system. Indeed, the Treaty of Asunción system has been ratified, developed, and improved by the OPP. The relaunching of the process in 2000 represented an incentive for the improvement of the MERCOSUR legal system.[5] This relaunching determined the introduction of the MERCOSUR Permanent Review Tribunal through the Olivos Protocol (OP) (adopted in 2002), and the dispute settlement system gained in certainty.

Over the past five years (2006–11), two important modifications with a clear impact on MERCOSUR law must be noted: the establishment of the MERCOSUR Parliament and Venezuela's request for accession to MERCOSUR as a member state (2006).[6] First, the MERCOSUR Parliament replaced the Joint Inter-Parliamentary Commission, bringing further modifications to the MERCOSUR legal system as seen below. Second, another recent modification to be acknowledged as relevant is the potential incorporation of Venezuela as a new member state, which implies the redefinition of the contours of the *acquis communautaire* of MERCOSUR.[7] In addition, the dispute settlement mechanism and the arbitration awards issued by the ad hoc arbitration tribunals (from 1999 up to the present)[8] and the Permanent Review Tribunal contributed to laying down the basis of MERCOSUR law.

In many respects, the current stage can be seen as crucial for the MERCOSUR legal system. The latest institutional changes and the addition of a new member state

3 At the beginning, MERCOSUR fulfilled member states' expectations about the establishment of a customs union. However, the establishment of a common market (the final aim of MERCOSUR) was delayed on several occasions, due to economic reasons and, in part, to the lack of commitment on the part of member states.

4 The Additional Protocol regarding institutional arrangements of MERCOSUR (Ouro Preto Protocol) was signed on 17 December 1994. The text of the Protocol is available in (1995) 34 ILM 1244. The Ouro Preto Protocol entered into force on 15 December 1995 (hereafter, 'OPP').

5 MERCOSUR/CMC/DEC. No. 23/00 – Relanzamiento del MERCOSUR – Incorporación de la normativa MERCOSUR al ordenamiento jurídico de los estados partes, available at www.mercosur.int/msweb/Normas/normas_web/Decisiones/ES/Dec_023_000_Relanzamiento_Incorp-Normativa_Acta%201_00.PDF.

6 Venezuela asked to become a full member state in 2006. However, its membership is still pending because the Paraguayan Congress has not yet ratified the accession framework agreement.

7 According to the accession framework agreement, Venezuela must gradually incorporate the norms already adopted within MERCOSUR, in the process of acquiring a 'full' membership.

8 During the period 1999–2005, there were ten ad hoc tribunals constituted under the Brasilia Protocol. The Permanent Review Tribunal was established in 2004.

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appear to suggest that a revision of the legislative procedure is required. The 20th anniversary of MERCOSUR offers a good opportunity to reflect on how MERCOSUR law has developed over the years in light of the relations between international law and the sources of MERCOSUR law.[9]

The main aim of this article is to provide some insights on the current stage of MERCOSUR law, taking into account the evolution of the legal system, the dispute settlement mechanism, and the relationship with international law. In order to do so, the author examines various turning points in the case law of the arbitration tribunals constituted so far and the Permanent Review Tribunal established by the OP. In the following section, the author provides a brief outlook on MERCOSUR sources of law. The third section is devoted to an analysis of the main features of the current dispute settlement mechanism and its impacts on MERCOSUR law. In the fourth section, the author examines the influence of international law on MERCOSUR law. Finally, the author's position and reflections on the evolution of the MERCOSUR legal system are summarized in the fifth section.

2. Sources of law in MERCOSUR: an overview

As in other international organizations, in MERCOSUR, a first distinction to be made is between primary and secondary law.[10] The various sources of law in MERCOSUR comprise the constitutive treaties and the norms integrating the secondary law.[11]

The institutional arrangements and main law-making process of MERCOSUR were established in the constitutive treaties (primary law).[12] As for MERCOSUR secondary law, from the outset, the Treaty of Asunción provided that the main bodies of this organization were endowed with legislative competencies to rule on various aspects of the achievement of the common market. Almost all binding MERCOSUR secondary norms must be transformed into national legislation before having legal effect. That is, most MERCOSUR norms integrating MERCOSUR secondary law must be internalized, with adequate implementing measures adopted by each member state.

2.1. MERCOSUR primary law

Like other integration processes, in MERCOSUR, the primary law consists of the founding treaties.[13] Article 41 OPP identifies the Treaty of Asunción, its protocols,

9 By MERCOSUR law, the author intends the legal system originating from the Treaty of Asunción, including primary and secondary law.

10 For a detailed analysis of this question, see M. B. Olmos Giupponi, 'Sources of Law in MERCOSUR', in M. Toscano Franca Filho, L. Lixinski, and M. B. Olmos Giupponi (eds.), *The Law of MERCOSUR* (2010), 57; see also the analysis of L. Olavo Baptista, 'MERCOSUR, Its Institutions and Juridical Structure' (1998), available at http://ctrc.sice.oas.org/geograph/south/mstit2_e.pdf; see also G. Gari, 'The MERCOSUR Legal System', in *The Liberalisation of Trade in Services in MERCOSUR* (2009), 43.

11 According to the definition provided by M. Benzig, under international law, 'a source of law must by definition be one that produces binding abstract and general rules': M. Benzing, 'International Organizations or Institutions: Secondary Law', *Max Planck Encyclopedia of Public International Law* (2009), available at www.mpepil.com.

12 Namely the Treaty of Asunción and the various protocols adopted under its framework.

13 These are formally international treaties that must be ratified by member states to enter into force.

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and additional or supplementary instruments as primary sources of MERCOSUR law.[14]

Among the key instruments integrating the MERCOSUR primary law ('core MERCOSUR law'), one can include the:

- Treaty of Asunción and its five Annexes (1991);
- OPP (1994);
- Brasilia Protocol for the Settlement of Disputes (1991);[15]
- OP for the Settlement of Disputes (2002);[16]
- protocol establishing the MERCOSUR Parliament (2005);[17]
- other protocols.[18]

The domestic effects of MERCOSUR primary law depend on the approach to international law (dualist or monist) member states adopt. In MERCOSUR member states' constitutional systems, the internal hierarchy of norms and the solutions adopted are diverse. Whereas Argentina and Paraguay reformed their constitutions in order to bring them in line with MERCOSUR law, the hierarchy of MERCOSUR law is still arguable in other member states.[19] This leads to so-called 'constitutional asymmetries' regarding the internalization of MERCOSUR law, which makes it quite difficult to ensure a uniform degree of compliance.[20] Moreover, reports issued by the MERCOSUR Administrative Secretariat revealed that an important number of secondary norms were not internalized by member states and, in some cases, norms were modified before their internalization.[21]

In addition to these protocols, parallel agreements have been concluded with associate states.[22] These agreements are signed by MERCOSUR's acting as an

14 MERCOSUR primary law covers an array of issues such as commerce, culture, and education. Frequently, these treaties are called 'protocols'.

15 The Brasilia Protocol was replaced by the OP and is available at www.sice.oas.org/Trade/MRCSR/brasilia/pbrasilia_e.asp.

16 The OP is available at http://untreaty.un.org/unts/144078_158780/5/7/13152.pdf.

17 MERCOSUR/CMC/DEC. No. 23/05. Protocolo Constitutivo del Parlamento del Mercosur. The Protocol is available in Spanish at www.parlamentodelmercosur.org.

18 See, e.g., Protocol on Human Rights (2005), Framework Agreement on the Protection of the Environment (2001), and Protocol on Cultural Integration (1996).

19 On the relationship between MERCOSUR and internal legal orders, see P. Labandera Ipata, 'Aspectos jurídico-institucionales que operan como freno para la integración', (1998) 2 *Revista de Derecho Internacional y del MERCOSUR* 63; A. Perotti, *Habilitación constitucional para la integración comunitaria: estudio sobre los Estados del MERCOSUR* (2004); and J. C. Cassagne, 'El MERCOSUR y las relaciones con el derecho interno', (1995) C *La Ley* 875.

20 See C. Pena and R. Rozemberg, 'MERCOSUR: A Different Approach to Institutional Development', (2005), available at www.focal.ca/pdf/mercosur_Pena-Rozemberg_different%20approach%20institutional%20development_March%202005_FPP-05-06_e.pdf.

21 See Third Report of the MERCOSUR Secretariat on the compliance with MERCOSUR law. Tercer informe sobre la aplicación del derecho del MERCOSUR por los tribunales nacionales (2005), Secretaría del MERCOSUR-Fundación Konrad Adenauer, 2010.

22 MERCOSUR and Chile signed the 'Acuerdo de Complementación Económica MERCOSUR – Chile' on 25 June 1996 and MERCOSUR did the same with Bolivia by concluding the 'Acuerdo de Complementación Económica MERCOSUR – Bolivia' on 17 December 1996.

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international subject.[23] Commentators recognize these agreements as part of MERCOSUR law with limitations according to Article 41 II OPP being, therefore, under the same rules.[24]

2.2. MERCOSUR secondary law

Whereas MERCOSUR primary law consists of international treaties, MERCOSUR secondary law is produced by its main bodies. Like other international organizations, in MERCOSUR, the allocation of legislative competencies and the form that these acts may take are defined in the founding treaties.

According to the OPP, three bodies[25] are endowed with legislative powers: the Common Market Council (CCM);[26] the Common Market Group (CMG);[27] and the MERCOSUR Trade Commission (MTC).[28]

The creation and implementation of the MERCOSUR Parliament have introduced a significant change.[29] According to the Protocol establishing the parliament of MERCOSUR (2005), this body has advisory as well as normative functions.[30] The regulation of the MERCOSUR Parliament foresees the participation of this legislative body in the law-making process. The MERCOSUR Parliament may intervene in decisions, resolutions, and directives issued by the CMC, the CMG, or the MTC, respectively, in the event that they require involvement of national parliaments in the implementation of standards. In addition to these legislative functions, the parliament may also request an advisory opinion from the Permanent Review Tribunal.[31]

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23 The basis for the participation of the associated countries was established through the decision adopted by the CMC. According to the special status of these third states, they can participate in meetings in an ad hoc capacity.

24 See J. Kleinheisterkamp, 'Legal Certainty in the Mercosur: The Uniform Interpretation of Community Law', 2000 (Winter) *NAFTA Law and Business Review of the Americas* 1.

