# *The Draft Protocol on the Creation of the Court of Justice of Mercosur. A New Milestone in the Judicialisation of Regional Integration Law*

# El proyecto de protocolo relativo a la creación de un Tribunal de Justicia del Mercosur. Un hito en la judicialización del derecho de integración regional

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SUMMARY: I. *Introduction*. II. *Mercosur's current dispute settlement mechanism*. III. *The Way Ahead*. IV. *Bibliography*.

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In addition, Bolivia's interest in joining the trade bloc despite its membership of the Andean Community («CAN») remains undiminished. However, after overcoming most of these challenges, the time would appear ripe for a new attempt to adjust the institutional framework to the demands of the integration process.

Before explaining the details of the reform, it appears sensible to describe concisely the current setup of Mercosur's dispute settlement mechanism. A closer look at the deficiencies of this mechanism will make clear why various legal scholars have called for reform.[3] The draft protocol must be regarded as an initiative aimed at providing a political answer to this appeal for reform.

## **II.** Mercosur's current dispute settlement mechanism



### **1.** *Actions aimed at pursuing infringements*

Article 33 of the UN Charter provides that a dispute settlement mechanism is an important instrument for the peaceful solution of international conflicts, listing a few examples such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of the parties' choice. The Protocol of Olivos («PO»), put in place the *Tribunal Permanente de Revisión* («TPR») in Mercosur, which seeks to resolve disputes concerning the interpretation, application and infringement of Mercosur law (which comprises the Treaty of Asunción «TA»: the treaty by which Mercosur was established, its protocols and the agreements concluded, as well as the disputes arising in connection with decisions, resolutions and directives adopted by Mercosur bodies having decision-making competence). Notwithstanding this, the

quent suspension of Paraguay in Mercosur on grounds of an alleged breach of the Protocol of Ushuaia regarding the Commitment of Mercosur to Democracy, and the entry of Venezuela in the organization as a full member led to litigation before the TPR. See, Rey Caro, Ernesto, "Crisis Institucional en el Mercosur. El Laudo No 1/12 del Tribunal Permanente de Revisión", *Revista de la Facultad*, 2013, p. 27.

[3] Perotti, Alejandro, "El proyecto de creación de la Corte de Justicia del Mercosur: estado de las negociaciones", *Foro de Derecho Mercantil*, 2009, p. 115.

Member States of Mercosur have the right to submit their disagreements to the WTO or any other dispute settlement mechanism.

The origins of the dispute settlement mechanism currently in place in Mercosur go back to the Protocol of Brasilia («PB»), which was replaced by the PO. The PB introduced a dispute settlement mechanism similar to the one that exists in the North American Free Trade Agreement («NAFTA»),[4] although the PO reshaped it so as to create one resembling more to the mechanism in place in the European Union («EU») and the CAN. Even though the PO creates a more sophisticated mechanism than found in NAFTA, it does not reach the level of sophistication attained by the EU or the CAN, as it does not foresee the establishment of a permanent court of justice but rather of a TPR.

Another important difference is the participation of individuals in the dispute settlement mechanism. There is no possibility under the PO to activate the dispute settlement mechanism directly, an option which exists in both the EU and CAN. The mechanisms in place in these integration systems allow individuals to submit their disputes before a permanent court of justice without the prior intervention of the respective Member State. Articles 39 and 40 PO provide for the right of individuals to lodge complaints before the respective National Section of the *Grupo del Mercado Común* («GMC») —the executive body of Mercosur— concerning legislative or administrative measures that allegedly have restrictive effect or are liable to distort competition in breach of Mercosur law. The procedure foresees that the complainants must provide elements of evidence confirming the authenticity of the breach as well as the existence or the threat of damage, so as to allow the complaint to be formally admitted by the National Section and assessed by the GMC and the group of experts summoned for this purpose.

The dispute settlement mechanism of Mercosur consists essentially of the following stages: (i) bilateral negotiations between Member States; (ii) the submission of the dispute to the GMC through consultations and complaints; and (iii) arbitration before the *ad hoc* panel and the TPR. When a

[4] The principal dispute settlement mechanisms of the NAFTA are found in Chapters 11 (Settlement of disputes between a party and an investor of another party), 19 (Mechanism to provide an alternative to judicial review by domestic courts of final determinations in anti-dumping and countervailing duty cases, with review by independent binational panels), and 20 (Disputes regarding the interpretation or application of the NAFTA).

dispute arises, the first step is to launch bilateral negotiations.[5] If no agreement is found, it is possible to opt for the procedure before the *Comisión de Comercio* («CCM»), which does not preclude the lodging of a complaint before the GMC, which will formulate detailed —but non-binding— recommendations as to how to solve the dispute. Where the settlement of the dispute in the two previous procedural stages has been unsuccessful, any of the Member States involved may inform the *Secretaría Administrativa* («Secretariat») —the body in charge of providing technical support to the other Mercosur bodies— of its intention to resort to the arbitration procedure (thus starting the third and last stage, which requires the setting up of an *ad hoc* panel).

