CONSIDERATIONS ON THE MERCOSUR DISPUTE SETTLEMENT MECHANISM AND THE IMPACT OF ITS DECISIONS IN THE WTO DISPUTE RESOLUTION SYSTEM.

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Abstract

This paper analyses the evolution of the dispute settlement mechanism (DSM) of the Common Market of the South (Mercosur) from its establishment to the current configuration, compares it with the systems of the European Union (EU) and the World Trade Organization (WTO) and examines certain Mercosur decisions that might influence on WTO rulings, revealing similarities and contradictions between these regional trade agreements and the multilateral trading system.

Introduction

The search for peaceful settlement to international disputes has been enhanced since the end of the 19th century as a result of the development of two principles. The first consists of the principle of "peace through law", according to which the use of force must be replaced by the intervention of an impartial third-party. The second principle refers to the illegality of the use of force as a means of solving disputes[1].

However, the solution of controversies in the international arena presents a series of particularities in relation to the activities performed by the States within the exercise of their domestic jurisdiction[2]. Such particularities result, to a large extent,

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A previous version of this paper was published in CEBRI Papers (CEBRI – Brazilian Center for International Relations, Volume 4, Year I, 2006).

[1] DUPUY, Pierre-Marie. *Droit International Public*. Paris: Dalloz, 2004, p. 545.
[2] Hildebrando Accioly and Nascimento e Silva explain that, unlike the civil society, where a superior authority is entitled to keep public order and judicial courts are authorized to apply sanctions, in the international society there are no authorities above the States and no compulsory jurisdiction empowered to solve international disputes. ACCIOLY, Hildebrando; NASCIMENTO E SILVA, G. E.. *Manual de Direito Internacional Público*. São Paulo: Saraiva, 1998, p. 425.

from the characteristics of international society, in which non-hierarchical relations are undertaken by sovereign States of unequal power.

In this context, the consent of the State, prior or subsequent to the emergence of the conflict, constitutes an essential condition for its adherence to a peaceful dispute settlement procedure. Moreover, the States are free to choose among the several existing mechanisms of dispute resolution, either the non-judicial or the judicial ones[3].

The non-judicial or diplomatic dispute resolution methods present two essential characteristics. On the one hand, they are endowed with great freedom to determine the bases to be used in the assessment of the concrete cases, in such a way that their solutions are not required to comply with the rule of law, being allowed to be based on matters of equity or mere opportunity. On the other hand, solutions reached by diplomatic means are not mandatory and do not bind the actions of the States. Among the non-judicial means, one can distinguish direct negotiations, good offices, mediation, conciliation and enquiry[4].

The judicial means of international dispute settlement are characterized by the intervention of an impartial third-party, in charge of providing international conflicts with solutions based on the rule of law[5], which are binding upon the parties to the dispute. Only two types of institutions are able to provide this kind of solutions: arbitration tribunals[6] and permanent international jurisdictions[7]. Within a regional framework, the Court of Justice of the European Communities (CJEC) stands out as an example of permanent jurisdiction.

Concerning international disputes of economic nature, certain aspects contribute to the States' decision to empower specialized international organizations to conduct the settlement of conflicts, rather than opting for international permanent jurisdictions or adopting non-judicial means. Among such aspects, one can mention the particularities

[3] DAILLIER, Patrick ; PERRET, Alain. *Droit International Public*. Paris : L.G.D.J., 2002, p. 823.
[4] COMBACAU, Jean; SUR, Serge. *Droit International Public*. Paris: Montchrestien, 2004, pp. 558-566.
[5] If the parties so agree, the tribunal may render its judgment "*ex aequo et bono*", which means based on equity, justice and fairness.
[6] Among the arbitration tribunals, it's noteworthy to mention the Permanent Court of Arbitration (PCA) established by the 1899 Convention for the Pacific Settlement of International Disputes (revised in 1907) and the International Centre for Settlement of Investment Disputes (ICSID), created by the Washington Convention of 1965, with the aim of settling investment disputes between governments and foreign investors.
[7] The International Court of Justice (ICJ) is the most important judicial body with universal scope. The ICJ is the principal judicial organ of the United Nations (UN) and was established in June 1945 by the Charter of the United Nations. The International Tribunal for the Law of the Sea also stands out as an international permanent jurisdiction with universal scope. However, its rulings are limited to the disputes related to the application of the 1982 United Nations Convention on the Law of the Sea. COMBACAU, Jean; SUR, Serge. *Ob. cit.*, p. 570.

of the scope of the disputes, the peculiarities of the applicable international law, and the importance of reciprocity and stability of international economic relations. In this context, the most remarkable example is the dispute settlement mechanism (DSM) of the World Trade Organization (WTO)[8].

Likewise, regional trade agreements (RTAs), such as the Common Market of the South (Mercosur)[9], also tend to set up their own DSMs, since the growth of trade flows largely depends on the existence of a system to which Member States can resort if commercial disputes arise out of the application, interpretation, or non compliance of the agreements.

Frequently, sovereign States are members of both WTO and RTAs for these have become very prominent over the last years. In this context, a problem may arise when a decision adopted within the regional framework conflicts with the trade liberalization rules under the WTO agreements, in such a way that the compliance with the regional ruling implies the State's non compliance with its multilateral obligations.

This subject is currently under discussion within the WTO Dispute Settlement Body (DSB) due to a dispute on retreaded tyres launched by the European Communities (EC)[10] against Brazil that somehow involves two arbitral awards previously issued within the Mercosur DSM: one related to a dispute initiated by Uruguay against Brazil and the other launched by Uruguay against Argentina, both regarding retreaded tyres.

The retreaded tyres cases illustrate an important dilemma faced by the multilateral trading system: on the one hand, the exemption for RTAs members under WTO rules might contribute to strengthening regional institutions and economic integration but, on the other hand, might bring legal insecurity to the multilateral system.

Therefore, this paper aims to provide an overview of the Mercosur DSM (Part I) so as to have better grounds to examine its decisions that might influence on WTO rulings (Part II). Apart from shedding some light on the subject, the paper ultimately aims to make some suggestions on the improvement of the Mercosur DSM.

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[8] DAILLIER, Patrick; PERRET, Alain. *Ob. cit.*, pp. 859-861.

[9] Brazil, Argentina, Paraguay, and Uruguay are the founding members of the Mercosur, which was established in November 1991 with the entry into force of the Treaty of Asunción. In addition to its Member States, Mercosur has five associate members: Bolivia, Chile, Colombia, Ecuador and Peru (also members of the Latin American Integration Association – ALADI). Venezuela signed in July 2006 a Protocol of Accession to the Mercosur. According to the Treaty of Asunción, the Mercosur is a customs union, but its final goal is to become a common market.

[10] The European Union is known for legal reasons as the European Communities in WTO matters.

