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## Providing Legal Certainty in South America: Can MERCOSUR Help?

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**PROVIDING LEGAL CERTAINTY IN  
SOUTH AMERICA: CAN MERCOSUR HELP?**

**Camilo A. Rodriguez Yong \***

ABSTRACT

The presence of legal certainty within a country's legal system is a very relevant factor in the foreign investor's decision to invest in a particular country. It is therefore necessary for countries to develop mechanisms for avoiding or reducing the uncertainty over the law in their legal systems. This article studies the Southern Common Market's ("MERCOSUR") structure and function with the purpose of assessing it as a mechanism to offer legal certainty to foreign investors in the region. The analysis is carried out by

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examining three basic elements of this regional integrationist experience: a) its body of law, b) its institutional experience, and c) its juridical system. By analyzing each of them, it is possible to identify several elements that contribute to the provision of legal certainty for foreign investors: a coordinated work among its institutions, recognition of the principle of supremacy of its body of law, the private sector's participation in the decision-making and a tribunal that issues consulting opinions about the meaning of MERCOSUR law. Under these considerations, the article proposes MERCOSUR as an innovative alternative to the traditional mechanisms used by countries for the provision of legal certainty, such as bilateral investment treaties.

Legal certainty has been defined as a principle that makes reference to the “fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly.”<sup>1</sup> For foreign investors, it is an element of utmost importance for the success or failure of their economic activities. For instance, in 2008, the Argentinean newspaper *La Nación* reported that the Alexander Gold Group, a British company, had decided to give up its copper and silver project in the region of Salta, Argentina.<sup>2</sup> One of the reasons alleged by the company for adopting such a measure was the existence of legal uncertainty to develop the project.<sup>3</sup> More recently, it was also reported that Argentina's gas production had been reduced as a consequence of foreign companies refraining from carrying out exploration activities, a situation motivated by the legal

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<sup>1</sup> P. TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 163 (1999). For the existence of the principle, several requirements have been necessitated: the law must be stable, clear, public, non-retroactive, and obeyed by those subjected to it. ANTONIO-ENRIQUE PEREZ LUÑO, *LA SEGURIDAD JURIDICA* 32–35 (Ariel 1994) (1991).

<sup>2</sup> Carlos F. Pastrana, *Una multinacional suspendió un proyecto minero en Salta*, *LA NACION* (Arg.), June 26, 2008, [http://www.lanacion.com.ar/nota.asp?nota\\_id=1024744](http://www.lanacion.com.ar/nota.asp?nota_id=1024744).

<sup>3</sup> *Id.*

insecurity of the country.<sup>4</sup> Yet Argentina is not the only country in the region suffering from this type of problem. In 2004, Acepar, an iron and steel company, asked the Paraguayan government to bring to a close the legal uncertainty that was impacting the execution of business activities.<sup>5</sup> As can be observed, the lack of legal certainty is a very relevant factor for foreign investors. Countries interested in having high levels of foreign investment in their economies need to develop mechanisms for avoiding or reducing the uncertainty over the law in their legal systems. This article proposes the use of the Southern Common Market, better known as MERCOSUR, as one of the possible alternatives to achieve this goal.<sup>6</sup>

MERCOSUR's structure and function is studied with the purpose of assessing it as a mechanism of offering legal certainty to foreign investors. This analysis is carried out by examining three basic elements of this regional integrationist experience: a) its body of law, b) its institutional experience, and c) its juridical system. From the analysis of each of them are identified the different circumstances that make MERCOSUR a valuable instrument for contributing to the improvement of the conditions of legal certainty in the region.

This article presents the following structure. The first part of the article analyzes the MERCOSUR body of law. In particular, it studies several of aspects that serve to provide legal certainty to foreign investors. Accordingly, the supremacy of MERCOSUR law over national laws is analyzed, together

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<sup>4</sup> Charles Newbery, *Slow Economy has Argentina Facing Fewer Gas Shortages this Winter*, PLATTS OILGRAM NEWS, June 29, 2009, at 10.

<sup>5</sup> *Acepar asks for an end to legal uncertainty*, BUS. NEWS AMERICAS (July 15, 2004), [http://www.bnamericas.com/news/metals/Acepar\\_asks\\_for\\_an\\_end\\_to\\_legal\\_uncertainty](http://www.bnamericas.com/news/metals/Acepar_asks_for_an_end_to_legal_uncertainty).

<sup>6</sup> MERCOSUR was created on March 26<sup>th</sup> of 1991 by Argentina, Brazil, Paraguay and Uruguay by the signature of the Treaty of Asuncion. Its composition would change in 2005 when through Decision 29, 2005. Venezuela was accepted as a new member party. However, as of February, 2010 the admission of Venezuela had not been approved by all the national Congresses of member parties and therefore is still pending. Protocolo de Adhesión de la República Bolivariana de Venezuela al Mercosur arts. 1-4, July 4, 2006, available at <http://www.mercosur.int/msweb/SM/Noticias/es/Protocolo%20Venezuela%20ES.pdf>.

with its binding character for member countries, its drafting and publicity, and the harmonization function that it develops. The second part of the article carries out a thorough study of MERCOSUR institutions to determine how they contribute towards enhancing the conditions of legal certainty throughout the regional integrationist process. The second part studies how these institutions allow the participation of foreign investors in the decision-making process of the organization and develop a coordinated and coherent work contributing to the adoption of consistent and stable legal instruments. Finally, the third and last part of the article reviews the dispute settlement mechanism of MERCOSUR and the ways in which it contributes to the provision of legal certainty, for example, through the adoption of uniform meanings of MERCOSUR law.

#### I. THE ROLE OF MERCOSUR LAW FOR THE PROVISION OF LEGAL CERTAINTY

MERCOSUR law is made up of different legal sources<sup>7</sup> which are stated in Article 41 of the Ouro Preto Protocol: a) Treaty of Asuncion; b) its protocols and additional or supplementary instruments; c) other agreements established within the Treaty of Asuncion and its protocols' framework; d) the decisions of the Council of the Common Market; e) the resolutions of the Common Market Group; and f) the adopted directives of the MERCOSUR Trade Commission.<sup>8</sup> In addition,

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<sup>7</sup> These legal sources of MERCOSUR have been divided in two categories: original and derivative MERCOSUR law. The first category is composed by the Asuncion Treaty, its protocols and additional or supplementary instruments. The second category is made up of Decisions of the Council of the Common Market, the Resolutions of the Common Market Group and the Directives of MERCOSUR Trade Commission. MIGUEL ÁNGEL EKMEKDJIAN, INTRODUCCIÓN AL DERECHO COMUNITARIO LATINOAMERICANO 271-72 (Ediciones Depalma 1994).

<sup>8</sup> Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR, Dec. 17, 1994, 34 I.L.M. 1244, available at [http://www.sice.oas.org/trade/mrcsr/ourop/ourop\\_e.asp](http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp) [hereinafter Ouro Preto Protocol].

international law and its general principles must also be included.<sup>9</sup> MERCOSUR law constitutes a fundamental mechanism for the provision of legal certainty because of three reasons: 1) it limits the power of member states to affect the development of foreign investment, 2) it promotes the harmonization of the law, and 3) it provides publicity and clearness to the law.

*A. The Principle of Supremacy and MERCOSUR Law*

Recognizing the supremacy of MERCOSUR law over the national law of member parties is a fundamental aspect in the provision of legal certainty within this integration process. Because MERCOSUR law prevails over national law, the regulation of foreign investment is not completely controlled by any one member country. Therefore, laws regulating the development of foreign investment would likely be more stable and foreign investors would not be forced to submit to the unilateral acts and will of the host country of the investment.

The principle of supremacy is not expressly recognized in the Asuncion Treaty nor the Ouro Preto<sup>10</sup> However, it has been recognized by the Permanent Tribunal of MERCOSUR.

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<sup>9</sup> This is a consequence of Article 34 of the Olivos Protocol which establishes the applicable law that Ad Hoc Arbitral Tribunals and Permanent Tribunal must consider to solve a conflict:

Los Tribunales Arbitrales Ad Hoc y el Tribunal Permanente de Revisión decidirán la controversia en base al Tratado de Asunción, al Protocolo de Ouro Preto, a los protocolos y acuerdos celebrados en el marco del Tratado de Asunción, a las Decisiones del Consejo del Mercado Común, a las Resoluciones del Grupo Mercado Común y a las Directivas de la Comisión de Comercio del MERCOSUR así como a los principios y disposiciones de Derecho Internacional aplicables a la materia. [The Ad Hoc Tribunals and the Revision Permanent Tribunal shall decide the controversy pursuant to the Asuncion Treaty, the Protocol of Ouro Preto, the protocols and agreements celebrated under the Asuncion Treaty, Council of the Common Market Decisions, Resolutions of the Common Market Group and the Directives of the Trade Commission of MERCOSUR as long as the principles and norms of international law applicable to the subject] (translation by the author).