Every *ad hoc* panel is made up of three members. Every Member State involved in the dispute shall designate one panel member respectively, while the third panel member, who chairs the panel and who may not be a national of either of the Member States, shall be designated by common agreement. In the event that no agreement should be found on the choice of the chair, the PO provides that the Secretariat shall designate it on the basis of a list of candidates drawn up for this purpose. The Member States have the right to designate their representatives and legal counsel. As the name suggests, the *ad hoc* panel is a tribunal expressly created for the resolution of the dispute in question. The panel must therefore limit itself to rule on the subject matter of the dispute, as determined by the written submissions and the pleadings of the parties. The parties must submit their factual and legal observations in support of their respective views.

Article 17 PO provides that any of the Member States involved in the dispute may appeal the panel decision before the TPR within 15 days of the notification of the decision to the parties. The TPR is composed of five referees, designated by each Member State, and a replacing referee, who shall be elected by unanimous vote. The referees must be permanently available. The TPR shall adopt a ruling within 30 days (with a possibility of an extension for another 15 days). The TPR has the power to confirm, modify or revoke the legal reasoning and the decisions adopted by the *ad hoc* panel. The TPR's arbitral award will be final, overriding the *ad hoc* panel's decision.

[5] This mechanism bears a slight similarity with the dispute settlement mechanism of the Eurasian Economic Union («EurAsEU») in so far as the latter also prescribes a mandatory attempt of pre-trial resolution prior to a referral of the matter to CJ-EurAsEU, according to Article 43 of its Statute.

It is feasible to skip certain stages of the procedure foreseen by the dispute settlement mechanism, as Article 23 PO provides for the possibility for the parties to submit the dispute immediately and in last instance to the TPR, however, only once the direct negotiations have ended. In this case, the TPR has the same competence as an *ad hoc* panel, with the consequence that its arbitral awards have the effect of *res iudicata*. They cannot be subject to revision. The importance of Article 23 PO gives the Member States the option of saving the time usually consumed by the regular dispute settlement mechanism created by the PB and refined by the PO. The regular procedure can last up to 195 days (including the possible extension of deadlines) from the initiation of the direct negotiations. The frequent use of the option laid down in Article 23 PO by the Member States involved might eventually favour turning the TPR into a permanent court of justice. However, for the time being, the Member States have shied away from taking this next, crucial step.

The arbitral awards —of both the *ad hoc* panels and the TPR— must be adopted by a majority, contain an account of reasons, and be signed by the chair and the other referees. The referees must keep their deliberation and the voting confidential. The parties to the dispute must comply with the arbitral award within the time limits specified. In the event that the Member State party to the dispute should not comply with the arbitral award, the harmed party is allowed to apply countermeasures in order to avoid any damages. Where proof has been adduced of a situation likely to cause grave and irreparable damages, the parties may request interim measures. Before the entry into force of the PO, interim measures could be ordered until the *ad hoc* panel would adopt its arbitral award. Nowadays, the effect of interim measures cease when the TPR has adopted it arbitral award.

### **2.** *Mechanisms aimed at obtaining an interpretation or verification of validity of integration law*

To a similar extent as other integration systems,[6] Mercosur has a mechanism in place allowing certain bodies to request an interpretation of the in-

[6] Article 267 TFEU in the EU (preliminary rulings); article 34 SCA in the EFTA pillar of the EEA (advisory opinions); article 32 TTJCAN in the CAN (*cuestiones prejudiciales*);

tegration system's common rules.[7] The «*Opiniones Consultivas*» are reasoned decisions adopted by the TPR in response to legal questions submitted, concerning the interpretation and application of the Mercosur in an individual case, with a view to safeguard its uniform application in the territory of the Member States. The mechanism is also applicable in circumstances in which it is necessary to verify the validity a specific legal act or provision of integration law. It can be invoked by the Member States acting jointly, the bodies of Mercosur having decision-making powers (CMC, GMC, and CCM), the Supreme Courts of the Member States, and Parlasur.

