



ACCESS OF INDIVIDUALS TO MERCOSUR TRIBUNALS: FILLING THE GAP VIA ADVISORY OPINIONS

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Abstract

The Mercosur dispute settlement system possesses several limitations, which are linked to its transitory aspect and include, in particular, the limited access of individuals who are only able to present their demands via the National Section of the Common Market Group of the member state in question. The application of the advisory opinions' mechanism embodies a possible alternative in order to overcome the lack of access of individuals and civil society to Mercosur Tribunals. The referred mechanism enables national courts to question the Permanent Review Court exclusively with regards to the interpretation of Mercosur law. Therefore, it guarantees an indirect access of individuals to Mercosur Tribunals. However, there is still a very low number of advisory opinions solicited to the PRC, which are due, among other factors, to the lack of knowledge of Mercosur law and its mechanisms by lawyers and national judges. This challenge is combined with a normative limitation, *i.e.*, the double non-binding character of the advisory opinions, thereby contributing to legal uncertainty. Some alternatives have been envisaged, notably with the creation of a permanent court for Mercosur.

Key words

Mercosur; Dispute Settlement; Permanent Review Court; individuals; advisory opinions.

O ACESSO DE INDIVÍDUOS AOS TRIBUNAIS DO MERCOSUL:

Preenchendo as lacunas via opiniões consultivas

Resumo

O sistema de solução de controvérsias do Mercosul possui várias limitações que estão vinculadas ao seu aspecto transitório e incluem, em particular, o acesso limitado de indivíduos que só podem apresentar suas demandas por meio da Seção Nacional do Grupo Mercado Comum do Estado em questão. A aplicação do mecanismo de opiniões consultivas constitui uma alternativa possível para

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superar a falta de acesso dos indivíduos e da sociedade civil aos Tribunais do Mercosul. O referido mecanismo permite que os tribunais nacionais questionem o Tribunal Permanente de Revisão exclusivamente no que diz respeito à interpretação do direito do Mercosul. O mecanismo garante, portanto, um acesso indireto de indivíduos aos Tribunais do Mercosul. No entanto, ainda há um número muito baixo de opiniões consultivas solicitadas ao TPR que se deve, entre outros fatores, à falta de conhecimento da legislação do Mercosul e de seus mecanismos por parte de advogados e juizes nacionais. Este desafio é combinado com uma limitação normativa, ou seja, o duplo caráter não vinculativo das opiniões consultivas, contribuindo assim para a incerteza jurídica. Algumas alternativas foram previstas, em particular a partir da criação de um tribunal permanente para o Mercosul.

Palavras-chave

Mercosul; Solução de controvérsias; Tribunal Permanente de Revisão; indivíduos; opiniões consultivas.

1. Introduction

Since its inception, Mercosur has opted for a non-coercive and diplomatic dispute settlement system. The 1991 Treaty of Asunción that established Mercosur predicted, in Annex III, a dispute settlement system. This Treaty did not predict the creation of a regional court for Mercosur. Disputes should have been solved, in the first place, by direct negotiations between interested states. As a result of negotiations, the absence of an agreement gave place to a consensus-based recommendation of the Common Market Group (CMG), the Mercosur executive body. Should State Parties not reach a common solution, the procedure continued with the concurring opinion of the Common Market Council (CMC, the highest level body of Mercosur), also by consensus.

The *Protocol of Brasília* filled in the blanks of the procedure as initially foreseen in *Asunción*. In effect, the preamble reinforces its transitory character, showing the importance of an effective instrument to ensure compliance with the *Treaty of Asunción*. The *Protocol of Brasília* for the settlement of disputes establishes a two-step process, with a political step that is binding before the arbitral phase could be activated.

The 1994 adoption of the Protocol of Ouro Preto, an addition to the Treaty of Asunción, confirmed the validity of the Protocol of Brasília. Indeed, Chapter VI of the Protocol of Ouro Preto on dispute settlement determines that conflicts will be submitted to proceedings established in the Protocol of Brasília. In 2002, the Protocol of Olivos (PO) was adopted and replaced the former Protocol of Brasília, entering into force on 1 January 2004. Among the most important innovations of the PO is the Permanent Review Court (PRC), established on 13 August 2004, and headquartered in Asunción.

