

**THE LACK OF ENFORCEABILITY OF THE MERCOSUR AGREEMENT**

**TOWARDS THE CREATION OF THE COURT OF JUSTICE OF MERCOSUR?**

**Abstract**

In March 1991, the governments of Argentina, Brazil, Paraguay and Uruguay signed the founding Treaty of Asunción, giving rise to the creation of the Common Market of the South, known as Mercosur.

The referred Treaty created an ambitious and progressive project, whose objective was the creation of a common market through the elimination of tariffs and non-tariff barriers (NTBs), as well as through the harmonisation of sanitary, technical and phytosanitary regulations. In its Preamble, the signatory States considered that *“the expansion of their national markets through integration is a fundamental condition for accelerating economic development with social justice.”* They approved therefore to establish the free movement of goods, services and productive factors between the parties, as well as a common external tariff – in relation to third States –. Moreover, they agreed to coordinate their macroeconomic and sectoral policies in certain areas, as well as to harmonise their legislations in the relevant areas to achieve the strengthening of integration.

28 years after the signing of the Treaty of Asunción and the Protocol of Ouro Preto, – which defined its institutional and functional structure and gave it international legal personality –, one might well ask whether or not Mercosur could be considered as a common market. To date, it is argued that there is no real free movement of goods and services, since national regulations maintain many obstacles to trade – mostly non-tariff restrictions –. Additionally, the transposition and enforcement of Mercosur law into the national legal frameworks have remained fragmented. This, together with the intergovernmental nature of Mercosur bodies and the many inefficiencies of the dispute settlement system, have clearly undermined Mercosur ambitions to conform an efficient common market. All that leads to a significant lack of enforceability of Mercosur law, where its effective application depends on the will of the States Parties, creating a serious legal uncertainty.

Therefore, a solution needs to be found. In light of these facts, one can ask whether the Court of Justice of Mercosur could be the instrument to solve all the legal uncertainty caused by the currents deficiencies of the Mercosur system, and therefore whether it would lead to the definitive consolidation of the Common Market of the South.

**Abstracto**

En marzo de 1991, los gobiernos de Argentina, Brasil, Paraguay y Uruguay firmaron el Tratado de Asunción, dando lugar a la creación del Mercado Común del Sur, conocido como Mercosur.

Este Tratado creó un proyecto ambicioso y progresivo cuyo objetivo era la creación de un mercado común, eliminando aranceles y barreras no arancelarias al comercio intrarregional, así como armonizando las regulaciones sanitarias, técnicas y fitosanitarias. En su Preámbulo, los Estados signatarios consideraron que “*la ampliación de las actuales dimensiones de sus mercados nacionales, a través de la integración, constituye condición fundamental para acelerar sus procesos de desarrollo económico con justicia social*”. Por lo tanto, acordaron establecer la libre circulación de bienes, servicios y factores productivos entre los Estados parte, así como un arancel externo común a terceros Estados. Además, acordaron coordinar sus políticas macroeconómicas y sectoriales en ciertas áreas, así como armonizar sus legislaciones en las áreas relevantes para lograr el fortalecimiento de la integración.

28 años después de la firma del Tratado de Asunción y el Protocolo de Ouro Preto, que definieron su estructura institucional y functional, y que le dieron personalidad jurídica internacional, uno podría preguntarse si el Mercosur podría considerarse un mercado común o no. Hasta la fecha, no existe una verdadera libre circulación de bienes y servicios, ya que las regulaciones nacionales mantienen numerosos obstáculos al comercio, en su mayoría a traves de restricciones no arancelarias. Además, la transposición y la aplicación del Derecho del Mercosur a los marcos legales nacionales se han mantenido fragmentadas. Esto es debido tanto a la naturaleza intergubernamental de las intituciones del Mercosur, como a las numerosas ineficiencias del sistema de solución de controversias, que han socavado claramente las ambiciones de Mercosur de formar a un mercado común eficiente.

Por lo tanto, hay que encontrar una solución. A la luz de estos hechos, nos preguntamos si el Tribunal de Justicia de Mercosur podría ser el instrumento para paliar toda la inseguridad jurídica causada por las deficiencias del Mercosur, y si, por tanto, llevaría a la consolidación definitiva del mercado común del Sur.

**Keywords**

Common Market of the South/Mercosur Intergovernmentalism

Court of Justice of Mercosur Legal enforceability

Direct Effect Non-tariff barriers to trade

Dispute Settlement System Protocol of Olivos

**Abbreviations**

CJM – Court of Justice of Mercosur

CMC – Council of the Common Market

ECJ – European Court of Justice

EU – European Union

GMC – Group of the Common Market

IMF – International Monetary Fund

NTBs – Non-Tariff Barriers

Parlasur – Parliament of Mercosur

PRT – Permanent Review Tribunal of Mercosur

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# Introduction

The Common Market of the South (Mercosur)[[1]](#footnote-0) was founded in 1991 by Brazil, Argentina, Uruguay and Paraguay with the signature of the Treaty of Asunción. Mercosur is one of the leading regional economic integration blocs and the fifth largest economy in the world.[[2]](#footnote-1) Its territory extends over 14,869,775 km², its population exceeds 295,007,000 and since the successful privatization developments and economic stabilization strategies in Argentina and Brazil in the 1990s, there has been a non-stop increasing demand for foreign direct investment in the area. There are no doubts that Mercosur is an issue of great interest to all those interested in economic integration and international trade, mostly since there are high chances to consolidate a commercial agreement with the European Union.