Secondary Mercosur legislation allows the supreme courts to extend this competence to other supreme judicial bodies of the Member States,[8] a competence that has not yet been used. Conversely, there is no legal provision in Mercosur law allowing lower national courts to refer questions directly to the TPR without the intermediary of the supreme courts. In other words, lower national courts must submit their questions on interpretation of Mercosur law to their supreme court before a referral to the TPR is possible at all. This is explicitly prescribed by secondary Mercosur legislation,[9] which requires the adoption of national implementing measures, a task that has been entrusted not to the parliaments but to the supreme courts.[10] Internal legislation adopted in the meantime by the supreme courts of all Member States specifies that all national courts may initiate a referral, either



Article 22 lit. k Statute CJ-SICA in the SICA (*consultas prejudiciales*). The Court of Justice of the Eurasian Economic Community («CJ-EurAsEC») used to have the competence laid down in Article 3 of the Private Litigants Treaty to give advisory opinions upon request of a national supreme court, even though it was only used once during its existence. The Court of Justice of the Eurasian Economic Union («CJ-EurAsEU») has not been conferred any similar competence (Karliuk, Maksim, "The Eurasian Economic Union: An EU-like legal order in the post-Soviet space?", *WP BRP 53/LAW/2015 National Research University Higher School of Economics*, 2016, pp. 15-16; Ispolinov, Alexei, "First judgments of the Court of the Eurasian Economic Community: Reviewing Private Rights in a New Regional Agreement", *Legal Issues of Economic Integration*, 2013, 225 (228).

7 Article 9, MERCOSUR/CMC/DEC. Nº 37/03.

8 MERCOSUR/CMC/DEC. Nº 02/07.

9 MERCOSUR/CMC/DEC. Nº 02/07 and MERCOSUR/GMC/RES. Nº 40/04 and Nº 41/04.

10 Atela, Vicente/Gajate, Rita/Martínez, Lautaro, "Las retenciones a las exportaciones ante el ordenamiento jurídico del Mercosur. La CSJN va al Tribunal Permanente de Revisión. Análisis desde el Derecho Constitucional, de la Integración y del Internacional Económico", *Anales de la Facultad de Ciencias Jurídicas y Sociales*, 2010, 272 (274).

the Americas and Europe. While the influence of CAN and, to a lesser extent, SICA is palpable, it is worth noting that most provisions ultimately relate to the legal order created by the EU. This concerns, for the most part, the system of procedures and remedies, which has been adopted with only few modifications. The same applies to the system of financial penalties for breach of integration law, what might ultimately make of Mercosur the only integration system in America to put in place such a mechanism of legal enforcement. However, the fact that the draft protocol partially adheres to a system of countermeasures in order to ensure enforcement, as is the case in CAN and SICA, indicates that the drafters were still cautious as regards the possible acceptance of a system of financial penalties by the Member States.

The dispute settlement mechanism envisaged is meant to replace a system of arbitration which has become obsolete for an integration system such as Mercosur, whose ambitious objective is to create a common market comprising the largest economies in South America. The tendency goes clearly towards the adoption of supranational features, leaving behind the intergovernmentalism of the past. Safeguards such as independence in financial matters as well as regards the appointment of judges shall ensure that the future CJM will operate efficiently, shielded from any possible intervention by national governments. The ultimate purpose is the consolidation of the Mercosur legal order as one distinct from national and international law, which shall evolve into community law. This aspiration can be deduced from the draft protocol and from the diverse decisions adopted by the TPR, which essentially acknowledge that Mercosur law is still at an early stage of development. It further follows from the recitals to the preamble and the explanations attached to the draft protocol that the drafters hoped for more professionalism in the exercise of judicial functions, liable to contribute to an improvement of the quality of Mercosur jurisprudence. Unfortunately, at this stage, certain panel and TPR decisions reveal a lack of legal creativity, with solutions often «imported» from the findings of other supranational courts. The involvement of permanent judges shall hopefully help the CJM to develop its own case law, derived from an inward and rigorous analysis of Mercosur law. Ultimately, depending on the success of the CJM, Mercosur law might advance to becoming an additional source of supranational integration law worldwide, contributing to a more authentic «judicial dialogue» with TJCAN[84] and other supranational courts, instead of remaining confined

[84] Kühn, Werner Miguel, "Reflexiones sobre una possible convergencia regional con la

to the role of the receiver, which processes and transposes foreign case law (mainly from CAN and EU).