Olivos Protocol for the Settlement of Disputes in MERCOSUR art. 34, Feb. 18, 2002, 42 I.L.M. 2, *available at* [www.sre.gob.mx/dgomra/mercosur/documentos/Olivos\\_02.doc](http://www.sre.gob.mx/dgomra/mercosur/documentos/Olivos_02.doc) [hereinafter Olivos Protocol].

<sup>10</sup> SANTIAGO DELUCA, UNION EUROPEA Y MERCOSUR: LOS EFECTOS DEL DERECHO COMUNITARIO SOBRE LAS LEGISLACIONES NACIONALES 66-68 (2003).

The Permanent Tribunal has stated that MERCOSUR law prevails over the national law of the member countries taking into consideration the supremacy of international treaties over national law and because of its concept, the nature and purpose of such. If it were not this way, the integration process would lose its justification to exist.<sup>11</sup> For the Tribunal, therefore, MERCOSUR law derives its supremacy from the Asuncion Treaty and the nature and purpose of the regional law itself.<sup>12</sup>

In analyzing the relationship between MERCOSUR law and national law, the Permanent Tribunal decided that the interpretation of the latter must take MERCOSUR laws into consideration. This is necessary to guarantee the uniform application and interpretation of MERCOSUR law and constitutes a clear expression of the supremacy of MERCOSUR law over national law. Regarding the relationship between MERCOSUR law and international law, the Permanent Tribunal also recognizes the supremacy of the former over the latter. MERCOSUR law prevails because it is autonomous from international law. Consequently, a member country cannot justify its breach of MERCOSUR law on the ground that it is bound by another international instrument.<sup>13</sup> For MERCOSUR's Judge Nicolas Becerra, although the supremacy of MERCOSUR law is not established in the constituting law of the integration process, its recognition must be accepted because it is necessary for unifying the integration legal order and thus guaranteeing its legal certainty in each of the member countries.<sup>14</sup>

The Permanent Tribunal's position does not concur with the position of the member countries of MERCOSUR. Brazil, for example, does not express recognition of the supremacy between the national constitution and MERCOSUR law. However, it is necessary to make some comments in connection with this point. Article 5 of Brazil's constitution establishes that: "... *International treaties and conventions on human*

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<sup>11</sup> Opinion Consultiva No. 1/2007, 358, 369 (Apr. 3, 2007), in LAUDOS, ACLARACIONES Y OPINIONES CONSULTIVAS DE LOS TRIBUNALES DEL MERCOSUR (Secretaria del Mercosur 2007).

<sup>12</sup> *Id.* at 365-67.

<sup>13</sup> *Id.* at 367-68.

<sup>14</sup> *Id.* at 376.

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*rights approved by both houses of the National Congress, in two different voting sessions, by three-fifths votes of their respective members, shall be equivalent to constitutional Amendments.*"<sup>15</sup>

From the reading of this article, the Brazilian constitution expressly establishes that international treaties on human rights approved under the conditions stated by the article will have the same level as a constitutional provision. Nothing is established in relation to other types of international agreements such as the ones of economic integration character, making it possible to state that MERCOSUR law does not prevail over the national constitution. Additionally, analysis of the supremacy of MERCOSUR law requires that Article 102 of the constitution must also be analyzed. This Article states that: "The Supreme Federal Tribunal has primary responsibility for safeguarding the Constitution, with the power:... III—to decide on extraordinary appeal, cases decided in sole or last instance, when the appealed decision:... b) declares a treaty or a federal law unconstitutional."<sup>16</sup>

Many consider this article the legal foundation for recognizing the supremacy of the national constitution over international treaties despite the lack of express recognition within the former.<sup>17</sup> Moreover, it is also important to mention Article 105.III.a of the Brazilian constitution, which states that the Superior Tribunal of Justice has the power to judge special appeal cases when the appealed decision is contrary to a treaty or federal law. Due to this constitutional Article, it has been interpreted that international law has a similar hierarchy to Brazilian federal law,<sup>18</sup> and therefore is submitted to the Brazilian constitution.

Nonetheless, the supremacy of MERCOSUR law over other national law not included in the constitution must be recognized. For legal scholar Marcio Monteiro Reis, original

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<sup>15</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.).

<sup>16</sup> *Id.* art. 102.

<sup>17</sup> Gustavo L. Nielsen & Alejandro Perot, *Jerarquia Normativa del Tratado de Asunción y de los Protocolos de Brasilia y de Ouro Preto en el Ordenamiento Juridico Brasileo* at 2, available at <http://www.hcdsc.gov.ar/biblioteca/ISES/comercio/derecho/A%2037%20Jerarquia%20normativa%20del%20%20tratado%20de%20Asunci%C3%B3n.pdf>.

<sup>18</sup> ROBERTO RUIZ DIAZ LABRANO, *MERCOSUR INTEGRACION Y DERECHO* 514 (1998).



MERCOSUR law prevails over national law because the constitutional treaties of MERCOSUR are not legally equivalent to national laws by which other international agreements are approved. This type of MERCOSUR law prevails over national law. Nonetheless, regarding derivative law of MERCOSUR, this author does not recognize its supremacy to MERCOSUR laws. This type of MERCOSUR law is incorporated through administrative rule and those rules are, from the perspective of the hierarchy of the legal system, inferior to an ordinary law.<sup>19</sup> It has also been considered that MERCOSUR law prevails over national law because the former is protected by Article 4 of Brazilian constitution, meaning that MERCOSUR laws are the execution of a constitutional mandate. In this sense, when MERCOSUR law is breached, the constitution is indirectly violated.<sup>20</sup> For this reason, MERCOSUR laws must prevail over the national laws.

In Paraguay's case, the country's legal system recognizes the supremacy of the constitution over MERCOSUR law. This recognition derives from Article 137 of the constitution, which establishes that the constitution is the superior law of the country.<sup>21</sup> Additionally, Article 141 of the constitution must also be mentioned. It states that "[i]nternational treaties that were properly concluded and approved by a law of Congress and the instruments of ratification which have been exchanged or deposited are part of the domestic legal system in keeping with the order of preeminence established under Article 137."<sup>22</sup> As can be inferred from Article 137, the position of the international treaties within the internal legal order is also expressly established as submitted to the constitution, which places MERCOSUR law under the national constitution.

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<sup>19</sup> 1 ALEJANDRO DANIEL PEROTTI, HABILITACIÓN CONSTITUCIONAL PARA LA INTEGRACIÓN COMUNITARIA 245-46 (2004).

<sup>20</sup> *Id.* at 247.

<sup>21</sup> CONSTITUCIÓN DE LA REPÚBLICA DE PARAGUAY [CONSTITUTION] June 20, 1992, art. 137. states:

The Constitution is the supreme law of the Republic. The Constitution, the international treaties, conventions, and agreements that have been approved and ratified by Congress, the laws dictated by Congress, and other related legal provisions of lesser rank make up the national legal system. This listing reflects the descending order of preeminence.

*Id.*

<sup>22</sup> *Id.* art. 141.

Regarding the relationship between MERCOSUR law and non-constitutional national laws, MERCOSUR law's supremacy is directly recognized by the constitution. With respect to the original MERCOSUR law, its supremacy derives from the congressional law approving the international treaty. In the case of derivative MERCOSUR law, the recognition of its supremacy also has its origin in Articles 137 and 141 of the constitution. The reason to affirm this is that the national Congress approved the international treaty that vested decision-making capacity to its own organs.<sup>23</sup>

Regarding to the relationship between MERCOSUR law and the national legal order in Uruguay, it has been considered that the constitution is at the top of the Uruguayan legal system. This is true for both original and derivative MERCOSUR law. However, some authors such as Correa Freitas argue that the integration law has supremacy.<sup>24</sup> In the specific case of the secondary MERCOSUR law, there is a discussion about the hierarchy of these laws. One position recognizes the supremacy of national law over MERCOSUR law because of its lack of recognition as communitarian law. One position recognizes the supremacy of national law over MERCOSUR law because of its lack of recognition as communitarian law. This could lead some to believe that MERCOSUR law has the legal hierarchy of the act by which it is incorporated (a Congress act, an administrative regulation, etc), which in turn may suggest that a later provision may affect its validity (for instance, by the enactment of later act). On the contrary, others recognize the prevalence of MERCOSUR law from Article 6 of the constitution. As a consequence of this supremacy, the state cannot enact a national law against it. The national law would be against the constitution because it would be against the integration established by the constitution.<sup>25</sup>

Lastly Argentina recognizes, the supremacy of the constitution over the national legal order through constitutional articles, such as Articles 27, 30, 31, and 75. Concerning the relationship between constitutional law and

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<sup>23</sup> PEROTTI, *supra* note 19, at 376-77.