The referred Treaty created an ambitious and progressive project whose objective is the creation of a common market, through the elimination of tariffs and non-tariff barriers (NTBs), as well as through the harmonisation of sanitary, technical and phytosanitary regulations. However, despite the commitments, the number of restrictive non-tariff measures have been increasing over time. Additionally, the transposition and enforcement of Mercosur law into the national legal frameworks have remained fragmented. This, together with the intergovernmental nature of Mercosur bodies and the many inefficiencies of the dispute settlement system, have clearly undermined Mercosur ambitions to conform an efficient common market.

In order to resolve the deficiencies of the current system, the Parliament of Mercosur (Parlasur) put forward a proposition in 2010 of a protocol that would transform the institutional order established by founding a Court of Justice. However, there has been no answer from the Council yet. This Court would restore the current Permanent Review Court – established by the Protocol of Olivos – and would dispose of large competences to control the legislation and to supervise its implementation. The proposed Court is largely inspired by the Court of Justice of the Andean Community and the European Court of Justice (ECJ).

The present document concretely analyses the adequacy of the enforceability of the Mercosur Agreement in light of the aim to create an efficient common market. This lack of enforceability of Mercosur law and the absence of a supranational judicial body, are here perceived as the roots of the difficulties that Mercosur encounters in moving towards a closer and much more successful union.[[3]](#footnote-2)

# The lack of enforceability of the Mercosur Agreement

## Protocol of Olivos: the current Dispute Settlement Mechanism

In order to improve the existing dispute settlement system established by the Protocol of Brasilia, the “Protocol of Olivos for the Resolution of Disputes in Mercosur” was adopted and approved by the Council the 18th February 2002, after two years of negotiations.[[4]](#footnote-3)

One of the most notable innovations was the creation of the *Tribunal Permanente de Revisión –* Permanent Review Tribunal (PRT) *–*. It hears the appeals to the decisions issued by the ad-hoc Arbitration Tribunals. Moreover, the PRT is issuing Advisory Opinions – without a binding nature – on any legal matter of Mercosur law.[[5]](#footnote-4)

In the first stage of a dispute, the parties seek to reach an agreement through direct negotiations.[[6]](#footnote-5) With the expiration of the deadlines without being able to reach a solution, the parties can submit in common agreement the dispute to the *Grupo Mercado Común* (GMC) *–* Group of the Common Market *–*.[[7]](#footnote-6) The first problem can be found here, since the recommendations made by such an organ are not binding.[[8]](#footnote-7) This leads again to legal uncertainty, mainly because their enforcement depends on the will of the States Parties.[[9]](#footnote-8)

In matters of procedural legitimation, the current Protocol maintains the parameters of the previous system, as only the States can activate solution mechanisms.[[10]](#footnote-9) Beyond small modifications, the role of individuals remains limited as mere petitioners before their respective administrations.[[11]](#footnote-10) Thus, it is also considered that the Protocol of Olivos squandered the opportunity to legitimise individuals to direct access to the dispute settlement system. As Mikhail Mukhametdinov summed up, “a common market can hardly become a reality if economic actors and citizens are not allowed to protect their interests obstructed by conflicting domestic laws.”[[12]](#footnote-11) In the same line of thought, Edgardo Rotman rightly argues that “the Mercosur dispute resolution system […] lacks an effective mechanism to protect the rights of individual entities or persons and is limited to disputes exclusively arising among member states regarding the application of Mercosur norms.”[[13]](#footnote-12)

On the other hand, the Protocol of Olivos introduces the *forum option* for settling disputes.This means the applicant is given the option of resorting to the Mercosur’s dispute settlement system or other mechanisms.[[14]](#footnote-13) It is here argued that the open possibility to choose the forum is another way of weakening the system. In light of this, Mikhail Mukhametdinovstates that “*if parties to a dispute decide to use arbitration courts outside MERCOSUR, the whole arbitration system of the union is by-passed.”*[[15]](#footnote-14)

According to Silva and Nóbrega, another difficulty faced by the PTR to implement its awards is the fact that the States parties have different internal procedures and legal regimes,[[16]](#footnote-15) which causes political and regulatory restrictions, both in the development of the complaints and in the fulfillment of the rulings.[[17]](#footnote-16) In this line, the lack of an harmonised interpretation also clearly affects the enforcement of Mercosur law.[[18]](#footnote-17) Both sources of primary law and secondary law have been applied by domestic courts, and this lack of coherence amongst different interpretations leads to an important legal uncertainty.[[19]](#footnote-18) This clearly does not give the necessary guarantees for the consolidation of Mercosur.