The draft protocol can be seen as an answer to the long debated question as to whether Mercosur could evolve into a supranational legal order by itself, relying exclusively on the efforts undertaken by its dispute settlement bodies and the case law produced, or rather by the creation of a judicial body with far-reaching competences, such as ECJ, EFTA Court, and TJCAN. Experience has shown that an arbitration system cannot deliver the expected results, due to its lack of continuity, professionalism and long-term perspective. Neither could it be expected that powerful Member States would relinquish their bargaining power in negotiations in favour of a more balanced system, which promotes the formal equality between Member States for the sake of the stability of integration process. Against this backdrop, the creation of a supranational court would constitute a radical turning point in Mercosur's history. Eventually, such a step might provide stimuli for other integration systems around the world to follow the example. As can be seen in the case of the CJ-EuAsEU, integration does not necessarily entail a continuous increase in the competence of judicial bodies but sometimes even the loss thereof.[85]

## III. The Way Ahead

Although five years have passed since Parlasur submitted the draft protocol for approval, the idea of establishing the CJM has not been abandoned. On

participación de la Comunidad Andina y el Mercosur. Lecciones de la experience integracionista europea", *Política Internacional*, 2013, p. 192, concerning the proposal concerning the creation of a legal mechanism aimed at establishing a link between CAN and Mercosur, which would make their legal orders compatible with each other. The ultimate objective would be to create an integrated «South American Economic Area», in which both, TJCAN and a future CJM would play a crucial role in the interpretation of the common integration law.

[85] The Statute of the CJ-EurAsEU shows a clear intention to limit its competences and authority. A few examples are the already mentioned abolishment of the mechanism or preliminary ruling, the authorisation of joint interpretations by the Member States themselves (article 47), the prohibition on the CJ-EurAsEU to vest additional competences to the bodies of the integration system (article 42) or to create new legal provisions, including in national legislation, and the pre-trial requirement (article 43). See further *Danilov,* The Court of the Eurasian Economic Union, Gent 31 October 2014.

the contrary, the election of a new government in Argentina has sparked hopes for a reconsideration of this project by the CMC. Accordingly, on 14 March 2016, the delegation of Paraguay at Parlasur submitted a note to the President of this body, inviting him to address again the CMC with a view to urge it to discuss the legislative proposal. Due to Uruguay's traditionally positive stance on this matter (in 1994 Uruguay had proposed the creation of a court of justice),[86] there is hope that the presidency of this Member State at the CMC will also be favourable to the project. Despite the overwhelming number of arguments presented by officials and legal scholars, at present the only certainty is that the Member States will have the last word on this issue.

## **IV.** Bibliography



Atela, Vicente *et al.*, "Las retenciones a las exportaciones ante el ordenamiento jurídico del Mercosur. La CSJN va al Tribunal Permanente de Revisión. Análisis desde el derecho constitucional, de la integración y del internacional económico", *Anales de la Facultad de Ciencias Jurídicas y Sociales*, año 7, núm. 7, 2010.

Barents, René, *Directory of EU Case Law on the Preliminary Ruling Procedure*, Alphen aan den Rijn, Kluwer Law International (ed.), 2009.

Bellocchio, Lucía, "Resolución de Controversias en el Mercosur ¿Hacia una Corte de Justicia para el Bloque?", *Congreso de Derecho Público «Democracia y Derechos»*, in: *http://www.derecho.uba.ar/institucional/deinteres/derecho-de-la-integracion-lucia-bellocchio.pdf* (last visited on 13 September 2016)

Blockmans, Steven *et al.,* "Towards a Eurasian Economic Union: The Challenge of Integration and Unity", *CEPS Special Report*, núm. 75, diciembre de 2012.

[86] On that occasion, Uruguay had submitted a draft document on the establishment of a court of justice, produced by the National Commission of Lawyers, which had started its work in 1992 with a seminary organised by the Ministry of Foreign Affairs of Uruguay, to which *Pierre Pescatore* (ECJ) and *Fernando Uribe Restrepo* (TJCAN) had been invited.

BOROVIKOV, Edward and DANILOW, Igor, "B2B: Balancing the Court of the Eurasian Economic Union", in: *The Moscow Times* of 17 March 2015, in: *http://www.themoscowtimes.com/article/b2b-balancing-the-court-of-the-eurasian-economic-union/517551.html* (last visited on 2 June 2016).

CHEDIAK GONZÁLEZ, Jorge and BENÍTEZ RODRÍGUEZ, Pablo, "Acerca de la competencia consultiva del Tribunal Permanente de Revisión del Mercosur y de la experiencia del poder judicial del Uruguay en la tramitación de opiniones consultivas", *Revista de la Secretaría del Tribunal Permanente de Revisión*, año 2, núm. 4, 2014.