Part I. The Mercosur Dispute Settlement Mechanism

The Mercosur DSM is entitled to solve controversies between the Member States regarding the interpretation, application or non-compliance of the provisions contained in the Treaty of Asunción, the agreements celebrated within its framework, and the decisions of the Mercosur institutional bodies. In order to assess its contribution to regional integration and its role within the multilateral trading system, the analysis of its evolution (item A) and a comparison with other important DSMs (item B) might be fruitful.

A. An evolution analysis

The Mercosur DSM had its legal features and institutional structure progressively improved from its early stages (item A.1) to the current system established by the Protocol of Olivos (item A.2).

A.1. The pre-Olivos period

The need to create a DSM within the Mercosur was identified ever since the celebration of the Treaty of Asunción. The Annex III of the Treaty (in force on November 29th, 1991) was the first set of rules devoted to the settlement of conflicts among its Member States, and established that such litigations should be solved through non-judicial methods. According to its provisions, the States would initially try to reach an agreement through direct negotiations. If the attempt failed, the controversy would be submitted to the Common Market Group (CMG)[11], Mercosur executive branch, and eventually to the Common Market Council (CMC)[12], the most important decision-making body within the Mercosur structure.

During Mercosur's 16 years of existence, its Member States have endeavored, by means of three protocols, to improve the original DSM. In fact, according to the

[11] The CMG is Mercosur executive body, in charge of supervising the application of the Treaty of Asunción, its protocols and the agreements signed within its framework, supervising Mercosur working groups and issuing binding resolutions in line with its mandate (articles 13 to 15 of the Treaty of Asunción and articles 10 to 15 of the Protocol of Ouro Preto).

[12] The CMC is Mercosur primary decision-making body, composed of the ministers of foreign affairs and the finance ministers of Member States. The CMC supervises the integration process, has negotiating authority to conclude agreements and formulates policy for the Mercosur through formal decisions. Its main purpose is to ensure that Member States are in compliance with the Treaty of Asunción, its protocols and the agreements signed within its framework (articles 10 to 12 of the Treaty of Asunción and articles 3 to 9 of the Protocol of Ouro Preto).

Treaty of Asunción, the original system would only be valid for a brief period of time, and a new mechanism should be built for the so-called "transition period", intended to last from the coming into force of the Treaty to December 31st, 1994. Thus, on December 17th, 1991 a proposal for a new mechanism was presented and on April 22nd, 1993 a new set of rules, the Protocol of Brasilia, entered into force.

The Protocol of Brasilia introduced two important new features in comparison to the Annex III of the Treaty of Asunción: it provided private individuals and companies from Member States with access to the DSM and established a judicial method of dispute resolution, the ad hoc arbitration tribunals[13].

The controversies involving Member States related to the interpretation, application and non-compliance of the Treaty of Asunción, other Mercosur agreements, CMC decisions and/or CMG resolutions could be settled through direct negotiations, conciliation by the CMG, or arbitration procedures carried out by ad hoc arbitration tribunals, in case of non compliance with the CMG recommendations.

The disputes involving claims from private individuals and companies referred to the application of legal or administrative measures by a Member State contrary to Mercosur agreements or decisions, with restrictive or discriminatory effects or resulting in unfair competition. However, the private parties were not granted with direct access to the Mercosur DSM. They had to present a formal complaint at the local section of the CMG, which would make a first attempt to solve the controversy. If a solution was not reached at that level, the private party could have its complaint sent to the CMG, which would provide an experts opinion on the case. If this opinion favored the private party's arguments, the Member State which adopted the controversial measures could be challenged by any other Member State within the CMG and subsequently before an arbitration tribunal.

The original text of the Protocol of Brasilia remained valid until the coming into force of the Protocol of Ouro Preto, on January 1st, 1995, which granted Mercosur with legal personality under international law and defined its institutional framework[14]. Regarding the dispute settlement procedures, the Protocol introduced at least one important amendment to the Protocol of Brasilia: the possibility of submitting the

[13] While the Protocol of Brasilia was in force, 10 arbitral awards were rendered by ad hoc arbitration tribunals.

[14] Other than the already existing CMC and CMG, the Protocol of Ouro Preto established the Mercosur Trade Commission, the Joint Parliamentary Commission (today's Mercosur Parliament), the Economic-Social Consultative Forum, and the Mercosur Secretariat (article 1 of the Protocol of Ouro Preto).

controversies to the Mercosur Trade Commission (MTC)[15], which could act as a mediator either in conflicts solely among Member States or in disputes involving Member States and private parties. Therefore, the CMG became a sort of political "instance of appeal" for the conflicts not solved within the MTC (even though the controversies could still be directly submitted to the CMG[16]). The Protocol of Ouro Preto also extended the validity of the Protocol of Brasilia to beyond the "transition period" ended in December 1994. In fact, the Protocol of Brasilia remained valid until the come into force of the Protocol of Olivos.

A.2. The Protocol of Olivos

The Protocol of Olivos, in force on January 1st, 2004, establishes the current rules for the solution of controversies within the Mercosur[17]. The Protocol is innovative from its very first article, which introduces the forum choice rule into the Mercosur legal order, allowing Member States to choose between multilateral or preferential free-trade agreements' DSMs (therein included the Mercosur's). According to such rule, the mechanism selected by the complainant is held competent and excludes the competence of any other DSM.

This innovation draws some criticism from those who understand that preference should be given to the Mercosur, as a regional agreement. These critics argue that the choice of a different DSM might contribute to slow down the integration progress, prevent the construction of local case-law and grant non-Members with access to the disputes arisen within the regional agreement zone[18].

Although these are reasonable arguments, it is worthwhile mentioning the benefits in terms of legal security brought by such provision, since it ensures that the same controversy may not be submitted to more than one DSM, as occurred in the WTO

[15] The MTC is responsible for the application of common trade policy instruments, as well as for the follow-up and revision of related issues (Decision CMC nº 13/93 and articles 16 to 21 of the Protocol of Ouro Preto).

[16] The analysis of both bodies' meetings history indicates that most part of the disputes reach the Mercosur DSM through the MTC (although its intervention is facultative) rather than through the CMG. MORAES, Henrique Choer. "O novo sistema jurisdicional do Mercosul – Um primeiro olhar sobre o Protocolo de Olivos". *Revista de Direito Constitucional e Internacional*, n. 39, 2002, p. 59.

[17] For further information on the settlement of disputes within the Mercosur, see CMC Decision nº 37/03.

[18] GOMES, Eduardo Biacchi. "Protocolo de Olivos: alterações no sistema de solução de controvérsias do Mercosul e perspectivas". *Revista de Direito Constitucional e Internacional*, nº. 42, 2003, p. 85. According to Guilherme Morales de Paula, the settlement of regional disputes by the WTO instead of the Mercosur DSM might allow the interference of nationals of non-Member States with political interests contrary to the Mercosur. PAULA, Guilherme Morales de. "A cláusula de eleição de foro do Protocolo de Olivos e seus efeitos contraproducentes para o Mercosul". *Revista Esc. Direito Pelotas*, n. 6 (1), 2005, p. 195.

Antidumping Duties on Poultry[19], which actually might have influenced the inclusion of the forum choice rule in the Protocol of Olivos.