25 Apart from the three bodies mentioned, the institutional set-up of MERCOSUR is completed with the MERCOSUR Parliament, the Economic-Social Advisory Forum, the MERCOSUR Secretariat, the Permanent Review Tribunal, the MERCOSUR Committee of Permanent Representatives (MCPR), the MERCOSUR Center for the Promotion of Rule of Law (MCPRL – Centro MERCOSUR de Promoción de Estado de Derecho) created by Decision 24/04 of the Common Market Council and the Administrative-Labour Court (ALC – Tribunal Administrativo-Laboral) established by Res. 54/03 of the Common Market Group. In 2010 (MERCOSUR/CMC/DEC. N° 63/10), the High Representative of MERCOSUR was created as a new organ in the framework of the CMC.

26 The CMC (Consejo del Mercado Común) is the highest MERCOSUR body and is composed of foreign affairs and economy ministers of each of the member states.

27 The Common Market Group (Grupo Mercado Común) is a body with executive and technical functions and is composed of four representatives from each member state's foreign affairs and economy ministries and central bank.

28 The MERCOSUR Trade Commission (Comisión de Comercio del MERCOSUR) developed its functions in the implementation of trade policy instruments within the context of the custom union and is composed of four representatives from each member state.

29 M. B. Olmos Giupponi, 'Mercosur y ciudadanía, en América Latina', in Fundación AMELA (ed.), *América Latina hacia su Unidad – Modelos de integración y procesos integradores* (2008), 135. C. M. Díaz Barrado and M. B. Olmos Giupponi, 'El establecimiento del Parlamento del Mercosur: Reflexiones desde la experiencia europea', (2007) 6 *Breviario de Relaciones Internacionales* 1, available at www.cea.unc.edu.ar/boletin/n-anteriores/009/articulo1.pdf.

30 Art. 19 of the Protocol stipulates that the acts that the Parliament can adopt are opinions, statements, recommendations, reports, and provisions. In this list, it is necessary to distinguish between the acts adopted by the Parliament in the legislative process and the drafting of rules to be subsequently adopted by other bodies. The internal organization of the Parliament is regulated by the MERCOSUR/PM/SO/DISP07/2009. For a review of the functions of the MERCOSUR Parliament, see www.parlamentodelmercosur.org.

31 Protocol Establishing the Parliament of MERCOSUR, Art. 13.

Moreover, in an advisory role, the parliament will give advice, prepare reports, and adopt statements and recommendations.

At this stage, the MERCOSUR Parliament has only formal legislative powers. To develop them, it is necessary to modify the legislative procedure and guarantee co-ordination with other MERCOSUR bodies such as the CMC.[32] To date, the relationship in terms of legislative powers is not very transparent. The constitution of the high-level group on the relationship between the CMC and the parliament (Grupo de Alto Nivel sobre la Relación Institucional entre el Consejo del Mercado Común y el Parlamento del MERCOSUR-GANREL) is the first step towards a more detailed definition of the different competencies among MERCOSUR bodies.[33]

After considering the legislative competencies of different MERCOSUR bodies, it is worth analysing in detail the types of legal act of MERCOSUR. With regard to acts passed by these organs endowed with decision-making powers, we can distinguish between decisions, resolutions, and directives (Article 41 OPP):[34]

a. Through decisions, the Council outlines general policies for the integration process. These norms are connected to the development of a MERCOSUR policy on a specific issue. They are addressed to all member states, which may need to modify their own laws in order to comply with them. Taking into account the various issues addressed in the different decisions, these comprise a vast range of issues such as the creation of ministerial meetings, negotiations with the European Union or the adoption of other protocols. Decisions are particularly useful when the aim is harmonising national laws within a certain area or introducing legislative changes.[35]

b. Resolutions are adopted by the Common Market Group and are binding on all member states.[36] Resolutions cover an array of subject matter related to freedom of movement within the MERCOSUR area, such as commercial aspects and documents required for MERCOSUR citizens,[37] budgetary aspects and relations with third states.

c. Directives differ from decisions and resolutions in two important respects: they emanate from the MERCOSUR Trade Commission and regulate specific technical commercial issues.[38]

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32 In our comparison between the European Parliament and the 'brand new' MERCOSUR Parliament in 2006, we suggested increasing progressively its functions following the experience of the European Parliament: Díaz Barrado and Olmos Giupponi, *supra* note 29, at 5. On the evolution of the competence of the parliament in legislative procedures, see A. Rasmussen and M. Shackleton, 'The Scope for Action of European Parliament Negotiators in the Legislative Process: Lessons of the Past and for the Future', University of Copenhagen/European Parliament, paper prepared for the Ninth Biennial International Conference of the European Union Studies Association, Austin, Texas, 31 March–2 April 2005, available at http://aei.pitt.edu/2983/01/EUSA_Rasmussen_and_Shackleton1.txt.

33 This group was established through Decision MERCOSUR/CMC/DEC. No. 47/08, available at www.mercosur.int.

34 Agreements with third countries and international organizations must also be included in MERCOSUR secondary law.

35 See, e.g., MERCOSUR/CMC/DEC. No. 08/95: Protocolo de armonización de normas sobre propiedad intelectual en el MERCOSUR, en materia de marcas, indicaciones de procedencia y denominaciones de origen.

36 The different resolutions adopted by the Common Market Group are available at www.sice.oas.org/trade/mrcsrs/resolutions/indice.asp.

37 See, e.g., Resolución sobre los documentos de cada Estado Parte que habilitan en tránsito de personas en el MERCOSUR (Derogación de la Res. GMC No. 75/96).

38 See D. Perotti and D. Ventura, 'El proceso legislativo del MERCOSUR, Comisión Parlamentaria Conjunta del MERCOSUR' (edited by Fundación Konrad Adenauer) (2004), 63.

All these different acts integrating MERCOSUR secondary law must meet certain requirements in order to be applicable. First, each member state must adopt the necessary measures to internalize the norm and notify the secretariat. Following internalization by all member states, the secretariat communicates this circumstance to each member state. As a final step, the MERCOSUR norm in question comes into force at the same time for all member states 30 days after the date of the notification by the secretariat.[39] It must be underlined that there are two exceptions: first, when all member states agree that the norm in question is related to the organization or internal functioning; and, second, when there is a domestic norm that contains the MERCOSUR norm in the same terms.[40] Various ad hoc arbitration awards confirmed that secondary law norms do not have a self-executing nature and therefore they need to be incorporated into internal legal orders.[41]

3. The current MERCOSUR dispute settlement system and its implications for MERCOSUR law

The dispute settlement system established in the Brasilia Protocol consisted of the classic inter-governmental dispute settlement mechanisms: consultations, direct negotiations, conciliation, and, as a last resort, arbitration.[42] Up to the present, the main mechanism continues to be arbitration. The OP replaced the old dispute settlement system established by the Brasilia Protocol.[43] After the OP's entry into force in 2004, new changes were introduced in the arbitration procedure.[44] The main innovation was the creation of the Permanent Review Tribunal, with the possibility of appellate review. However, no significant modifications were made to individuals' access to the arbitration procedure.

The following subsections briefly examine the salient features of the current system, providing a critical appraisal of controversial aspects that have a direct effect on the MERCOSUR legal system.

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39 Within 30 days, member states should publish the entry into force of the MERCOSUR norms in their official journals; see OPP, Art. 39, available at www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp.

40 According to Decision 23/2000.

41 The issue of incorporation has become controversial in different disputes before the ad hoc arbitration tribunals. See the cases Brazil – Pork Subsidies (09/1999), Argentina – Poultry (05/2001), Brazil – Phytosanitary Products (04/2002) and Uruguay – Cigarettes (05/2002). The prevailing opinion in these cases was that secondary norms must be incorporated into national legal systems according to procedures established by member states' constitutions.

42 In my view, arbitration tribunals in MERCOSUR have an inter-governmental nature, since they are composed of arbitrators chosen by the member states involved in the dispute and, most importantly, there is not provision like that in the European Union, the Andean Community, or the Central American Integration System. However, authors such as Perotti argue that arbitration tribunals in MERCOSUR have a supranational nature, because they do not represent member states, the awards are approved by majority, and they are binding on member states. Cf. A. Perotti, 'Estructura institucional y Derecho en el Mercosur', (2002) 1 RDIM 6, at 66.

43 On the reform of the dispute settlement system in MERCOSUR, see R. Olivera García, 'Dispute Resolution Regulation and Experiences in MERCOSUR: The Recent Olivos Protocol', (2002) 8 *NAFTA: Law and Business Review of the Americas* 535.

44 For a detailed analysis on the new dispute settlement system after the reforms of the OP, see M. B. Olmos Giupponi, 'El Tribunal de MERCOSUR' ['The Tribunal of MERCOSUR'], in C. Fernández Liesa (ed.), *Tribunales Internacionales y espacio iberoamericano* (2009), 135.

3.1. The dispute settlement system after the reforms of the OP

3.1.1. Disputes between member states

Disputes between MERCOSUR member states relating to the interpretation or application of, or non-compliance with, primary and secondary law can be submitted under the OP dispute settlement system.[45] Notwithstanding this, member states are not obliged to settle their claims in MERCOSUR arbitrations. In fact, member states can choose other international dispute settlement systems to which MERCOSUR member states are parties.[46]

At present, dispute settlement procedures within MERCOSUR comprise preliminary direct negotiations (compulsory), conciliation before the CMG (optional), arbitration procedure, and Appellate Review Instance.

3.1.1.1. Preliminary direct negotiations (compulsory). Member states involved in a dispute are obliged to attempt to resolve the dispute through direct negotiations and to inform the MERCOSUR Secretariat of the outcome of such negotiations.[47]

3.1.1.2. Conciliation before the CMG (optional). If the dispute is not resolved through direct negotiations (or if only partly resolved), both member states can reach an agreement and bring the dispute before the CMG.[48] The CMG will examine the parties' arguments and issue non-binding recommendations.[49]

3.1.1.3. Arbitration procedure. If the dispute persists, any member state involved has the right to file a claim before an ad hoc arbitration tribunal.[50] At this stage, provisional measures can be granted by the tribunal following the request of one party based on the presumption of grave and irreparable damages due to the persistence of the initial situation.[51]

The award rendered by the ad hoc arbitration tribunal can be subject to a request for clarification[52] and also to appellate review before the Permanent Review Tribunal.[53] If the award is not appealed, it is final, having the effect of *res judicata* between the parties.[54]

3.1.1.4. Permanent Review Tribunal. The Permanent Review Tribunal[55] not only performs review tasks (as seen above) but also can develop other important roles:

45 The Treaty of Asunción, the OPP, and the protocols and agreements concluded in the framework of the Treaty of Asunción, the CMC's Decisions, the Common Market Group's Resolutions, and MERCOSUR Trade Commission's Directives.