<sup>24</sup> *Id.* at 553, n.463.

<sup>25</sup> *Id.* at 555-56.

MERCOSUR laws, from Article 75 incises 22 and 24, the prevalence of the constitutional norm over MERCOSUR's is clearly established. Regarding non-constitutional laws, MERCOSUR laws do prevail. This supremacy, based on Article 75 incise 22, establishes the prevalence of original and secondary MERCOSUR laws without considering the moment of their creation. In the specific case of secondary MERCOSUR law, it prevails if the constituting treaties authorize the enactment of those laws. Moreover, because of the principle of *pacta sunt servanda*, the non-recognition of that supremacy would affect the effects and execution of the creating treaties.<sup>26</sup>

In conclusion, supremacy of MERCOSUR law over national laws is recognized by MERCOSUR jurisprudence. However, this recognition is unclear from the point of view of national constitutions and courts of the member parties. For them, MERCOSUR law does not prevail over the constitution, although its supremacy over non-constitutional national laws is accepted. This partial supremacy, although it is not ideal for the protection of foreign investors, it still constitutes an important guarantee for foreign investment because the power of member countries to unilaterally modify MERCOSUR law through a national law is largely restricted. Therefore, foreign investors can enjoy of a more stable environment for the execution of their investments.

*B. The Role of the Binding Character and Incorporation System of MERCOSUR Law for the Provision of Legal Certainty*

Another aspect of MERCOSUR law that provides legal certainty to foreign investors is that it is binding on member parties.<sup>27</sup> This binding character, along with the principle of

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<sup>26</sup> *Id.* at 834-36.

<sup>27</sup> The binding character of MERCOSUR is established in several instruments that are part of MERCOSUR legal order. For instance, Article 2 of the Asuncion Treaty establishes: "The common market shall be based on reciprocity of rights and obligations between the States Parties." Treaty Establishing a Common Market art. 1, Mar. 26, 1991, 30 I.L.M. 1041 [hereinafter Asuncion Treaty].

Likewise, Article 9 of Protocol of Ouro Preto establishes: "The rulings of the Council of the Common Market shall take the form of Decisions *supra* which shall be binding upon the States Parties." Protocol of Ouro Preto, *supra* note

supremacy, also limits the power of member countries to unilaterally modify the regulation applicable to foreign investors' activities. However, the effectiveness of this binding character is limited because MERCOSUR law is not automatically incorporated within the internal legal order of member countries.

The need for incorporation of MERCOSUR law is a consequence of the non-recognition of the direct application principle in MERCOSUR, a principle that is recognized in other integrationist experiences such as the Andean Community and the European Union. The Arbitral Award IV (2001) studied the principle within MERCOSUR. There, the tribunal considered that it was not admitted under the MERCOSUR legal system because MERCOSUR legal instruments are only in force when they have been incorporated by all member countries of the integration process.<sup>28</sup> Moreover, there is no provision within MERCOSUR law authorizing their direct application.<sup>29</sup>

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8. Moreover, Articles 15 and 20 of the same Protocol expressly recognize the binding character of other legal sources within MERCOSUR. Article 15 states the following: "The decisions of the Common Market Group shall take the form of Resolutions which shall be binding upon the States Parties." *Id.* art. 15. Article 20 states: "The decisions of the Mercosur Trade Commission shall take the form of Directives or Proposals. The Directives shall be binding upon the States Parties." *Id.* art. 20. The precedent Articles are complemented with other Articles included within the Protocol of Ouro Preto such as Article 42. This Article recognizes the binding character of the different organs of MERCOSUR. It states: "The decisions adopted by the Mercosur organs provided for in Article 2 of this Protocol shall be binding and, when necessary, must be incorporated in the domestic legal systems in accordance with the procedures provided for in each country's legislation." *Id.* art. 42. The institutions mentioned in Article 2 are the Council of the Common Market, the Common Market Group and the MERCOSUR Trade Commission. *Id.* art. 2.

<sup>28</sup> However, Article 5 of Decision 23 of 2000 establishes two exceptions to the necessary incorporation of MERCOSUR law into the national legal order of member parties. MERCOSUR law does not need to be incorporated into the national legal order of member parties if the law is about the internal functioning of MERCOSUR, or a national law already exists which regulates in an identical way what MERCOSUR law establishes. Council of the Common Market Decision MERCOSUR/CMC/DEC No. 23/00 (2000), art. 5.

<sup>29</sup> Brazil v. Argentina, Laudo IV, 89, 111 (May 21, 2001), *in* LAUDOS, ACLARACIONES Y OPINIONES CONSULTIVAS DE LOS TRIBUNALES DEL MERCOSUR (Secretaria del Mercosur 2007).

Arbitral Award VII (2002) also pointed out the lack of direct application of MERCOSUR law.<sup>30</sup> However, the Arbitral Award IV also stated that it was mandatory for member parties, although it was not in force. This mandatory character must be understood in the sense that the obligations derived from MERCOSUR law have both an active and passive character. Due to their active character, member parties have the obligation to incorporate MERCOSUR laws into their national legal orders, and due to their passive character, member parties cannot take measures against the nature of purpose of the approved but not incorporated law.<sup>31</sup>

Scholars have also considered that the principle of direct application is inapplicable within the MERCOSUR legal system.<sup>32</sup> The argument supporting this position is that Articles 9, 15, 20 and 42 of the Ouro Preto Protocol state that MERCOSUR law is mandatory for the states parties of MERCOSUR, but it is not mandatory for MERCOSUR's individuals until that law is incorporated within their national legal order. Pursuant to Article 42 of the Ouro Preto Protocol, MERCOSUR law issued by the Council of the Common Market, the Common Market Group and the MERCOSUR Trade Commission, when necessary, must be incorporated by member parties to their national legal orders. Article 42 is developed by Decision 23 of 2000 issued by the Council of the Common Market which also states in its Article 1 that the decisions, resolutions and directives are mandatory for the member parties, and when necessary, they must be incorporated into the national legal system of member parties.<sup>33</sup>

Moreover, the manner in which MERCOSUR law is incorporated into the national legal order of member parties has an influence on the extent of how MERCOSUR law can provide legal certainty to foreign investors. Under this

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* 185, 191.

<sup>32</sup> DELUCA, *supra* note 10, at 74.

<sup>33</sup> An exception to the incorporation of MERCOSUR law is Article 5 of Decision No. 23/00 which establishes that incorporation is unnecessary when MERCOSUR law regulates the internal management of MERCOSUR or its content already exists within the internal legal order of the member country in identical terms. Council of the Common Market Decision, *supra* note 28, art. 5.

perspective, there are two situations to consider. One is the incorporation of MERCOSUR law through a national law issued by the Congress of a member country. The other is the incorporation through administrative rules issued by administrative agencies.<sup>34</sup> When MERCOSUR law must be incorporated by a law, the intervention of the Congress must be present. It is here where the incorporation of MERCOSUR law can present some problems for the effective provision of legal certainty because people will not be able to enjoy the benefits recognized in the legal instruments adopted at the regional level.