The Protocol also introduced one important change to the procedure for solving disputes among Member States, allowing them to resort to judicial means after the failure of the direct negotiations without any prior intervention from the Mercosur political bodies (MTC and/or CMG). Concerning the disputes involving Member States and private parties, the Protocol of Olivos did not bring innovations to the existing proceedings and maintained the lack of direct access of private individuals and companies to the judicial procedures.

The most important legal innovation introduced by the Protocol of Olivos was certainly the creation of a permanent judicial body. Thus, in accordance to its article 17, the Member States are allowed to appeal against arbitration awards issued by the ad hoc arbitration tribunals[20]. However, the reasons of appeal must be strictly related to issues of law and to the legal interpretations developed within the decisions. Arbitration awards issued on the basis of equity and the principle *ex aequo et bono*[21] cannot be appealed.

The appeal is filed before the Permanent Review Court (PRC), with seat in Asunción (Paraguay) since August 13th, 2004. The PRC, which seems to be largely inspired on the WTO Appellate Body (AB), is composed of five arbitrators (one arbitrator designated by each Member State and the fifth one chosen by consensus[22]) and follows simple proceeding rules. When settling a dispute between two Member States, the PRC is integrated by three arbitrators: one from each party to the controversy

[19] The dispute, also known as the "chicken case", referred to the imposition by Argentina of antidumping measures on imports of poultry from Brazil. The controversy was submitted to an ad hoc arbitration tribunal within the Mercosur DSM. The arbitration tribunal's findings were based on the WTO antidumping agreement due to the lack of antidumping provisions within the Mercosur legal framework and to the provisions of article 19 of the Protocol of Brasilia, which considered international law as subsidiary applicable law to the disputes among Mercosur Member States. However, according to Brazil, the Mercosur arbitration tribunal applied WTO law differently than it would have been done by the WTO DSM. Therefore, Brazil filed the same claim against Argentina before the WTO DSM (DS241) and "won" in the multilateral arena a dispute that it had "lost" in the regional level.

[20] The arbitral procedure is tried before an ad hoc tribunal composed of three arbitrators: one from each party to the controversy and a third one, who cannot be a national of the Member States to the controversy, is designated upon common agreement and presides over the Arbitral Tribunal (articles 11 and 12 of the Protocol of Olivos and CMC Decision nº 30/04).

21 Latin for "according to what is right and good". See footnote nº. 5.

[22] Each Member State designates one arbitrator and one alternate for a renewable term of two years. The fifth arbitrator is chosen by consensus from the arbitrators included in a list of eight arbitrators - two from each Member State (articles 18 to 20 of the Protocol of Olivos).

and a third one, randomly chosen among the arbitrators originating from the Member States not involved in the dispute, who presides over the Tribunal. When a dispute involves more than two Member States, the PRC sits as a full court, with all its five arbitrators.

The PRC findings prevail over the decisions from the ad hoc arbitration tribunals, which can be upheld, modified, or reversed. Other than exercising its power of review, the PRC can also work as a first instance court. Therefore, according to the Protocol of Olivos, the Member States may have their disputes submitted directly to the PRC (*per saltum*), which in such a case performs the duties of an ad hoc arbitration tribunal. In both circumstances (as a jurisdiction of first instance or review), the PRC findings are unappealable and binding on the parties from the moment the respective notification is received (effect of *res judicata*).

Once a decision is delivered, if doubts arise as to the nature of the compliance measures to be adopted, the parties are allowed to ask the trial court (the arbitration tribunal or the PRC) for clarifications. Accordingly, when divergences emerge out of the adoption of such compliance measures (usually when the prevailing party understands that the measures adopted by its counter party do not entirely comply with the decision), the matter can be submitted to the trial court. In case of total or partial non-compliance with the rulings rendered by the ad hoc tribunal or the PRC, the prevailing party may impose retaliatory measures within one year from the end of the designated period for implementing such ruling[23].

Along with its original duty of solving regional disputes, the PRC also works as an advisory jurisdiction[24]. It means that Member States (conjointly), as well as the CMC, the CMG, the MTC, and the Mercosur Parliament[25] are allowed to request the PRC to give advisory opinions on legal questions concerning the interpretation of Mercosur rules and decisions. The Member States Superior Courts with nationwide jurisdiction are also entrusted with legitimacy to request advisory opinions from the PRC[26], provided that such opinions are related to cases on trial and involve the interpretation of

[23] The Protocol of Olivos and the decisions adopted within its framework provide clearer rules on the adoption of provisional remedies with the aim of preventing serious and irreparable damages to the parties to controversies (articles 15 and 24 of the Protocol of Olivos and CMC Decision nº 23/04).
[24] For further information on the PRC advisory opinions, see Chapter III of the Protocol of Olivos and Chapter II of the CMC Decision nº 37/03.
[25] According to article 13 of the Mercosur Parliament Constitutive Protocol.
[26] The first advisory opinion was requested by a Paraguayan first instance judge, through the Paraguayan Supreme Court. For further information see Advisory Opinion n° 01/2007.

Mercosur rules and decisions. It is important to notice that such opinions are neither binding nor mandatory and cannot refer to issues being discussed within the Mercosur DSM.

Finally, it is noteworthy that, according to its article 53, the Protocol of Olivos was adopted on an interim basis and a revision of its provisions is planned to take place before the convergence of the Mercosur Common External Tariff, scheduled for December 31st, 2008[27]. As the rules of the Mercosur DSM are not fully established, the comparison with other important DSMs[28] might contribute to determine its role in the regional integration process, its place in the multilateral trading system as well as to inspire the construction of the Mercosur permanent DSM.

B. A comparative analysis

The current Mercosur DSM already incorporates some features from the EU judicial body and the WTO mechanism. However, depending on the degree of integration achieved by its Member States, it is possible to envisage the Mercosur mechanism reaching a level of institutionalization similar to the EU judicial body (item B.1) or at least incorporating additional provisions from the WTO DSM (item B.2).

B.1. The EU and Mercosur DSM

With the aim of establishing the European Communities, today's European Union, the Member States[29] concluded several agreements[30] and created a robust institutional apparatus, represented by the European Parliament, the European Council, the European Commission, the European Court of Auditors, and the Court of Justice of the European Community (CJEC).

[27] According to the CMC Decision nº 38/05.
[28] Due to the limited scope of this paper, the comparison does not include other important DSM such as those from the North American Free Trade Agreement (NAFTA) and the Andean Community.
[29] The current Member States of the EU are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom.
[30] The Treaty establishing the European Coal and Steel Community (1951), the Treaty establishing the European Economic Community (1957), the Treaty establishing the European Atomic Energy Community (1957), the Merger Treaty (1965), the Single European Act (1985), the Treaty on European Union (1992), which changed the name of the European Economic Community to "European Community", the Treaty of Amsterdam (1997), and the Treaty of Nice (2001). BLUMANN, Claude; DUBOIS, Louis. *Droit Institutionnel de l'Union Européenne*. Paris: Éditions du Juris-Classeur, 2004, pp. 1-20.