46 After starting the procedure under one system, no member states involved in the dispute will be able to go to other dispute settlement systems.

47 OP, Art. 4.

48 Ibid., Art. 6(2).

49 Ibid., Art. 7(1)(2).

50 The ad hoc tribunal is composed of three arbitrators. Two arbitrators are appointed by the parties on the basis of the list submitted previously by member states. The Presiding Arbitrator is selected by common agreement of the other two arbitrators: OP, Arts. 9–11.

51 OP, Art. 15.

52 Ibid., Art. 28.

53 Ibid., Art. 17(1).

54 Ibid., Art. 26(1).

55 The Permanent Review Tribunal was established on 13 August 2004, in Asunción, Paraguay, and its judges were nominated by Decisions 26/04, 18/06, 38/0749, and 42/0750 of the CMC.

as a unique instance of dispute settlement (by common agreement of the parties involved in the dispute),[56] as a unique instance of urgent and exceptional cases,[57] and as a consultative body.[58]

According to the OP,[59] any party to a dispute can request an appellate review by the Permanent Review Tribunal against the award rendered by the ad hoc arbitration tribunal. The appellate review is limited to 'points of law' discussed in the controversy and to interpretations developed by the ad hoc arbitration tribunal.[60] The decision of the Permanent Review Tribunal will be definitive and will substitute the award issued by the ad hoc arbitration tribunal.[61]

Another important role performed by the Permanent Review Tribunal is the consultative function. The Permanent Review Tribunal can issue consultative opinions on the interpretation of MERCOSUR law. Requests for consultative opinions can be made by member states, MERCOSUR executive bodies (the CMC, CMG, and MTC), and member states' supreme courts with national jurisdiction.[62] Nevertheless, these consultative opinions do not have binding effects.

3.1.2. Disputes between a private party and a member state

Private parties (individuals and legal persons) to the dispute settlement system can submit a claim against the adoption or the application by any of the member states of legal or administrative measures with restrictive, discriminatory, or unfair competition effects, in violation of the Treaty of Asunción, the OPP, the protocols and agreements concluded in the framework of the Treaty of Asunción, the CMC's decisions, the CMG's resolutions, or the MTC's directives.[63]

As a first step in the procedure, the claim must be submitted to the National Section of the CMG in the member state in which the claimants have their residence or the head office of the business is domiciled.[64] Once submitted, the claim will be analysed by the National Section. If it declares the claim admissible, it will contact the National Section of the member state alleged to have breached MERCOSUR regulations. This query aims at reaching an immediate settlement of the dispute.[65]

In the event that the dispute is not settled, the National Section will submit the claim to the CMG.[66] At this stage, the CMG will examine whether it fulfils the requirements of Article 40(2) of the OP. In the worst-case scenario, the CMG will reject the claim.[67]

56 OP, Art. 23.
57 Ibid., Art. 24 and Decision 23/04 of the CMC, Art. 1.
58 OP, Art. 3 and Annex to the Decision 37/03 of the CMC, Art. 2.
59 OP, Art. 17.
60 Ibid., Art. 17(2).
61 Ibid., Art. 22(1)(2).
62 Ibid., Art. 3 and Annex to the Decision 37/03 of the CMC, Art. 2.
63 OP, Art. 39.
64 Ibid., Art. 40(1).
65 Ibid., Art. 41(1).
66 Ibid., Art. 41(2).
67 Ibid., Art. 42(1).

If, on the contrary, the claim accomplishes the requirements, the CMG calls a group of experts that shall issue a legal opinion on the subject matter.[68] If the panel accepts the claim against one of the member states, issuing a unanimous opinion, any other member state may request the adoption of corrective measures or the repeal of the contested measures. In that case, if the request is not accepted within 15 days, the member state will have the right to start the arbitration procedure as noted above.[69]

If the panel does not reach unanimity or holds that the claim is unfounded, the CMG will complete the procedure.[70] The last resort for the member state that has submitted the case to the CMG is to start the arbitration procedure.[71]

3.2. Critical appraisal of the current dispute settlement system

Having analysed the current dispute settlement system, a critical appraisal of the reforms introduced by the OP is in order. The analysis underlines three main aspects in the functioning of the system that have direct implications for the development of the MERCOSUR legal system.

3.2.1. The absence of a court of justice in MERCOSUR

It is clear that an adequate and efficient dispute settlement system is essential not only to consolidate the regional integration process, but also to strengthen the rule of law.[72] The creation of a judicial body in MERCOSUR is a controversial issue that has been widely discussed by specialized commentators on MERCOSUR law. In this regard, some commentators have emphasized the need for a permanent court of justice in MERCOSUR guaranteeing the enforcement and uniform interpretation of community law.[73] Another part of MERCOSUR legal scholarship proposes to introduce different changes in the institutional arrangements to address the enforcement problems MERCOSUR faces and to ensure a uniform application, without going beyond the present inter-governmental machinery.[74]

Scholars such as Perotti advance the main arguments for the creation of a regional court within MERCOSUR, underlying the basic requirements for this court to be operative.[75] Additionally, the Permanent Forum of Supreme Courts of MERCOSUR has insisted upon the need to include a court of justice in the institutional

68 Ibid., Art. 42(2)(3).
69 Ibid., Art. 44(1)(i).
70 Ibid., Art. 44(1)(ii)(iii).
71 Ibid., Art. 44(2).
72 Cf. A. Perotti, *Tribunal Permanente de Revisión y Estado de Derecho en el MERCOSUR* (2008), 14.
73 A. Perotti, 'Elementos básicos para la constitución de un Tribunal de Justicia del MERCOSUR', VI Encuentro del Foro Permanente de Cortes Supremas del MERCOSUR, Brasilia, 21 November 2008, available at www.stf.jus.br/arquivo/cms/sextoEncontroConteudoTextual/anexo/Texto_dos_Exposiotres/Elementos_basicos_para_la_constitucion__Alejandro_Perotti.pdf.
74 See, e.g., Gari, *supra* note 10, at 103.
75 See Perotti, *supra* note 73.

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framework.[76] The main reasons for this inclusion are linked to the need to provide greater legal certainty to MERCOSUR law.

Despite these debates and proposals, MERCOSUR authorities have not yet decided on the creation of such a court. The reasons for this apparent reluctance can be found, on the one hand, in the main features of MERCOSUR and, on the other hand, in the refusal of member states for political reasons linked to the defence of national sovereignty.

Originally, MERCOSUR was conceived as a dynamic and pragmatic integration process. Accordingly, the diplomatic approach was selected as a way of dealing with disputes. As Gari explains:

> during the early stages of the integration process, the diplomatic approach contributed to settle conflicts in a quick and cost-effective way, but in the long run when conflicts got more complex . . . the 'presidential diplomacy' strategy ended up overexposing top political leaders.[77]

To a greater extent, this conception of MERCOSUR as an inter-governmental and pragmatic integration process (needless of a sophisticated bureaucracy) is still predominant.[78]

As for the political reasons underlying the absence of a MERCOSUR court of justice, they are related to the imbalance of power among member states and the lack of political will on the part of key states. The author agrees with Gari's observation that:

> the problem with proposals aimed at the supranationalisation of MERCOSUR institutions is their lack of political feasibility . . .. Due to the sharp structural asymmetries between State Parties, it is highly unlikely that Brazil would be willing to pay the costs of supranational institutions in terms of sovereignty curtailment in exchange for the type of benefits supranationality can offer.[79]

Up to the present, MERCOSUR authorities have chosen the inter-governmental solution, with some ad hoc adjustments. The question that is raised again is for how long the current system (with its limitations) can ensure a steady progress of MERCOSUR law and the integration process itself.

3.2.2. Precedents, legal certainty, and uniform interpretation of MERCOSUR law

One of the main objectives pursued in the adoption of the OP was strengthening legal certainty. Indeed, Decision 25/2000 of the Reform of the Brasilia Protocol foresaw the inclusion of 'alternatives for a uniform interpretation of MERCOSUR regulations'.[80] Consequently, the OP envisaged the Permanent Review Tribunal and the request of

76 This forum is integrated by judges of the member states' supreme courts. The meetings have taken place on a regular basis since 2003. In the framework of this forum, various proposals seeking to improve the MERCOSUR legal system have been drafted.

77 Gari, *supra* note 10, at 89.

78 Ibid., at 103.

79 Ibid., at 95.

80 MERCOSUR/CMC/DEC N° 25/00 – Relanzamiento del MERCOSUR – Perfeccionamiento del sistema de solución de controversias del Protocolo de Brasilia, available at www.sice.oas.org/trade/mrcsrs/decisions/dec2500s.asp.

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advisory opinions as main pillars of the new system.[81] Indeed, the introduction of the advisory-opinion procedure contributed to develop 'a uniform, consistent and coherent interpretation and application of MERCOSUR Law'.[82]

In order to assess the present system, we must be aware that, in MERCOSUR, the uniform interpretation of the regional integration law involves two different questions: on one hand, how to guarantee the uniform interpretation of MERCOSUR law in the arbitration procedure having different ad hoc tribunals whose composition varies and, on the other, how to reconcile the various interpretations made at the domestic level by national courts.

As for the first question, nothing in the wording of the OP appears to suggest that arbitration awards rendered by ad hoc arbitration tribunals are binding for succeeding tribunals. Despite the absence of an explicit mandatory precedent system, arbitration tribunals make constant references in their awards to previous decisions. Commentators have emphasized the creation of an *acquis communautaire* in MERCOSUR. In their analysis, Vinuesa underlined that 'Mercosur arbitration awards constantly refer to previous Mercosur precedents to reinforce the idea of recognizing common patterns in the application and interpretation of Mercosur law'.[83] The grounds on which this process is based include the principles of *pacta sunt servanda*, good faith, and reasonableness.[84] Different ad hoc arbitration tribunals have drafted 'doctrines'. In other words, MERCOSUR ad hoc tribunals have put forward different arguments laying down important interpretative criteria, for instance, regarding the mandatory nature of MERCOSUR rules or the need to incorporate secondary-law norms into national legal systems.[85] Taking this into account, the new advisory opinion system is contributing to foster this more or less *sui generis* uniform interpretation made by the ad hoc arbitration tribunals.