Responsible for controlling the interpretation and application of Mercosur law, the PRC has been lauded as the major innovation of the PO. The Court consists of an *ultima ratio* jurisdiction, capable of confirming, modifying, or revoking the legal bases and decisions of the *ad hoc* Arbitral Tribunal. It can even pronounce itself, in the first instance, if the parties are willing. The arbitral awards are binding for the states involved in the disputes, and have to be properly executed. The PRC is also able to give advisory opinions on any legal question that involves the interpretation of *Mercosur's* primary and secondary law.

Unfortunately, the Protocol has not led to a permanent jurisdictional body capable of ensuring legal security to Mercosur since State Parties still oscillate between institutionalization based on the European model and the maintenance of an arbitral system for the settlement of disputes. The creation of a court with clear supranational characteristics implies considerable costs that State Parties have not been willing to bear. This lack of a jurisdictional body with all its related consequences implies serious challenges capable of compromising the legitimacy of the Mercosur dispute settlement system.

2. The Lack of Direct Access of Individuals to Mercosur Tribunals

The Mercosur dispute settlement mechanism does not permit private parties, natural persons, or legal persons to submit their claims against State Parties for arbitration. There is a specific procedure to accommodate private parties' claims established through the intervention of the CMG. These claims can be related to the adoption or application by a state party of legal or administrative measures of a restrictive or discriminatory nature or those leading to unfair competition in violation of Mercosur treaties and secondary norms (Article 39)

Private persons must initially submit their claims to the National Chapter of the CMG where they are domiciled or have registered their usual place of business (Article 40). In a case where the National Chapter endorses the claim after consultation with the affected individual, that National Section may enter into negotiations with the National Chapter of the State Party charged with the violation. If consultations end without reaching a solution, the National Chapter may submit the claim directly to the CMG (Article 41).

It is possible that the CMG decide that the requirements to hear the case have not been met and then rejects the claim (Article 42.1). In case the claim is not rejected, the Group shall convene a group of experts to issue an opinion on its admissibility (Article 42.2). If the Group of Experts confirms that the claim against a state party is admissible, any other state party may request the adoption of corrective measures or the annulment of the challenged provision. If the request is not complied with within fifteen days, the claiming state party may resort directly to the arbitral proceedings (Article 44.1).

This procedure established by the PO to entertain private parties' claim has only been applied once in the case concerning *Discriminatory and restrictive measures on trade of tobacco and tobacco products* against Brazil¹. The dispute originated from an application filed by a domiciled Uruguayan company, *Compañía Industrial de Tabacos Monte Paz SA*, before the National Chapter of the CMG in Uruguay. The complaint was judged admissible by the Mercosur Group of Experts. Considering that Brazil failed to comply with it within the prescribed period of time, Uruguay resorted directly to the arbitral proceedings and requested the installation of an Ad Hoc Tribunal.

¹ Ad Hoc Tribunal, *Discriminatory and restrictive measures on trade of tobacco and tobacco products, Uruguay v. Brazil*, Arbitral Award of 5 August 2005.

Clearly, the overall system to entertain private-party claims depends upon political decisions of those State Parties directly concerned. The decision of the CMG not to reject the claim requires the unanimous consensus of State Parties, including that of the state allegedly responsible for the violation. According to ex-arbitrator Vinuesa (R. E.), 'at the very end of the entire process, interested Member States will have the same remedy that they already have if they had decided to submit the claim as a dispute among state parties'².

In general, individuals do not have direct access to Mercosur tribunals: the possibility of claiming their rights before sub-regional tribunals remains in the hands of their respective State Party. Instead, claims can be pursued by individuals concerned through proceedings before national courts. National courts shall apply Mercosur law and may recur to the PRC in case of doubt via the mechanism of advisory opinions, which is similar to the EU preliminary rulings³. As a consequence, civil society organizations can only obtain access to Mercosur tribunals via advisory opinions. The PO does not provide for *amicus curiae* briefs.