With respect to the NTBs**,** it is important to noted that many decisions taken by the ad hoc tribunals or by the PTR were not duly fulfilled by the loosing parties. According to Luciana Beatriz Scotti, the case of the import prohibition of remolded tires from Uruguay, which was the subject of many of the awards dictated by the PTR under the Protocol of Olivos, were never duly fulfilled, even if there have been applied compensatory measures.[[20]](#footnote-19)

Similarly, it is argued that the compensatory measures as the instrument to obtain compliance with the PRT’s decisions is not as effective as other enforcement mechanisms.[[21]](#footnote-20) For example, in the case of the EU, the ECJ imposes lump sum or penalty payments to the Member State that does not comply with its judgments. Moreover, it is the Commission, a supranational and independent body, which brings the Member State before the ECJ. This system brings legal certainty and legal security.[[22]](#footnote-21) As Luciana Beatriz Scotti argues, Mercosur *“*does not have an effective system for the execution of awards in the event of a lack of voluntary compliance by the State party infringing the law […] Small countries will never be able to apply a measure that has the sufficient impact to generate a change of behavior in the failing party*”.*[[23]](#footnote-22)

Finally, it is here considered that a procedure established for the settlement of disputes through arbitration has been thought exclusively for commercial matters, which leads to a situation where the possibility of going to the system with a conflict of another nature is very exceptional.[[24]](#footnote-23)

Therefore, it can be concluded that even if the intentions of the new Protocol were to improve the Protocol of Brasília with respect to the enforcement of Mercosur law into the domestic systems, it is far from being efficient.

## The Intergovernmental nature of Mercosur

It is here argued that the lack of political will of the States Parties to transfer competences to Mercosur Bodies – which entails their intergovernmental nature –, is another significant impediment to the consolidation of an efficient common market. As Maria Eugenia Jimenez explains, “the key precondition to the existence of regional integration is the will from sovereign states to voluntarily transfer parcels of sovereignty to a supranational institution.”[[25]](#footnote-24)This argument is especially important if what is indented to create is a common market. However, in lower levels of regional integration it is also desirable. For instance, the Andean Community has two supranational bodies – the Court of Justice and the General Secretariat –, being only a Free Trade Area, not a common market.[[26]](#footnote-25)

It is considered that the intergovernmental nature causes the absence of a system that guarantees and protects the uniformity of the decisions taken in the regional level. [[27]](#footnote-26) This clearly deepens the legal uncertainty and generates problems with the control of legality of the secondary law. The current system of Mercosur may be useful at the international level, to solve conflicts of interest arising between sovereign States, that cooperate with each other, but not in legal conflicts originated in the field of an integration process such as Mercosur, which need to be resolved in an efficient judicial system.

# The creation of the Court of Justice of Mercosur

What it is here proposed is a complete reform of Mercosur’s institutional and legal system, being the creation of the Court of Justice of Mercosur (CJM) the leading instrument to establish a real Common Market of the South. It is true that the project is ambitious, with significant reforms and innovations, but it would bring an important stability and prosperity to the bloc. Nevertheless, there are also several complications that should be taken into consideration in order to make the fourth scenario a real success.

## Draft Protocol on the creation of the Court of Justice of Mercosur

In December 2010, the Parlasur approved, after an intense debate, the creation of the Court of Justice of Mercosur.[[28]](#footnote-27) After the approval, the project was sent to the Council, which has not analysed it since then. Even though its analysis is not the aim of this paper, the draft protocol brings some important reforms that shall be mention in order to realise the positive impact that the CJM could bring:

On the one hand, it replaces the Permanent Review Tribunal and grants absolute independence to the judges of the CJM. It also creates the possibility for individuals and companies to bring disputes before the CJM. Moreover, the Court rulings are compulsory – under a system of penalties – and it also allows CJM to control the legality of Mercosur rules. In addition, the proposed system allows any national judge to consult directly with the CJM on the interpretation of the regional law. And it also establishes its exclusive jurisdiction – for disputes raised under the legal framework of Mercosur –. This constitutes an important turning point in the evolution of Mercosur, given the little confidence shown by the States Parties of the current dispute settlement mechanism.