The CJEC is the judicial body of the EU and is composed of the Court of Justice, the Court of First Instance, and the Civil Service Tribunal[31].

The Court of Justice is composed of 27 Judges (one judge corresponding to each Member State) and eight Advocates General, all appointed by common agreement of the Member States for a renewable term of six years. The Court has a clearly defined jurisdiction, which it exercises by means of reference for preliminary rulings and other categories of procedures. The preliminary rulings refer to the cases where a national court needs clarification on the interpretation of Community law or seeks the review of the validity of an act of the same law. The Court of Justice's reply binds the decision of the corresponding national court as well as other national courts before which the same question is raised. The other categories of procedures under its jurisdiction include a wide range of actions that enable the Court of Justice to control the fulfillment by Member States of their obligations under Community law, to determine the annulment of measures adopted by European institutions, to review Community institutions' failures to act, apart from its attributions as a review court.

The Court of First Instance is composed of 27 Judges (one judge designated by each Member State) appointed by common agreement of the Member States for a renewable term of six years. Within its jurisdiction, it is noteworthy to mention the direct actions filed by private parties against acts or failures to act on the part of Community institutions[32].

The Civil Service Tribunal is composed of seven judges appointed by the European Council for a renewable term of six years. The Tribunal exercises jurisdiction at first instance in European civil services disputes.

Thus, the CJEC is responsible for examining the legality of Community acts and ensuring the uniform interpretation and application of Community law. Its case-law settled some essential principles to the effectiveness of the judicial activity and to the progress of the European integration ("*l'intégration par la 'judiciarisation' du droit de l'Union*"[33]).

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[31] The European Treaties, the Statutes of the Courts and other related texts establish the rules governing the institutional structure and legal procedures of each Court.

[32] It also comprehends actions brought by the Member States against the European Commission and the European Council (related to specific issues); actions seeking compensation for damages caused by the Community institutions or their staff; actions based on contracts made by the Communities which expressly give jurisdiction to the Court of First Instance; and actions relating to Community trade marks.

[33] BERRAMDANE, Abdelkhaleq; ROSSETO, Jean. *Droit Institutionnel de l'Union Européenne*. Paris: Montchrestien, 2005, p. 178.

A first principle guarantees the direct application of Community law in its Member States, enabling European citizens to rely directly on Community provisions before their national courts. Another principle ensures the primacy of Community law over national law, meaning that administrations and national courts are compelled to disapply national provisions conflicting to Community rules. The Court has also recognized the principle of the liability of Member States for breach of Community law, which helps to consolidate the protection of individual rights within the EU and contributes to more diligent application of Community provisions by Member States, once any infringements might lead to the payment of indemnities and/or financial penalties[34].

Due to the CJEC, Community law could stand apart from international law and the internal legislation of Member States, and became an autonomous, strong and legitimate legal order. Indeed, some authors refer to the CJEC as a *sui generis* constitutional jurisdiction[35].

The European institutions' high complexity and unique characteristics are a result of the special legal nature of the EU, which does not correspond to a Federal State or an international organization of classical type, but rather to a federation of States, whose strategy associates the transference of competence from Member States and the coordination of their national policies[36].

The Mercosur, on the other hand, holds an institutional structure typical of intergovernmental organizations with institutional bodies composed of representatives from the Member States' governments who decide by consensus.

In this context, considering the different degrees of integration reached by the EU and the Mercosur, the comparison between their respective DSMs cannot be done on a direct basis. However, some traces of similarity and distinction can be pointed out.

The European system adopts a permanent international jurisdiction, the CJEC, while the Mercosur mechanism still combines non-judicial methods (by means of direct negotiations and the intervention of the MTC and the CMG) and judicial methods (ad hoc arbitration tribunals and the PRC). However, by creating a permanent judicial body (the PRC) and allowing States to resort directly to it (without prior intervention of

[34] Established, respectively, by the judgments Van Gend & Loos (1963), Costa (1964), and Francovich and Others (1991).
[35] BERRAMDANE, Abdelkhaleq; ROSSETO, Jean. *Ob. cit.,* p. 208, 236.
[36] BERRAMDANE, Abdelkhaleq; ROSSETO, Jean. *Ob. cit.,* p. 1.

political bodies or ad hoc arbitration tribunals), the Protocol of Olivos made a huge contribution towards approaching both systems.

The two mechanisms share other common aspects, such as the possibility of granting provisional remedies and the judicial bodies' lack of competence to carry on execution acts (which, in both cases, remain under the Member States' jurisdiction). Other aspects, although presenting some similarities, need to be better developed within the Mercosur, such as the restricted access to the DSM granted to private parties and the procedure for requesting advisory opinions (the European "preliminary rulings"). As mentioned before, in the Mercosur, the legitimacy to request such opinions is exclusively held by the Superior Courts of the Member States and the opinions, which are non binding, are limited to questions not under dispute within the DSM.

However, the two systems diverge in one essential respect. Within the Mercosur DSM, there is no such thing as a "Mercosur law", meaning that its rules are adopted and incorporated by Member States according to the general procedure applied for international treaties and have no priority over their national law. Conversely, the EU has legitimate institutions and mechanisms for the adoption of Community law, which has direct effect in the legal system of the Member States and prevails over their domestic law. In summary, while the EU holds the supranational concept, the Mercosur is still run by intergovernmental relations. Apparently, the recently established Mercosur Parliament[37] means an important step towards supranationality.

B.2. The WTO and Mercosur DSM

The WTO was established[38] in 1995 and is one of the most important results of the GATT[39] negotiations carried out between 1986 and 1994 (Uruguay Round). Its role include hosting negotiations of trade agreements, settling trade disputes, monitoring national trade policies of Member States and providing technical assistance to developing countries.

[37] The Mercosur Parliament was established by the Mercosur Parliament Constitutive Protocol (CMC Decision nº 23/05). It is composed of eighteen congressional representatives designated by each Member State and aims to contribute to the consolidation of regional integration and cooperation. Part of its role is to establish mechanisms to facilitate the incorporation of Mercosur norms into the Member States' legal order. After 2014, in accordance with specific criteria, the Parliament members will be directly elected by secret vote in a system of universal suffrage.

[38] Established by the Marrakesh Agreement, concluded on April 15th, 1994. The WTO had 151 members as of July 2007.

[39] General Agreement on Tariffs and Trade, first signed in 1947.

The Marrakesh Agreement and its covered agreements (WTO agreements) spell out the principles of trade liberalization - mainly the most-favored-nation (MFN) and national treatment principles - and the permitted exceptions. They also include Member States' commitments to lower customs tariffs and other trade barriers and to open services and non-agricultural markets.

The establishment of the WTO is an important landmark, not only due to the institutional innovation it represents, but also for having promoted a deep change in the nature of international trade relations, which became rule-oriented and no longer power-oriented. Moreover, the negotiations within the WTO abide by the principle of single undertaking, meaning that all agreements under negotiation are part of a whole and indivisible package and cannot be agreed separately, preventing Member States from adopting only the items corresponding to their interests.