The Project on the creation of a permanent Court of Justice for Mercosur emphasises the access of individuals to national courts in case of a breach of Mercosur law⁴, as well as the possibility to initiate an infringement proceeding against a State Party for failure to fulfil its obligations via the Mercosur dispute settlement mechanism⁵. According to the project, individuals may not only lodge a complaint with the Mercosur Secretariat (similarly to the EU Commission) against a State Party for any measure or practice which is considered incompatible with a provision or principle of Mercosur law, but also decide to bring the case before the Mercosur Court of Justice⁶.

3. An Indirect Access of individuals *via* the advisory opinions' mechanism

The mechanism of advisory opinions enables national courts to question the PRC exclusively with regards to the interpretation of Mercosur law. It guarantees an indirect access of individuals to Mercosur Tribunals. Indeed, individuals may vindicate their rights derived from Mercosur law before national courts, which may be required to address an interpretation request to the PRC. Contrary to the EU reference for preliminary ruling whereby the mechanism occurs 'from one judge to another', Mercosur expands the active legitimacy of those capable of requesting consultative opinions. State Parties acting together along with decision-making bodies and the Parliament are all empowered to request a consultative opinion on any legal question arising from Mercosur law to the PRC⁷. However, consultative opinions requested by national judges via their Supreme Courts may only concern the interpretation of a

² R. E. VINUESA, 'Enforcement of Mercosur Arbitration Awards Within the Domestic Legal Orders of Member States', *Texas International Law Journal*, vol. 40 (2005), 429.

³ For further details regarding the mechanism of advisory opinions, see Section 2, Subsection 2.2, Title 2.2.2.

⁴ See Article 32 of the Project: 'Natural and legal persons shall have the right to appear before the competent national courts, in accordance with domestic law, when a State Party fails to comply with MERCOSUR law in cases where their rights are affected by the referred breach'.

⁵ One option precludes the other in order to avoid forum shopping. See Art. 27.2 of the Project: 'The action brought under the terms of the preceding paragraph, excludes the possibility of appealing simultaneously to the proceeding mentioned in Article 32, for the same reason (...)'.
⁶ Complainants have to demonstrate that they are directly concerned by the infringement (Art. 27.1 of the Project).

⁷ Article 2 and 3 of the Regulation of the PO.

Mercosur norm⁸. Moreover, first instance national judges are not permitted to directly access the PRC; their request must be submitted to the respective Supreme Courts.

The importance of this mechanism is well known, as is the preliminary ruling in the European Union. Its objective is to guarantee uniform application of Mercosur law throughout the organization by promoting active cooperation between the national courts and the PRC. This objective is hardly achievable since the PRC's reply does not bind the national court to which it is addressed⁹. The Court's opinion likewise does not legally bind any other national courts before which the same problem is raised. The double non-binding character implies that national courts, even those acting as a final resort, are not obliged to exercise the advisory opinion mechanism, nor bound to apply the interpretation rendered by the Court. The national court therefore remains competent for the original case and may decide whether or not to apply the PRC's advisory opinion.

More details on the submission of advisory opinions can be found in Mercosur secondary norms¹⁰. Although there is a *rapporteur*, it is possible that the arbitrators specify the grounds for their dissenting votes. This was highly criticised since the advisory opinion must ensure uniformity of Mercosur law instead of underlining the dissenting opinions of its arbitrators. Another source of criticism concerns the costs of issuing advisory opinions, which are due to the State Party from where the demand for clarification originated¹¹. Considering that these opinions will be beneficial for all State Parties since they promote uniform application of Mercosur law, such a requirement may discourage national courts from recurring to the PRC. Therefore, advisory opinions proceedings before the PRC should be free of charge.