Moreover, as is the case in EU law, the CJM would have competence for *Actions of Annulment, Actions for Failure to Act* and *Actions for Infringement*. As Werner Miguel Kühn Baca states, it is indeed “an important novelty in the procedural law of Mercosur, crucial to survey compliance by the Member States with their obligations derived from this integration system’s legal order.”[[29]](#footnote-28) CJM rulings would therefore constitute a sufficient legal basis for individuals to properly defend their rights before national jurisdictions in the event of State liability for breach of Mercosur law.[[30]](#footnote-29)

Another very significant innovation of the draft protocol is the *Preliminary Ruling Procedure*, following the example of the European Union and the Andean Community. It is here argued that the potential of the *Preliminary Ruling Procedure* for the strengthening of Mercosur’s integration process is huge. As Domitilla Sartorio explains, it is particularly important in an integration process because *“*it provides links between the Court and subnational actors, such as private litigants and national courts. […] Lastly, as governments find it harder to disobey their own courts, compared to international courts, the preliminary procedure ensures that Community law remains uniform in all Member States.”[[31]](#footnote-30)

## The importance of a Court of Justice for the consolidation of Mercosur

As the CJM project itself says in its Explanatory Memorandum, the existence of a Court of Justice is imperative for the purpose of consolidating the internal legal mechanism of the bloc, which is necessary to provide security and legal certainty to the process of integration, and thereby guaranteeing the application of the rights attributed to the States parties, regional bodies and natural and legal persons. It is considered the creation of the Court of Justice will safeguard the Rule of Law in Mercosur, elevating its level of institutional and legal development, and thereby filling the absence of a Community jurisdiction.[[32]](#footnote-31)

This proposal is not a mere idealistic suggestion, but an initiative with an important practical impact. As already seen, intra-Mercosur borders are undermined by restrictions on trade. For instance, concerning the DJAI dispute, if the CJM had existed, any company could have easily and directly sued the violation of the free movement of goods. The CJM would have declared that the DJAI were incompatible with Mercosur and thus Argentina would have been obliged to remove the norm. Presidential diplomacy is an inappropriate and flawed method of resolving regional trade restrictions, mostly when the States Parties present big differences between them. Thus, not only governments should be involved with this project, but also companies, trade unions, business chambers, civil society and lawyers.

Furthermore, a Court of Justice would ensure a uniform interpretation of the rules – both Primary and Secondary law – and its subsequent enforcement. Through its rulings, it would help to keep a legal certainty, which would lead to achieve stability in legal relations between States Parties. In this light, it should be highlighted that, as Domitilla Sartorio remarks, the European Court of Justice (ECJ), through its two fundamental legal doctrines, supremacy and direct effect, together with the preliminary ruling procedure, “resulted in the creation of an autonomous legal order that maintained the conditions for integration through an enforcement mechanism.”[[33]](#footnote-32) Thus, the coherent legal protection system that governs the EU law has been the result of the work carried out by the Court of Justice.[[34]](#footnote-33)

In conclusion, the creation of a supranational Court of Justice, with exclusive, compulsory, consultative and contentious competence, which guarantees the legality and uniform interpretation of Mercosur law, becomes essential for the consolidation of the common market. However, its creation is more complex that it could be seen at first sight.

## Hidden Stakes

### Procedural issues

First, the Draft Protocol must be approved by the Council through a “Decision”. As Mariana Peña-Piñon argued, there is already a contradiction in this approach.[[35]](#footnote-34) Indeed, she wondered how a decision, which belongs to the category of secondary law, can adopt a protocol which will assume the rank of primary law and, consequently, will be hierarchically superior.[[36]](#footnote-35) But the procedural problems of creating the CJM does not stop at this stage.

The entry into force of secondary legislation, including Council’s Decisions, is complex and often described as obscure.[[37]](#footnote-36) Their implementation will depend again on the political will of States. It is sufficient for a State not to adopt the relevant domestic provisions – or not to inform the Secretariat – to cause that the standard does not enter into force. The direct consequence of these multiple stages is the lack of legal certainty.

### Substantive issues

The creation of the CJM seeks to overcome the criticisms that were made to the system implemented with the Protocol of Brasilia and Olivos. However, it does not seem to be possible for a Court to develop an autonomous community law if the legal and political resistance by the States Parties continue to exist.

On the one hand, a first step should be the transfer of certain parcels of sovereignty. In this regard, Christian Leathley explains that “the creation of a supra-national tribunal not only means the creation of a physical institution, but more importantly implies the delegation of both juridical and legislative powers to a new independent court.”[[38]](#footnote-37)

This actually seems complicated since there has always been an important reluctance to transfer parcels of national sovereignty, mostly from Brazil. As already seen, the European Union and the Andean Community are good examples. The Member States of the EU, from the Schuman plan for more than sixty years of evolution in the process of integration, have been transferring more and more competences.[[39]](#footnote-38) Furthermore, in the Andean Community the General Secretariat and the Court of Justice are supranational institutions. This particular case is very interesting because, even though it is a mere Free Trade Area, it has a supranational Court of Justice.

Another issue key issue is that both Argentinian and Paraguayan Constitutions have clauses that admit membership in supranational organizations, however, the Brazilian and Uruguayan Constitutions only provide for the encouragement of economic and social integration.