The WTO DSM serves as the central pillar of the multilateral trading system for it is in charge of ensuring the Member States' compliance with the agreements therein concluded[40]. Prior to the establishment of the WTO, the GATT also had a mechanism for solving trade disputes. However, such mechanism was particularly inefficient, since its decisions had to be approved by all Member States ("affirmative consensus"), including the ones who "lost" the disputes. Therefore, the strategy often adopted by those States was to block the consensus needed for implementing the decisions.

Today, in addition to the possibility of appealing the panel's findings before the Appellate Body (AB), the "reverse or negative consensus" rule applies. Thus, the rejection of the panel's decision (and/or the AB's) depends on the agreement of all Member States, including those who "won" the disputes. Moreover, in the event of partial or total non-compliance with such findings, the prevailing State is authorized to impose retaliatory measures. Indeed, the peculiar features of the WTO DSM have turned it into the most efficient system among international organizations[41].

[40] The Dispute Settlement Understanding (DSU), also known as the Annex II of the Marrakesh Treaty, provides the general rules and procedures governing the settlement of disputes related to the interpretation and application of the agreements concluded within its framework. However, some of these agreements (such as the antidumping and the agriculture ones) contain specific procedural provisions that prevail over the DSU general rules.

[41] However, the WTO is frequently criticized due to the fact that its bodies do not have the mandate to issue unilateral acts with binding legal effects (derivative law) and its agreements do not have direct effect in the domestic law of Member States. CARREAU, Dominique; JUILLARD, Patrick. *Droit International Économique*. Paris: L.G.D.J., 1998, pp. 63-64.

Dispute settlement within the WTO takes place before a political institution, the DSB[42], and before independent, quasi-judicial institutions such as panels, the AB and arbitrators. It begins with a diplomatic phase consisting of direct negotiations, good offices, consultations and/or mediation that may involve the Director-General of the Organization. If consensus is not reached, the complainant may request the establishment of a panel to settle the dispute[43]. The panel rules on the factual and legal aspects of the case and delivers a report containing its findings and conclusions. The panel's report only becomes binding after being adopted by the DSB.

The parties may decide to file an appeal (limited to issues of law) before the AB, which may uphold, modify or reverse the legal findings and conclusions of the panel. The AB report also becomes binding after being adopted by the DSB. In fact, the need for the DSB approval is determinant for the non-characterization of the AB as a judicial instance, considering that decisions emanating from such instances do not need to be validated by political agents to become mandatory.

Following to the adoption of the panel or AB report, the "losing" party is supposed to implement the necessary measures to bring itself into compliance with WTO law. If the parties do not find mutually satisfactory trade adjustments, the prevailing party might be allowed by the DSB to impose retaliatory measures.

The WTO seems to be one important source of inspiration for the Mercosur DSM. Indeed, both mechanisms stimulate the amicable settlement of disputes, and begin with a diplomatic phase. This step is followed by a first legal and factual assessment of the case (performed by the ad hoc tribunals within the Mercosur and by the panels in the WTO). Subsequently[44], the dispute can be reviewed by the Mercosur PRC and the WTO AB on legal grounds. In both Mercosur and WTO DSMs, the implementation of decisions can be reviewed if not deemed appropriate by the prevailing parties. As a last resource, the two systems allow the prevailing parties to impose retaliatory measures against the non-complying Member State.

However, the two DSMs are not identical. Some differences can be pointed out such as the existence of an implementation procedure in the WTO where Member States might request the arbitration of the "quantum" to be imposed on others under retaliatory

[42] The DSB is composed of all Member States' governments, usually represented by diplomats.
[43] As an alternative to adjudication by panels and the AB, the parties to a dispute can resort to arbitration according to article 25 of the DSU.
[44] As mentioned before, according to the Protocol of Olivos, the Member States may decide to submit their disputes directly to the PRC, which in such cases performs the duties of an ad hoc arbitration tribunal.

measures, as well as the timetable for implementing the decisions[45]. In addition, according to WTO rules, the retaliatory measures can only be undertaken pursuant the DSB authorization. It is an indispensable step within the WTO DSM which does not exist in the Mercosur mechanism. Accordingly, the panel and AB reports must also be approved, within the DSB, by all other Member States not participating to the controversy. Although such an approval is not more than a formal step, still it represents a relevant difference if compared to the Mercosur DSM, which requires no further approvals for the decisions delivered by its judicial bodies.

One minor difference to be mentioned is that the WTO panelists are appointed on a case by case basis, since there are no standing panelists. They are selected among the names periodically presented to the WTO Secretariat by each Member State. On each dispute, the defendant and the claimant shall agree on the names of three panelists who cannot be nationals of the two parties. If they do not agree on the names, the panelists might be appointed by the Director-General. In order to avoid the problem of parties not agreeing on the panelists' names, some WTO members have suggested the adoption of a roster of panelists (which would imply the revision of article 8 of the DSU). Such a change would approximate the WTO and Mercosur DSMs, since the new WTO provisions would resemble Mercosur rules regarding the selection of ad hoc arbitrators. It is also noteworthy that in the Mercosur DSM both ad hoc arbitrators and permanent tribunal members are required to be legal experts, while in the WTO such a requirement only applies to the AB members.

At last, the two DSMs diverge with respect to an essential aspect. While the provisions under the WTO agreements reflect the goals of trade liberalization, the Mercosur agreements, on the other hand, ultimately envisage regional cooperation and integration. The nature of the applicable law (WTO multilateral trade liberalization law and Mercosur regional integration law[46]) certainly influences the approaches adopted by panelists and arbitrators while assessing the disputes and affects their outcome.

The potential contradiction between the multilateral and regional approaches might also take place when decisions adopted within an RTA DSM affect the States' compliance with their obligations under multilateral trade law. In this context, the

[45] Regarding the timetable for adopting implementation measures, the joint interpretation of articles 29 and 31 of the Protocol of Olivos leads to the conclusion that such measures must be adopted within at least 13 months following notification of the decision. Considering that the average implementation time within the WTO DSM is 15 months, both DSMs are quite similar in this regard.

[46] It's noteworthy that both WTO and Mercosur law do not have direct effect in the domestic law of Member States.

impact of the Mercosur DSM decisions in the WTO retreaded tyres dispute appears as an interesting case-study.

Part II. The impact of the Mercosur DSM decisions within the WTO

The WTO created a dispute settlement panel on January 20th, 2006 regarding a claim from the EC, which argued that a Brazilian import ban on retreaded tyres was WTO inconsistent. The EC also questioned the exemption of Mercosur imports from the ban, raising questions related to the status of the Mercosur at the WTO (item A) and to the implication of two[47] arbitral awards previously issued within the Mercosur DSM (item B).

A. The Status of the Mercosur at the WTO

We shall first mention certain conceptual and normative aspects of the regional agreements and subsequently discuss the Mercosur status in the WTO.