According to the Regulation of the PO adopted in 2003, the procedure to request advisory opinions to the PRC shall be regulated by the High Courts of Justice of the Mercosur States Parties (Article 4). Four years after, the Common Market Council adopted decision N^o 02/07, regulating the referred mechanism. From that moment on, it was up to national Supreme Courts to specify the formal requirement to be complied with by first instance national judges intending to submit advisory opinions. It took a while until all national courts were finally able to apply this mechanism. Uruguay was the very first State Party to adopt rules authorizing the national request of advisory opinions (2007), followed by Argentina and Paraguay one year later (2008). Brazil was by far the last State Party allowing its nationals to indirectly clarify a question on the interpretation of Mercosur law (2012)¹².

⁸ Article 4 of the Regulation of the PO.

⁹ See Article 11 of the Regulation of the PO: It seems that Mercosur State Parties have opted for this nonbinding character in order to avoid the risk of judicial law-making by Mercosur tribunals, taking into account the experience of the ECJ in the 60s.

¹⁰ See Article 4 of the Regulation of the PO for the formal requirements in order to submit an advisory opinion to the PRC. See also Decision CMC N^o 37/03, approving the Regulation of the PO for the Settlement of Disputes in Mercosur; Decision CMC N^o 02/07, regulating the procedure of requesting an advisory opinion from the Permanent Review Court by the High Courts of Mercosur State Parties; Decision CMC N^o 15/10, amending the time limit for issuing advisory opinions.

¹¹ Article 11, Decision CMC N^o 02/07, regulates the procedure of requesting an advisory opinion from the PRC by the High Courts of Mercosur State Parties. PRC arbitrators, however, are only paid per proceeding and the amount established for rendering an advisory opinion consists of US\$ 2,000, *rapporteur*, and US\$ 1,000 per arbitrator (a total of 4 arbitrators excluding the *rapporteur*). See Section 2, Subsection 2.1, Title 2.1.1.

¹² For a comparative analysis of national regulations authorizing the submission of advisory opinions to the PRC by national courts, see Appendix 7. See also Uruguay, Circular 86/2007 of the Supreme

However, national regulations on the matter differ as to the scope of the request to be submitted to the PRC, as can be seen below:

Rules of procedure of Mercosur State Parties concerning the request of advisory opinions to the PRC					
Author	Regulation	Active Legitimacy	Scope of Request	Requirements	Requesting Court
CMC	Decision N° 02/07	National judges; State Parties acting together, along with decision-making bodies and the Parliament	Interpretation (national judges); Any legal question arising from Mercosur law (other Mercosur bodies)	Formal: Written request containing the statement of the facts and the object of the request; the description of the reasons that motivate the request; a precise indication of the Mercosur rules in question. The request may be followed by considerations made by the parties in dispute, if there are any, and by the <i>Ministerio Público</i> on the object of the request, and any document that may contribute to the statement. The PRC may request the national court clarifications and documents that it finds necessary for the exercise of its jurisdiction. The advisory opinions shall necessarily be linked to ongoing lawsuits in the judiciary or contentious-administrative judicial bodies from the applicant State Party. Admissibility: the request shall originate from one of the superior courts designated by State Parties; the request shall comply with the referred formal requirements; and the matter shall not concern an object of ongoing procedure being settled on the same issue.	Argentina: Supreme Court of Justice of the Nation; Brazil: Federal Supreme Court; Paraguay: Supreme Court of Justice; Uruguay: Supreme Court of Justice and the Contentious Administrative Court
Argentina	Acordada N° 13/08	All judges of the Republic, at the request of the party or ex-officio. The judges will forward the case to the high court so that it refers back to the requesting court.	Interpretation	Written request containing: precise determination of the respective mechanism; mention of the trial or court in which the lawsuit is ongoing; description of the request's object; clear and accurate report of all relevant circumstances of the case related to the request; description of the grounds for the request; and a precise indication of the Mercosur rule which is the object of the request.	Supreme Court of Justice of the Nation
Brazil	Emenda Regimental N° 48/2012	The judge hearing the case or any of the parties	Interpretation	Written request containing: a statement of the facts and the object of the request; the description of the reasons that motivated the request, the precise norm that is the object of the request; and the indication of the national proceedings that originates the request.	Federal Supreme Court
Paraguay	Acordada N° 549/2008	Any body of the Judiciary.	Interpretation or validity	Formal: written request; formulation, in precise terms, of the question that originates the request of interpretation of Mercosur norms and the reasons therefor; concrete indication of the rules to be interpreted and detailed description of the facts involved; these followed by the documentation and records that may contribute to the elucidation of the question. Admissibility: the requested advisory opinion shall refer exclusively to the interpretation or legal validity of one or more of the legal instruments mentioned; it shall be linked with pending cases or cases already decided by the judiciary; it shall relate to one or more standards of the said instrument, and its interpretation or validity shall not be entirely clear; the object matter of the request can not have been the object of a previous advisory opinion.	Supreme Justice Court of Justice
Uruguay	Circular 86/2007	Any body of the Judiciary.	Interpretation or validity	Formal: written request; formulation, in precise terms, of the question that originates the request of legal interpretation of the Mercosur norms and the reasons therefor; concrete indication of the rules to be interpreted and description of the facts involved; Admissibility: the requested advisory opinion shall exclusively refer to the interpretation or legal validity of one or more of these legal instruments; it shall be linked with ongoing lawsuits before the national judiciary; it shall be related to a norm in need of interpretation or assessing the validity; the request subject matter can not have been the object of a previous advisory opinion.	Supreme Court of Justice and the Contentious Administrative Court

