

Summary

Arbitral Jurisdiction and Permanent Court of Appeals of the Mercosur

Enhancement of the integration process of Mercosur by international dispute resolution and jurisdiction

One of the specific characteristics of Latin America's successful integration scheme Mercosur is its reluctance to create over-dimensional institutions and bureaucracy. Right from the beginning, Mercosur consistently avoided to set up institutions that did not fit to the stage of integration at the respective time. Consequently, the design of institutions followed the dynamic development of Mercosur's political integration path. The institutional setup of Mercosur's arbitral jurisdiction developed along these lines of dynamic integration from simple ad hoc arbitration bodies to a more elaborate system of arbitral jurisdiction combined with a permanent court of appeals. And vice versa, when pursuing their institutional activities, dispute settlement and jurisdiction, the arbitration panels and the Permanent Court of Appeals (TPR) made use of their (still limited) instruments to shape Mercosur's integration process and contributed to its current design.

The foundation agreement of Mercosur, the Treaty of Asunción (TA) signed in 1991, only contained few provisions regarding a simple dispute resolution mechanism for possible disputes arising between the member states Argentina, Brazil, Paraguay and Uruguay (later to be joined by Venezuela). This temporary mechanism, which was never used, was soon, in 1993, replaced by a more elaborate dispute resolution scheme contained in the Protocol of Brasilia. The new dispute resolution system provided for a procedure consisting of three consecutive steps in order to settle a dispute between the member states: first, structured direct negotiations between the member states, then conciliation within an institutional body of the Mercosur, and, as a last step, reference to an ad-hoc arbitration panel.

Then, as a result of Mercosur's crisis at the beginning of this century, a need for more profound integration and stronger institutions was felt and, consequently, the dispute settlement system was strengthened by

the adoption of the Protocol of Olivos in 2002. Besides several changes regarding the selection of arbitrators and the implementation of arbitration awards, the main improvement contained in the Protocol of Olivos consisted in the establishment of the TPR which can act either as appellate body for arbitration awards or as a single level of jurisdiction. Reference to the TPR can also be made as regards preliminary rulings as well as legal opinions. It can be said that the changes that came along with the Protocol of Olivos represented a new qualitative step in the development of Mercosur's dispute settlement system, which is since then equipped with arbitral and permanent jurisdiction. Nevertheless, the Protocol of Olivos still contains the mandate to further develop dispute settlement and jurisdiction as the integration process of Mercosur advances.

Mercosur's institutional framework comprises several political institutions. The Council of the Common Market (CMC), consisting of the ministers of economic affairs and the state secretaries of the member states, is the leading political body. The Group of the Common Market (GMC) can be considered as the executive body of the Mercosur. It consists of four members per member state and its main task is to control the implementation of the integration process. Both bodies meet on an ad-hoc basis whereas the third decision-making body, the Trade Commission (CCM), meets at least once a month. It supports GMC in ensuring the implementation of the integration process with a focus on trade policy and internal trade which are the most advanced areas of Mercosur's integration.

Each of these three decision-making bodies can unanimously issue legal acts that are binding for the member states. In the context of Mercosur legal acts are named pursuant to the issuing body, that is: the CMC issues decisions, the GMC resolutions and the CCM directives. Such description of the legal acts only refers to the issuing political body and does not imply any indication about further legal characteristics (as it is known for different types of legal acts in the European Union). All three types of binding legal acts create an obligation of the member states to implement such acts into domestic law. Several arbitration panels and the TPR have deliberated on this and stressed that this is an essential obligation of the member states which also implies the prohibition of any action that may contradict the provision which is to be implemented. Thereupon, certain institutional measures have been taken by Mercosur political bodies in collaboration with national authorities in order to ensure a swift and smooth transposition of legal acts of the decision making bodies of Mercosur into national law. Nev-

ertheless, the considerable lack of implementation into national law is one of the major constraints to the full effectiveness of Mercosur's legal framework.

Arbitration panels also deliberated that there exist self-executing provisions in Mercosur's primary law (for example the automatic trade liberalisation programme of the TA). But they were clear on the point that there is neither room for direct applicability, nor for direct effect of Mercosur's secondary law provisions. For the judicial bodies, the main reason for such comprehension is that Mercosur's legal system cannot be considered as an autonomous source of law. As no transfer of sovereignty has taken place, Mercosur is an intergovernmental system based on international public law. The intergovernmental structure of the decision making bodies does not feature supranational elements like a majority voting system or the existence of an institutional body that is independent from national interests. There is no supranational system in place like in the European Union where Community law has reached a degree of independence from member states which allows for the exhibition of features like direct applicability, direct effect and precedence principle. Arbitrators and judges intensely and controversially deliberated on this, especially with regard to the superiority of Mercosur law over national laws. They consider the law of Mercosur as international law instead of Community law, but also stress, that being the law of an integration process it is a special type of international law that by nature is constantly changing and developing and therefore calls for process-oriented teleological interpretation. Such interpretational approach may open extensive possibilities for the arbitration panels and the TPR to influence and shape the integration process. Nevertheless, the judges clearly pointed out that it is up to the political decision makers to give Mercosur a design which enables it to take effect as an autonomous source of law. At this point in time there is not only political reluctance to do so, but there are also constitutional restrictions in the member states that may inhibit major progress on this.

