*Reappraising the Jurisprudence of MERCOSUR: An Exercise in Regional Innovation or Malinchismo?*

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Abstract:

The development of dispute settlement at MERCOSUR can be described as one of missed opportunities: political disputes and economic shifts among its members have hampered its role in settling trade disputes. Overlooked for its apparent demise at the hands of political clashes and sparse case-law, the jurisprudence of the MERCOSUR dispute settlement system nonetheless demonstrates a marked and innovative move in regional integration. While seemingly drawing inspiration from European Union law, and to a lesser extent that of the Andean Community and WTO, *ad hoc* arbitral tribunals and the Permanent Tribunal of Review (*Tribunal Permanente de Revisión* - ‘TPR’) have developed a set of coordinating principles which differ notably from those found in the European context. First, this paper argues that the similarities to the European approach are superficial and the references made to EU law by the TPR hide the differences of the MERCOSUR approach to regional trade law. Second, that the jurisprudence of MERCOSUR displays interesting characteristics in pursuing regional integration within a wider multilateral system under the World Trade Organization. This paper argues that the jurisprudence of MERCOSUR demonstrates a number of developments in how regional integration agreements can both consolidate a regional trade regime as well as engage in a policy of accommodation with other international legal systems. Though its practical importance within MERCOSUR may have diminished, the insights gained from its case-law may well inspire other regional dispute settlement systems as well as demonstrate the limits of judicial agency in deepening regional links.

1. Introduction

Attempts at regional integration within Latin America have a considerable pedigree, predating attempts to solidify peaceful relations within Western Europe in the modern period.[[1]](#footnote-1) Regionalism in Latin America has taken a number of forms, offering a wide range of alternate models and systems for coordinating policy in many substantive areas of international regulation, from stock exchanges to asylum.[[2]](#footnote-2) The Common Market of the South (*Mercado Común del Sur* - ‘MERCOSUR’) is only one such interesting example. And yet, in spite of the originality and uniqueness of MERCOSUR, it is frequently compared (often unfavourably) to other integration efforts such as the Andean Community, or more commonly, the European Union (‘EU’).[[3]](#footnote-3)

This look toward Europe is not only made by commentators, but also by the ‘judicial’ bodies of MERCOSUR themselves.[[4]](#footnote-4) References to the jurisprudence of the European Court of Justice (‘ECJ’) are frequent, and the use of concepts well-established in the EU, common.[[5]](#footnote-5) There is a danger that such exercises extend beyond mere legal or political comparativism and into the realm of *malinchismo*: the sentiment that foreign (in this case, European) approaches are necessarily superior to local endeavours.[[6]](#footnote-6)

Rather than framing MERCOSUR’s differences as a weakness, or as a ‘lesser’ body than other institutions such as the EU, here it is argued that MERCOSUR’s jurisprudence demonstrates a nuanced and fruitful site of inspiration for thinking about models of regional integration, and how such integration models can fit within a multilateral landscape. Indeed, in spite of MERCOSUR’s current paralysis, its jurisprudence may offer insights for the international community more broadly (including organizations which have similar gaps in their normative framework such as the World Trade Organization – ‘WTO’).

The article is structured as follows: Section II identifies key elements of the MERCOSUR system which set it apart from other regional trade agreements; Section III examines the ‘look to Europe’ and the use of the European Union as a source of inspiration and criticism for MERCOSUR by both commentators and the institutions themselves; Section IV turns to the way in which MERCOSUR has looked to the multilateral scene, opening itself to other areas of international law including the World Trade Organization and engaging with them yet maintaining its distinctive character; Section V concludes by identifying areas in which MERCOSUR can serve, not as a cautionary tale, but as (in some ways) a potential model for other forms of preferential economic arrangement which are currently being concluded.

1. The MERCOSUR system

MERCOSUR is best understood as either a regional trade agreement that seeks to become a custom union with minimal internal barriers to trade (whether tariff or non-tariff based) and with a common external customs tariff, or as an imperfect customs union with sectoral exceptions to liberalization in a number of areas.[[7]](#footnote-7) Progress has been slow with occasional grand political gestures indicating the will for further integration (including the completion of legal instruments) which are then not adopted. One of the primary weaknesses of MERCOSUR is the need for secondary-rules to be adopted within the national legal systems of all State Parties before as a condition of their entry into force.[[8]](#footnote-8) Nonetheless, advances have been made as since its formation in 1991, and MERCOSUR has progressively developed an increasingly detailed institutional and normative structure.[[9]](#footnote-9)

Briefly, the legal story has been this: in 1991 the Treaty of Asunción established MERCOSUR to create a common market which was to be completed by 1994, involving the free movement of goods, services and factors of production, as well as a common external tariff, legislative harmonization in economic matters and policy coordination in economic affairs.[[10]](#footnote-10) The motivation was both internally and externally focussed: internally, to continue the process of regional integration begun in earlier programmes such as the Treaty of Montevideo 1980,[[11]](#footnote-11) and externally, to place the States Parties in a strong position to compete with other regions such as the EU but also NAFTA, which was then under negotiation.[[12]](#footnote-12)

In 1994, the Protocol of Ouro Preto set out a more detailed institutional framework that included a greater number of rule-generating bodies and formally granted international legal personality to MERCOSUR.[[13]](#footnote-13) In 2002 the Protocol of Olivos replaced the temporary system for dispute settlement[[14]](#footnote-14) and created a more detailed dispute settlement system that included, amongst other elements, recourse to arbitration and a permanent body that serves as both appellate court and provider of advisory opinions.[[15]](#footnote-15)