The Argentinean and Brazilian norms only authorise requests on the interpretation of Mercosur law, whereas Paraguay and Uruguay also permits demands on the validity of an act of Mercosur law¹³. It is clear that both Paraguayan and Uruguayan norms expand the scope of the request to an unforeseen extent expressly stated by the Regulation of the PO and subsequent norms. Yet, no request concerning the validity of Mercosur norms has ever been submitted to the PRC. This could provide the tribunal an opportunity to clarify applicable rules or lead to a modification of current norms by expanding the scope of request (interpretation and validity), similar to that of the EU system.

Concretely, the PRC has issued a total of three advisory opinions exclusively related to the interpretation of Mercosur law: one submitted by the Supreme Court of Paraguay and two by the Supreme Court of Uruguay¹⁴:

Court of Justice; Argentina, Acordada N° 13/08 of the Supreme Court of Justice of the Nation; Paraguay, Acordada N° 549/2008 of the Supreme Court of Justice; Brazil, Emenda Regimental N° 48/2012 of the Federal Supreme Court.

¹³ See Table available on Appendix 7.

¹⁴ Demand No. 01/2007, submitted by the Supreme Court of Paraguay; Demand No. 01/2008, submitted by the Supreme Court of Uruguay; Demand No. 01/2009, submitted by the Supreme Court of Uruguay.