With regard to guaranteeing the uniform interpretation of MERCOSUR law in national courts, in the OP member states, supreme courts were entitled to seek an advisory opinion. As commentators underline, 'advisory opinions can be particularly useful for national judiciaries facing litigation involving the interpretation of MERCOSUR rules, in that PRC (Permanent Review Tribunal) advice helps to prevent

81 On the advisory opinion system, see A. Dreyzin de Klor, 'La primera opinión consultiva del MERCOSUR Germen de cuestión prejudicial?', (2007) 23 *Revista Española de Derecho Europeo* 437; and S. Czar de Zalduendo, 'La Primera Opinión Consultiva en el MERCOSUR', en Suplemento La Ley Constitucional, Buenos Aires, 26 June 2007, at 57.

82 Gari, *supra* note 10, at 91.

83 R. E. Vinuesa, 'Enforcement of MERCOSUR Arbitration Awards within the Domestic Legal Orders of Member States', (2005) 40 Texas ILJ 425, at 433.

84 E. J. Cardenas, 'Mercosur's Fragile Dispute Resolution System at Work: First Decision Ever Made by an "Arbitration Panel" in a Dispute Arising among Sovereign Parties', in M. Bronckers and R. Quick (eds.), *New Directions in International Economic Law* (2000), 281. See, likewise, E. J. Cárdenas and G. Tempesta, 'Mercosur, el derecho internacional y el estoppel propósito del laudo arbitral sobre prohibición de importación de neumáticos "remoldeados"', (2002) 6 *Revista de Derecho Internacional y del Mercosur* 2, at 107.

85 Decisión 02/07, Consejo de Mercado Común, Reglamento del Procedimiento para la Solicitud de Opiniones Consultivas al Tribunal Permanente de Revisión por lo Tribunales Superiores de Justicia de los Estados Partes del Mercosur.

divergent rulings in different countries on the same legal issue'.[86] Despite this, supreme courts were initially excluded from the regulation of the advisory-opinions procedure.[87] In an exercise of what some scholars call 'judicial diplomacy in MERCOSUR', the Forum of Supreme Courts (referred to above) drafted a proposal, taking the initiative to provide an adequate regulation.[88] As a result, the Decision 02/2007 regulating the request of advisory opinion by supreme courts was adopted in January 2007.[89] This shows the proactive role played, in general, by supreme courts in MERCOSUR.[90] The advisory opinions issued so far demonstrate the interest of supreme courts in acquiring specific guidelines in the interpretation and application of MERCOSUR law.[91] This judicial activism could contribute to further develop the advisory-opinion system in the future.

3.2.3. The lack of effective access of private parties to the dispute settlement system

The reduced legal standing of private parties is one of the weaknesses of MERCOSUR's present system.[92] Like the previous mechanism, private parties (individuals and legal persons) have limited access to the arbitration procedure, even after the reforms introduced by the OP. As Olivera García points out, the distinction between the regime applicable to disputes between member states and that to private claims has been maintained.[93] Private parties can bring a claim to the National Section in question. Yet, they do not possess direct access to the arbitration procedure. For this reason, the author agrees with Cárdenas and Tempesta on their critique that:

> the role played by individuals is quite limited because, although they can start the proceedings and will always be heard, they can do nothing if their claims are dismissed . . .. Member states are the ones who have, at all times, control of the proceedings and who, at their discretion, decide whether to resort to the Arbitration Tribunal if the controversy persists.[94]

Furthermore, the limited availability of reliable judicial remedies at regional level also involves the protection of human rights. As Petersmann affirms, individuals'

86 M. A. Jardim de Santa Cruz Oliveira, 'Judicial Diplomacy: The Role of the Supreme Courts in Mercosur Legal Integration', (2007) 48 *Harvard ILJ Online* 93, at 97, available at www.harvardilj.org/wp-content/uploads/2011/05/HILJ-Online_48_Oliveira.pdf.

87 The OP was regulated through CMC Decision 37/03, 15 December 2003.

88 Judicial diplomacy within MERCOSUR is defined as 'the dialogue among Supreme Courts of Member States on legal matters relevant to Latin American integration': Jardim de Santa Cruz Olivera, *supra* note 86, at 94.

89 Argentina – Poultry (05/2001), Brazil – Phytosanitary Products (04/2002) and Uruguay – Cigarettes (05/2002).

90 Oliveira analyses this from a judicial-diplomacy perspective 'as collaborative action and communication among national courts, usually the highest judicial bodies, toward regional legal integration': Jardim de Santa Cruz Oliveira, *supra* note 86, at 93–4; see, likewise, Perotti, *supra* note 72, at 153.

91 Perotti, *supra* note 72, at 153.

92 A. Dreyzin de Klor and D. Perotti, 'Los particulares en el Protocolo de Olivos', in *El rol de los tribunales nacionales de los Estados del MERCOSUR* (2009), 76, at 79.

93 Olivera García, *supra* note 43, at 535.

94 E. J. Cárdenas and G. Tempesta, 'Arbitral Awards under MERCOSUR's Dispute Settlement Mechanism', (2001) 4 *Journal of International Economic Law* 337, at 345. In the same vein, Dreyzin and Perotti underline that 'lamentablemente no se ha modificado la vía contemplada para el reclamo de los particulares, pese a que Uruguay insistió férreamente en este punto que por lo demás, era mayoritariamente solicitado por todos los sectores' (unfortunately, the access of private parties to the procedure has not been modified, despite the strong insistence of Uruguay on this point, which was asked for by all sectors): Dreyzin de Klor and Perotti, *supra* note 92, at 76, 79.

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access to international courts is a basic procedural guarantee in an international democratic context, also applicable in international economic law.[95] Private parties' lack of access to the arbitration procedures is seen as part of MERCOSUR's 'democratic deficit'. Indeed, the limited participation of non-governmental sectors is one of the features of the institutional arrangement: most of the MERCOSUR decision-making process mainly takes place behind closed doors.[96] The 'opacity' of the procedures is the rule. In the institutional and functional framework, there is little room left for private parties to actively participate. Despite the creation of the Advisory Forum and the MERCOSUR Parliament, the participation of individuals and private parties is minimal.

There is hope that, after the OP's reform, the advisory-opinion procedure could lead in the long run to an improvement in the position of private parties in the context of MERCOSUR.[97] Gari suggests that:

> the procedure to request Advisory Opinions should play a pivotal role in the protection of private persons' interests . . . for this to be possible it is essential to implement this procedure . . . when the issue about the interpretation of MERCOSUR law reaches the highest court, the request for an Advisory Opinion should be compulsory and it should have binding effects on the requesting domestic court.[98]

In any case, addressing civil-society claims for participation and more democratic rule-making are two fundamental aspects for strengthening the rule of law at a regional level that cannot be overlooked for too long.

4. Relationships between international law and MERCOSUR law: so near, yet so far?

International law played an essential role in building MERCOSUR law. As a new regional integration process, MERCOSUR was created through a classical international treaty among states. Moreover, as Vinuesa recalls, 'All awards were founded on pre-existing MERCOSUR law as well as general principles of international law'.[99]

Besides, economic international law offered an appropriate legal framework for the establishment and development of MERCOSUR law. For the aims of this analysis, the author bears in mind the classical definition of international economic law provided by Petersmann that emphasizes its mixed nature. Indeed, this scholar identifies it with:

> [a] conglomerate of private law (including 'law merchant' and 'transnational commercial law'), state law (including 'conflict of laws') and public international law (including supranational integration law as in the EEC) with a bewildering array of multilateral and bilateral treaties, executive agreements, 'secondary law' enacted by international

95 U. Petersmann, 'Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationships', (2001) 4 *Journal of International Economic Law* 3, at 39.

96 As Gari correctly underlines, current inter-governmental institutional arrangements could risk 'government encapsulation': Gari, *supra* note 10, at 100.

97 Perotti, *supra* note 72, at 69.

98 Gari, *supra* note 10, at 101.

99 Vinuesa, *supra* note 83, at 442.

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> organizations, 'gentlemen's agreements,' central bank arrangements, declarations of principle, resolutions, recommendations, customary law, general principles of law, de facto-orders, parliamentary acts, governments decrees, judicial decisions, private contracts or commercial usages.[100]

Commentators also agree on the underlying importance of the EU law in shaping MERCOSUR law. However, in the author's view, since MERCOSUR law is still an inter-governmental integration process, the EU law institutions and doctrines have limited application. Indeed, as Ventura clearly explains, in MERCOSUR law, the 'Absence of the principle of direct applicability is linked to the complete lack of a principle establishing the primacy of community law over national ones'.[101]

In the framework of the relationship between international law and MERCOSUR law, two initial features merit mention.

First, it must be emphasized that the main features of the dispute settlement mechanism selected by MERCOSUR member states determine the relationships between MERCOSUR law and international law. As seen above, it is unlike other integration processes in Latin America, such as the Andean Community or the Central American Integration System in which a judicial body was created. The dispute settlement system chosen by MERCOSUR member states is close to the classical system used in international economic law.[102] Indeed, the dispute settlement system of MERCOSUR was inspired by the prevailing regimes in the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO).[103]

Second, from the beginning, there was a specific provision (Article 19.1 of the Brasilia Protocol, 1994) that included a general reference to international law, which stated:

> 1. The Arbitration Tribunal will decide the controversy based on the dispositions of the Treaty of Asunción, of the agreements concluded within its framework, on the decisions of the Common Market Council, the resolutions of the Common Market Group, as well as on the principles and dispositions of international law which are applicable to the matter.[104]

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100 E. U. Petersmann, 'International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order', in R. S. J. Macdonald and D. M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983), 227, at 251. In accordance with this broad definition of international economic law, the following instruments can also be included: UN Declaration on the Permanent Sovereignty of States over Their Natural Resources 1962, UN Charter of Economic Rights and Duties of States 1974, and the Rio Declaration on Environment and Development 1992. See also E. U. Petersmann, 'Dispute Settlement in International Economic Law: Lessons for Strengthening International Dispute Settlement in Non-Economic Areas', (1999) 2 *Journal of International Economic Law* 189, at 189–248.