In this sense, as Mariana Peña-Pinon indicated, the Uruguayan Judge Gutierrez, who was in favour of the creation of a CJM, recalled that the doctrine has been unanimous in expressing the impossibility of admitting a supranational law, as well as the direct effect of the Mercosur law despite its mandatory nature. [[40]](#footnote-39) Additionally, she stated that the Judge Van Rompaey was even more explicit arguing that the Constitution does not allow the transfer of competences to supranational bodies.[[41]](#footnote-40) Moreover, the Brazilian constitutional system also reveals that much more needs to be done. Nonetheless, some progress has been made in recent times. The Supreme Federal Court of Brazil has already publicly held that the CJM would be compatible with its national Constitution. The rest of the Supreme courts have also supported this initiative.[[42]](#footnote-41)

On the other hand, authors as Santiago Deluca argue that, *a priori*, this project may seem an ideal scheme, however, it does not respond to the current needs of Mercosur.[[43]](#footnote-42) He stresses the idea that when the necessary efforts have not been made to make the current system work, trying to create a Supreme Court sounds “*utopian*” and “*unbelieving*”.[[44]](#footnote-43)According to Brenda Luciana Maffei, the creation of the CJM does not respond to a current need of the block, but it responds to an expectation of what is intended that Mercosur can become.[[45]](#footnote-44)

However, others such as Lucía B. Bellocchio, argue that the integration process of Mercosur is at the appropriate time for the creation of the CJM due to the progress achieved by the bloc in other areas.[[46]](#footnote-45)

In this sense, the European Union has offered and provided political, technical and financial support to the strengthening of the institutions in Mercosur, as it wished to support regional integration in Latin America, in coherence with the idea of regional integration European. However, – from the European side – the feeling is that the reluctance of the Mercosur countries to establish supranational structures and rules, as well as the great differences between the individual States Parties, constitute very clear limits to the degree of regional integration that Mercosur can obtain.[[47]](#footnote-46) In this sense, the establishment of the CJM does not tries to satisfy only the current needs, but rather, it aspires to be the method that can satisfy needs that derive from the future evolution that the CJM itself will be responsible for guaranteeing.

It is for this reason that the promoters and defenders of the creation of the CJM, such as Eric Salum Pires, argue that “insofar as the CJM is instituted, as a jurisdictional, judicial and independent body, whose essential function is to ensure the uniform interpretation and application of the Mercosur law, the legal and institutional consolidation of the integration process will be strengthened, permeating to civil society, since any natural or legal person, as well as any State or organ Mercosur may appeal directly to the CJM to claim the right violated by a State Party.” [[48]](#footnote-47)

# Conclusion

Since the signing the Treaty of Asunción, the increase in intra-regional trade has led to the consequent increase in legal conflicts – between individuals and between these and the States Parties – and, with them, the need to adopt institutional mechanisms to solve them through procedures that grant security, credibility and transparency to the system.

To date, Mercosur cannot be considered as a true common market. There are still many obstacles to intra-Mercosur trade and many deficiencies in the current dispute settlement system. The recommendations taken by the Group of the Common Market are non-binding, the *forum option* weakens the system*,* individuals have not direct access, the implementation of arbitral awards is inefficient, the dispute settlement system is limitated to commercial matters andcompensatory measures are not usually very effective. All of that causes serious legal uncertainty and a lack of confidence in the dispute settlement system. Thus, even if the intentions of the Protocol of Olivos were to improve the dispute settlement mechanism established by the Protocol of Brasília, it has been far from being efficient.

In light of that, it is considered that the economic, political, social and cultural integration cannot be devised without a proper legal system, and there can be no effective legal system if there is no Court of Justice. Therefore, if States Parties opt for the consolidation of Mercosur, its dispute settlement system needs to be transformed into a supranational judicial system, so that its citizens and institutions can trust it and do not need to resolve its disputes in foreign *forums* – as happens in the Andean Community and in the EU –.Without this legal systematization, it is not possible to consolidate an integration process such as Mercosur.

The creation of the CJM thus arises with the expectation that it will become the body responsible for the consolidation of Mercosur, as an instrument for guaranteeing the legality and uniform interpretation of the regional law as well as for elaborating the principles of an appropriate regional law. In other words, once created the CJM, the next step would be to give Direct Effect and Supremacy to Mercosur law in every State Party.

However, in order to conform a successful common market, many institutional and political changes need to be done, both in the national and regional level. The first step should be the transference of certain parcels of sovereignty. The creation of a supranational judicial system not only means the establishment of a Court, but also implies the delegation of sovereign powers.

Therefore, the creation of the Court of Justice would derive from a serious attempt to bring Mercosur to another level of evolution. This, accompanied by the establishment of a Mercosur institutional system with characteristics of supranationalism, would lead to the definitive consolidation of the Common Market of the South.

The challenge is raised, now it depends on the willingness of the States Parties to move forward to a successful integration.