It is possible that in a democracy, as an expression of the separation of powers expressed in the theory of check and balances, that the Congress does not support the initiatives of the Executive. Therefore, there is a possibility that a legal instrument of MERCOSUR law is not incorporated into the national legal system of a country because of the inability of

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<sup>34</sup> MERCOSUR law is incorporated in national legal systems either through a national law of the Congress or the enactment of an administrative rule by government agencies. The nature of the act will depend on the subject covered by MERCOSUR law. In the case of Argentina, the legal nature of the acts by which the laws are incorporated is not expressly established (for example, if it must be incorporated through a law, decree or resolution). That nature will depend on the subject regulated by MERCOSUR law. Argentina has incorporated MERCOSUR law through “laws” when the incorporation has been made through the Congress, and “Avisos,” “Circulares,” “Comunicaciones,” “Decretos,” “Disposiciones,” “Notas,” and “Resoluciones” when the incorporation has been made by Administrative Agencies. In the case of Brazil, the Congress issues a “Decreto Legislativo” to incorporate original MERCOSUR law such as treaties, protocols or agreements. In the case of the derivative MERCOSUR law, the incorporation is made through Administrative rules such as “Ato,” “Ato Declaratorio,” “Carta Circular,” “Comunicado,” “Decretos,” “Instrucao Normativa,” “Resolucao,” amongst others, which are issued by organisms belonging to the executive branch. Paraguay has a similar system of incorporation. In this sense, the incorporation of MERCOSUR law is done either by the activity of the legislative or executive branch. Then, MERCOSUR law is incorporated by laws, “Circulares,” “Decretos,” or Resolutions. Finally, Uruguay will also incorporate MERCOSUR law through laws, “Decretos,” “Ordenanzas” and Resolutions. Eduardo Rivas, *Adopcion e Internalizacion de la Normativa Comunitaria en el Seno del Mercosur: Un Repaso historico*, 62 OBSERVATORIO DE LA ECONOMIA LATINOAMERICANA 1, 21-35 (2006). The legal nature of the act will depend on the subject of the law to incorporate. Jamile Bergamaschine Mata Diz, *El Sistema de Internalización de Normas en el Mercosur: La Supranacionalidad Plena y la Vigencia Simultánea*, 11 IUS ET PRAXIS 227, 227-60 (2005).

the National Congress to do it.<sup>35</sup>

Consequently, the development of MERCOSUR's process has resulted in a low level of incorporation of the regional legal instruments into the member countries' national legal systems. From 1991 to 2003, 1494 MERCOSUR laws had been enacted. The laws were divided as follows: 331 decisions, 1027 resolutions and 136 directives.<sup>36</sup> From all these MERCOSUR norms, 1009 (67.53 %) must be incorporated. Despite this, only 497, which equals to 49.25% of MERCOSUR law, have been incorporated by all member states of MERCOSUR. In a country-by-country analysis, the status of incorporation of MERCOSUR law was the following. In the case of Argentina, 724 (71.75%), Brazil, 753 (74.72%), Paraguay 677 (67.09%), and Uruguay 702 (69.57%) MERCOSUR norms were incorporated.<sup>37</sup>

Some of the MERCOSUR laws that have not been incorporated into the national legal systems of member countries are the following: Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in MERCOSUR (1994), Complementary Agreement to the Protocol of "medidas cautelares"(1997),<sup>38</sup> Harmonization

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<sup>35</sup> However, it must be highlighted that MERCOSUR law grants MERCOSUR's Parliament a role in the process of incorporation. Article 15 of Decision 20 of 2002 states that member parties can ask the collaboration of the Parliament of MERCOSUR for the incorporation of MERCOSUR law into the national legal system yet this measure is not strong enough to guarantee its incorporation. Council of the Common Market Decision MERCOSUL/CMC/DEC. N° 20/02, Art. 15 states:

En los casos de las normas MERCOSUR que requieren ser incorporadas a los ordenamientos jurídicos internos por vía de aprobación legislativa, los Estados Partes solicitarán, a la luz de lo dispuesto en el artículo 25 del Protocolo de Ouro Preto, la colaboración de la Comisión Parlamentaria Conjunta [In the cases of the MERCOSUR laws that require to be incorporated into the internal legal orders by means of a legislative approval, the state parties will request, pursuant to Article 25 of the Protocol of Ouro Preto, the collaboration of the Parliamentary Joint Commission.] (translation by the author).

Council of the Common Market Decision MERCOSUR/CMC/DEC No. 20/02 (2002), art. 15, *available at* <http://www.mercosur.org.uy/show?contentid=578>.

<sup>36</sup> Rivas, *supra* note 34, at 6.

<sup>37</sup> *Id.* at 17.

<sup>38</sup> Interim or precautionary measure (preliminary injunction, order of sequestration). 2 DICCIONARIO JURIDICO ESPANOL INGLES (Guillermo Cabanellas & Eleanor C. Hague eds., 1991).

Protocol on Intellectual Property Norms in MERCOSUR, in the matter of trademarks, precedence indications and origin denominations (1995), Protocol on Promotion and Protection of Investments Coming from States no Member Parties of MERCOSUR (1994), Complementary Agreement to the Protocol of Cooperation and Juridical Assistance on Civil, Commercial, Labor and Administrative Issues (1997), Protocol on Defense on Competence of MERCOSUR (1996), Agreement on International Commercial Arbitration of MERCOSUR (1998), Harmonization Protocol of Norms on industrial designs (1998), Agreement on Jurisdiction on International Transportation of Freight Contract among member parties of MERCOSUR (2002), Agreement for the Facilitation of Entrepreneurial Activities in MERCOSUR (2004), Protocol on Public Contracting of MERCOSUR (2006). These MERCOSUR laws regulate issues of interest for foreign investors. However, although they were approved several years ago, they have not been incorporated by all or some of MERCOSUR's member parties. Therefore, foreign investors in the region cannot enjoy the benefits derived from the regulation of their activities by means of MERCOSUR instruments, which greatly affects MERCOSUR's effectiveness to serve as an instrument to provide legal certainty.

*C. The Publicity and Clearness of MERCOSUR Law as a Tool for the Provision of Legal Certainty*

The publicity of MERCOSUR law also provides legal certainty to foreign investors. The publicity satisfies the requirement of *lege promulgate* which is one of the requirements for the existence of legal certainty and consists in that the law must be known by the subjects submitted to it. For foreign investors, knowing MERCOSUR law allows them to plan to the development of their investments accordingly. The law becomes known through its publication. In the case of MERCOSUR, Resolution No. 26 of 2001 issued by the Common Market Group states in its Article 12 that minutes, laws and annexed documents are public, unless states decide to classify them as reserved. Therefore, there is a presumption in favor of the broad publication of and easy access to MERCOSUR documents.



Moreover, as a development of the publicity of MERCOSUR acts, Article 39 of the Ouro Preto Protocol establishes the adoption of an Official Bulletin where the decisions of the Common Market Council, resolutions of the Common Market Group and directives of the Trade Commission of MERCOSUR are published. Likewise, any other act considered by the Common Market Council and the Common Market Group as necessary to be published must be published in the Bulletin.<sup>39</sup> In addition, access to MERCOSUR law can also be obtained by means other than the Official Bulletin. On MERCOSUR's web page it is possible to have access to an electronic (PDF) copy of the decisions and recommendations of the Common Market Council, resolutions of the Common Market Group and directives of the Trade Commission of MERCOSUR.

Additionally, public access to MERCOSUR law is promoted by the publication of other materials that have an influence on the adoption of a MERCOSUR law. For instance, since 2007 there is access to the minutes of the meetings or working papers elaborated during the process of the creation and adoption of MERCOSUR law. This is a useful instrument for the construction of MERCOSUR law and makes the decision-making process much more transparent.

Another of the requirements for the provision of legal certainty is *lege manifesta*, which requires that the law be clear and easy to understand by the subjects submitted to it.<sup>40</sup> Regarding this requirement, MERCOSUR has established a formal adoption of the documents and laws issued by its organs. In this sense, Resolution 26 of 2001 states that MERCOSUR laws must indicate the legal basis for its adoption, the reasons and objectives for the enactment of the law, the necessity of incorporation of MERCOSUR law, and the period of time to put it into effect. In addition, whether the law supersedes a previous MERCOSUR law must be indicated. The

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<sup>39</sup> The Bulletin is published every three months and the General Secretariat of MERCOSUR is in charge of its edition. *Boletín Oficial del Mercosur*, [http://www.mercosur.org.uy/t\\_ligaenmarco.jsp?title=off&contentid=294&site=1&channel=scretaria](http://www.mercosur.org.uy/t_ligaenmarco.jsp?title=off&contentid=294&site=1&channel=scretaria) (last visited Oct. 6, 2010).

<sup>40</sup> PEREZ LUÑO, *supra* note 1, at 32.

adoption of this uniform structure gives MERCOSUR law clearness in its formal content.

An additional aspect that helps to grant clarity to MERCOSUR is the fact that MERCOSUR law must be published in Spanish and Portuguese.<sup>41</sup> This way, citizens of all member countries can understand the meaning of MERCOSUR provisions. However, care must be taken with the translation of MERCOSUR laws in order to avoid the law having different interpretations in each language. In the case of the minutes, the language to be adopted will be that one of the country holding the presidency pro tempore of MERCOSUR.<sup>42</sup> Articles 17 of the Asuncion Treaty and 46 of the Ouro Preto establish that the language of the working papers will be that one of the place where the meeting was held. It would be more transparent to have all MERCOSUR documents in all the official languages of the organization.