101 See D. Ventura, 'First Arbitration Award in MERCOSUR: A Community Law in Evolution?', (2000) 13 LJIL 447, at 450.

102 See Petersmann, 'Dispute Settlement in International Economic Law', *supra* note 100, at 189.

103 NAFTA dispute settlement is established in NAFTA Chapter 11 refers to investor arbitration following traditional investor–state arbitration schemes in bilateral investment treaties (BITs). Chapter 11, Section A refers to the substantive obligations assumed by NAFTA state parties, establishing rules relating to performance, requirements, discrimination, expropriation, and violation of the minimum standard of treatment established by international law. Chapter 11, section B contains enforcement provisions allowing individual investors of state parties to bring arbitration actions (provided that certain criteria are met) against host governments regarding investment disputes.

104 Brasilia Protocol, English version available at www.sice.oas.org/trade/mrcsr/brasilia/pbrasilia_e.asp.

The OP, with a slight difference, states:

> [t]he ad hoc Arbitration Tribunals and the Permanent Review Tribunal shall settle the dispute on the basis of the Treaty of Asunción, the Protocol of Ouro Preto, the protocols and agreements executed within the framework of the Treaty of Asunción, the decisions of the Common Market Council, the Resolutions of the Common Market Group and the Instructions of the MERCOSUR Trade Commission, as well as the applicable principles and provisions of International Law.[105]

Upon such articles, MERCOSUR arbitration tribunals have applied international law and international economic law provisions in different ways, as can be observed in various awards rendered.[106] With regard to the methodology of MERCOSUR arbitration tribunals in interpreting treaties, they have adopted the international-law approach to treaty interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties.[107] Accordingly, the terms of a treaty are to be interpreted in good faith in accordance with the ordinary meaning in context and in light of the treaty's objective and purpose. Commentators underline that this 'teleological approach' adopted since the I Arbitration Award has been confirmed by the subsequent awards, developing a doctrine in this respect.[108]

To explain the evolution of the relationships between international law and MERCOSUR law, focus is placed on the analysis of relevant arbitration awards arising out of claims under MERCOSUR law, emphasizing the main aspects of these relations.[109]

4.1. Establishing the basis for the new legal order: laying down MERCOSUR law

Under the Protocol of Brasilia system, various arbitration awards concerning different aspects of MERCOSUR law were laid down.[110] Principles and norms of international law have contributed to forming the basis for the development of the MERCOSUR legal order.

In the I Arbitration Award (1999), issued in the dispute between Argentina and Brazil concerning the application of restrictive measures to reciprocal trade, the ad hoc arbitration tribunal recognized the importance of international law for the sources of MERCOSUR law.[111]

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105 OP, Art. 34. A similar provision can be found in NAFTA Art. 102(2), which states that NAFTA parties 'shall interpret and apply' its provisions 'in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law'.

106 See Cárdenas and Tempesta, *supra* note 94, at 358; and Vinuesa, *supra* note 83, at 442.

107 On the Vienna Convention on the Law of the Treaties (VCLT), see M. Fizmaurice, O. Elias, and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010).

108 Cárdenas and Tempesta, *supra* note 94, at 351.

109 The awards are originally in Spanish, with translation into English by the author.

110 MERCOSUR arbitration awards are available (in Spanish) at www.mercosur.int/msweb/portal%20intermediario/es/controversias/laudo.html.

111 Dispute concerning the Releases No. 37 of 17 December 1997 and No. 7 of 20 February 1998 of the Department of Foreign Trade Operations (DECEX) of the Ministry of Foreign Trade (SECEX). In Spanish: Laudo sobre Controversia sobre Comunicados No. 37 del 17 de diciembre de 1997 y No. 7 del 20 de febrero de 1998 del Departamento de Operaciones de Comercio Exterior (DECEX) de la Secretaría de Comercio Exterior (SECEX): Aplicación de Medidas Restrictivas al Comercio Recíproco.

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On that occasion, the arbitration tribunal stated:

> In this context, the tribunal must find and identify the applicable legal rules, guided by the aims and objectives of the normative order established by the Parties . . . to regulate their mutual relations in order to achieve the shared goal of integration, within the scope of the purposes and principles of the Treaty of Asunción. In this sense, the dispute settlement system under the Brasilia Protocol anticipates that disputes require interpretative tasks at various levels (article 1).[112]

Furthermore, the arbitration tribunal assessed the different nature of the norms forming part of the MERCOSUR legal system, in the following terms:

> The architecture of the Treaty of Asunción and the documents clearly shows a combination of norms of a framework agreement with other self-executing norms . . .. There are, therefore, norms setting goals and principles as a permanent framework and guide to the activities of MERCOSUR member states. There are other provisions that create organs, through the activity of which the parties may shape the integration process. Finally, there are other provisions which are enforceable by themselves, imposing specific obligations on the parties, without further legal acts on the part of member states. These are mainly contained in the Annexes, instruments which play the role of facilitators of the integration process.[113]

As Cárdenas and Tempesta point out, the approach taken by the tribunal in this award and confirmed subsequently is a 'contextual method that preferred the analysis of the dispute from the perspective of the "MERCOSUR legal framework" to the adoption of any "specific and isolated" rule'.[114]

In the III Arbitration Award (2000) concerning safeguard measures applied by Argentina against textile imports from Brazil, the ad hoc arbitration tribunal established that 'dispute' must be defined within the legal framework of MERCOSUR and secondarily by means of international law. On this matter, the tribunal assessed both the primary content of the agreements and different decisions and resolutions in the MERCOSUR legal system in order to find an adequate definition of 'dispute'. The tribunal concluded that such a definition did not exist in the Treaty of Asunción or in the law arising from that treaty. Consequently, the tribunal relied upon international law to achieve an appropriate definition of 'dispute' following Article 19 of the above-mentioned Brasilia Protocol.

In addition, in this III Arbitration Award, the ad hoc tribunal underlined the character of the MERCOSUR legal system by referring to the liberalization programme and the main obstacles to integration processes in Latin America. The tribunal clarified:

> The trade liberalization programme has a central role and is a strategic component in shaping MERCOSUR . . .. The authors of the TA ensured a rapid pace of trade liberalization. In this way, the trade liberalization programme . . . would constitute the critical mass needed to drive actions towards a common market.[115]

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112 I Arbitration Award, para. 51.
113 Ibid., para. 64.
114 Cárdenas and Tempesta, *supra* note 94, at 350.
115 I Arbitration Award, para. 65.

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Therefore, international law contributed in a significant way to developing the MERCOSUR legal system. Even if the ad hoc arbitration tribunals identified MERCOSUR law as the main source to solve disputes, in many cases, the core of the subject matter in dispute was regulated in international law.

4.2. Application of international law and international economic law as a way of filling a legal vacuum in MERCOSUR law

Another important role played by international law and international economic-law norms was to fill a legal vacuum (absence of MERCOSUR regulation on specific matters), as discussed below. Notwithstanding this recognition, some ad hoc arbitration tribunals were reluctant to apply international law when it was necessary to fill a legal vacuum or loophole.

In the III Arbitration Award (2000) rendered on the dispute between Argentina and Brazil referred to above, as part of its defence, Argentina invoked as legal basis the norms of economic international law. In this case, the controversial issue was the application of safeguard measures in the textile sector by Argentina – a subject not regulated by MERCOSUR from 1994 onwards. The issue here was whether the safeguard measures imposed by Argentina in the form of annual quotas on imports of cotton textiles from Brazil were in violation of legal norms of MERCOSUR. From 1991 until 1994, intra-MERCOSUR safeguard measures were regulated in MERCOSUR by Annex IV of the Treaty of Asunción. In 1995, the Marrakesh Agreements came into effect. Consequently, due to the absence of specific rules on textile safeguard measures in MERCOSUR, Argentina held that the WTO rules were applicable. Argentina argued that MERCOSUR member states were also subject to compliance with the rules of the WTO, since MERCOSUR norms did not preclude the application of multilateral arrangements, as follows:

> If an issue has been the object of regulation between the countries of MERCOSUR deepening WTO commitments, these rules are compulsory for the members and take precedence over multilateral rules. However, if a matter is not regulated in MERCOSUR, then the member states have the right to apply WTO instruments.[116]

Argentina relied upon the principle of speciality, under which a specific rule overrides a general rule. According to this principle, Annex IV of the Treaty of Asunción allowed the application of safeguard measures by the end of 1994. Since 1994, MERCOSUR has not adopted any legislation on this subject, thus creating a 'legal vacuum'. Subsequently, the Marrakesh Agreement entered into force and established rules on textile safeguard measures that were incorporated into domestic legislation in Argentina (Law No. 24.425 and Decree 1059/96). These provisions set special rules that, confronted with the existence of the legal vacuum in MERCOSUR in the field of textiles, were entitled to be applied to intra-zone transactions (following the reasoning of the Argentine position).[117]

116 Argentina's position is quoted in Section H of the arbitration award.
117 Ibid.

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The ad hoc tribunal analysed the legal context and objectives of MERCOSUR and rejected Argentina's arguments on the basis of Articles 1 and 5 of Annex IV of the Treaty of Asunción, which formulated a general prohibition on the application of safeguard measures to the intra-zone. According to the tribunal, this prohibition could be exempted only by a specific rule within the MERCOSUR system that legitimized the imposition of safeguard measures on textile products. Consequently, according to the tribunal, there was no such a 'loophole' in this matter. The tribunal stated:

> The interpretation of the provisions of the MERCOSUR customs union should be made, unless there is express provision to the contrary, according to the object and purpose of economic integration; . . . As a general rule, it is possible to apply safeguard measures for the intra-MERCOSUR area if an explicit rule has authorized so. The tribunal finds no MERCOSUR rules that explicitly allow the application of safeguard measures on intra-zone imports of textile products.[118]

4.3. The so-called 'principle of autonomy' of MERCOSUR law

In the dispute resolution process of MERCOSUR, the ad hoc arbitration tribunals affirmed the 'principle of autonomy of the integration law'.[119] That is, the application of the principles and provisions of international law in the context of integration should be possible only in an alternative or subsidiary way, never directly and first.[120]

This principle of autonomy has been quoted and confirmed in various awards, such as the VI Award (2002) of the ad hoc arbitration tribunal in the dispute between Uruguay and Brazil on 'Prohibition of Import of Remoulded Tires from Uruguay applied by Brazil'[121] and the V Award (2001) of the ad hoc arbitration tribunal in the dispute brought by Uruguay against Argentina on 'Market Access Restrictions on Bicycles Imported from Uruguay'.[122]

The Permanent Review Tribunal, in its first award dealing with the review presented by Uruguay against the arbitration award in the dispute on 'remoulded tyres',[123] reinforced the idea of autonomy:

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118 III Arbitration Award.