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Protocol of Olivos for the Resolution of Disputes in Mercosur. To see the full text:

<http://opil.ouplaw.com/view/10.1093/law-oxio/e148.013.1/law-oxio-e148-regGroup-1-law-oxio-e148-source.pdf>

 Protocol of Ushuaia. To see the full text: <http://www.internationaldemocracywatch.org/index.php/mercosur-treaties-and-protocols/112-protocolo-de-ushuaia>

 MERCOSUR/PM/PN 02/2010: *Corte de Justicia del Mercosur*. To see the full text (Spanish): <https://www.parlamentomercosur.org/innovaportal/file/5130/1/proyecto-de-norma-corte-de-justicia.pdf>

<http://www.tprmercosur.org/es/sol_contr_resoluciones.htm>

Andean Subregional Integration Agreement “Cartagena Agreement” (1969). To see the full text: <https://www.wipo.int/edocs/lexdocs/treaties/en/asiaca/trt_asiaca.pdf>

Treaty on the Establishment of the Court of Justice. To see the full text: https://idatd.cepal.org/Normativas/CAN/Ingles/Treaty\_Creating\_the\_Court\_of\_Justice.pdf

Treaty on the Functioning of the European Union.

World Economic Outlook Database – International Monetary Fund (IMF) (2014).