Complications have arisen not least due to a number of complex political factors.[[16]](#footnote-16) The aim of MERCOSUR has long been to cement the bilateral relationship between Argentina and Brazil, and for the other original State Parties, Uruguay and Paraguay to stabilize their position in a region otherwise dominated by two larger economic powers. Argentina’s change of policy following its economic crisis in 2001-2002 and the later accession of Venezuela and Bolivia (though the latter has yet to be ratified by the Paraguayan congress) in what had originally been a comparatively economically liberal project has complicated the dynamic between the membership. Acceptance of Venezuela’s accession during Paraguay’s suspension in 2012 (following the ousting of the Paraguayan president, Fernando Lugo), has thrown progress at MERCOSUR off schedule, with Paraguay (now resubmitted) only now turning its attention to MERCSUR during its rotating presidency, having focussed on rebuilding bilateral relations. Venezuela meanwhile has dragged its heels over enacting the necessary internal measures to ensure compliance with MERCOSUR obligations.

The legal framework has not helped either. The approach has been one where bold commitments are made, but the detail is left to be resolved at a later date such as has been the case with dispute settlement or the completion of the customs union.[[17]](#footnote-17) For example, while a common customs code has been agreed upon,[[18]](#footnote-18) it has not been adopted by the States Parties and thus is not in force.[[19]](#footnote-19) Similarly, though a common external tariff has been agreed upon, it is heavily conditioned by exceptions for the States Parties.[[20]](#footnote-20) Alternatively, the membership has moved to create potentially powerful institutions such as the Council of the Common Market (*Consejo del Mercado Común*) which could function as a motor for regional integration, yet limit the practical effect of such a move by, for example, requiring the internal ratification and subsequent notification of all MERCOSUR secondary rules for their entry into force.[[21]](#footnote-21)

In spite of these complications, or indeed perhaps because of them, MERCOSUR offers a number of interesting possibilities for different approaches to regional integration. These innovations are perhaps most clearly viewed when seen through the way in which MERCOSUR has looked to other legal orders: the EU and the WTO.

1. The Look to Europe

There are superficial similarities between MERCOSUR and the EU. Both are regional trade agreements that have their origins in cementing an alliance between two otherwise potentially antagonistic neighbours. They both had as their objective political aims in entrenching democratic traditions in an area that had been previously subjected to militaristic regimes, and in pursuing these aims through economic means. While the European Economic Community of the 1950s may have felt like a second best after the failure of the European Defence Community and European Political Community,[[22]](#footnote-22) the use of economic integration to further peaceful coexistence was never far from the minds of policy-makers.[[23]](#footnote-23) Similarly, the goals of MERCOSUR, at first implicitly and later explicitly (through the Protocol of Ushuaia in 1998) conditioned the maintenance of democratic institutions as the *sine qua non* of membership.[[24]](#footnote-24)

There are other similarities of particular interest in the way that regional economic orders structure their legal systems. One such concept is the principle of primacy or supremacy of the law of the organization over national law. Though the outcome appears similar in the reasoning of the respective bodies, the MERCOSUR approach is qualitatively different, and though its impact is lesser, its logic is arguably, bolder.

1. *Similarities and Differences: The Question of Primacy*

Under EU law, the concept of primacy has existed since the early days of the European Court of Justice, most notably declared in *Costa v ENEL* (though as we will see, the seeds predated *Costa*) where the ECJ staked out the position clearly:

‘By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

…

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.’[[25]](#footnote-25)

Primacy of EU law is one of the central elements that ensure the effective functioning of the European legal order (with direct effect and direct applicability of the other pillars).

On the point of primacy under the MERCOSUR system, however, the first arbitral award (under the previous system set up by the Protocol of Brasilia) made clear its role in not only applying the law but in doing so as part of an institutional framework that went beyond traditional international legal obligations:

‘…the question put before this Tribunal, relating to the compatibility or otherwise with the system of the TA [Treaty of Asunción] – if there is a violation or not of MERCOSUR norms – of a specific import regime, cannot be dealt with simply as a mere mechanical application of provisions found together in a code or unified text. It necessarily implies the exercise of a wide interpretative exercise to identify those rights and obligations arising from a set of norms of progressive development through the accumulation of regulations created as part of a complex process of political and legal decisions, inserted in a changing economic reality.’[[26]](#footnote-26)

Going further, in its first advisory opinionthe TPR borrowed heavily from *Costa v ENEL* to support its superficially similar claim that MERCOSUR obligations were to enjoy primacy over national law.[[27]](#footnote-27) And yet, the logic of the TPR is different to that of the ECJ from which it appears to draw so much.[[28]](#footnote-28) While the ECJ’s position was a bold step for the time it was yet in-line with what international law permitted.[[29]](#footnote-29) Note the ECJ’s concern with the text of the Treaty of Rome, and the objectives of the agreement:

‘The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the *attainment of the objectives of the Treaty set out in* Article 5(2) and giving rise to the discrimination prohibited by Article 7

…

*The precedence of Community law is confirmed by Article 189*, whereby a regulation “shall be binding” and “directly applicable in all Members States”. This provision, which is subject to no reservation, *would be quite meaningless* if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.’[[30]](#footnote-30)

It is this focus on the text and the aims of the Treaty that guides the ECJ’s reasoning.[[31]](#footnote-31) While the EU’s position has moved closer over time to that put forward by the TPR, it has been progressive and subtle.[[32]](#footnote-32) The TPR, however, is altogether bolder. Whereas the ECJ’s reasoning was based on international law principles, the TPR draws on the ‘law of integration’ of which it views ‘community law’ as its most developed form (and end point).[[33]](#footnote-33) It is not the objective of the treaties or protocols that the TPR draws on but the objective of the law of integration *per se*.