119 The 'principle of autonomy' can be interpreted in different ways. In EU law, the principle of autonomy emerged as one of the main pillars of European Community law. In this context, the principle has a specific meaning. Indeed, the principle of autonomy in the EU legal order was elaborated by the European Court of Justice in *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 and *Costa v. ENEL* [1964] ECR 585. The principle of autonomy, together with the principles of direct effect and supremacy, constitute the core of the EU constitutional doctrine. When it comes to MERCOSUR, one can observe attempts to 'transplant' such a principle and apply it to explain the autonomous nature of MERCOSUR law.

120 A similar provision can be found in the NAFTA Treaty, Art. 1131.

121 VI Award (01/2002): Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR Constituido para Entender de la Controversia Presentada por la República Oriental del Uruguay y a la República Federativa del Brasil sobre 'Prohibición de Importación de Neumáticos Remoldeados Procedentes de Uruguay'.

122 V Award (09/2001): Laudo del Tribunal Arbitral Ad Hoc de MERCOSUR Constituido para Entender de la Controversia Presentada por la República Oriental del Uruguay a la República Argentina sobre 'Restricciones de Acceso al Mercado Argentino de Bicicletas de Origen Uruguayo'.

123 Award No. 1/2005 of the Permanent Review Tribunal on the motion for review submitted by Uruguay against the 25 October 2005 arbitral award of the ad hoc Tribunal concerning the dispute 'Prohibition of Remoulded Tires Imports from Uruguay' (Laudo del Tribunal Permanente de Revisión Constituido para Entender en el Recurso de Revisión Presentado por la República Oriental del Uruguay contra el Laudo Arbitral del Tribunal Arbitral Ad Hoc de fecha 25 de Octubre de 2005 en la Controversia 'Prohibición de Importación de Neumáticos Remoldeados Procedentes del Uruguay').

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> This Tribunal is aware that the principles and provisions of international law are referred to in the Protocol of Olivos as one of legal sources to be used (Art. 34), but they must always be subsidiarily applied (or, in the best-case scenario, in a complementary way), only when they are pertinent to the case, never in a direct and primary way, in accordance with the law of integration and from a community law perspective, as a legal order MERCOSUR aspires to develop [*sic*]. Overall, MERCOSUR law has and must have sufficient autonomy from other fields of law . . . otherwise the institutional and legal development of MERCOSUR would be undermined.[124]

As a result of the application of the principle of autonomy, in different awards, certain principles or norms forming part of international law were declared inapplicable – for instance, in the first award rendered by the Permanent Review Tribunal and in the VIII Arbitration Award issued by the ad hoc tribunal within the framework of MERCOSUR law, both of which are examined in the following sub-subsections.

4.3.1. The principle of estoppel has a limited application in MERCOSUR law

The Permanent Review Tribunal, in its I Award (mentioned above), held that the principle of estoppel does not belong to primary or secondary MERCOSUR legislation. Consequently, it cannot be considered as a specific principle of MERCOSUR law and its application is only complementary. Furthermore, following the argument provided by the tribunal, when applicable, the estoppel should be tailored to the object and purpose of MERCOSUR 'community law'. Hence, the tribunal concluded that the application of the principle was not required in that case.[125]

Since this is a peculiar interpretation of estoppel, it must be stated that the Central American Court of Justice has recognized the full applicability of the principle of estoppel in the context of the Central American integration process.[126]

4.3.2. Retortion measures are not applicable within the MERCOSUR legal framework

In the VIII Arbitration Award (2002), the ad hoc arbitration tribunal limited the adoption of the *exceptio non adimpleti contractus* among member states following the doctrine established in the European Union.[127] This limitation also applied to MERCOSUR member states in their reciprocal relations. The arbitration tribunal tried to provide examples of different situations and sectors of international law in which retortion measures were not legitimate. Indeed, the arbitration tribunal began by saying:

> In certain multilateral treaties, such as those which deal with human rights, peace and disarmament, there are severe restrictions on the application of the exception, and, in

124 Ibid., Section C3.

125 Ibid., para. 23.

126 See M. B. Olmos Giupponi and E. Ulate Chacón, *Diálogo judicial y gobernanza global: La influencia del derecho comunitario europeo en la jurisprudencia de la Corte Centroamericana de Justicia* [*Judicial Dialogue and Global Governance: The Influence of the EU Law in the Case Law of the Central American Court of Justice*] (2012), and Central American Court of Justice, Ruling on the violation of Community law (lawsuit against Costa Rica), 8 September 2008.

127 VIII Award of the ad hoc Arbitration Tribunal on the dispute between Paraguay and Uruguay on the application of 'IMESI' (excise tax) to cigarettes (05/2002).

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> the field of European integration, the institution is not applicable. In MERCOSUR, the nature of the founding treaty suggests the need for a restrictive interpretation.[128]

The tribunal concluded:

> The application of measures of retortion in an integration process is meaningless. For this reason, there are dispute resolution mechanisms that allow the legal implementation of appropriate sanctions. In the framework of a regional integration agreement the aim of which is to become a common market, the 'exceptio non adimpleti contractus' has more limited scope than . . . in public international law.[129]

4.4. Environmental issues and human rights concerns as exceptions to the free-trade principle[130]

In recent years, MERCOSUR Arbitration Tribunals and the Permanent Review Tribunal have analysed environmental matters and human rights issues invoked by member states before them in different disputes. In these cases, the arbitration tribunals solved the disputes from a traditional international economic-law perspective: the applicable principle was free trade, and environmental and human rights issues were considered as exceptions to this principle.

As for the environmental exception, the object of various awards on the prohibition of the importation of remoulded tyres was if the restrictions to free trade were admissible with the objective of protecting the environment and the right to health.[131]

In Award 1/2005, dealing with the review of the award on 'Prohibition on Remoulded Tires Imports from Uruguay' (referred to previously), the Permanent Review Tribunal made it clear that:

> [I]t is wrong to suggest that there are two principles in conflict or confrontation in the process of integration, as seems to be stated at paragraph 55 of the award under appeal. There is only one principle (free trade) to which some exceptions can be applied (such as, for example, the above-mentioned environmental exception). Furthermore, this tribunal does not agree with the arguments put forward at paragraph 55 (final part) of the award under appeal, according to which the tribunal should apply the application of the above-mentioned confronted principles (free trade and environmental protection) by defining the precedence of one over the other in accordance with the precepts of international law. For this tribunal, the relevant issue is the possibility of invoking the environmental exception under MERCOSUR rules and not under international law.[132]

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128 Ibid.

129 Ibid.

130 See M. B. Olmos Giupponi, *Derechos humanos e integración en América Latina y el Caribe* (2006).

131 There were different awards on the same issue ('prohibition of remoulded tires imports') involving Argentina and Uruguay: Arbitration Award XI of 25 October 2005 (in favour of Argentina, overthrown by the Permanent Review Tribunal); Award No. 1/2005 of the Permanent Review Tribunal on the motion for review submitted by Uruguay; Award No. 1/2006 of the Permanent Review Tribunal on the clarification of the previous award; and Award No. 1/2008 of the Permanent Review Tribunal on the 'Divergence on the Implementation of the Award No. 1/2005 Initiated by Uruguay (Article 30OP)' (Laudo del Tribunal Permanente de Revisión en el Asunto No. 1/2008 'Divergencia sobre el cumplimiento del laudo No. 1/2005 iniciada por la República Oriental del Uruguay (Art. 30 Protocolo de Olivos)').

132 Award No. 1/2005 of the Permanent Review Tribunal.

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Award 1/2008 of the Permanent Review Tribunal on 'Divergence on the Implementation of the Award 1/05' (*Uruguay* v. *Argentina*) also concerned the relationship between the environment and trade. In the proceedings, Argentina argued that Argentine law (prohibiting the importation of remoulded tyres) 'was not only consistent with MERCOSUR law, but also meant a step forward to achieve the welfare of the peoples of the region through the protection of the environment and health'.[133] The law at issue was presented as a preventive measure aimed at preventing potential harm originating from the use of remoulded tyres.[134]

On the occasion of this award, the Permanent Review Tribunal[135] recalled that '[t]here are not two principles in conflict or confrontation . . .. There is only one principle (free trade), and some exceptions to the principle'.[136] Nevertheless, the Permanent Review Tribunal determined that the exception based upon environmental issues was not applicable in that case, for the following reasons:

> Argentina has submitted a long list and reasons related to problems from an environmental point of view arguing that 'the importation of re-manufactured tyres (including remoulded ones) to Argentina, increases the threats for life and health of people, animals and plants.' . . .. However, the view already expressed by the Award 1/2005 is not compatible with this position . . .. Adopting a rigid criterion on certain points raised by Argentina would allow the prohibition of importing a large amount of materials whose toxicity, compared with that of tyres, could be much higher, such as batteries, cell phones, MP3 players, cans, aluminium, telgopor [*sic*], plastics in general and, in particular, certain products such as polyethylene terephthalate (PET), just to mention some items which are frequent objects of commercial transactions; many of which . . . constitute to a greater or lesser extent . . . potential environmental damage.[137]

The tribunal underlined that the environmental exceptions to free trade should be further discussed in the future by relevant bodies of MERCOSUR.

With regard to human rights issues, the XII Arbitration Award (2006) addressed the conflict between free trade and free movement of persons and goods and the protection of human rights. This award settled the dispute between Uruguay and Argentina concerning the interruption of international bridges between both countries provoked by demonstrations against the installation of pulp mills on the Uruguay River.[138]

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133 Award No. 1/2008 of the Permanent Review Tribunal, at 3.

134 The main reason to restrict the imports related to the hazardous, difficult, and costly waste disposal generated by the use of remoulded tyres.

135 The 'remoulded tyres' controversy between Argentina and Uruguay was subject of three different awards as noted above. In this case, the quotation is from Award No. 1/2008 of the Permanent Review Court.