1. *Mercado Común del Sur* (Mercosur) in Spanish and *Mercado Comum do Sul* (Mercosul) in Portuguese. [↑](#footnote-ref-0)
2. World Economic Outlook Database – International Monetary Fund (IMF) (2014). [↑](#footnote-ref-1)
3. It shall be noted that the present analysis will only take into consideration the four founding members, since the Republic of Venezuela is suspended in all the rights and obligations inherent in its status as a State Party of Mercosur – in accordance with the second subparagraph of article 5 of the Ushuaia Protocol –, and Bolivia is still in the accession process. To know more, see: https://www.mercosur.int/en/about-mercosur/mercosur-countries/ [↑](#footnote-ref-2)
4. It entered into force on the 1st January 2004. [↑](#footnote-ref-3)
5. They can be requested by the States Parties acting jointly, the bodies with the decision competences of Mercosur and the higher courts of the States Parties. Article 2 of Protocol of Ouro Preto states that “*The following are inter-governmental organs with decision-making powers: the Council of the Common Market, the Common Market Group and the Mercosul Trade Commission.”* Furthermore, article 13 of the Protocol of creation of the Parliament of Mercosur enables the same one to request advisory opinions to the Permanent Review Tribunal. [↑](#footnote-ref-4)
6. Articles 4 and 5 of the Protocol of Olivos. To see the full text: http://opil.ouplaw.com/view/10.1093/law-oxio/e148.013.1/law-oxio-e148-regGroup-1-law-oxio-e148-source.pdf [↑](#footnote-ref-5)
7. In the event that the recommendations of the Common Market Group cannot resolve the controversy, the next step is to resort to the arbitral procedure. In this case an Ad Hoc Tribunal will be formed with the intervention of three arbitrators. The Tribunal shall issue an arbitral award which will be binding, which can be contested before the Permanent Review Tribunal. In the event of failure to comply with the award, the complaining Party shall have the power, for a period of one year-counted from the day following the date of the expiry of the decision, of initiating the application of temporary compensatory measures, such as the suspension of concessions or other equivalent obligations, to obtain the fulfillment of the award. See articles 9 to 16 and 28 of the Protocol of Olivos. [↑](#footnote-ref-6)
8. Luciana B. Scotti, “Cumplimiento e implementación de los Laudos en el Mercosur”, (2013)*, IV, 9, NEGRO, Jurisprudencia Argentina,* *Ed. Abeledo Perrot*, p.4. [↑](#footnote-ref-7)
9. According to article 6 of the same Protocol, there exists also the possibility to initiate directly an arbitration procedure. Thus, contrary to the regime of the Brasilia Protocol, there is no need of the intervention of GMC. It is considered that this reform sought to depoliticize disputes between States Parties, due to the purely intergovernmental nature of this body. [↑](#footnote-ref-8)
10. Article 1 of the Protocol of Olivos. [↑](#footnote-ref-9)
11. Ibid*.* article 39. [↑](#footnote-ref-10)
12. Mikhail Mukhametdinov, *MERCOSUR and the European Union: Variation and Limits of Regional Integration,* Cham,Switzerland*,* Palgrave Macmillan*, 2019.* p.109. [↑](#footnote-ref-11)
13. Edgardo Rotman, (updated by Gloria Orrego and Mariel Romani), “A Guide to MERCOSUR Legal Research – Sources and Documents”, GlobalLex, July/August 2018, retrieved 18 April 2019, http://www.nyulawglobal.org/globalex/Mercosur1.html#\_edn1 [↑](#footnote-ref-12)
14. Article 1.2 of the Protocol of Olivos expressly refers to the World Trade Organization. Moreover, the intervention of the Common Market Group in the new system becomes optional, which under the regime of the Brasilia Protocol was mandatory, and the parties can resort directly to the arbitral authority.To know more, see: A. M. Pastorino Castro, “Legal-institutional dimension of the Mercosur: a panorama to its twenty years”, (2012), 12, *Revista de Estudios Jurídicos* *(Universidad de Jaén, Spain*), p.15. [↑](#footnote-ref-13)
15. Mikhail Mukhametdinov, *supra note 12,* p.109. [↑](#footnote-ref-14)
16. To know more about how the States Parties implement the NTBs in their domestic legal orders, see: Amelia Regina Mussi Gabriel Teixeira, “Restricciones no arancelarias al comercio en el MERCOSUR: propuesta de mecanismo para su eliminación”, Master Thesis, Universidad de Buenos Aires, 2017, p.5. [↑](#footnote-ref-15)
17. Aline Rosado Targino da Nóbrega & Marcelo Mauricio da Silva, “A incorporação dos laudos Arbitrais do tribunal Permanente de revisão do Mercosul e o direito brasileiro.” (2016), Ano 4, 8 *Revista da Secretaria do Tribunal Permanente de Revisão.,* p.171. [↑](#footnote-ref-16)
18. To know more, see: John A. Vervaele, “Mercosur and regional integration in South America”, (2005), 54.2, *International & Comparative Law Quarterly,* pp.389-390. [↑](#footnote-ref-17)
19. Ibid. [↑](#footnote-ref-18)
20. See Luciana B. Scotti, *supra note* *8*, pp.16-22. [↑](#footnote-ref-19)
21. Article 31 of the Protocol of Olivos states: “1. If a State party to the dispute fails to comply fully or partially the decision of the Arbitration Court, the other party to the dispute shall have the right, within one (1) year from the expiration next day referred to in Article 29.1 and whether recourse to the procedures of Article 30, to start the implementation of temporary compensatory measures such as the suspension of concessions or other similar obligations, in order to obtain compliance with the decision. 2. The report benefited from the State Party shall endeavor, first, to suspend equivalent concessions or obligations in the same sector or sectors affected. If deemed impractical or ineffective suspension in the same industry, may suspend concessions or obligations in other sectors, and shall indicate the reasons for that decision.” [↑](#footnote-ref-20)
22. Article 260.2 of the Treaty on the Functioning of the European Union states that: “If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.” [↑](#footnote-ref-21)
23. Luciana B. Scotti, *supra note 8*, p.22. [Original text]: “El Mercosur, tal como hemos podido apreciar, no cuenta con un sistema eficaz para la ejecución de los laudos en caso de falta de cumplimiento voluntario por parte del Estado parte infractor. Las medidas compensatorias se asemejan más a la “ley del talión” (ojo por ojo, diente por diente) que a una verdadera ejecución de sentencia, ya sea judicial o arbitral. Ni siquiera existe certeza de que estas medidas sean útiles en todos los casos para estimular el cumplimiento del laudo. Por ejemplo, los países pequeños nunca van a poder aplicar una medida que tenga el suficiente impacto para generar un cambio de conducta en el Estado incumplidor.” [↑](#footnote-ref-22)
24. Indeed, as Mikhail Mukhametdinovstates, with the PRT’s failure to enhance “the absolute superior authority in MERCOSUR law, the MERCOSUR arbitration system lacks the centralization that is crucial for the performance in the legal sphere.” See *supra note* 12. To know more, also see: S. Deluca, “El dilema de esperar el cambio o usar las herramientas existentes.”, (2012), 27, Revista Aportes para la Integración Latinoamericana, p.12. [↑](#footnote-ref-23)