According to the decision of the WTO General Council, dated of February 6th, 1996, which set up the Regional Trade Agreement Committee (RTAC), a regional trade agreement (RTA) is understood as "every bilateral, regional or plurilateral agreement of preferential nature"[48].

Within the WTO, if a Member State also belongs to an RTA it might be entitled to certain waivers concerning the MFN clause obligations. Indeed, GATT Article XXIV establishes the rules on the coexistence and compatibility of the RTAs with the objectives of trade liberalization envisaged at the creation of the WTO.

GATT provisions currently in force are a result of the original GATT Article XXIV, complemented by an "Ad Art XXIV", which included paragraphs 9 and 11 to the old GATT, and updated in 1994 with the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 ("Understanding")[49], which was also negotiated during the Uruguay Round with the purpose to define the extent of the article's content.

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[47] Note that the Mercosur DSM has so far settled 12 disputes, therein included the two retreated tyres disputes relevant to the WTO case. There was indeed a Mercosur dispute ("the chicken case"), re-submitted to the WTO DSM. The chicken case dates of 2000, thus prior to the Protocol of Olivos (2002) which forbids forum shopping. In addition, the Mercosur has no antidumping agreement, so Brazil considered itself legitimate to demand reparation under the WTO Antidumping Agreement. For further references on this dispute, see previous remarks on footnote 19.

[48] See TN/RL/W/8/Rev. 1.

[49] http://www.wto.org/english/tratop_e/region_e/region_art24_e.htm#ad.

In this sense, today's GATT Article XXIV, in accordance with its paragraph five, applies specifically to[50]:

i) customs unions (trade barriers removal and adoption of a common external tariff to third parties);

ii) free-trade areas (trade barrier removal, but with contracting parties' autonomy to impose differentiated tariffs to third parties);

iii) interim agreements evolving into the formation of one of the above mentioned integration regimes.

In addition, the requirements included in the very same paragraph five of GATT Article XXIV as read in accordance with Article XXIV:5 of the Understanding should be strictly observed in order that RTAs may be considered compatible with the GATT provisions. Those requirements are briefly described herein below:

a) in any of the three integration regimes (customs unions, free-trade areas and interim agreements), the duties and other regulations of commerce therein imposed and/or maintained shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the relevant integration regime area prior to the formation of that area; and

b) regarding interim agreements, the formation of the customs unions or the free-trade area shall occur within ten years, unless exceptional circumstances take place.

Although there are other provisions of GATT Article XXIV to be observed so that an RTA can be considered WTO-compliant, we shall bear in mind that by their very nature RTAs are discriminatory, for they mitigate the MFN principle, a cornerstone of the multilateral trading system[51]. Therefore, a tight control of RTAs' provisions is necessary. In this sense, the already mentioned RTAC was put in charge of analyzing their transparency and consistency.

The analysis procedure begins with the notification of an RTA to the WTO Secretariat. Such notification should take place as early as possible, in general no later than the parties' ratification of the RTA or any party's decision on the application of the

[50] PADUA LIMA, Maria Lúcia, et al. "Acordos Regionais de Comércio". In: THORTENSEN, Vera; JANK, Marcos (orgs). *O Brasil e os grandes temas do comércio internacional*. São Paulo: Aduaneiras, 2005, pp. 211- 212.

[51] http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm
See also Appellate Body Report, EC- Tariff Preferences, paragraph 101.

relevant parts of an agreement and before the application of preferential treatment between the parties[52]. In addition, parties should specify under which provision(s) of the WTO agreements the RTA is being notified and provide its full text and any related schedules, annexes and protocols[53].

Once basic information is gathered, the Secretariat sends them to the Member States which can pose written questions to the RTA members who, on their turn, should answer the questions in writing. The consolidated questions and answers shall be reviewed in several RTAC meetings. Once the analysis is over, the Secretariat prepares a final report on the RTA and sends it to the respective Council within the WTO structure: Council for Trade in Goods - CTG (if required compatibility is under the GATT), Council for Trade in Services – CTS (if required compatibility is under the GATS) and/or Committee on Trade and Development – CTD (if required compatibility is under the Enabling Clause)[54].

Although WTO State Members are expected to notify the Secretariat on negotiated and/or signed RTAs, the notifications are not always done as they should be. Indeed, according to WTO website information[55], there are RTAs which are in force but have not been notified. In addition to those, there are RTAs signed but not yet in force, some others currently being negotiated, and some still in the proposal stage. Altogether, there are almost 400 RTAs which are scheduled to be implemented by 2010. Some 380 out of the-almost-400 have been notified to the GATT/WTO up to July 2007. Of these, 300 RTAs were notified under Article XXIV of the GATT 1947 or GATT 1994; 22 under the Enabling Clause; and 58 under Article V of the GATS. At that same date, 205 agreements were in force[56].

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[52] http://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm
According to the background note prepared by the WTO Secretariat as per the request of the Negotiating Group on Rules, at its meeting of May 8th, 2002, the time at which an RTA should be notified by a Member is not precisely formulated nor homogeneously expressed in WTO rules. In practice, many RTAs are notified when their texts have already been sealed or even when the RTA is already in force, and it has been argued that this restrains the effectiveness of the ensuing examination process. It has been suggested that the terms «shall promptly notify» and «deciding to enter» in GATT Article XXIV: 7(a) should be interpreted to mean that the notification and submission of information should take place, at least, before the entry into force of the RTA. Conversely, it has been observed that a case-by-case approach is more appropriate to take into account the complexity of issues surrounding RTAs, in particular the political and legal difficulties related to notifying an RTA prior to its ratification. For further information, see (TN/RL/W/8/Rev.1, dated of August 1st 2000).

[53] For further information see http://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm

[54] PADUA LIMA, Maria Lucia, et al. *Ob. cit*., p.218.

[55] http://www.wto.org/english/tratop_e/region_e/region_e.htm.

[56] For further references on RTA notifications and statistics within the RTAC, seehttp://www.wto.org/english/tratop_e/region_e/region_e.htm

The Mercosur Member States notified the RTAC on March 5th, 1992[57], but as happened with other RTAs, there is no final report stating its compatibility (or not) with the WTO provisions. Actually, it has been agreed that the RTAC shall no longer decide on RTAs compatibility with WTO agreements and such a task shall be performed by the panelists and the AB on a case-by-case basis if an RTA issue arises.

However, as clearly taught by Joost Pauwelyn in a recent paper, where Article XXIV is raised as a defense for the breach of certain WTO obligations, panels and the AB do everything to avoid discussing the matter, that is, analyzing the compatibility of the RTA provision with WTO agreements[58]. The most recent example of this trend is the case Brazil - Retreaded Tyres (DS332).

In big lines, the core allegation of the EC in the WTO panel against Brazil refers to the Brazilian decision to exempt Mercosur countries from the import ban on retreaded tyres while it was kept for third parties, including the EC. According to the EC, Brazil has violated its MNF clause obligations and has thus directly affected the commercial interests of EC retreaded tyres industries.