Use of Precedents and Reference to other Treaties and Tribunals: Advisory Opinions						
Case	Arbitrators	External Precedents	Internal Precedents	Doctrine	Standards of Other Treaties or Courts	References to other Courts and Treaties
Advisory Opinion N° 1/2007	Nicolás Eduardo Becerra (president), Joao Grandino Rodas, Wilfredo Fernández de Brix, Ricardo Oliveria Garcia and José Antonio Moreno Ruffinelli Fifth arbitrator)	ECJ, <i>Costa v. ENEL</i> , 6/64 (pages 5, 16, 21); Court of Justice of the Andean Community, Process 34-A1-2001, 08/21/2002 (page 8); ECJ, <i>Krombach</i> , 7/98 (page 11); <i>Van Gend en Loos v. Nederlandse Administratie der Belastingen</i> , 26/62 (page 21, footnote)	PRC, Award N° 1/2005, 20/12/2005 (page 7); Ad Hoc Tribunal, Award N° 9, 04/04/2003 (page 11); Ad Hoc Tribunal, Arbitral Award issued on 04/28/1999 (page 14)	Santiago Bendava (page 2); Samantha Sanchez Miralles (page 3, foot note); Ricardo Vigil Toledo (page 3); Paolo Mengozzi (page 3); Ricardo Alonso Garcia (page 4,5); Walter Laune (page 4, 5); Luis Ignacio Sánchez (cited by Walter Kaune, page 5); Alejandro Daniel Perotti (pages 5, 6, 11); Paula All (page 8); Adriana Dreyzin de Klor (page 8); Pablo Rodriguez Grez (page 9); Milton Feuillade (page 10); Laura Dromi San Marino (page 15); Cecilia Fresnedo de Aguirre (page 19, 21, 23); Tomas Hutchinson (page 20); Julián Peña (page 20); Jorge Pérez Otermin (pages 20, 21), Héctor Gros Espiell (page 21); Erick Jaime (page 22); Diogo P. Fernández Arroyo (page 22, 23); Werner Goldschmidt (page 23, foot note), Domingo M. López Saavedra (page 23, foot note), Eduardo Tellechea Bergman (page 24), Ruben Santos (page 24), Antonio Boggiano (page 24); Charles Brocher (page 24, foot note); Berta Kaller de Orchansky (page 24, foot note), Carmelitti (page 25), Roubier (page 25), Vescovi (page 25), Hugo Alsina (page 26), Daniel Hugo Martins (page 26)	Art. 27, VCLT (page 19)	Andean Community, European Community (page 7); Panama and New York Convention (page 17); Court de Cassation, France (page 17); Haya (page 17); OAS Inter-American Convention on General Rules of Private International Law, Montevideo, 1979 (page 19, 22, 23, 24) Treaty of Rome (page 21)
Advisory Opinion N° 1/2008	Carlos María Correa, João Grandino Rodas, Roberto Ruiz Dias Labrano (president), Roberto Puceiro Ripoll, e Jorge Luiz Fontoura Nogueira (fifth arbitrator)	X	Ad Hoc Tribunal, 04/28/1999, 1st Award (page 6); Ad Hoc Tribunal, 05/21/2002, 8th Award (pages 9, 11)	X	Art. 26 and 27, VCLT (page 2)	Aladi (page 11); WTO (page 11)
Advisory Opinion N° 1/2009	Carlos María Correa, João Grandino Rodas, Roberto Ruiz Dias Labrano (president), Roberto Puceiro Ripoll, and Jorge Luiz Fontoura Nogueira	X	X	X	Art. 26 and 27, VCLT (page 2)	X

Similar to the EU, several important principles of Mercosur law have been laid down by advisory opinions. The first advisory transposed the EU principles of primacy and direct effect to the Mercosur legal order, whereas the second and third advisory opinions were far less ambitious¹⁵. The national tribunals which made the request of advisory opinions, however, did not accurately follow the interpretation issued by the PRC. In the Paraguayan situation, the national requesting judge ended up reaching a similar solution to the case, even when applying a distinct reasoning from that of the PRC¹⁶. In the second and third advisory opinions originating from Uruguay, the national requesting judges followed the exact opposite path and thus, did not comply with the PRC's opinion¹⁷.

These are not the sole advisory opinions ever to be solicited to the PRC. Indeed, the tribunal has recently terminated two official requests submitted by Argentinean tribunals via resolutions N° 01/2014¹⁸ and 02/2014¹⁹. The PRC had duly received both

¹⁵ See Section 2, Subsection 2.2, Title 2.2.2 for a summary of the reasoning of the arbitrators applied by the first advisory opinion. For more details, see C. ESPOSITO; L. DONADIO, 'Inter-jurisdictional Co-operation in the MERCOSUR: The First Request for an Advisory Opinion of the MERCOSUR's Permanent Review Tribunal by Argentina's Supreme Court of Justice', *The Law and Practice of International Courts and Tribunals* 10 (2011), p. 261–84.

¹⁶ Interview with Alejandro Perotti dated 12 July 2014 and 10 May 2015.

¹⁷ Interview with Alejandro Perotti dated 12 July 2014 and 10 May 2015. The Uruguayan Supreme Court considered that domestic law had the same hierarchy as international treaties and prevailed over the Asunción Treaty. Interview with Magdalena Bas, professor from the Universidad de la República, Montevideo, dated 15 August 2014. For more details on the referred cases, see M. B. VILIZIO, *Solución de Controversias en el MERCOSUR: Análisis de resultados 2004-2011 desde la perspectiva jurídico-política*, (Montevideo: ed. CSIC: UdelAR: Universidad de la República, 2013), p. 34–6.