DELUCA, Santiago, "El Mercosur necesita su Maastricht", *Pensar en Derecho*, Buenos Aires, año 1, núm. 1, 2012.

DRAGNEVA, Rilka y WOLCZUK, Kataryna, "Eurasian Economic Integration: Institutions, Promises and Faultlines", in Davier Cadier (ed.), *The Geopolitics of Eurasian Economic Integration*, Special Report 19, LSE IDEAS.

GAZZE, Patricio, "Desarrollo del derecho ambiental en el ámbito del Mercosur. El desafío a futuro que plantea el caso de las pasteras del Río Uruguay", *El Derecho*, 2013, año LI, núm. 66.

HOUSE OF LORDS, European Union Committee, 12th Report of Session 2006-07, "*Funding the European Union – Report with Evidence*".

ISPOLINOV, Alexei, "First Judgments of the Court of the Eurasian Economic Community: Reviewing Private Rights in a New Regional Agreement", *Legal Issues of Economic Integration*, vol. 40, núm. 3, 2013.

KARLIUK, Maksim, "The Eurasian Economic Union: An EU-like legal order in the post-Soviet space?", *WP BRP 53/LAW/2015 National Research University Higher School of Economics*, 2016.

KLUMPP, Marianne, *Schiedsgerichtsbarkeit und Ständiges Revisionsgericht des Mercosur*, Heidelberg 2013.

KÜHN, Werner Miguel, "Reflexiones sobre una posible convergencia regional con la participación de la Comunidad Andina y el Mercosur. Lecciones de la experiencia integracionista europea", *Política Internacional*, núm. 109, julio-septiembre de 2013.

LENAERTS, Koen *et al.*, *EU Procedural Law*, Oxford, Oxford University Press (ed.), 2014.

LEPOUTRE, Naiké, "Le renvoi préjudiciel et l'instauration d'un dialogue des juges – Le cas de la Cour de justice de l'Union européenne et du juge administratif français", *Jurisdoctoria,* núm. 6, junio de 2011.

LOGAR, Ana Cristina, "Tribunal de Justicia para el Mercosur. Una decisión impostergable", *Revista de Relaciones Internacionales*, vol. 6, núm. 12, 1997.

MARTÍNEZ PUÑAL, Antonio, "El Protocolo de Olivos para la Solución de Controversias en el Mercosur: una reforma en clave continuista", *Anuario de Derecho Europeo*, 2003, núm. 3.

NOLL, Gregor, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague, Martinus Nijhoff Publishers (ed.), 2000.

PEÑA-PINON, Mariana, "Une cour de justice pour le Mercosur? Vraies-fausses avancées vers une institutionnalisation renforcée", *Revue Québécoise de Droit International*, vol. 25, núm. 1, 2012.

PEROTTI, Alejandro, "El proyecto de creación de la Corte de Justicia del Mercosur: estado de las negociaciones", *Foro de Derecho Mercantil*, núm. 25, octubre-diciembre 2009.

———, "Algunos desafíos que presenta la constitución de un Tribunal de Justicia Comunitario", *El Derecho*, Universidad Católica Argentina (ed.), 2011.

PUNTSCHER, Sonja/Mokre, Monika/Latzer, Michael, *The State of Europe. Transformations of Statehood from a European Perspective*, Campus Verlag, Frankfurt am Main 2004.

REY CARO, Ernesto, "Reforzamiento institucional del Mercosur: El Tribunal Permanente de Revisión", *Anuario Argentino de Derecho Internacional*, vol. 13, 2004.

———, "Crisis Institucional en el Mercosur. El Laudo No 1/12 del Tribunal Permanente de Revisión", *Revista de la Facultad*, vol. 4, núm. 2, 2013.

RUIZ DÍAZ LABRANO, Roberto, "Mercosur, necesidad de un tribunal de carácter supranacional", *Azpilcueta*, núm. 14, 1999.

SASAKI OTANI, María Ángela, "El sistema de sanciones por incumplimiento en el ámbito de la Comunidad Andina", *Anuario Mexicano de Derecho Internacional*, México, vol. 12, 2012.

SALAZAR GRANDE, César Ernesto y ULATE CHACÓN, Enrique Napoleón, *Manual de Derecho Comunitario Centroamericano*, 2a. ed., San Salvador, 2013.

SCOTTI, Luciana and KLEIN VIEIRA, Luciane, "La creación de un tribunal de justicia: un paso ineludible para el fortalecimiento del Mercosur", in *Scotti*, *"Balances y perspectivas a 20 años de la constitución del Mercosur"*, 2013, p. 151.