The parties' allegations and defenses are not relevant for the purposes of this paper, but we shall mention that the EC state at their first written submission to the panel that Brazil should prove that Mercosur is a customs union[59] if it wanted to claim an exemption under GATT Article XXIV (in particular as far as item 5(a) is concerned).

The relevance of such an EC statement lies on the doubt raised on the status of the Mercosur as an RTA, even though the EC have not directly requested the panel to analyze this question. Any statement of a similar nature should sound to Brazil and its Mercosur partners at least very awkward, since not only was Mercosur duly notified to the RTAC in 1992, but also the EU has been negotiating bilateral agreements with the Mercosur.

However, the RTAC neither did decide on Mercosur compatibility with WTO law nor on the compatibility of any other RTA already notified to the WTO Secretariat. So, as the RTAC has already stated that it shall not decide on RTA compatibilities, the EC strategy might sound legitimate.

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[57] Note that the notification requirement for RTAs already existed under the GATT47. That is why the Mercosur notification occurred in 1992, before the establishment of the WTO.

[58] PAUWELYN, Joost. *Legal Avenues to 'Multilateralising Regional': beyond article XXIV* presented at the Conference on Multilateralising Regionalism, sponsored and organized by the WTO –HEI, and co-organized by the Centre for Economic Policy Research, on the 10th -12th September, 2007, in Geneva.

[59] See http://www.gvdireito.com.br/casoteca/default.aspx?pagid=IPDGNKQN&menuid=107

In its report, the panel did not rule on the Mercosur compatibility with WTO obligations by exercising judicial economy with respect to the EC claim under GATT Articles I.1 and XIII:1 related to the Mercosur exemption and Brazil's defense under Articles XXIV and XX(d) of GATT 1994. Therefore, such a task will be likely transferred to the AB, since we believe that the EC might understand that the panel legally erred on this decision and might appeal. We shall see how the AB will approach this extremely relevant issue. Indeed, the WTO retreaded tyres case shall certainly create an important case-law not only to Brazil, but also to all other WTO Member States willing to use GATT Article XXIV exception.

The referred case is very rich and interesting, since it deals with a good amount of new issues at the WTO, like environmental concerns and compliance with RTAs rules. Not to mention that even though Brazil was found in non-compliance with its WTO obligations, it did not appeal. Conversely, the EC did request the AB to review issues of law and legal interpretations contained in the panel report. Yet, due to the scope of this paper, we shall be limited to the discussion of the relevant reasoning of the panel's findings and the parties' arguments as far as Brazil's need to comply with a Mercosur arbitral award was determinant to justify the breach of its WTO obligations[60].

B. The Mercosur Arbitral Awards relevant for the WTO retreaded tyres dispute

After the failure of diplomatic negotiations between Uruguay and Brazil, Uruguay notified the Mercosur Administrative Secretariat on 27th August, 2001 about its decision to start an arbitral proceeding against Brazil, regarding a ban on retreaded tyres, since Mercosur Member States were not supposed to introduce new trade restrictions after the conclusion of the Treaty of Asunción.

The parties' allegations and defenses are not relevant for the purposes of this paper. Yet, according to the ad hoc arbitral tribunal award rendered on January 9th, 2002, the Brazilian ban was indeed considered in violation of the obligations undertaken by Brazil under the Asunción Treaty. It should also be mentioned that Brazil did not use any environmental defense to justify the ban, thus the arbitral tribunal was not requested to analyze if the ban was justified under article 50 (d) of the Montevideo Treaty (MT), dated of August 12th, 1980[61].

[60] The EC claimed that Brazil had breached its obligations under GATT Articles I.1, III.4, XI.1 and XIII.1.
[61] Article 50 of the MT: "No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding: a. Protection of public morality; b. Implementation of

Brazil complied with the Mercosur award and derogated the "Portaria" 8/00 issued by the Foreign Affairs Secretariat (SECEX) of the Development, Industry and Foreign Trade Ministry on September 25th, 2000. All subsequent Brazilian related normative rules on retreaded tyres excluded Uruguay and other Mercosur countries from the import ban.

It is noteworthy that Brazil did not file an appeal against the ad hoc tribunal award because the Protocol of Olivos, which set up the PRC within the Mercosur DSM, had not been installed at that time. Neither did Brazil invoke any grounds relating to the protection of human life or health in defense of the ban.

On July 26th, 2005, a new Mercosur ad hoc tribunal was set up to analyze a very similar measure: an Argentinean import ban on retreaded tyres originated from Uruguay.

Once again, the parties' allegations and defenses are not relevant for the purposes of this paper. Yet we shall briefly mention the outcome of this dispute for two reasons. On the one hand, most of the Argentinean environmental arguments were also brought along by Brazil at the ongoing WTO dispute on retreaded tyres initiated by the EC. We should make clear however that both disputes are neither directly related nor comparable, for the Brazilian defense at the WTO is far more sophisticated than the Argentinean defense in the Mercosur, even because the EC claim under the WTO rules is far more challenging than the Uruguayan claim under the Mercosur rules. On the other hand, the legal errors allegedly committed by the Mercosur ad hoc tribunal resulting on the overcome of the Argentinean favorable result might also be identified at the WTO case by the time the AB hears the EC appeal and issues its report.

It was indeed the first time ever within the Mercosur mechanism that an appeal was filed against an ad hoc tribunal award. Due to the Uruguayan appeal to the PRC, the ad hoc tribunal arbitral award was revoked. It is noteworthy that according to the PRC award issued on December 20th, 2005, the Mercosur tribunal found that the Argentinean measure based on environmental reasons could not prevail on the grounds analyzed by the ad hoc tribunal because its award had clear and serious legal errors[62]. In fact, the PRC ruled that the ad hoc tribunal should have set up some criteria ("necessity tests",

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security laws and regulations; c. Regulation of imports and exports of arms, munitions, and other war materials and, under exceptional circumstances, all other military equipment; d. Protection of human, animal and plant life and health; e. Imports and exports of gold and silver in bullion form; f. Protection of national treasures of artistic, historical or archeological value; and g. Exportation, use and consumption of nuclear materials, radioactive products or any other material used for the development and exploitation of nuclear energy".

[62] See item 25 of the PRC Award 1/05 at http://www.mercosur.int/msweb/principal/contenido.asp

according to the WTO terminology) to determine the weighing and balancing of two apparently conflicting principles of integration law: free trade and environmental protection. So, the ad hoc tribunal should have demonstrated why in that particular case the principle of environmental protection should prevail over the free trade principle, which is the only principle to be followed in integration regimes unless exceptions apply.