*D. The Harmonization of MERCOSUR law as a Mechanism for the Provision of Legal Certainty.*

MERCOSUR can also provide legal certainty to foreign investors through the harmonization of law. Article 1 of the Asuncion Treaty expressly states the commitment of member parties to harmonize their national legal orders.<sup>43</sup> The harmonization looks at the simplification of judicial and administrative processes among member parties of MERCOSUR. As a development of this harmonization, measures to guarantee national treatment of foreign parties within a judicial proceeding, the recognition and enforcement of public documents and judgments, and the regulation of rules about judicial jurisdiction have been adopted. In the area of substantive laws, there are harmonized regulations related to stock exchange regulation, competition policy, commerce in

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<sup>41</sup> Common Market Group Resolution MERCOSUR/GMC/RES No. 26/01 (2001), art. 3, *available at*

[http://www.mercosur.int/msweb/Normas/normas\\_web/Resoluciones/ES/R es\\_026\\_001\\_Actas\\_Documentos%20del%20MERCOSUR\\_Acta%202\\_01.PDF](http://www.mercosur.int/msweb/Normas/normas_web/Resoluciones/ES/R es_026_001_Actas_Documentos%20del%20MERCOSUR_Acta%202_01.PDF) [hereinafter MERCOSUR/GMC/RES No. 26/01].

<sup>42</sup> *Id.* annex 1.

<sup>43</sup> Asuncion Treaty, *supra* note 27.

services, and foreign investment.<sup>44</sup> This harmonization activity might be very important for foreign investors because it establishes more transparent rules and more efficient proceedings.<sup>45</sup> Moreover, foreign investors' knowledge of the laws would be increased because they would have the same law being applied in all the countries of the region.

However, the harmonization role of MERCOSUR law has limited effects for the provision of legal certainty because of the lack of incorporation of the principle of direct application. For instance, despite the enactment of several MERCOSUR laws regulating uniformly relevant aspects for foreign investors such as the Colonia Protocol for the Promotion and Protection of Investments Coming from States Non-Members of MERCOSUR, its uniform application and validity has not been possible because of the lack of incorporation of the member parties to their national legal systems. Therefore, the condition of incorporation of MERCOSUR law hampers the effective application of these uniform laws and therefore, the creation of uniform regulations in the region.

## II. THE ROLE OF THE INSTITUTIONS OF MERCOSUR FOR THE PROVISION OF LEGAL CERTAINTY

In the provision of legal certainty, MERCOSUR's institutions have a very important role. Several reasons support this affirmation. First, they have the power of establishing law and policies that can serve to promote legal certainty to foreign investment and cannot be unilaterally modified by member countries. Second, they work coordinately in the adoption of law and policies which contributes to the enactment of coherent and stable laws. Finally, they make possible the participation of foreign investors and private sector in the decision-making process of MERCOSUR. Under this perspective, an analysis of each of MERCOSUR institutions and their duties that influence the provision of legal certainty will be presented next.

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<sup>44</sup> RAFAEL A. PORRATA-DORIA, JR., *MERCOSUR: THE COMMON MARKET OF THE SOUTHERN CONE* 95-122 (2005).

<sup>45</sup> *Id.* at 93.

*A. The Council of the Common Market*

The Council of the Common Market (“Council”) is composed of the member states’ foreign relations and economy ministers.<sup>46</sup> It is the superior organism of MERCOSUR because it exercises the political direction of the integration process. The role of the Council of the Common Market is very important for the provision of legal certainty to foreign investors. First, pursuant to Article 3, the Council is in charge of the policy implementation of the integration process, from its initiative, the adoption of policies for the attraction of foreign investment and the provision of legal certainty through MERCOSUR can be promoted.

Second, the relationship of the Council with national governmental functionaries creates an environment of coordination and collaboration which produces a coherent and uniform activity among MERCOSUR and national governments and helps to coordinate their activities. This relationship is expressed in many ways within the MERCOSUR structure: a) national ministers or authorities with ministerial level can be invited to participate in Council meetings,<sup>47</sup> and b) the presidents of each member country must meet with the Council every time that is necessary and at least twice per year. The meetings with these high profile functionaries bring the functionaries into direct contact with the policies and decisions adopted at MERCOSUR’s level. This way, the application and respect of the decisions adopted in MERCOSUR are more likely to be applied and respected by member parties. Furthermore, a deeper participation of governmental functionaries that are not an official part of MERCOSUR in the integration process is made possible.

Moreover, the Council can also invite representatives from economic and social sectors to participate in its meetings.<sup>48</sup> These meetings are very important for the provision of legal certainty because foreign investors, through their representatives, have the opportunity to be heard and propose laws and measures that help to create a more legal stable

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<sup>46</sup> Protocol of Ouro Preto, *supra* note 8, art. 4.

<sup>47</sup> *Id.* art.7.

<sup>48</sup> *Id.* art. 10.

environment for their investments. This provides a good opportunity to participate in the elaboration and adoption of MERCOSUR laws.

Finally, the Council helps the provision of legal certainty through the creation of MERCOSUR law and the control of its implementation. The Council acts through decisions which must be recognized, and applied by the member parties<sup>49</sup> and whose non-fulfillment produces the international liability of the member country. Therefore, the Council has the power to create MERCOSUR laws about matters of interest to foreign investors and the development of their investment. For example, laws about the regulation of foreign investment, contracts, or conflicts of laws. This way an environment of legal certainty is promoted because the laws regulate the activity of foreign investors and MERCOSUR member parties cannot unilaterally modify their content, thus contributing to the stability of the legal environment where the investment is carried out.

Moreover, the Council watches out for the fulfillment of the Asuncion Treaty, its protocols and the other subscribed agreements within the MERCOSUR integration process. Although it does not have the power to punish non-fulfillment of the obligations derived from MERCOSUR, the Council exercises a policy role about the status of fulfillment of MERCOSUR law and adopts the necessary measures to comply with it. This duty is very important for the provision of legal certainty because it guarantees that the rights recognized by MERCOSUR law to the investors will be applied and implemented by member countries.

### *B. The Common Market Group*

The Common Market Group (“the Group”) is the executive organism of MERCOSUR.<sup>50</sup> It also contributes to the provision of legal certainty through different powers and duties. First, it

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<sup>49</sup> *Id.* art. 9.

<sup>50</sup> *Id.* art. 10. (The Common Market Group shall consist of four members and four alternates for each country, appointed by their respective governments, who must include representatives of the Ministries of Foreign Affairs, the Ministries of the Economy (or their equivalents) and the Central Banks.) *Id.* art. 11.

is a creator of MERCOSUR law by enacting resolutions, a legal source of MERCOSUR that is mandatory for member countries.<sup>51</sup> Second, it has the power to propose projects of decisions to be adopted by the Common Market Council.<sup>52</sup> Through these powers to enact and propose the adoption of MERCOSUR legal instruments, the Group contributes to the creation of a more transparent and stable legal environment for foreign investors.

A third way in which the Group contributes to the provision of legal certainty is by watching out for the fulfillment of the Asuncion treaty, the protocols, and other agreed upon agreements. In other words, it has a controlling role over MERCOSUR law. This duty guarantees the implementation and respect of MERCOSUR legal instruments, which makes it possible for foreign investors to enjoy the prerogatives and rights recognized in MERCOSUR legal instruments.<sup>53</sup>

### *C. The MERCOSUR Trade Commission*

The MERCOSUR Trade Commission<sup>54</sup> (the “Commission”) is another institution that also aids in the provision of legal certainty. The Commission has the power to propose to the Common Market Group the adoption of new commercial or customs laws and their modification of the Group. This duty is important for foreign investors because these laws have a direct effect on the development of the foreign investment. However, this duty plays an indirect role because the power of the Commission is limited to making proposals to the Common Market Group. Nonetheless, the Commission can also create mandatory laws for member countries through the enactment of directives.<sup>55</sup>

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<sup>51</sup> *Id.* art. 15.

<sup>52</sup> *Id.* art. 14.

<sup>53</sup> Council of the Common Market Decision MERCOSUR/CMC/DEC No. 04/91 (1991) Reglamento Interno del Grupo Mercado Común, art. 4, *available at* [http://www.mercosur.int/msweb/Normas/normas\\_web/Decisiones/ES/CM-C\\_1991\\_Dec\\_004\\_ES\\_Reglamento%20GMC.PDF](http://www.mercosur.int/msweb/Normas/normas_web/Decisiones/ES/CM-C_1991_Dec_004_ES_Reglamento%20GMC.PDF).

<sup>54</sup> It is made up of four principal and four alternative members for each member party. It will be coordinated by the foreign relations ministers of the member parties. Protocol of Ouro Preto, *supra* note 8, art. 17.