The decision-making bodies of Mercosur are completed by several advisory bodies such as the Economic and Social Forum, the Commission of the Permanent Representatives and the Secretariat of the Mercosur, which grants administrative and technical support to all other organs of Mercosur and is, apart from the TPR, the only body that has a permanent seat and constant personnel and logistic equipment.

It is remarkable that a Parliament of Mercosur has come into existence already at this stage of the integration process. Each member state delegates 18 of its members of parliament to PARLASUR. Direct elections

are envisaged, but a proportional allocation of seats is not intended. PARLASUR can direct enquiries to other Mercosur bodies and may comment on legal acts before they are issued by Mercosur's decision making bodies. Nevertheless, the collaboration of the advisory bodies and the decision-making bodies cannot be considered as a type of law-making process that includes the contestability of legal acts in case of breach of procedural rules. Also, as the three decision making bodies, and consequently the legal acts they produce independently from each other, are considered to be in a clear hierarchical relationship to each other, there are hardly ever conflicts and barely opportunities for the arbitration panels or the TPR to deal with issues regarding law-making procedures on Mercosur-level.

Nevertheless, arbitration panels and TPR took several opportunities to deliberate on Mercosur's dispute settlement procedures. Early arbitration panels considered the two diplomatic steps of dispute settlement as obligatory before starting arbitral proceedings. They also discussed whether the relevant matter of dispute of arbitration proceedings is determined by written allegations during the conciliation within GMC or by the written submissions starting the arbitration procedure. Both issues were resolved by innovations of the Protocol of Olivos. Provisions now clearly stipulate that conciliation within GMC takes place on a voluntary basis only and that the matter of dispute is determined by the written submissions within the arbitration procedure itself, but based on allegations made during preceding procedural steps.

Member states having a dispute can, after undertaking structured negotiations supported by Mercosur institutions, directly refer to an arbitration panel or to the TPR. Or they may decide to enter into conciliation within GMC where representatives of all member states participate in structured negotiations with clear deadlines, optionally supported by expert opinions. As a result, GMC including its members representing the member states in dispute issues a recommendation in order to end the dispute. In the event of non-compliance with such recommendation, the dispute might be referred to an arbitration panel or to the TPR. A similar conciliation proceeding exists within CCM, but is restricted to technical issues referring to trade policies. Negotiation and conciliation proceedings may also be initiated by private natural or legal persons. They can submit a complaint to the member state where their place of business is located against discriminatory measures of another Mercosur member state. The relevant member state will approve the complaint and pursue negotiations and conciliation procedures within GMC which might also escalate to arbitration or TPR proceedings. The

member state will act as party or litigant instead of the natural or legal person in any step of the proceedings.

As regards arbitration procedures, early arbitration panels had to deliberate on the choice of forum and the applicable law. Mercosur's integration process is embedded in the legal frameworks of other economic integration projects on the continent as well as of the WTO. Situations occurred where not only the arbitration proceedings of Mercosur seemed to be a viable forum to solve a dispute. Mercosur arbitration panels were not able to prevent a dispute to be discussed in a second forum. Therefore, a provision was included in the Protocol of Olivos introducing a compulsory choice of forum. The applicable law consists in the law of the Mercosur as well as in general principles of international law. As the creators of Mercosur wanted to avoid overdesigning Mercosur's legal framework, the existing legal framework exhibits considerable gaps. Arbitration panels and later the TPR tried to close these gaps by making use of the general principles of international law, but also by supporting their interpretation by references to the legal framework of other economic integration projects on the continent or to provisions of the WTO. Arbitration panels and TPR used references to legal concepts of the European Union as a help to interpret Mercosur law. Arbitration panels and TPR also used precedent arbitral awards and court rulings of the Mercosur dispute settlement bodies to complete their legal reasoning.

The innovations introduced by the Protocol of Olivos contain tighter provisions on the independence of the arbitrators (as well as of the judges of the TPR) including their professional qualification, nationality and personal independence. Arbitration panels and TPR may be requested to issue preliminary rulings as well as to give explanations regarding their decisions. Additionally, the Protocol of Olivos strengthened Mercosur's dispute resolution mechanism by establishing enforcement procedures for arbitration awards and court rulings. The prevailing party may request the arbitration panel or the TPR to assess whether the measures undertaken by the other party are sufficient enough to comply with the arbitration award or the court ruling respectively. The prevailing party may also impose compensatory measures on the other party in case it considers the measures of the other party as not sufficient to fulfil the award or ruling. In such case, the other party has the right to request the relevant dispute settlement body to assess the proportionality and justification of the measures undertaken by the prevailing party.