In its first Advisory Opinion the TPR was at its boldest, stating unequivocally that:

‘[t]o this date, it has been a constant error of both the jurisprudence and the existing doctrine, only to appeal to the argument of the prevalence of a treaty over [national] law to maintain the primacy of MERCOSUR law over national law. Though this is a legally correct argument, it should never be the principal argument to arrive at such a conclusion.

The principal argument should always be this: the law of integration, by its nature and purpose should always prevail over national laws that relate to the same subject.’[[34]](#footnote-34)

It is not only the treaty and other constitutive instruments of the MERCOSUR system that confirm the need for primacy of its law, but its nature as a form of ‘law of integration’ that by its nature contains inherent legal consequences. This argument is built upon a tradition quite different from the logic underpinning the ECJ’s earlier constitutional development, and the TPR sees no difficulty with viewing its role as the promoter of such a position. Note the openness with which the TPR states:

‘In relation to this point [the primacy of community norms over national law], it is evident that this case gives the TPR the opportunity to act in a praetorian fashion[[[35]](#footnote-35)] to insert this principle within the legal order of the MERCOSUR community, which is perfectly possible given the current legal regime in force.’

The boldness of such a claim, however, is tempered by other factors. One such limitation is the need for the national approval of secondary rules. Thus, though the TPR can pursue its policy of legitimation of primacy through the nature of the aims of the legal institution rather than the text of the constitutive treaties *per se*, it nonetheless acknowledges the limitations. First, as identified, rules require internalization, and second, the limits on the ability of the TPR to declare a national norm void *as a matter of national law*.[[36]](#footnote-36)

On this point the TPR nods to the hope that this process of integration will continue to proceed toward a system of deeper integration, ‘Community law’ as a more profound form of the ‘law of integration’ which would necessarily include not only primacy but also the possibility of direct applicability and direct effect of rules.[[37]](#footnote-37) It acknowledges that ‘in the current stage of the process of integration’ neither the TPR nor the *Ad Hoc* arbitral tribunals have the competence to declare a national norm void, only to identify the incompatibility of the norm under MERCOSUR law.[[38]](#footnote-38)

1. Las Opiniones Consultivas*: Advisory Opinions or Preliminary Rulings?*

There are also similarities if we look to the role that preliminary rulings have played in the EU system historically, and the TPR’s approach to *opiniones consultivas* under the Protocol of Olivos and its subsequent Regulation.[[39]](#footnote-39)

Under the MERCOSUR system the States Parties, decision-making bodies of MERCOSUR, and the Supreme Courts of the States Parties can request an *opinión consultiva* from the TPR.[[40]](#footnote-40) The purpose of such opinions is to clarify the precise meaning or scope of a provision of MERCOSUR law.[[41]](#footnote-41)

Formally, an *opinión consultiva* is an advisory opinion, such as those given by the International Court of Justice, and as such are ‘not binding or obligatory’.[[42]](#footnote-42) The TPR, however, has distinguished *opiniones consultivas ‘*so-called’ from *opiniones consultivas* in the MERCOSUR system which were, in essence, to serve the role that preliminary rulings play in the EU or Andean mould.[[43]](#footnote-43) By drawing on the different nature of the ‘law of integration’ as part of the legal order that constitutes bodies such as MERCOSUR, the TPR distinguished between the function of advisory opinions in other systems (such as the ICJ) and the EU’s preliminary rulings procedure.[[44]](#footnote-44)

We note that in the EU context, the preliminary rulings procedure has played a central role in developing a coherent European legal order. By permitting (and indeed) encouraging access to a supranational body to determine a question of the regional legal order, the possibility of variations in implementation across the membership are minimised.[[45]](#footnote-45)

The TPR’s reasoning on this point has been interesting, demonstrating the way in which it engages with other legal orders on its own terms. Indeed, the difficulties faced by the TPR in establishing a body of coherent MERCOSUR law is different to that faced by the ECJ in the late 1950s and 1960s, where the principles of direct effect and primacy were introduced and the ability of Member States to exclude the analysis of the ECJ in matters of a ‘domestic’ matter limited.[[46]](#footnote-46)

As with the discussions relating to primacy, the TPR drew on the ‘law of integration’ as a justification for imbuing the *opiniones consultivas* with some of the legal characteristics of a preliminary rulings procedure. Openly claiming the right to develop the law yet noting the limited ability of the tribunal to act in a manner that would be appropriate should a preliminary ruling be delivered (i.e. that it constitute a binding obligation) and acknowledging the normative weakness of the MERCOSUR system in which the TPR must function,[[47]](#footnote-47) it nonetheless ensured that it was able to examine not only the compatibility of MERCOSUR norms but also domestic norms with obligations under MERCOSUR.[[48]](#footnote-48)

This ‘small track’ opens the possibility for the TPR to solidify the possible utility of the *opiniones consultivas* as possible counterpoints to preliminary rulings rather than advisory opinions.[[49]](#footnote-49) The result in the meantime is the rejection by the TPR of an equivalence between *opiniones consultivas* as advisory opinions *strictu sensu* and instead their consideration as a form of preliminary ruling – and yet – trapped by the normative framework of MERCOSUR which does not permit *opiniones consultivas* to enjoy their most relevant characteristic were they to constitute preliminary rulings, their binding status.[[50]](#footnote-50)