136 Ibid., Section B, at 12.

137 Ibid., Section C.

138 MERCOSUR ad hoc Arbitration Tribunal constituted to solve the dispute between Uruguay and Argentina on the 'failure of Argentina to adopt appropriate measures to prevent and/or eliminate the impediments to free movement of goods due to cuts in Argentine territory of the way of access to the international bridges General San Martin and General Artigas connecting the Republic of Argentina and the Oriental Republic of Uruguay'. The background of this case is the controversy between Argentina and Uruguay regarding the construction of pulp mills on the Uruguay River. Environmental organizations and citizens protested against the installation of pulp mills blocking the road and affecting tourism and transportation. Argentina brought proceedings before the International Court of Justice: *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, available at www.icj-cij.org/docket/index.php?p1=3&p2=3&case=135.

In its arguments, Uruguay mentioned that the free movement of persons is a principle to be respected and, consequently, the roadblocks ignored existing commitments between the parties under international legal instruments.[139] The obstruction of the free movement of passengers and goods affected transport operations under the agreement, not only between MERCOSUR member states, but also with regard to movements to or from third countries. In its claim, Uruguay also invoked WTO rules, such as those relating to treatment of most-favoured nation, freedom of movement, and access to markets, among others, which were affected by the measures already mentioned. Uruguay alleged that Argentina failed to adopt effective measures to stop this situation.

Argentina argued the existence of a conflict between the rights of free expression of thought and assembly, on the one hand, and the right to free movement of goods, on the other hand. In the proceedings, Argentina emphasized that international human rights standards had constitutional status in Argentina, while the integration rules were of legal status. In Argentina's view, human rights concerns may justify a restriction on the exercise of rights under a regional integration agreement. To support its argument, Argentina mentioned the precedent of the *Schmidberger* case in which the European Court of Justice gave priority to the right to free expression over the right to free movement of goods, affected by the closure of an international motorway by demonstrations.[140]

In its reasoning, the ad hoc arbitration tribunal examined the conflict between the two rights, stating that:

> In multilateral agreements on trade facilitation, with special reference to the WTO . . . the harmonization of the rights in conflict without considering the commitments made under such agreements is extremely difficult or impossible, because they relied on principles and values accepted by the international community. It is inevitable that the solution of safeguarding interests and values of higher rank should be chosen, because 'legal rights' are more valuable objects and could be classified hierarchically in a preferred position. However, the Tribunal considers that . . . this solution would allow some degree of restriction but not the absolute cancellation of the value which is considered minor, in the interests of another to be judged more important.[141]

The arbitration tribunal underlined that international treaties on human rights with constitutional hierarchy recognize the relativity of individual rights, before

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139 In particular, Uruguay mentioned the International Road Transport Agreement in force between MERCOSUR member states and third states, 'Acuerdo sobre Transporte Internacional Terrestre' (ATIT) signed on 1 January 1990 in the framework of the Latin American Integration Association (ALADI).

140 ECJ Judgment of 12 June 2003, Case C-112/00. In the *Schmidberger* case, the Austrian government granted permission to close the Brenner Pass in order to allow a demonstration against the levels of pollution caused by heavy traffic on the motorway to the Alps. The German company Schmidberger, which transported goods in this region, argued that the closure interfered with the free movement of goods. The ECJ recognized that the closure restricted the free movement of goods and considered whether the restriction of the free movement of goods could be justified due to the concerns of the Austrian authorities to protect the right of freedom of expression and freedom of assembly. The ECJ examined the relation between Arts. 10 and 11 of the European Convention of Human Rights (freedom of expression and freedom of assembly) on the one hand and the free movement of goods as expressed by the EC Treaty on the other. The ECJ held that the restriction of the free movement of goods was justified and, therefore, that the national authorities were entitled to authorize the demonstration.

141 XII Award (2006), para. 133.

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the rights of other individuals, and the possibility of limiting them on the ground of general welfare. The tribunal quoted the main human rights instruments that would be applicable as follows: the preamble of the American Declaration of the Rights and Duties of Man (Bogotá, 1948), Article XXVIII; Article 29.2 of the Universal Declaration of Human Rights; and Article 32.2 of the American Convention on Human Rights (Pact of San José de Costa Rica).

On analysing the Argentinean position in light of these provisions, the tribunal stated:

> It can be concluded that, even if according to Argentine law, the right to protest is absolute . . . it must be limited when it affects the rights of others as expressed in art. 29 paragraph 2 of the 1948 Universal Declaration of Human Rights, art. 32 paragraph 2 of the 1969 American Convention on Human Rights and, in particular, regarding freedom of expression, art. 19 paragraphs 2 and 3 and art. 21 of the United Nations International Covenant on Civil and Political Rights of 19 December 1966, which are an integral part of the Constitution of Argentina since 1994, having been incorporated into art. 75 paragraph 22.[142]

Furthermore, the tribunal detailed:

> The roadblocks . . . led to a restriction on the free movement within the integrated economic space. This could be tolerated provided that the necessary precautions were taken to minimize the inconvenience caused by them and that the demonstrations did not interfere or cause serious damage . . .. In this case, . . . Argentine internal courts delayed the adoption of a decision for more than three months . . . with serious consequences for both countries.[143]

Accordingly, the tribunal considered that Argentina had not respected its obligation to limit demonstrations by adopting appropriate measures. Notwithstanding this, the tribunal left open the possibility that, in the future, human rights protection could represent a limit with respect to proportionality. For the very first time, a tribunal in the framework of MERCOSUR referred to human rights standards as a limit to free trade and free movement of people and goods.

4.5. MERCOSUR law and other legal systems of regional integration, namely EU law

It is without doubt that EU and European Community law serves as a model for most economic integration processes in Latin America.[144] In the case of MERCOSUR, legal scholars often compare European Community law with the MERCOSUR legal system, in the attempt to use the EU model for the transformation of an intergovernmental law into community law. This approach is also reflected in the various awards rendered up to the present.

Moreover, in the current system, the Permanent Review Tribunal undertakes within its main functions to guarantee the uniform interpretation of MERCOSUR

142 Ibid, para. 139.
143 Ibid., para. 134.
144 See the analysis of the influence of EU law on Latin American integration in Giupponi and Chacón, *supra* note 126.

law, which enhances the possibility to refer to previous awards and judgments adopted in other integration processes. Thus, the OP introduced a sort of preliminary ruling procedure. As seen above, the tribunal may issue advisory opinions (preliminary rulings) following a request by authorized bodies of MERCOSUR or member states jointly and also when requested by member states' supreme courts.[145] Consequently, the tribunal can come to a decision on the scope of a MERCOSUR norm when there is a possible conflict with another domestic or MERCOSUR norm. However, in any case, the decision adopted is not binding on either MERCOSUR bodies, member states, or national courts.

The Permanent Review Tribunal had the occasion to clarify the interpretation of MERCOSUR law by exercising such advisory competence. In the first preliminary ruling issued in 2007, the tribunal specified the nature and the function of the preliminary ruling system, stressing that this is a mechanism to enhance cooperation between national and community judges, and aims to provide a uniform interpretation of community norms.[146] On that occasion, the tribunal also recalled that, unlike in the MERCOSUR system, both the EU and the Andean Community preliminary rulings are binding. In addressing the request, the tribunal examined carefully the prevalence of MERCOSUR law over domestic legislation and public and private international-law norms. Advisory Opinion 1/2008 emphasized the primacy of MERCOSUR law, recalling that MERCOSUR norms, once internalized in accordance with Articles 38–42 of the OPP and the constitutions of member states, take prevalence over domestic legislation.[147]

Another interesting development is that the Permanent Review Tribunal has started to cite other economic integration law, such as Andean Community law. In particular, during the controversial 'Prohibition of the Importation of Remoulded Tires from Uruguay', the Permanent Review Tribunal adopted a clear position with regard to the violation of MERCOSUR law, laying down a minimum legal basis in order to assess the compliance of member states with the law of MERCOSUR. In its considerations, the tribunal analysed the compliance of member states with MERCOSUR law, emphasizing that, within the TJCA (Tribunal Andino de Justicia – Andean Court of Justice) and the European Court of Justice (ECJ), there have been several cases in which, once the infringement was demanded before the Community Court, the defendant member state had struck down the infringing rule and adopted a new rule aimed at responding to the challenge by the other member state.[148] Therefore, the tribunal has chosen the thesis about continued non-compliance.

145 OP, Art. 3; Rules of Procedure for the Request of Advisory Opinions to the Permanent Tribunal of Revision by the Superior Tribunals of the Member States CMC Decision 02/2007, adopted on 18 January 2007; and Jardim de Santa Cruz Oliveira, *supra* note 86.

146 Advisory Opinion No. 1/2007, originated in the request of the Paraguayan Supreme Court, available at www.mercosur.int/msweb/portal%20intermediario/PrimeraOpinionConsultiva-Versionfinal.pdf.

147 Advisory Opinion No. 1/2008, issued following the request of the Supreme Court of Uruguay, available at http://asadip.files.wordpress.com/2009/04/oc-1–2008-ms-primacia-d-del-ms.pdf.

148 Original text in Spanish, author's translation.

5. Concluding remarks: what lies ahead for MERCOSUR law?

MERCOSUR law shows the evolution of a 'step-by-step' integration process. Over the first ten years, the law emanating from MERCOSUR adjusted to the goals of economic integration in a pragmatic way. During the past decade, after the relaunching of the process, MERCOSUR law made significant progress towards a more reliable and comprehensive legal system.

Despite the improvements, in the author's view, up to the present, MERCOSUR law represents an international law scheme in which the features of community law do not yet apply. On the one hand, MERCOSUR law-making relies on member states, and MERCOSUR norms require national implementation, which is easier in constitutional systems in which international law prevails. On the other hand, the dispute settlement system has evident limitations in guaranteeing compliance at a regional level. In fact, most attempts to compare the law of MERCOSUR to that of the European Union overlook their different natures, institutional arrangements, and procedures of adoption and enforcement of norms. However, this approach does not exclude the possibility of developing an authentic community law in MERCOSUR, as argued below.

As for the relationships between international law and MERCOSUR law, in the analysis of the various cases addressed in this article, one can see in some of them points of contact with international law, whereas in other cases one can perceive a different solution chosen in the framework of the specific rules applicable in MERCOSUR.

In light of the various arbitration awards rendered, the following reflections can be drawn up on the future of MERCOSUR law.