<sup>55</sup> The Directives will be adopted by consensus and with the participation

The Commission also contributes to the provision of legal certainty by allowing the participation of the private sector, which includes foreign investors, within its activity. This participation is done through the Technical Committees, which can consult representatives of the private sector<sup>56</sup> to present recommendations to the Commission. Through this participation foreign investors can promote and participate in the adoption of law and policies favorable to the establishment of certainty conditions and to the development of their economic activities.

#### *D. The Parliament of MERCOSUR*

The Parliament of MERCOSUR<sup>57</sup> also has important duties with respect to the provision of legal certainty. For instance, it controls the fulfillment of MERCOSUR's laws, which helps in guaranteeing their implementation and respect by the national authorities. In addition, the Parliament is in charge of arranging public meetings with the civil society and productive sectors.<sup>58</sup> It receives, examines and sends petitions coming from any individual or legal person regarding actions or omissions from MERCOSUR institutions to the decision-making institutions of the organization. These duties

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of all member parties. If one member party is not present, it will be considered approved if within 30 days after the meeting, the absent state party does not produce any objection. MERCOSUR Trade Commission Directive MERCOSUR/CMC/Dir. 5/96 (1996), *amended by* MERCOSUR/GMC/Res. 61/96 (1996), Reglamento Interno de la Comisión de Comercio del Mercosur, art. 13, *available at* [http://www.mercosur.int/msweb/Normas/normas\\_web/Resoluciones/ES/Res\\_061\\_096\\_PDF](http://www.mercosur.int/msweb/Normas/normas_web/Resoluciones/ES/Res_061_096_PDF).

<sup>56</sup> *Id.* arts. 6, 18.

<sup>57</sup> It was created by Decision 23, 2005 and replaced the Parliamentary Joint Commission. Its first meeting was held in May 7, 2007. The Parliament is integrated by representatives elected by popular election for a period of 4 years. Until 2010, it will be made up of 18 parliaments by each member party. The number of parliamentarians for the next period is pending to be determined by the Common Market Council. The Parliament acts with independency and is not submitted to mandatory mandate. Council of the Common Market Decision MERCOSUR/CMC/DEC. N° 23/05 (2005), Protocolo Constitutivo del Parlamento Del Mercosur, art. 9, *available at* [http://www.mercosur.int/msweb/Normas/normas\\_web/Decisiones/ES/DEC%20023-05-Acuerdo%20%20Parlamento\\_ES.PDF](http://www.mercosur.int/msweb/Normas/normas_web/Decisiones/ES/DEC%20023-05-Acuerdo%20%20Parlamento_ES.PDF).

<sup>58</sup> Protocol of Ouro Preto, *supra* note 8, art. 4.

contribute to the provision of legal certainty because they allow foreign investors to know the activities being developed by MERCOSUR, and the possible adoption of policies and laws that can affect their activities. Moreover, they represent an excellent opportunity for foreign investors to participate within the integration process. In these ways, foreign investors become involved in the generation of policies regarding of legal certainty.

Additionally, the Parliament has the power to propose projects of MERCOSUR's laws to be considered by the Council of the Common Market. The Parliament also prepares studies and bills of national laws related to the harmonization of the national legislation of the member parties. As can be observed, this duty also contributes to the promotion of legal certainty by promoting uniformity in the law and the adoption of laws that generate a more certain legal environment for the development of economic activities.

The Parliament also helps the provision of legal certainty by promoting the coordinated work among MERCOSUR institutions and joint works with the national Parliaments. This last aspect is of substantial importance because it helps achieve the incorporation of MERCOSUR law into the national legal system of member parties, making it possible for foreign investors to enjoy of the benefits arising from regional laws. Moreover, the Parliament invites functionaries from the different MERCOSUR organisms and meets twice each year with the Economic-Social Consultative Forum to exchange information and opinions about the integration process. This constitutes another mechanism that contributes to the adoption of coherent, stable laws, and policies at the regional level. It helps as well as to increase the participation of foreign investors in the MERCOSUR decision-making process and development.

#### *E. The Economic-Social Consultative Forum*

This Economic-Social Consultative Forum is MERCOSUR's institution representing the social and economic sectors of MERCOSUR's member countries.<sup>59</sup> As a consequence

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<sup>59</sup> *Id.* art. 28. It has an advisory role in the integration process and acts



of its powers, it constitutes a relevant institution for the provision of legal certainty for foreign investment. The Forum can propose laws and economic policies to be adopted within MERCOSUR and must promote the participation of the society in the integration process.<sup>60</sup> Therefore, it is through this Forum where the private sector can have a direct, active, and continuous participation within the integration process. The institution serves as an instrument by which foreign investors can analyze the impact of the measures adopted in MERCOSUR that affect issues such as legal certainty and foreign investment. It is a place where they can propose policies regarding these two issues.

An analysis of the recommendations issued by the Council related to foreign investment reveals an interest in developing policies in favor of legal certainty. For instance, in the Recommendation N° 5/1997, the Forum mentioned the importance of increasing the levels of investment in MERCOSUR.<sup>61</sup> In order to achieve this objective, the Forum considered that it was necessary to offer legal certainty to foreign investors and there must be stability both in the national and regional laws. In addition, the provision of equal treatment between national and foreign investors and the adoption of previous consults when a country takes unilateral measures was recommended. This way the rules within the integration system can be protected.<sup>62</sup>

Later, in Recommendation No. 3 of 1999, the Forum insisted on the importance of complying with the accords adopted by the member parties and claimed a more active role

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through “recommendations.” *Id.* art. 29. Regarding its own structure, the Forum is integrated by national sections which autonomously establish the participating sectors. The organizations representing those sectors must be the most representative of the national scope.) Common Market Group Resolution MERCOSUR/GMC/RES No. 68/96 (1996), Reglamento Interno del Foro Consultivo Economico Social, art. 3, *available at* [http://www.mercosur.int/msweb/Normas/normas\\_web/Resoluciones/ES/Res\\_068\\_096.PDF](http://www.mercosur.int/msweb/Normas/normas_web/Resoluciones/ES/Res_068_096.PDF).

<sup>60</sup> *Id.* art. 2.

<sup>61</sup> Economic-Social Consultative Forum Recommendation MERCOSUR/FCES/IV/ Recomendación N° 5/97 (1997), Políticas de Promoción del Empleo, *available at* [www.camara.gov.br/merc-sul/Forum\\_Consultivo/Recom%201997-2003%20esp18-06-2004.doc](http://www.camara.gov.br/merc-sul/Forum_Consultivo/Recom%201997-2003%20esp18-06-2004.doc).

<sup>62</sup> *Id.*

of the civil society through the participation of the Forum in the decision-making process. Finally, the Forum recommended that the mechanism to settle conflicts be strengthened, which would allow more predictability within MERCOSUR.<sup>63</sup>

In 2001, the Forum, through recommendation No. 1 of that year, emphasized the necessity of creating a Tribunal for the settlement of conflicts in MERCOSUR. Moreover, it recommended the harmonization of tax law among member parties and highlighted the importance of incorporating MERCOSUR's law in continuing the development of the integration process.<sup>64</sup> In 2003, the Forum recommended the adoption of a precise, agile and foreseeable system of incorporation of MERCOSUR law, the participation of the representatives of the Forum in the meetings of the Common Market Group, and the provision of financial resources in order to guarantee the continuity and efficiency of the Forum.<sup>65</sup> Finally, in 2007, the Forum recommended the continuation of the development of tax, financial, custom and investments attraction policies.<sup>66</sup>

Despite the Forum's many possibilities to promote conditions of legal certainty in MERCOSUR, it must be mentioned that there are some limitations impacting the effectiveness of the Forum to achieve this goal. One of these limits is the lack of binding effects of its recommendations. The Forum only has advisory power, therefore the non-adoption of

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<sup>63</sup> Economic-Social Consultative Forum Recommendation MERCOSUR/FCES/ XII/Recomendación N° 3/99 (1999), Situación Actual y Futura del Mercosur, *available at* [www.camara.gov.br/mercosul/Forum\\_Consultivo/Recom%201997-2003%20esp18-06-2004.doc](http://www.camara.gov.br/mercosul/Forum_Consultivo/Recom%201997-2003%20esp18-06-2004.doc).

<sup>64</sup> Economic-Social Consultative Forum Recommendation MERCOSUR/FCES/ XVII/Recomendación N° 1/01 (2001), Situación Actual y Futura del Mercosur (III), *available at* [www.camara.gov.br/mercosul/Forum\\_Consultivo/Recom%201997-2003%20esp18-06-2004.doc](http://www.camara.gov.br/mercosul/Forum_Consultivo/Recom%201997-2003%20esp18-06-2004.doc).