1. *Inspiration or Justification*

It is common for the literature on MERCOSUR to draw comparisons with the EU.[[51]](#footnote-51) The TPR has been little different, also looking to the EU seemingly for inspiration or as a form of self-criticism.[[52]](#footnote-52)

A harsh reading of these statements might conclude that the TPR’s behaviour is at best auto-critical and at worse, textbook *malinchismo*, yet a closer examination of the examples above suggests that the TPRs engagement with the European experience is more complex. By using the ECJ as an example, and then interpreting principles in a different way, drawing on the distinctive nature of the law of integration as its legitimising logic, the TPR demonstrates a tactical sensitivity to speak to both the successes of another regional bloc, whilst simultaneously presenting a novel interpretation.[[53]](#footnote-53) Further, though less frequent, the TPR turns to other models, most notably the Andean Community, yet it is telling that it chooses these two models for principal comparison, those who it perceives of as reaching the ‘community law’ end of the ‘law of integration’ spectrum.

In both the case of primacy, and in its attempt to give a greater purpose and effect to *opiniones consultivas*, the TPR has carved its own path unlike those of either the EU or Andean Community. In doing so, it has openly criticised its normative weaknesses, and the institutional failings, and identified strengths elsewhere. However, far from acting through insecurity, it has sought to build upon the framework it has inherited. The effect of such acts may be limited but the nuance with which it has approached these superficially similar challenges is instructive.

1. The Look to the WTO

Just as the TPR turns to the European and Andean examples of regional integration, it also acknowledges its place within international law generally, and a multilateral economic integration project, the WTO, more specifically. Whereas many pages have been written on the dangers of the fragmentation of the international legal system,[[54]](#footnote-54) and its implications for developed specialised regimes such as the EU, MERCOSUR has openly engaged with international law without suffering the levels of existential doubt plaguing the EU during the *Kadi* saga. In this section, the engagement by the dispute settlement system of MERCOSUR with certain points of international law (first) and trade law (second) will be analysed. Demonstrating an open yet limited acceptance of general international law norms, and where appropriate specialised international law norms (such as WTO disciplines), it is argued that the MERCOSUR model for coordination is one that other specialised regimes might well choose to emulate.

1. *Openness to other International Regimes*

The arbitral tribunals of MERCOSUR have chosen to face the role of general international law in the MERCOSUR system a number of times in a relatively short number of disputes.

For example, in the case of human rights obligations, in a dispute between Uruguay and Argentina over the Argentine government’s alleged inaction in halting environmental protests restricting the movement of goods at the border, Argentina (drawing parallels with the ECJ *Schmidberger* judgment[[55]](#footnote-55)) claimed that the the maintenance of human rights obligations could constitute an exception for free movement between the two States.[[56]](#footnote-56) Specifically, that the respect of the right to freedom of expression restricted the ability of the Argentine government to put a stop to the blockades disrupting transit.[[57]](#footnote-57)

In responding to this point the arbitral tribunal looked both to the Argentine Constitution as well as a number of *international* human rights instruments including the Universal Declaration of Human Rights, the American Convention on Human Rights, and the International Covenant on Civil and Political Rights, concluding that the exercise of the right to freedom of expression was not absolute and was to be balanced in light of public policy considerations.[[58]](#footnote-58) The reasoning is clear, and the tribunal is open as to how it acknowledges a claim under ‘non-MERCOSUR’ law.[[59]](#footnote-59)

We might contrast this with the Appellate Body’s concern not to examine rules of international law that are not rights or obligations under the covered agreements save for the purposes of interpretation (and even then, in a limited fashion),[[60]](#footnote-60) or the ICJ which did not make wide scale reference to specialised regimes of international law until its recent *Jurisdictional Immunities* judgment.[[61]](#footnote-61)

Nor has have MERCOSUR tribunals restricted their analysis to specific instruments: other general principles of law such as estoppel have also formed part of their analysis and reasoning.[[62]](#footnote-62)

1. *Openness to other Trade Law Regimes*

While it may seem logical for MERCOSUR arbitral tribunals or the TPR to take into account rules of general international law, MERCOSUR tribunals have also acknowledged the special role that trade law including WTO law plays. Unlike the EU where WTO law is (contrary to the rules the EU has itself set out) denied meaningful effect within the EU legal system,[[63]](#footnote-63) or the WTO itself which has been cautious to the point of parochialism in acknowledging the role of regional trade law,[[64]](#footnote-64) MERCOSUR has taken WTO law into account at certain key points.

In a dispute over the possible use of safeguard measures in the field of textiles, the arbitral tribunal took care to respond to the Argentine claim that within MERCOSUR law there existed a *lacuna* which thus meant that there could be no violation of a rule on safeguards within MERCOSUR as no rule existed.[[65]](#footnote-65) The tribunal responded that safeguards constituted an exception and thus, the expiry of a permission for the use of safeguards constituted an obligation *not* to introduce such measures.[[66]](#footnote-66)

Argentina’s argument continued, however, that there were a number of examples that demonstrated that regional trade agreements (or customs unions) could permit the introduction of *inter se* safeguard measures. What is of note is that it was not necessary for the tribunal to provide a brief overview of each system (the EU, NAFTA and the WTO), but that it identified that in each instance where such measures were possible, they were specifically provided for by the constituent treaty in question.[[67]](#footnote-67) The unproblematic way in which the tribunal was willing to engage with other legal regimes, open to the potential that other obligations be relevant yet unconvinced in this instance, can be seen most clearly in its conclusions:

‘From the general evaluation of the questions posed, the Tribunal has come to the conclusion that there exists a MERCOSUR norm, specifically Article 5 of Annex IV of the Treaty of Asunción, that regulates the use of safeguard measures between Member States. In the Tribunal’s view there is insufficient evidence to demonstrate that the current MERCOSUR rules should not apply to the safeguard measures introduced by Argentina. For this reason the Tribunal does not consider that there is a ‘legal gap’ that would make it necessary or possible to have recourse to other rules of international law such as those found in Article 6 Agreement on Textiles and Clothing. Further, there is no evidence that during the conclusion of the Agreement establishing the WTO, the MERCOSUR Parties expressed their intention to permit the application of unilateral safeguard measures as foreseen by Article 6 ATC in the textiles trade within MERCOSUR.’[[68]](#footnote-68)

Nor should the tribunal’s position be viewed as one of false openness: note the use of WTO law, specifically the Agreement on Subsidies and Countervailing Measures, so as to help with the interpretation of a MERCOSUR decision in a dispute between Argentina and Brazil over pork subsidies.[[69]](#footnote-69) Rather than viewing WTO law and MERCOSUR law as in conflict, they are understood as part of the same global system. Running counter to the traditional ‘stumbling blocks’ approach to regionalism within a multilateral trading system the tribunal in this instance set out the relationship in the following terms:

‘At a wider level than the regional, international commercial relationships are regulated by the rules of the World Trade Organization (WTO). In this field, the restrictions on the use of export subsidies are regulated by the Agreement on Subsidies and Countervailing Measures (ASCM). At the core of the WTO are added the rules of ALADI [Latin American Integration Association] and within a further circle, the norms of MERCOSUR. All of these rules seek to ensure conditions of free trade that characterize and support a process of integration.’[[70]](#footnote-70)

Note the focus again on the importance of integration as the defining identifier for the organization and its aims. The WTO does not jeopardise the integration effort within MERCOSUR but instead serves as an umbrella, at times helping to clarify the scope of the (at times) unclear obligations within.[[71]](#footnote-71)

1. *Unmuting the ‘muted dialogue’*

In his 2008 article, ‘From Direct Effect to “Muted Dialogue”’, Marco Bronckers refered to the practice of the ECJ in relation WTO law.[[72]](#footnote-72) While the EU does not acknowledge the direct effect of WTO obligations,[[73]](#footnote-73) Bronckers draws attention to the number of instances where the ECJ *in effect* applies the WTO rule, adapting to changing jurisprudence, though it does not openly admit so. In an increasingly plural international legal system with a plethora of dispute settlement systems, such forms of judicial dialogue are not uncommon, though of course they present a far greater challenge for study than instances where judicial bodies are more open about their influences.[[74]](#footnote-74)

In this context, we can see how the MERCOSUR approach is more willing to openly acknowledge the influences at play. If we accept that judicial decisions should provide cogent reasoning for their conclusions, and do so in a clear and coherent manner it seems axiomatic that such decisions should acknowledge a meaningful influence on their decision-making process.[[75]](#footnote-75) Indeed, even if we were to view dispute settlement bodies such as those found in MERCOSUR as administrative rather than judicial in nature, the obligation to give reasons is still a relevant factor.[[76]](#footnote-76) In this regard, MERCOSUR awards are commendable in openly acknowledging the other influences that may have a role to play in their reasoning or that were raised during pleadings.

1. Conclusion

The purpose of this contribution has not been to extol the virtues of dispute settlement at MERCOSUR. It is clear that it is far from perfect. Indeed, if we are to look to comparisons with the EU, it is in their similar weaknesses that they are closest: the willingness of members to make great claims over what the institution is to do, without providing the necessary institutional framework to match it.[[77]](#footnote-77)

Instead, the aim here has been to identify the dangers of making such a comparison in the commentary, and the equal counterintuitive subtle advantage for judicial decision-makers at MERCOSUR to do just this. By identifying the EU as a gold standard of regional integration, we can entrench post-colonial responses to advances made in regions, most notably Latin America, which had a tradition of regional integration long before Western Europe began its own peace-making processes. The few examples identified here have drawn attention to the way in which the MERCOSUR tribunals have looked to other examples of regional integration and in each instance, drawn on them without resorting to mimicry.

At a time when new ‘mega-regionals’ are being concluded, each with their own dispute settlement system, it is as yet unclear as to what their impact will be, either on the multilateral trading system or the international legal system more widely. Similarly, many include interpretative obligations on their dispute settlement bodies which require them to look outside of their own internal legal system and interpret in light of WTO jurisprudence.[[78]](#footnote-78) The question of how this will function, say in CETA or the potential EU–US Transatlantic Trade and Investment Partnership is an open question.[[79]](#footnote-79) MERCOSUR offers a number of insights into how specifically regional agreements, though with diverse and differentiated participants, can use key concepts such as integration as the ordering principle for their legal order. Rather than considering MERCOSUR a lesser attempt at regional integration, the jurisprudence, such as it is, demonstrates original approaches to current challenges.