5.1. The nature of the MERCOSUR legal system

At this stage of the integration process, MERCOSUR law is neither 'community law' nor a completely autonomous legal system. Yet, one can refer to MERCOSUR law using the expression 'law of integration', which is, in other words, a special legal order within the broader framework of international law, but still rather dependent upon it. Could, then, MERCOSUR law be considered as a law 'in between' international law and community law? This seems to be the approach chosen by some arbitration tribunals: MERCOSUR law is still inter-governmental but can be seen as community law at a very early stage. Developments in recent years provide some hope that, in the future, MERCOSUR law will acquire the features of community law. In this regard, the contribution of the Permanent Review Tribunal to the emergence of an authentic MERCOSUR community law could be decisive.

5.2. Access of private parties to arbitration and legitimacy of MERCOSUR law

One of the main critiques of the current dispute settlement system regards the lack of direct resort to arbitration on the part of individuals and legal persons. Judicial protection and guarantees of judicial review at a regional level are of significant importance for transactions within the integrated space. The persistence of the

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obstacles to the access of private parties to MERCOSUR dispute settlement jeopardizes the legitimacy of MERCOSUR law. The improvements in the system should take into account granting them direct procedural *jus standi*. Direct access to the arbitration procedure and the availability of appellate review would confer more legitimacy to MERCOSUR integration law.

5.3. The autonomy of MERCOSUR law

The proclaimed 'autonomy' of MERCOSUR law (as arising from arbitration awards) has a specific connotation: MERCOSUR law is a specialized international legal order that is applicable (under certain circumstances) before international economic law or general international law. It is not feasible to speak of the principle of autonomy in the way it is understood and applied in the EU context. Nevertheless, this peculiar interpretation of the ad hoc tribunals has contributed to the idea of MERCOSUR law as a legal order that 'claims' to be independent, with clear implications for a further transformation into community law.

5.4. The evolution of MERCOSUR 'case law'

The more or less random composition of each arbitration tribunal and, sometimes, the inconsistency of the 'doctrine' being applied in the different cases undermine legal certainty in MERCOSUR law. As a matter of interpretation, the absence of a permanent court of justice *stricto sensu* makes things even more difficult for MERCOSUR law to develop into a community-law scheme. However, at the moment, an independent, non-political, judicial body might be difficult to incorporate. There is also a concern related to the absence of a mandatory precedent system. MERCOSUR member states do not adhere to the doctrine of *stare decisis*, nor does the arbitration system encourage the establishment of binding precedents. Nevertheless, the dispute settlement mechanism (with its clear limitations) has contributed to some extent to foster a common interpretation of MERCOSUR law that has been followed by successive arbitration tribunals. Over this 'case-by-case' ruling, there are some common elements that can be put together to distinguish the main features of MERCOSUR law, setting up the basis for a uniform interpretation.

APPENDIX*

TABLE 1. MERCOSUR – arbitration awards – Brasilia Protocol – ad hoc arbitration tribunals

Arbitration award	Issue	Parties	Arbitrators*	Date
I (09/1999)	Application of Restrictive Measures (non-tariff restrictions) by Brazil affecting the reciprocal trade with Argentina	Argentina v. Brazil	Juan Carlos Blanco (Uruguay) Guillermo Michelson Irustra (Argentina) João Grandino Rodas (Brazil)	Date of constitution of the tribunal: 01.02.1999 Date of the arbitration award: 28.04.1999
II (09/1999)	Pork meat subsidies applied by Brazil to production and export in favour of Brazilian producers Request for clarification	Argentina v. Brazil	Jorge Peirano Basso (Uruguay) Atilio Anibal Alterini (Argentina) Luiz Olavo Baptista (Brazil)	Date of constitution of the tribunal: 07.04.1999 Date of the arbitration award: 27.09.1999
III (03/2000)	Application of safeguard measures by Argentina in the textile sector based on the WTO regulations affecting Brazilian textile exports Request for clarification	Brazil v. Argentina	Gary Horlick (United States) Jose Carlos de Magalhães (Brazil) Raúl Emilio Vinuesa (Argentina)	Date of constitution of the tribunal: 30.12.1999 Date of the arbitration award: 10.03.2000
IV (05/2001)	Application of antidumping export measures by Argentina on poultry meat from Brazil Request for clarification	Brazil v. Argentina	Juan Carlos Blanco (Uruguay) Tercio Sampaio Ferraz Junior (Brazil) Enrique Carlos Barreira (Argentina)	Date of constitution of the tribunal: 07.03.2001 Date of the arbitration award: 21.05.2001
V (09/2001)	Market access restrictions on bicycles produced in Uruguay Request for clarification	Uruguay v. Argentina	Luis Martí Mingarro (Spain) Ricardo Olivera García (Uruguay) Atilio Anibal Alterini (Argentina)	Date of constitution of the tribunal: 23.07.2001 Date of the arbitration award: 29.09.2001
VI (01/2002)	Prohibition of import of remoulded tyres from Uruguay applied by Brazil	Uruguay v. Brazil	Raúl Emilio Vinuesa (Argentina) Ronald Herbert (Uruguay) Maristela Basso (Brazil)	Date of constitution of the tribunal: 17.09.2001 Date of the arbitration award: 09.01.2002
VII (04/2002)	Access restrictions on the import of Argentine phytosanitary products in Brazil	Argentina v. Brazil	Ricardo Olivera García (Uruguay) Héctor Masnatta (Argentina) Guido Fernando Silva Soares (Brazil)	Date of constitution of the tribunal: 27.12.2001 Date of the arbitration award: 19.04.2002

TABLE 1. Continued.

VIII (05/2002)	Application of a specific internal tax ('IMESI' – Impuesto Específico Interno) on the sales of cigarettes imported from Paraguay Request for clarification	Paraguay v. Uruguay	Luiz Olavo Baptista (Brazil) Evelio Fernández Arévalo (Paraguay) Juan Carlos Blanco (Uruguay)	Date of constitution of the tribunal: 18.03.2002 Date of the arbitration award: 21.05.2002
IX (4/2003)	Incompatibility with MERCOSUR law of incentives applied by Uruguay on the export of processed wool to Argentina	Argentina v. Uruguay	Ricardo Alonso García (Spain) Enrique Barreira (Argentina) Eduardo Mazzera (Uruguay)	Date of constitution of the tribunal: 17.05.2002 Date of the arbitration award: 04.04.2003
X (08/2005)	Discriminatory and restrictive measures on the import of tobacco products from Uruguay applied by Brazil	Uruguay v. Brazil	Raúl Emilio Vinuesa (Argentina) Nadia de Araujo (Brazil) Ronald Herbert (Uruguay)	Date of constitution of the tribunal: 10.05.2005 Date of the arbitration award: 05.08.2005

*These tables were elaborated on by the author on the basis of the information provided by SICE/OAS (www.sice.oas.org/dispute/mercosur) and official MERCOSUR sources: www.tprmercosur.org/es/sol_contr_opiniones.htm and www.mercosur.int. Information as of 11 May 2012.
*The first arbitrator is the president, the second arbitrator is appointed by the claimant, and the third arbitrator is appointed by the respondent.

TABLE 2. MERCOSUR – arbitration awards – Olivos Protocol – ad hoc arbitration tribunals

Arbitration award	Issue	Parties	Arbitrators	Date
XI* (10/2005)	Prohibition of import of remoulded tyres from Uruguay Award overturned by the Permanent Review Tribunal	Uruguay v. Brazil	Ad hoc tribunal H. M. Huck (Brazil) J. M. Gamio (Uruguay) M. A. Gottifredi (Argentina) Permanent Review Tribunal	Date of constitution of the tribunal: 26.07.2005 Date of the arbitration award: 25.10.2005
XII (09/2006)	Lack of adoption of appropriate measures to prevent or stop impediments to free movement of goods caused by the block of highways leading to international bridges between Argentina and Uruguay	Uruguay v. Argentina	Ad hoc tribunal Permanent Review Tribunal L. Martí Mingarro J. L. Gamio E. C. Barreira	Date of constitution of the tribunal: 21.06.2006 Date of the arbitration award: 06.09.2006
MERCOSUR – Permanent Review Tribunal – awards				
Award	Issue	Parties	Arbitrators	Date
01/ 2005	Review of the award on the prohibition of the import of remoulded tyres	Uruguay v. Argentina	W. Fernández Ricardo Olivera N. E. Becerra	20/12/05
01/ 2006	Clarification of the award on the prohibition of the import of remoulded tyres	Uruguay v. Argentina	W. Fernández Ricardo Olivera N. E. Becerra	13/01/06
02/ 2006	Review of the award on the lack of measures to stop the impediments to free movement of goods	Argentina	J. A. Moreno Ruffinelli N. E. Becerra R. Olivera N. de Araujo W. Fernández	06/07/06
01/ 2007	Excess in the application of compensatory measures in the dispute between Argentina and Uruguay concerning remoulded tyres	Argentina	W. Fernández N. Becerra R. Olivera García	08/06/07
01/ 2008	Divergence on the compliance with the arbitration Award 1/2005	Uruguay	C. A.González Garabelli (Paraguay) N. Becerra (Argentina) R. Olivera García (Uruguay)	25/04/08

*Since this arbitration award was overturned, commentators often refer to the subsequent award as XI.

TABLE 2. Continued.

MERCOSUR – Permanent Review Tribunal – advisory opinions				
Advisory opinions	Issue	Request	Arbitrators	Date
01/2007	Nature of the preliminary rulings procedure Primacy of MERCOSUR law over national legislation	Requested by the Supreme Court of Paraguay	João Grandino Rodas (Brazil) Dr Wilfrido Fernández Dr Ricardo Olivera Gacía Dr J. A. Moreno Ruffinelli Dr Puceira	03/04/07
01/2008	Primacy of MERCOSUR law over national norms	Requested by the Supreme Court of Uruguay	Carlos M. Correa (Argentina) João Grandino Rodas (Brazil) R. Ruíz Díaz Labrano (Paraguay) R. Puceiro Ripoll (Uruguay) J. L. Fontoura Nogueira (5th Arbitrator)	24/04/09
01/2009	Compatibility of an internal tax with MERCOSUR legislation	Requested by the Supreme Court of Uruguay	Carlos M. Correa (Argentina) João Grandino Rodas (Brazil) R. Ruíz Díaz Labrano (Paraguay) R. Puceiro Ripoll (Uruguay) J. L. Fontoura Nogueira (5th Arbitrator)	15/06/09