<sup>65</sup> Economic-Social Consultative Forum Recommendation MERCOSUR/FCES/XXV/Recomendación N° 1/03 (2003) Programa para la Consolidación de la Unión Aduanera y para el Lanzamiento del Mercado Común "Objetivo 2006", *available at* [www.camara.gov.br/mercosul/Forum\\_Consultivo/Recom%201997-2003%20esp18-06-2004.doc](http://www.camara.gov.br/mercosul/Forum_Consultivo/Recom%201997-2003%20esp18-06-2004.doc).

<sup>66</sup> Economic-Social Consultative Forum Recommendation MERCOSUR/FCES /XXXVII Recomendación N° 1 /07 (2007) Superación de las Asimetrías en el Mercosur, *available at* [www.mercosur.int/msweb/SM/Actas%20TEMPORARIAS/GMC/GMC\\_EXT\\_16\\_Dic2007/Anexo%20VII%20-%20FCES\\_Recomendacion%201%20SupAsimetríasMERCOSUR.doc](http://www.mercosur.int/msweb/SM/Actas%20TEMPORARIAS/GMC/GMC_EXT_16_Dic2007/Anexo%20VII%20-%20FCES_Recomendacion%201%20SupAsimetríasMERCOSUR.doc).

its recommendations does not produce liability for member parties. Another problem is its lack of a budget. These circumstances limit the influencing power of the Forum within the structure and functioning of MERCOSUR.<sup>67</sup>

*F. The MERCOSUR Administrative Secretariat*

The MERCOSUR Administrative Secretariat is divided in four principal branches known as sectors. They are the Administration, Support, Technical Assistance, and Rules, Documentation, and Disclosure Sectors.<sup>68</sup> The last two sectors have an important role in the provision of legal certainty. The Technical Assistance Sector controls the legal consistency of the acts and law projects issued by MERCOSUR's institutions.<sup>69</sup> This way, the MERCOSUR integration process guarantees respect of the rule of law and the non-existence of contradictory rules within the system.

In the case of the Rules, Documentation and Disclosure Sector, it is in charge of watching out for the incorporation of MERCOSUR's laws into the legal system of member countries. As for the development of this duty, the Sector registers the notifications of member parties about the incorporation of national laws into their legal systems, informs member parties when a process of incorporation has finished, keeps the record of incorporation of MERCOSUR's laws, and collects the national laws of the member countries incorporating MERCOSUR's laws. It also and keeps updated the list of agreements, protocols, decisions, resolutions, directives, recommendations and projects emanating from the technical forums for the consideration of MERCOSUR's institutions with power of decision.<sup>70</sup> Additionally, the Sector is in charge of divulging MERCOSUR'S law. Therefore, it must edit

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<sup>67</sup> Jamie Elizabeth Jacobs & Martin Maldonado, *Civil Society in Argentina: Opportunities and Challenges for National and Transnational Organization*, 37 J. LAT. AMER. STUD. 141, 168 (2005).

<sup>68</sup> Council of the Common Market Decision MERCOSUL/CMC/DEC. N° 07/07 (2007) Estructura y Funcionamiento de la Secretaria del Mercosur, *available* [http://www.mercosur.int/msweb/Normas/normas\\_web/Decision-es/ES/2007/DEC%20007-2007\\_ES\\_Estructura%20y%20Funcionamiento-%20de%20la%20Secretaria.pdf](http://www.mercosur.int/msweb/Normas/normas_web/Decision-es/ES/2007/DEC%20007-2007_ES_Estructura%20y%20Funcionamiento-%20de%20la%20Secretaria.pdf).

<sup>69</sup> *Id.* at 6.

<sup>70</sup> *Id.* at 8.

MERCOSUR's Bulletin and answer inquires about MERCOSUR law.<sup>71</sup> All these duties serve to satisfy one of the requirements for the existence of legal certainty, which is the publicity of the law. Through the execution of all these duties, knowledge and publicity of MERCOSUR law is provided to foreign investors.

### III. THE ROLE OF THE JURIDICAL BODIES OF MERCOSUR FOR THE PROVISION OF LEGAL CERTAINTY

The success of MERCOSUR as an instrument for the provision of legal certainty depends to a great extent on the respect of its legal order by member parties. This respect will rely largely on the existence of a court that effectively enforces MERCOSUR law and helps to build a unique and common understanding of its meaning. Precisely these goals are recognized by the Olivos Protocol, the current regulation of MERCOSUR dispute settlement mechanism. The Protocol has as one of its motivations the guaranteeing of consistent, systematic and correct interpretation, application and fulfillment of MERCOSUR legal order and the consolidation of legal certainty within the integration process.<sup>72</sup>

The judicial role in MERCOSUR is held by the Permanent Tribunal and Ad Hoc Arbitral Tribunals.<sup>73</sup> They have jurisdiction to decide conflicts that arise as to the interpretation, application or non-fulfillment of the Asuncion Treaty, the Ouro Preto Protocol, other protocols and agreements adopted within the integration process, decisions of the Council of the Common Market, resolutions of the Common

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<sup>71</sup> *Id.* at 10.

<sup>72</sup> The Olivos Protocol, Preamble states:

CONSIDERING The need to guarantee the correct interpretation, application and enforcement of the fundamental instruments of the process of integration and the regulations of Mercosur, in a consistent and systematic way; CONVINCED That it is convenient to make specific modifications to the system for the settlement of disputes in order to strengthen juridical security within Mercosur.

Olivos Protocol, *supra* note 9, pmb.

<sup>73</sup> Before the Permanent Tribunal's recent creation, only the Ad Hoc Arbitral Tribunals were in charge of the settlement of conflicts within the integration process. Therefore, MERCOSUR did not have a unitary and continuous body with juridical powers.

Market Group or the directives of the MERCOSUR Trade Commission among member states of MERCOSUR. Consequently, they play a fundamental role to guarantee that member countries respect and implement the commitments assumed at MERCOSUR level and therefore foreign investors can enjoy the benefits flowing from them.

However, the provision of legal certainty by the existence of a juridical body that enforces MERCOSUR law will also depend to a large extent on the possibility for foreign investors to have access to the Permanent Tribunal. In the case of MERCOSUR, legal and natural persons have the ability to use the MERCOSUR system for settlement of conflicts. They may bring a claim against a member party of MERCOSUR for the adoption or application of any restrictive, discriminatory or unfair competition legal or administrative measure that violates the Asuncion Treaty, Ouro Preto Protocol, protocols and agreements adopted within the integration process, the decisions of the Common Market Council, resolutions of the Common Market Group or the directives of the Trade Commission of MERCOSUR.<sup>74</sup> The affected natural or legal person must bring his claim before the National Section of the Common Market Group where he is domiciled.<sup>75</sup>

For foreign investors, this system is not favorable for guaranteeing legal certainty for their investments because of two main reasons. The first one relates to the cause of actions available for claims brought by individuals. As mentioned before, the available cause of action to claim the liability of member parties of MERCOSUR is for the adoption or

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<sup>74</sup> Olivos Protocol, *supra* note 9, art. 39.

<sup>75</sup> Once the claim is received, the National Section must begin consultations with the National Section of the Common Market Group of the State accused of the violation. If there is no solution, the National Section will bring the claim before the Common Market Group. *Id.* art. 41. There, the Common Market Group will appoint a group of experts which will issue a decision 30 days after its designation. During this time, the parties will have the right to be listened and present their arguments. *Id.* art. 42. Regarding the decision of the group of experts, Olivos Protocol establishes that if the claim is accepted by a unanimous decision, any State can demand the adoption of corrective measures or the annulment of the adopted measures. If that demand is not adopted, the asking State can bring a suit before the Ad Hoc Arbitral Tribunal. If there is not a unanimous decision, the group of experts must submit its conclusions to the Common Market Group who will judge as finished the conflict. *Id.* art. 44.

application of any restrictive, discriminatory or unfair competition legal or administrative measure by any member state that is against MERCOSUR law. Thus, for legal and administrative measures of a different character, there is no cause of action for individuals. This produces the impossibility of foreign investors being able to claim the liability of the state that adopts or applies a legal or administrative measure against MERCOSUR law that do not have a restrictive or discriminatory effect or impacts the fair competition. For example, this problem would occur, where a member country modifies through a national law rights recognized by a MERCOSUR legal instrument.

The second inconvenience for foreign investors is that there is no direct access to the Permanent or ad hoc Tribunals. They can only be heard before the National Section of the Common Market Group and it is that National Section which can bring the claim before the Common Market Group who appoints the group of experts. In other words, the participation before an Ad Hoc Arbitral Tribunal cannot be invoked by an individual. The intervention must be brought by a member state of MERCOSUR.