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   The influence of Simón Bolívar’s vision of a united Latin America (at least against peninsular oppression) has had a long lasting impact on regional integration: S Guerra, ‘MERCOSUL: Do Ideal Bolivariano Para a Realidade Atual (E Quem Sabe Futura?)’ 1 *Revista de la Secretaría del Tribunal Permanente de Revisión* 1 (2013) 275, 277. [↑](#footnote-ref-1)
2. Respectively: the *Mercado Integrado Latinoamericano* which links the stock exchanges of Chile, Colombia, Mexico and Peru (see: <http://www.mercadomila.com>); and *Asylum Case (Colombia v. Peru)* Judgment of November 20th, 1950: ICJ Reports 1950, p266. [↑](#footnote-ref-2)
3. See for example: D Pavón Piscitello & J P Schmidt, ‘In the Footsteps of the ECJ: First Decision of the Permanent MERCOSUR-Tribunal’ 34 *Legal Issues in Economic Integration* 3 (2007) 283; María del Pilar García Martínez, María de la Paz Herrera y Sabrina Victoria Olivera, ‘La Naturaleza De Las Opiniones Consultivas En El Mercosur. Análisis Comparativo Con La Unión Europea’ VII *Revista Electrónica del Instituto de Investigaciones ‘Ambrosio L. Gioja’*, 10 (2013) 73; A Pereira Gaio Júnior & L Santos Daltro Leite,‘Integración Mercosureña: Entre Lo Intergubernamental Y Lo Supranacional’, 3 *Revista de la Secretaría del Tribunal Permanente de Revisión* 6 (2015) 226; G L Gardini, ‘MERCOSUR: What You See Is Not (Always) What You Get’, 17 *European Law Journal* 5 (2011) 683, 685. [↑](#footnote-ref-3)
4. The question over the exact status of the *ad hoc* arbitral tribunals or the TPR (i.e. ‘judicial’ or ‘quasi-judicial’) is a common one in international economic law, yet for the purposes of this article it is sufficient to acknowledge that they exercise functions of a judicial nature, and (in the view of some in the TPR) certain powers flow implicitly from the exercise of such functions (see further below, Section III). For a clear analysis of the difficulties with such classifications: L Bartels, ‘The Separation of Powers in the WTO: How to Avoid Judicial Activism’, 53 *International and Comparative Law Quarterly* 4 (2004) 861, 864. [↑](#footnote-ref-4)
5. See Section III below. [↑](#footnote-ref-5)
6. The term *malinchismo* is borrowed from another Latin American context, Mexico, though the essence of this concept is common amongst post-colonial States (see, for example, A Sen, *The Argumentative Indian* (Penguin 2006) 73-88). The utility of such a concept does not exclude from consideration the problematic relationship that depictions of La Malinche share with equal gender relations. [↑](#footnote-ref-6)
7. Sugar and automotive goods, for example. [↑](#footnote-ref-7)
8. Article 40 Protocol of Ouro Preto 1994. [↑](#footnote-ref-8)
9. The MERCOSUR treaties are available at: <http://www.mercosur.int/innovaportal/file/2485/1/textos\_fundacionales\_es\_agosto\_2012.pdf> Unless otherwise specified translations of either the treaties or arbitral awards are the author’s own. [↑](#footnote-ref-9)
10. Article 1 Treaty of Asunción 1991. [↑](#footnote-ref-10)
11. The constitutive treaty of the Latin American Integration Association. [↑](#footnote-ref-11)
12. Note, the reference in the preamble to the Treaty of Asunción 1991 to ‘international trends, particularly the integration of large economic areas’. [↑](#footnote-ref-12)
13. Article 34, Protocol of Ouro Preto 1994. [↑](#footnote-ref-13)
14. Set out in the Protocol of Brasilia 1991. [↑](#footnote-ref-14)
15. *Opinión Consultiva* - though on the effective treatment of such opinions as preliminary references, see below, Section III(b). [↑](#footnote-ref-15)
16. On the complex nature of Latin (and specifically South) American regional relationships: N B Mellado, ‘Regionalismo Sudamericano: Sus Características’ 1 *Revista de la Secretaría del Tribunal Permanente de Revisión* 1 (2013) 137. [↑](#footnote-ref-16)
17. G L Gardini, ‘MERCOSUR: What You See Is Not (Always) What You Get’ (n3) 683-4. [↑](#footnote-ref-17)
18. ‘Arancel Externo Común’, MERCOSUR/CMC/DEC No 22/94. [↑](#footnote-ref-18)
19. ‘Codigo Aduanero del MERCOSUR’, MERCOSUL/CMC/DEC. No 27/10. [↑](#footnote-ref-19)
20. See, for example: ‘Listas Nacionales de Excepciones al Arancel Externo Común’, MERCOSUL/CMC/DEC N° 58/10. [↑](#footnote-ref-20)
21. Supra, n7. [↑](#footnote-ref-21)
22. M Rasmussen, ‘Revolutionizing European Law: A history of the *Van Gend en Loos* judgment’, 12 *I.CON* 1 (2014) 136, 141-142. [↑](#footnote-ref-22)
23. R Shütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2013) 44. [↑](#footnote-ref-23)
24. Article 1, Protocol of Ushuaia on the Democratic Commitment in MERCOSUR, the Republic of Bolivia and the Republic of Chile (1998). See also the discussion in: Laudo del Tribunal Permanente de Revisión en el asunto Nº01/2012, ‘Procedimiento Excepcional de Urgencia solicitado por la República del Paraguay en relación con la suspensión de su participación en los Órganos del Mercado Común del Sur (MERCOSUR) y la incorporación de Venezuela como Miembro Pleno’. [↑](#footnote-ref-24)