That said, it is important to emphasize that the PRC did not revoke the arbitral award because it found that the Argentinean measures were not necessary to protect the environment and enough to exempt Argentina from the trade liberalization rule, but rather because the reasoning used by the ad hoc tribunal to accept the Argentinean measure was not legally accurate[63]. Thus, we believe that the PRC line of argument might be followed by the WTO AB when reviewing the EC appeal filed against certain elements of the panel's ruling on the retreaded tyres case involving Brazil[64], even if on different grounds. As a matter of fact, we believe that somehow the EC shall argue that the legal standards used by the panel to consider Brazil's ban measure within the exceptions foreseen at GATT Article XX (b) and (d) were legally wrong. Indeed according to an EC official website release[65], the EC understands that the panel produced an extremely narrow condemnation of Brazil, which makes it possible for Brazil to implement the ruling without removing the import ban on retreaded tyres and without ending its exemption of Mercosur imports from the ban.

In addition, it is noteworthy that the Mercosur PRC reversed the arbitral tribunal's findings based on the relevance of the existence or not of a "substantial trade flow" to determine whether the estoppel principle should apply to the case[66]. Likewise, the WTO panel in the Brazil-Retreaded Tyres case considered that the import trade volume is relevant for the purpose of judging whether a certain measure (ban) can be considered a disguised restriction on international trade. The panel found that the Mercosur exemption does not result in the measure being applied in a manner that constitutes a disguised restriction on international trade[67] to the extent that it results only in volumes of imports that do not significantly undermine the ability of the general

[63]For further references, see items 9 to 18 of the PRC Award 1/05 at http://www.mercosur.int/msweb/principal/contenido.asp

[64] On September 3rd, 2007, the EC informed the DSB on its decision to appeal against the panel report. The hearings before the AB are scheduled for the 15th-16th October, 2007.

[65] http://trade.ec.europa.eu/doclib/docs/2007/september/tradoc_135792.pdf

[66] See item 22 of the PRC Award 1/05.

[67] See item 7.354 of the Brazil – Retreaded Tyres.

import ban which aims at fulfilling Brazil's stated objective (the protection of human life and health). We wonder if as in the Mercosur PRC award, the WTO AB will consider the volume of imports irrelevant for the purposes of evaluating whether a ban is WTO-compliant.

Moreover, we should mention that under the terms of article 28 of the Protocol of Olivos, on December 20th, 2005 Argentina submitted a Clarification Appeal on 31 items of the PRC award, which were almost entirely dismissed because the PRC understood that Argentina was misusing that procedure. Indeed such an appeal is meant to clarify and explain possible unclear extracts of the awards rather than giving a second chance to States for appealing on legal grounds. Article 28 of the Protocol of Olivos has indeed clear language, so it does not seem necessary to modify it by the time the Protocol is amended into its definitive structure. We understand that its misuse was actually due to the fact of being filed for the very first time.

Finally, for the purpose of our reflections on the influences of the decisions of Mercosur DSM within the WTO's (and vice-versa) we should add another very interesting interpretation of the PRC under the same retreaded tyres case. By means of the Retaliatory Measures Award rendered on June 8th, 2007, the PRC decided that certain retaliatory measures adopted by Uruguay against the Argentinean ban were not disproportionate in relation to the objective of enforcement of the tribunal's ruling. Indeed, Argentina claimed that the term "equivalent obligations or suspension of concessions" contained on article 31 of the Protocol of Olivos refers to the equivalence existing between the retaliatory measure and the prejudice caused to the complainant party as far as the Mercosur inconsistent measure is referred, just like it is understood in the WTO case-law. Under that award, the PRC pointed out that WTO rules and decisions shall not be directly used as case-law for the Mercosur awards since integration law has different nature, purpose and extent if compared to WTO law. According to the PRC, its institutional responsibility is to guarantee the effective application of regional law since the lack of implementation of its decisions affects a wide range of aspects which go beyond the interests of the Member States[68].

In this sense, one can notice the importance of identifying the legal standards used by the members of both multilateral and regional DSMs in order to avoid the simple assumption that what is ruled by one dispute settlement tribunal can be just

[68] For further information, see items 3.1.3, 9.4 and 10.1 of the Retaliatory Measures Award.

repeated by the other, even if similar issues are under discussion. At the same time it is important to bear in mind that multilateral and regional DSMs might rule differently due to the distinctive nature of the respective applicable law. It is important, though, to preserve legal security in the multilateral trading system and probably the best way to achieve it is by avoiding unnecessary inconsistencies among rulings of similar issues.

Conclusion

Understanding RTA implications for the multilateral trading system seems to be steadily more essential in times when multilateral negotiations appear to fail while bilateral and regional agreements proliferate. Not surprisingly, there was a Conference on Multilateralising Regionalism in the WTO on the 10th – 12th September, 2007, which aimed at exploring the relationship between regionalism and multilateralism, and discussing the consequences for future trade relations of a continued splintering of trading arrangements into dozens of often overlapping and potentially inconsistent agreements[69].

As taught by Prof. Pauwelyn[70], the political and legal reality is that RTAs are here to stay, whether or not they comply with WTO rules. To avoid the potential conflicts arising out of different DSMs within overlapping agreements, a situation which was interestingly coined by the image of a "spaghetti bowl"[71], it may be more fruitful to think of how the web of WTO and co-existing RTAs can be untangled so as to give maximum effect to both[72].

The future rulings that the WTO panels and AB shall give on the issue will play a significant role in determining the nature of the relations between RTAs and the multilateral trading system. We hope this paper has contributed to shed some light on the subject as far as the Mercosur DSM is referred.

Largely inspired by the successful experience of the 12-year-old WTO mechanism, which plays fundamental role on the consolidation of the multilateral trade organization, and by the Luxembourg Court, considered as the European "integration

[69] For further information on this Conference, see http://www.wto.org/english/tratop_e/region_e/conference_sept07_e.htm
[70] PAUWELYN, Joost. *Ob. cit*, p. 3.
[71] The notion of the "spaghetti bowl" is that of the intertwining of regional, inter-regional and global arrangements. For one further reference on this notion see ZILLER, Jacques. *Ob cit*.
[72] PAUWELYN, Joost. *Ob. cit*, p. 3.

gear"[73], the Mercosur DSM has been an essential instrument of regional integration, that still needs to be strengthened and improved.

For instance, singular judges and appealing courts should be entrusted with legitimacy to directly request opinions to the PRC, further rules on transparency and efficiency should be adopted (providing a clear procedure for the stipulation of retaliation measures, creating an antidumping code, etc.), and the access of individuals and companies should be facilitated, for they are the ultimate users and the major responsible for the success of integration initiatives.

The improvement of the Mercosur legal framework and the expedite incorporation of its rules into the Member States' legal order would certainly contribute to increase the number of settled disputes, constructing a sophisticated case-law and improving its legal standards. The growing number of rulings would also contribute to develop integration law and would ultimately confirm the Mercosur mechanism legitimacy as an RTA DSM.

[73] According to Claudia Lima Marques, the ECJT experience "has demonstrated its importance as an case law systematizing body, which guarantees the human rights to European citizens and non-discrimination rights to European companies, been the 'integration gear'". MARQUES, Cláudia Lima. "O 'Direito do Mercosul': Direito oriundo do Mercosul, entre Direito Internacional Clássico e novos caminhos de integração". Revista da Faculdade de Direito da UFPR, vol. 35, 2001, p.87.

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