Apart from the secretariat, the TPR is the only permanent body of Mercosur with a permanent administrative organization. It consists in five permanent judges and has its seat in Asunción, Paraguay. The TPR may decide as an arbitration court on a single level of jurisdiction or as a court of appeals against arbitration awards of ad-hoc arbitration panels. In the first case, it decides in full composition, whereas in the latter case it decides in a composition of three judges. Member states can also refer to the TPR within a specific procedure established in order to facilitate urgent measures in case of conflicts regarding perishable goods. A further specific proceeding as regards the prevention of trade-restrictive measures is being discussed.

CMC, GMC, CCM as well as the member states (unanimously) may file a request to the TPR to deliberate in full composition on any legal question considering primary or secondary law of Mercosur. Such legal opinion of the TPR is not binding, but may well serve as valuable source of interpretation of Mercosur law. Furthermore, the TPR may also issue legal opinions upon request of the supreme courts of jurisdiction of the member states. National courts must file their request via the supreme courts, but their court procedure does not have to traverse all stages of appeal. This type of legal opinion of the TPR has become an important instrument of collaboration with national courts when it comes to the uniform interpretation of Mercosur law. TPR is now in a position to deliberate on manifold legal questions beyond disputes between member states. It has, and already had, the opportunity to assess the compatibility of national law with Mercosur law and by this means to give guidance to national courts as to the interpretation and application of Mercosur legislation. Nevertheless, TPR has already deliberated that it is not competent to decide on the nullity of national law. The legal opinion procedure is an important step regarding the extension of TPR's competences and opportunities to take effect in the integration process, but falls short in comparison to the similar preliminary rulings of the European Court of Justice, mainly because TPR's legal opinions are not binding and national courts are not obliged to refer their queries to the TPR.

Legal opinion procedures initiated by national courts also create a valuable link to the citizens of Mercosur as they allow for a feedback regarding Mercosur law within national court proceedings initiated by natural or legal persons. Citizens may therefore act as custodian of Mercosur law although it is not the prior aim of this type of proceeding to grant legal protection to individuals. This new type of procedure rather opens another channel to bring legal questions to the forum in

order to develop jurisdiction and uniform interpretation of Mercosur law. So far, the TPR had only to deal with players that are member states or institutional bodies which do not act independently from the member states. There is no independent institutional body which could play the part of the guardian of the common integration interest and bring relevant legal questions to the TPR. To the contrary, the political institutions of Mercosur are strong representatives of the member states' interest and do not leave much room for discretion to the judicial bodies of Mercosur as they stand ready to clarify legal uncertainties by the issuance of new legal acts.

Nonetheless, Mercosur's dispute settlement system has shifted from a politics-oriented towards a law-oriented system and it focuses not only on dispute resolution, but also on jurisdiction and the interpretation of Mercosur legislation. Arbitration panels and TPR used their room for manoeuvre in order to shape Mercosur's legal landscape by integration-oriented interpretation of its legal framework. Both jurisdictional bodies have constantly taken a clear view on the protection of the free movement of goods within Mercosur by strengthening the implementation of the automatic trade liberalisation programme of the TA and by insisting on the installation of a common external tariff and on the abolition of trade-restrictive measures. They also clearly expressed that Mercosur's legal framework prohibits circumvention measures like safeguard measures as well as escape clauses and strengthened the binding character of certificates of origin within Mercosur.

Both, arbitration panels and the TPR, made a big effort in order to define possible exceptions to the internal market freedoms, especially to the free movement of goods. As no precise criteria are established in the applicable law, the TPR developed a detailed catalogue of criteria for the assessment of possible restrictions to internal market freedoms. The TPR declared in line with precedent arbitration awards that, within the context of an integration process, exceptions to the internal market freedoms always have to be interpreted restrictively. In another important decision an arbitration panel carefully balanced internal market freedoms with human rights like the freedom of assembly. In both cases, the judicial bodies considered jurisdiction of the European Court of Justice in order to develop their criteria. Furthermore, arbitration panels and TPR deliberated on issues regarding competition law and state aid law dealing with gaps of Mercosur's legal framework as regards these areas of law.

When interpreting the law of Mercosur, the arbitration panels as well as the TPR repeatedly made reference to the dynamic concept of the inte-

gration process of Mercosur and consequently prefer a teleological approach to the interpretation of Mercosur law. Thus, not only the design of institutions followed the dynamic development of Mercosur's political integration path, but also Mercosur's integration process followed the dynamic development of its legal framework triggered by its judicial bodies.