25. *Costa v ENEL* [1964] ECR 585 (6/64), 593-594. [↑](#footnote-ref-25)
26. Laudo del Tribunal AD HOC del MERCOSUR Constituido para la Controversia sobre Comunicados Nº 37 del 17 de diciembre de 1997 y Nº 7 del 20 de febrero de 1998 del Departamento de Operaciones de Comercio Exterior (DECEX) de la Secretaría de Comercio Exterior (SECEX): Aplicación de Medidas Restrictivas al Comercio Recíproco, para 50. [↑](#footnote-ref-26)
27. Opinión Consultiva 1/2007 del Tribunal Permanente de Revisión constituido para entender en la petición de Opinión Consultiva presentada por la Señora Jueza de Primera Instancia en lo Civil y comercial del Primer Turno de la jurisdicción de Asunción, Paraguay, Magistrada María Angélica Calvo, en los autos caratulados ‘Norte S.A. Imp. Exp. c/ Laboratorios Northia Sociedad Anónima, Comercial, Industrial, Financiera, Inmobiliaria y Agropecuaria s/ Indemnización de Daños y Perjuicios y Lucro Cesante’, vía la Excma. Corte Suprema de Justicia del Paraguay, recibida por este Tribunal en fecha 21 de diciembre de 2006, at Part III.2(C)1-5. [↑](#footnote-ref-27)
28. Not only Costa v ENEL but also *Internationale Handelsgesellschaft* [1974] Case 11-70 and *Simmenthal* II [1978] ECR 629. Ibid, at Part III.2(C)4. [↑](#footnote-ref-28)
29. M Rasmussen, ‘Revolutionizing European Law: A history of the *Van Gend en Loos* judgment’ (n18), 139. [↑](#footnote-ref-29)
30. *Costa v ENEL*, 594 (emphasis added). [↑](#footnote-ref-30)
31. Contra the view that the ECJ has focused on integrationist aims *per se* rather than, as suggested here, the aims of the treaties (which happen to be integrationist): D Pavón Piscitello & J P Schmidt, ‘In the Footsteps of the ECJ: First Decision of the Permanent MERCOSUR-Tribunal’ (n3) 291-292. [↑](#footnote-ref-31)
32. For example, see the view of the Council Legal Service incorporated in the ‘Declaration concerning primacy’ that the principle of primacy ‘is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL,15 July 1964, Case 6/641 (1) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.’ [2008] OJ C115/1. [↑](#footnote-ref-32)
33. Laudo 1/2005 Laudo del Tribunal Permanente de Revisión Constituído para Entender en el Recurso de Revisión Presentado por la República Oriental del Uruguay contra el Laudo Arbitral del Tribunal Arbitral AD HOC de fecha 25 de octubre de 2005 en la Controversia ‘Prohibición de Importación de Neumáticos Remoldeados Procedentes del Uruguay’, para 9. [↑](#footnote-ref-33)
34. Opinión Consultiva 1/2007 (n23), Part III.2(C)2-3. [↑](#footnote-ref-34)
35. The term *creación pretoriana* refers to a judicial act in response to a legal situation which the law itself does not foresee or for which it makes insufficient provision. For the inspiration of this term, see: A Watson, ‘The Development of the Praetor’s Edict’ (1970) 60 *Journal of Roman Studies* 105. [↑](#footnote-ref-35)
36. Opinión Consultiva 1/2008 del Tribunal Permanente de Revisión constituído para entender en la solicitud cursada por la Suprema Corte de Justicia de la República Oriental del Uruguay con relación a los autos del Juzgado Letrado de Primera Instancia en lo Civil de 1º turno IUE 2-32247/07 ‘Sucesión Carlos Schnek y otros c/Ministerio de Economía y Finanzas y otros. Cobro de pesos’, para 33. [↑](#footnote-ref-36)
37. Not only looking to the European Union but also to the Andean Community’s experience: Opinión Consultiva 1/2007 (n23), Part III.2(C)1. [↑](#footnote-ref-37)
38. Opinión Consultiva 1/2008 (n29), para 33. [↑](#footnote-ref-38)
39. Regulation of the Protocol of Olivos for the Settlement of Disputes in MERCOSUR (MERCOSUR/CMC/DEC. N°37/03). [↑](#footnote-ref-39)
40. Article 2, Regulation of the Protocol of Olivos (n31). [↑](#footnote-ref-40)
41. Article 4, Regulation of the Protocol of Olivos (n31) [↑](#footnote-ref-41)
42. Article 11, Regulation of the Protocol of Olivos (n31). *C.f.*, Articles 65-58, Statute of the International Court of Justice (1945) 39 AJIL Supp. 215. [↑](#footnote-ref-42)
43. Opinión Consultiva 1/2007 (n22), Part III.2(B)1. [↑](#footnote-ref-43)
44. Ibid. [↑](#footnote-ref-44)
45. See: ‘Information Note on references from national courts for a preliminary ruling’ [2005] C 143/01, para 1. The system is now found within Article 267, Treaty on the Functioning of the European Union [2010] OJ C83/47. [↑](#footnote-ref-45)
46. For example, as early as *Van Gend en Loos* where the ECJ rejected the Belgian position that it was not for the court to examine matters of an essentially domestic constitutional nature: *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62, p6. [↑](#footnote-ref-46)
47. Opinión Consultiva 1/2007 (n22), Part III.2(B)3. [↑](#footnote-ref-47)
48. Opinión Consultiva 1/2008 (n29), para 41. [↑](#footnote-ref-48)
49. María del Pilar García Martínez et al, ‘La Naturaleza De Las Opiniones Consultivas En El Mercosur’ (n5) 80. [↑](#footnote-ref-49)
50. Opinión Consultiva 1/2007 (n22), Part III.2(B)4. [↑](#footnote-ref-50)
51. Supra n3. [↑](#footnote-ref-51)