25. María Eugenia Jimenez, “Understanding the Roadblocks to the EU- Mercosur Trade Negotiations: A Comparative Analysis of the Two Periods of EU-Mercosur Interregional Trade Agreement Negotiations 1999 – 2004 and 2010 – 2016”, Master Thesis, University of Leiden, 23rd August 2017, p.22. [↑](#footnote-ref-24)
26. To qualify an integration organization as “supranational”, it is needed: the creation of bodies that can enact mandatory secondary acts binding on States Parties and directly applicable in their domestic legal orders; the transfer of competences to the bodies of the integration model; and the establishment of a jurisdictional institution with exclusive competence to interpret the law deriving from this system and controlling its uniform application. [↑](#footnote-ref-25)
27. As Jaime P. Kaliski stated, “there are no regional integration projects in Latin America with true supranational institutions […] nor authentic regional common markets that allow the convergence of national economic policies. That is the reason why Mercosur has only become an imperfect customs union, since going further to achieve a coherent common market would necessarily imply the adoption of supranational institutions, and the resulting loss of decision-making power by the States Parties governments.” [Original text]: “De hecho, en Latinoamérica no existen proyectos de integración regional con verdaderas instituciones supranacionales, al estilo europeo, ni tampoco se han realizado auténticos mercados comunes regionales que permitan la convergencia de las políticas económicas nacionales. Es por ello que el Mercosur sólo ha alcanzado a ser una unión aduanera imperfecta, puesto que ir más lejos hasta lograr un coherente mercado común implicaría necesariamente la adopción de instituciones supranacionales, y la resultante pérdida de poder decisorio por parte de los gobiernos centrales.” See Jaime Pinto Kaliski, “El Mercosur: El Paso Previo Necesario para el Establecimiento de un Espacio Geopolítico Suramericano”, [2014], FLACSO-ISA, pp.7-9. [↑](#footnote-ref-26)
28. MERCOSUR/PM/PN 02/2010: *Corte de Justicia del Mercosur.* To see the full text (Spanish):https://www.parlamentomercosur.org/innovaportal/file/5130/1/proyecto-de-norma-corte-de-justicia.pdf [↑](#footnote-ref-27)
29. Werner Miguel Kühn Baca, “The Draft Protocol on the Creation of the Court of Justice of Mercosur. A New Milestone in the Judicialisation of Regional Integration Law”, (2017), 17 *Anuario Mexicano de Derecho Internacional*, p.425. [↑](#footnote-ref-28)
30. Ibid. p.427. [↑](#footnote-ref-29)
31. Dormitilla Sartorio, “The European Court of Justice: a catalyst for European integration”, (2015), I, 4 *Rivista Internazionale di Studi Europei, Royal Holloway University of London, RISE,* p.20. [↑](#footnote-ref-30)
32. To see the full text, see *supra note 28.*  [↑](#footnote-ref-31)
33. Domitilla Sartorio, supra note 112. [↑](#footnote-ref-32)
34. The important role carried out by the ECJ is a valuable experience, whose analysis – from the perspective of comparative law – cannot be ignored in the current instance of Mercosur, since it is not only a question of finding a more efficient dispute resolution mechanism, but to develop a legal and judicial system that works as a key factor of community integration. [↑](#footnote-ref-33)
35. Mariana Peña-Pinon, “Une Cour de Justice pour le Mercosur? Vraies-fausses avancées vers une institutionnalisation renforcée”, [2012], *Revue québécoise de droit international*., p.147. [↑](#footnote-ref-34)
36. Ibid. [↑](#footnote-ref-35)
37. This is described in Article 40 of the Ouro Preto Protocol, stating that it is “simultaneous” in all States Parties. Once this has occurred, they must notify it to the Secretariat, which will inform all Member States. [↑](#footnote-ref-36)
38. Christian Leathley, “The Mercosur Dispute Resolution System”, [2012], The Royal Institute of International Affairs, Chatham House, Mercosur Study Group, p.15. [↑](#footnote-ref-37)
39. Nevertheless, it shall be noted that the origin of Mercosur was neither after a context of two World Wars nor supported by federalist ideas – as in the EU –. The objective to establish Mercosur was purely economic creating a common market. Moreover, they did neither worked with the idea of transfer of parcels sovereignty, nor created a law with direct effect and primacy over domestic law. In other words, the legislator chose from the very beginning a system of macro-integration where each internal power of the States remains intact and fully sovereign in their competences. [↑](#footnote-ref-38)
40. Mariana Peña-Pinon, *supra note 35,* p.153. [↑](#footnote-ref-39)
41. Ibid. [↑](#footnote-ref-40)
42. Alejandro D. Perotti, “Propuesta para el Mercosur: eliminar las restricciones”, La Nación, Comercio Exterior, 27th October 2015, retrieved 28th March 2019, https://www.lanacion.com.ar/economia/comercio-exterior/propuesta-para-el-mercosur-eliminar-las-restricciones-nid1839413 [↑](#footnote-ref-41)
43. Santiago Deluca, *supra note 24,* p.18. [↑](#footnote-ref-42)
44. Ibid. [↑](#footnote-ref-43)
45. Brenda L. Maffei, “El Parlasur y la Corte de Justicia del mercosur: ¿órganos que buscan desarrollar el proceso de integración o creación institucional innecesaria?”, [2015], *I Seminário Internacional de Ciência Política Universidade Federal do Rio Grande do Sul*, p.20. [↑](#footnote-ref-44)
46. Lucía B. Bellocchio, “¿Hacia una Corte de Justicia para el bloque?”, [2012], Congreso de Derecho Público “Democracia y Derechos”, Universidad de Buenos Aires. [↑](#footnote-ref-45)
47. Interview with Mr. Matthias Jorgensen, Head of Unit - Latin America DG TRADE at European Commission, Bruges, 10th April 2019. [↑](#footnote-ref-46)
48. Eric Salum Pires, “La Corte de Justicia del Mercosur como alternativa para consolidar el proceso de integración regional”. (2011), 241, *El Derecho, Buenos Aires, Universitas*, p. 865, in B. L. Maffei, “El Parlasur y la Corte de Justicia del mercosur: ¿órganos que buscan desarrollar el proceso de integración o creación institucional innecesaria?”, [2015], *I Seminário Internacional de Ciência Política Universidade Federal do Rio Grande do Sul*, p.18. [Original text]: *“en la medida en que se instituya la CJM, como órgano jurisdiccional, judicial e independiente, cuya función esencial sea garantizar la interpretación y aplicación uniformes del derecho del Mercosur, se afianzará la consolidación jurídica e institucional del proceso de integración,* *permeando a la sociedad civil, pues cualquier persona física o jurídica, así como cualquier Estado, órgano o del mismo Mercosur podrán recurrir directamente ante dichas instancias a reclamar los derecho que crea conculcados por un Estado-parte”.* [↑](#footnote-ref-47)