From this perspective, the possibility for foreign investors to access to the judicial body of MERCOSUR is limited. This fact can constitute an important weakness within the integration process for the provision of legal certainty. The members of the National Section of the Common Market Group are the same representatives as those of the state in the Common Market Group. This could make the defense of foreign investors at MERCOSUR level likely impossible when foreign investors are claiming the violation of MERCOSUR law before the national section of the state violating MERCOSUR law. Likewise, in a case where a foreign investor is bringing a claim before the national section of a state other than a breach of MERCOSUR law, the acceptance of the claim is still pending of the approval of the national section, in other words, the state itself. Therefore, the participation of the state is always necessary. This situation does not guarantee a completely objective and transparent mechanism because the foreign investor is always relying on the decision of a governmental body. Taking into consideration this situation, the necessity to

provide individuals with direct access to the system to solve the conflicts has been proposed. This would provide security to them and credibility to the integration process.<sup>76</sup>

In the case of the Permanent Tribunal, it contributes to the provision of legal certainty by issuing consulting opinions on MERCOSUR law. This power is established in Article 3 of the Olivos Protocol and Decision 37 of the Council of the Common Market, which is the law that develops the Olivos Protocol. It is the exercise of this power where the Tribunal has a larger impact for foreign investors because this power appears as an instrument to provide certainty and predictability to the integration process.<sup>77</sup> The consulting opinions establish a uniform meaning of MERCOSUR law, making it possible for foreign investors to rely on a uniform definition adopted by a supranational expert authority in MERCOSUR law.

In its first consulting opinion, the Permanent Tribunal of MERCOSUR determined the extent of the power of the Tribunal to issue its opinion. It stated that the Tribunal duty is to interpret the MERCOSUR law, and the duty of the national judge is to apply that interpretation to the case. This position follows what is stated in Article 4 of Decision 37 of 2003 which establishes that the Tribunal exclusively can make a legal interpretation of the Asuncion Treaty, the Ouro Preto Protocol, other agreements entered into the integration process: decisions of the Council of the Common Market, resolutions of the Common Market Group, and directives of the Trade Commission of MERCOSUR. However, the Tribunal also stated that the national judge was not obligated to follow the interpretation of the Tribunal.<sup>78</sup> This is in concordance with the Olivos Protocol Article 11. This Article establishes: “Las opiniones consultivas emitidas por el TPR no seran vinculantes ni obligatorias [the consulting opinions issued by the TPR will neither be binding nor mandatory].” Therefore, there is an express legal recognition of that character.

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<sup>76</sup> CARLOS MACIAL RUSSO CANTERO, *EL MERCOSUR ANTE LA NECESIDAD DE ORGANISMOS SUPRANACIONALES* 421 (1999).

<sup>77</sup> Adriana Dreyzin De Klor, *El Reglamento del Protocolo de Olivos. Algunas Anotaciones*, 3 REVISTA LATINOAMERICANA DE DERECHO 69, 74 (2005).

<sup>78</sup> Opinion Consultiva No. 1/2007, 358, 365 (Abr. 3, 2007), in LAUDOS, ACLARACIONES Y OPINIONES CONSULTIVAS DE LOS TRIBUNALES DEL MERCOSUR (Secretaria del Mercosur, 2007).

The lack of a binding and mandatory adoption of the consulting opinion can provoke an environment of uncertainty for foreign investors regarding the meaning and interpretation of MERCOSUR law. The fact that the national judge has the discretion to decide whether or not to adopt and apply the interpretation issued by MERCOSUR's Permanent Tribunal can generate a lack of uniform interpretation over the same law. Accordingly, MERCOSUR's Permanent Tribunal can issue an interpretation of a MERCOSUR law and when that interpretation is received by the national judge, he or she has the power to decide either to follow it, or disregard it and adopt its own. Under this perspective, if the judge chooses the second alternative, there would be two different interpretations over the same law. However, these would not be the only ones because the judges of each member country of MERCOSUR could make their own. Therefore, it would be interpretations of the same MERCOSUR laws from an Argentinean, Brazilian, Paraguayan or Uruguayan perspective; all of them could be different. The lack of a Permanent Tribunal within the MERCOSUR integration process would make the national legal tribunals responsible for the interpretation and application of MERCOSUR law. Moreover, it would produce a different interpretation and application of MERCOSUR law not only among judges of the member parties but also among those within a member state itself.<sup>79</sup>

It must be added that the interpretation of MERCOSUR law by the national judge would be made under his or her legal order perspective and not under MERCOSUR perspective. This would be possible because the national judge is more familiar with his or her national law than with MERCOSUR's law. Therefore, this situation could provoke the existence of interpretations from particular legal systems' perspectives and not from a global perspective of MERCOSUR which could only be obtained from the Permanent Tribunal of MERCOSUR. In addition, this situation could place foreign investors in a somewhat partial forum because the interpretation of the law

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<sup>79</sup> SECRETARIA DEL MERCOSUR & FUNDACION KONRAD ADENAUER, SEGUNDO INFORME SOBRE LA APLICACIÓN DEL DERECHO DEL DEL MERCOSUR POR LOS TRIBUNALES NACIONALES 13 (Secretaria del Mercosur & Fundacion Konrad-Adenauer eds., 2006).



is made by a national judge from the place where the investment was made and not from a more neutral judge which is not necessarily a citizen of that country. Therefore, there could be a risk of a lack of impartiality for foreign investors.

Finally, regarding the consulting opinions, the Permanent Tribunal has requested that they acquire mandatory and binding character under MERCOSUR law.<sup>80</sup> It has stated that this instrument should be a pre-judicial interpretation instead of a consulting opinion such as the ones existing in the EU and the Andean Community. For the Tribunal, this would help in two aspects. The first aspect is that it would help to emphasize to the national judges of the member countries the importance of the prejudicial interpretation within an integration process. The second aspect is that the prejudicial interpretation would allow the updating and modification of the Communitarian Court criteria.<sup>81</sup>

An additional power of MERCOSUR's Permanent Tribunal is to judge the inapplicability of secondary MERCOSUR laws that contradict the original MERCOSUR law.<sup>82</sup> However, the Tribunal has ruled that it did not have the power to judge the nullity of the provision, but only to declare the non-applicability of the law. If the Tribunal did not have that authority, it would be the national judge who would have that power. This situation would provoke a non-uniform application of MERCOSUR law.<sup>83</sup>

Finally, the fundamental importance of strong enforcement and respect of the Tribunal's decisions is necessary for the provision of legal certainty by MERCOSUR. In this sense, the Tribunal has remarked on the importance of the respect for its judgments by member countries within the integration process. Consequently, it has stated that the lack of fulfillment of Tribunal decisions is an attack on the stability and effectiveness of MERCOSUR institutions and provokes a bad

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<sup>80</sup> Opinion Consultiva No. 1/2007, 358, 361-62 (Abr. 3, 2007), in LAUDOS, ACLARACIONES Y OPINIONES CONSULTIVAS DE LOS TRIBUNALES DEL MERCOSUR (Secretaria del Mercosur, 2007).

<sup>81</sup> *Id.* at 367.

<sup>82</sup> *Id.* at 376.

<sup>83</sup> *Id.* at 367.

perception of the integration process on society.<sup>84</sup>

#### IV. CONCLUSION

MERCOSUR has several elements that contribute to the provision of legal certainty for foreign investors: a coordinated work among its institutions, recognition of the principle of supremacy of its body of law, participation of the private sector in the decision-making and a Tribunal that issues consulting opinions about the meaning of MERCOSUR law. However, the regional organization suffers from relevant limitations such as the lack of recognition of the principles of direct and immediate effect, a high percentage of non-incorporated legal instruments into the national legal systems and the absence of a permanent supranational court where foreign investors can directly bring a claim for any violation of MERCOSUR law. All these circumstances affect MERCOSUR's effectiveness for providing legal certainty to foreign investors.

Finally, it must be mentioned that although a regional integrationist experience as MERCOSUR can help for improving the conditions of legal certainty, the attraction of foreign investment to their member countries will depend on other internal factors such as corruption, lack of infrastructure, high levels of violence, lack of government transparency, amongst other factors. Therefore, although MERCOSUR represents an invaluable instrument to attract foreign investment, it cannot do it alone. It needs the presence of other factors.

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<sup>84</sup> Uruguay v. Argentina, Laudo No. 1/ 2007, 343, 351 (Jun. 8, 2007), *in* LAUDOS, ACLARACIONES Y OPINIONES CONSULTIVAS DE LOS TRIBUNALES DEL MERCOSUR (Secretaria del Mercosur, 2007).