¹⁸ PRC Presidency, Resolution N° 01/2014, adopted in the auspices of the advisory opinion N° 01/2014 requested by the Argentinean Supreme Court of Justice on the case concerning 'Dow Química Argentina S.A. c/ E.N. –DGA.– (SANLO) Resol. 583/10 y otros s/ Dirección General de Aduanas'.

requests and had already initiated the proceedings when the requesting party took the decision to withdraw its demand for an advisory opinion. The withdrawal decision was then communicated to the PRC less than a month following the initiation of the proceedings. As a consequence, the Tribunal classified both requests on 27/03/2014 and 12/08/2014, respectively. The PRC's decision to classify the cases was very much criticised since it was not up to the parties to the main proceedings to decide whether to refer a question to the tribunal. If the decision to refer the question lies in the national tribunal alone, the same logic should be applicable to withdrawal decisions. Once the national tribunal, via its Supreme Court, has submitted the request of advisory opinion to the PRC, the parties no longer have control over the procedure at the sub-regional level²⁰. In several other cases originated from the Argentinean Supreme Courts, the parties withdrew the request of advisory opinions or abandoned the original case before the national tribunals²¹. Most of them dealt with intra-zone export duties²².

This very low number of advisory opinions may be due to four main challenges within Mercosur: firstly, the 'double' non-binding character of advisory opinions; secondly, the delay in regulating the submission mechanism by national courts, as previously indicated²³; thirdly, the lack of incorporation of Mercosur law in State Parties so that individuals and legal persons can extract a subjective right based on Mercosur; and finally the lack of knowledge of Mercosur law and its mechanisms by lawyers and national judges²⁴.

4. Conclusion

The Mercosur dispute settlement system possesses several limitations, which are linked to its transitory aspect: the absence of obligatory submission to Mercosur courts, since Article 1 from the *Protocol of Ouro Preto* allows the activation of Dispute Settlement Body (DSB) of the WTO; the *inter partes* effect of the arbitral award, endangering the uniform application of Mercosur law; the limited access of individuals who are only able to present their demands via the National Section of the Common Market Group of the member state in question; the absence of an autonomous coercive power capable of enforcing arbitral awards; the 'double' non-binding character of the advisory opinion.

¹⁹ PRC Presidency, Resolution N° 02/2014, adopted in the auspices of the advisory opinion N° 02/2014 requested by the Argentinean Supreme Court of Justice on the case concerning 'S.A. LA HISPANO ARGENTINA CURTIEMBRE Y CHAROLERIA C/ E.N. -DGA.- (SANLO) s/ Dirección General de Aduanas'.

²⁰ Interview with Alejandro Perotti dated 12 July 2014 and 10 May 2015.

²¹ A. Perotti, 'La judicatura argentina y las opiniones consultivas: el 'largo' camino a Asunción' (Buenos Aires: CARI, 11 November 2014).

²² For further details concerning the Argentinean cases, see M. P. PINON, 'Una Mirada al Mercosur desde la Corte Suprema de Justicia de la Nación. Comentario al fallo Bio Sidus', **Revista de Doctrina Judicial**, N° 35 (Buenos Aires: ed. La Ley, 28 August 2013), p. 17-21 and 21-7, available on: <http://grupodeintegracion.blogspot.com.br/2013/09/una-mirada-al-mercosur-desde-la-corte.html>.

²³ The non-adoption of internal regulations authorizing the submission of advisory opinions does not preclude a tribunal from requesting it to the PRC. Indeed, the Paraguayan Supreme Court submitted a request even before the adoption of the respective domestic regulation. See PINON, Mariana Peña de, 'Una Mirada al Mercosur', p. 23.