52. Lamenting the normative paucity of the MERCOSUR system on this point: Opinión Consultiva 1/2007 (n22), Part III.2(B)5. [↑](#footnote-ref-52)
53. In this line: R Pound, *Interpretations of Legal History* (Macmillan 1923) 3-4. [↑](#footnote-ref-53)
54. In its most institutional form at the International Law Commission: ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (13 April 2006) A/CN4/L682. [↑](#footnote-ref-54)
55. Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659. [↑](#footnote-ref-55)
56. Laudo del Tribunal Arbitral *‘AD HOC’* del MERCOSUR Constituido para Entender de la Controversia Presentada por la República del Uruguay a la República Argentina sobre ‘Omisión del Estado Argentino en Adoptar Medidas Apropiadas para Prevenir y/o Hacer Cesar los Impedimentos a la Libre Circulación Derivados de los Cortes en el Territorio Argentino de Vías de Acceso a los Puentes Internacionales Gral. San Martín y Gral. Artigas que Unen la República Argentina con la República Oriental del Uruguay’ [↑](#footnote-ref-56)
57. Ibid, para 51. [↑](#footnote-ref-57)
58. Ibid, paras 138-139. [↑](#footnote-ref-58)
59. Human rights law and trade law share a closeness in the Latin American context as they were often concluded at similar times (i.e. during the period of democratization in the late 20th century). On the impact of such a conflation: M T Franca-Filho, L Lixinski and B Olmos Giupponi, ‘Protection of Fundamental Rights in Latin American FTAs and MERCOSUR: An Exploratory Agenda’, 20 *European Law Journal* 6 (2014) 811. [↑](#footnote-ref-59)
60. Most notably in the possible use of the precautionary principle as a principle of customary international law to aid in the interpretation of Article 5.7 SPS Agreement: *European Communities – Measures Concerning Meat and Meat Products*, Report of the Appellate Body (16 January 1998) WT/DS26/AB/R and WT/DS48/AB/R, para 123. [↑](#footnote-ref-60)
61. *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* Judgment, I.C.J. Reports 2012, p. 99. [↑](#footnote-ref-61)
62. See: Laudo del Tribunal Permanente de Revisión en el asunto Nº1/ 2008 ‘Divergencia sobre el Cumplimiento del Laudo Nº 1/05 Iniciado por la República Oriental del Uruguay (Art.30 Protocolo de Olivos)’; Laudo del Tribunal Arbitral AD HOC del MERCOSUR Constituido para Entender de la Controversia Presentada por la República Oriental del Uruguay y a la República Federativa del Brasil sobre ‘Prohibición de Importación de Neumáticos Remoldeados (Remolded) Procedentes de Uruguay’. [↑](#footnote-ref-62)
63. For example: Case 21-24/72 *International Fruit Company NV and Others v Produktschap voor Groenten en Fruit* [1972] ECR 1219; Case C-149/96 *Portugal v Council* [1999] ECR I-8395. [↑](#footnote-ref-63)
64. Report of the Appellate Body, *Mexico – Tax Measures on Soft Drinks and Other Beverages* (WT/DS308/AB/R) 6 March 2006, paras 54-56. [↑](#footnote-ref-64)
65. Laudo del Tribunal Arbitral AD HOC del MERCOSUR Relativo a la Controversia entre la República Federativa del Brasil (Parte Reclamante) y la República Argentina (Parte Reclamada) sobre la ‘Aplicación de Medidas de Salvaguardia sobre Productos Textiles (Res. 861/99) del Ministerio de Economía y Obras y Servicios Públicos’, Part III(E). [↑](#footnote-ref-65)
66. Ibid. [↑](#footnote-ref-66)
67. Ibid. Part III(F)1-3. [↑](#footnote-ref-67)
68. Ibid. Part III(I). [↑](#footnote-ref-68)
69. Laudo del Tribunal AD HOC del MERCOSUR Constituido para Entender en la Reclamación de la República Argentina al Brasil, sobre Subsidios a la Producción y Exportación de Carne de Cerdo, para 59. [↑](#footnote-ref-69)
70. Ibid. para 57. [↑](#footnote-ref-70)
71. n57 and accompanying text. [↑](#footnote-ref-71)
72. M Bronckers ‘From ‘Direct Effect’ to ‘Muted Dialogue’: Recent Developments in the European Courts’ Case Law on the WTO and Beyond’, 11 *Journal of International Economic Law* 4 (2008) 885. [↑](#footnote-ref-72)
73. n55. [↑](#footnote-ref-73)
74. For example: A Tzanakopoulos ‘Judicial Dialogue in Multi-level Governance: The Impact of the Solange Argument’ in O Fauchald & A Nollkaemper (eds.) *The Practice of International and National Courts and the (De-)fragmentation of International Law* (Hart Publishing 2012). [↑](#footnote-ref-74)
75. For example: *Klöckner v Cameroon*, Decision of the Ad Hoc Committee (ICSID Case No ARB/81/2), paras 127-130. [↑](#footnote-ref-75)
76. See generally: J Hepburn, ‘The Duty to Give Reasons for Administrative Decisions in International Law’, 61 *International and Comparative Law Quarterly* 3 (2012) 641. [↑](#footnote-ref-76)
77. Note the ongoing difficulties in regulating both the Eurozone and Schengen area. [↑](#footnote-ref-77)
78. For example: Article 14:10 Comprehensive Economic and Trade Agreement Article (‘CETA’); Article 15.8 EU-Singapore Free Trade Agreement. [↑](#footnote-ref-78)
79. See: G Messenger, ‘Anti-Fragmentation Strategies: the Curious Case of the EU and World Trade Law’, EJIL: *Talk!* (20 February 2015) <http://www.ejiltalk.org/anti-fragmentation-strategies-the-curious-case-of-the-eu-and-world-trade-law/> [↑](#footnote-ref-79)