²⁴ The universities of some Mercosur State Parties, particularly in Brazil, do not offer specialised courses in Mercosur law. And also the teaching at the law faculties, at least in Brazil, remains too much focused on domestic law.

Indeed, the interaction with national courts as part of the judicial decision-making process, motivated by an individual request, does not seem effective. The 'double' non-binding character of the advisory opinion may endanger the uniform application of Mercosur in State Parties. The possibility to engage in a constructive dialogue with Mercosur tribunals is thus dependent upon the discretion of national courts.

Taking all these challenges into consideration, some initiatives have been adopted recently in order to enhance normative and democratic legitimacy, paving the way to the creation of a permanent court for Mercosur. In its first report of 2004, the Mercosur Secretariat already pointed to the risks of not having a true court capable of controlling the application of Mercosur law by State Parties and of ensuring its uniformity. Numerous reform initiatives were adopted by member state supreme courts (Mercosur supreme court meetings), as well as Mercosur institutional organs, including the Mercosur Parliament. They both consist of adopting a binding mechanism based on the creation of a permanent court for Mercosur. The Parliament pronounced on 13 December 2010, transmitting the Project of Norm N^o 02/10 to the approval of the Common Market Council.²⁵ In the case of the latter adopting the project, it should be submitted for ratification by national authorities before entering into force.

The proposal by Mercosur parliamentarians is based primarily on the experience of the European Court of Justice, as well as that of the Andean Community and the Central American Integration System.²⁶ Homologous with European courts, the Mercosur Court of Justice would be provided with competencies to receive actions for annulment, the exception of illegality, actions for failure to act, and actions for failure to fulfil obligations. Preliminary rulings would also be among the competencies of the Court, replacing the optional mechanism of advisory opinions. However, the question remains whether the creation of such a Court will materialise, despite the reluctance of Mercosur State Parties.

The referred Project also envisages the exclusivity of the Court's jurisdiction in all matters relating to Mercosur law, explicitly excluding the possibility for States Parties to access other dispute settlement systems to which they are individually a party (Ar 47(1) of the Project of Norm on the Creation of a Permanent Court of Justice for Mercosur (Project No 02/10)). It also emphasizes the access of individuals to national courts in case of a breach of Mercosur law; and allows for an individual to initiate an infringement proceeding against a State Party due to failure to fulfil its obligations via the Mercosur dispute settlement mechanism. According to the project, individuals may not only lodge a complaint with the Mercosur Secretariat (similar to the EU Commission) against a State Party for any measure or practice which is considered incompatible with a provision or principle of Mercosur law, but also decide to bring the case before the Mercosur Court of Justice.

²⁵ The project was submitted to Mercosur's Parliament on 30 April 2009 and presented by Mercosur's parliamentarian Rodriguez Saa, from Argentina, and Salum Pires, from Paraguay.

²⁶ The comparison with other integration organizations and not with the WTO DSB is based on the fact that Mercosur is not only about free trade, but also deals with a variety of other topics, such as democracy, human rights, environment, infrastructure, transport, migration, etc. The legal instruments and the sub-regional bodies forming part of the structure created by the founding treaties should be in accordance with the objectives followed by the organization.

In 24 April 2017, at the XLVI Session, the Mercosur Parliament discussed Project No 02/10. As a result, in 26 June 2017, the Parliament issued a recommendation (MERCOSUR/PM/SO/REC No 07/2017) for the CMC to resume analysis, consideration and approval of the Project.

The absence of a jurisdictional solution cannot assure the necessary legal security of the Mercosur dispute settlement system.²⁷ Indeed, State Parties face constant tension between the need to solve conflicts, on the one hand, and the refusal to submit to coercive modalities of dispute settlement, on the other. They prefer diplomatic procedures, combined with arbitration to solve conflicts derived from Mercosur laws, without interference from an external authority. However, a permanent and independent Court for Mercosur would be the result of a coherent approach in which the legal instrument should result from objectives followed by international organizations. If the objective of State Parties limited itself to the creation of a simple common market in Mercosur, it would be sufficient to obtain reciprocal compromises through a mere treaty of commerce.

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