



Society of
International
Economic
Law

Society of International Economic Law Translation Project

SIEL has started a project to translate certain Spanish language material related to International Economic Law into English. This is the second project, for which the translation team comprised:

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This is a pilot project, and we welcome comments. Should this project prove to be sustainable and successful, we will look to expand it to include further MERCOSUR decisions, as well as other material in other languages. We are open to suggestions as to what material should be prioritised.

21 August 2011

Translators' Note: *The unusual nature of the legal language in the Spanish original has presented certain difficulties of translation. As a consequence, a more literal approach to translation has been preferred, even at the expense of a degree of fluency in the translated English. Footnotes in this document are from the original, explanatory endnotes have been added by translators where necessary.*

Award of the *ad hoc* MERCOSUR Arbitral Tribunal established to hear the dispute brought by the Oriental Republic of Uruguay against the Republic of Argentina concerning the “Failure of the Argentinean State to adopt suitable measures to prevent and/or put an end to the barrier to free movement caused by the road blocks in Argentinean territory of access routes to the international bridges General San Martín and General Artigas, which link the Republic of Argentina with the Oriental Republic of Uruguay”.

In the city of Montevideo, on 6 September 2006, the *ad hoc* MERCOSUR Arbitral Tribunal established to hear the dispute between the Oriental Republic of Uruguay and the Republic of Argentina concerning the “Failure of the State of Argentina to adopt suitable measures to prevent and/or put an end to the barrier to free movement caused by the road blocks in Argentinean territory of access routes to the international bridges General San Martín and General Artigas, which link the Republic of Argentina with the Oriental Republic of Uruguay”, in accordance with the provision in the Olivos Protocol for the Settlement of Disputes in MERCOSUR made up of senior arbitrators Dr Luis Martí Mingarro, Dr José María Gamio and Dr Enrique Carlos Barreira, nationals, respectively, of Spain, Uruguay and Argentina.

The Tribunal has structured the arbitral decision in the following order:

Summary

I – Findings.

- I – A) The *ad hoc* Arbitral Tribunal at the time of its establishment.
- I – B) Events and procedures relating to the composition and the constitution of the *ad hoc* Arbitral Tribunal.
- I – C) The parties and their representatives in the proceedings.
- I – D) Request for suspension of the proceedings.
- I – E) Invitation for third States to be present during the proceedings.
- I – F) Claim of the Oriental Republic of Uruguay.

- I – G) Response of the Republic of Argentina.
- I – H) Discovery and production of evidence.
- I – I) Final written submission of the Oriental Republic of Uruguay.
- I – J) Final written submission of the Republic of Argentina.
- I – k) Deadline to issue the Award.

II – Reasoning.

- II – A) The respondent’s submission substituting and extending the object claimed.
- II – B) The respondent’s submission that the claim is moot for lack of substance.
- II – C) The seat of the Tribunal.
- II – D) The facts that led to the demonstrations by the residents of the Argentinean shore that gave rise to the dispute.
- II – E) On the existence of a breach by omission of MERCOSUR norms.
- II – F) On the reference to human rights.
- II – G) The required conduct in response to the present circumstances.
- II –H) The responsibility of the Federal State for the omissions of the Provincial Governments
- II – I) The stance of the residents of Gualeguaychú.
- II – J) The issue of damages.
- II –K) The request to require the respondent to take appropriate measures to prevent and/or put an end to the road blocks should the situation be repeated in the future.

III – Conclusions.

IV – Decision.

Findings

– I – A –

THE *AD HOC* ARBITRAL TRIBUNAL AT THE TIME OF ITS ESTABLISHMENT

- 1) On 21 June 2006 the constitutive session of the *ad hoc* Tribunal took place, at which the three arbitrators were present and during which the Act of Session Number 1 was raised and the Rules of Procedure were adopted by the *ad hoc* Tribunal, in the course of which the Arbitrators Drs Luis Martí Mingarro and José Maria Gamio were dulyⁱ appointed as arbitrators, in accordance with the Olivos Protocol for the Settlement of Disputes and its Rules of Procedure, to hear the dispute.
- 2) Drs Mingarro and Gamio also confirmed that they were included in the list of arbitrators established in accordance with Article 11 of the Olivos Protocol and that they had signed the declaration of acceptance required from arbitrators under Article 21 of the Rules of Procedure of the Olivos Protocol.
- 3) For his part, the arbitrator appointed by Argentina, Dr Héctor Masnatta, suggested that, in his opinion, the appointment of Dr Luis Martí Mingarro did not fulfil the legal requirements necessary for it to be effective, leaving aside his personal and professional respect for the aforementioned arbitrator.
- 4) While Dr Masnatta reserved his opinion, the remaining arbitrators found that the commencement of proceedings was established by note number 423/06 of 04/05/06 of the Uruguayan National Coordinator

in the Common Market Group which was duly notified; that the period of the proceedings began on 10 June 2006 according to the provisions of Article 16 of the Olivos Protocol; that the Presidency would be exercised by Dr Luis Martí Mingarro, in accordance with Article 10(3)(ii) of the Olivos Protocol; that the seat of the Tribunal would be fixed in the City of Montevideo, capital of the Oriental Republic of Uruguay, in accordance with Article 38 of the Olivos Protocol, and that the Rules of Procedure adopted by the Tribunal were approved.

5) The two parties were also invited to appoint their respective representatives and to establish their respective legal domiciles in the city of Montevideo, in order to serve notice, the claimant was invited to file a written submission within 10 days of the day after the service of notice and both parties were also invited to communicate their position regarding the intervention of third countries according to the provisions of Article 14 of the Rules of Procedure.

– I – B –

EVENTS AND PROCEDURES RELATING TO THE COMPOSITION AND THE CONSTITUTION OF THE *AD HOC* ARBITRAL TRIBUNAL

6) The Minister of External Relations, International Trade and Worship of the Republic of Argentina has made his objection to the process of appointment of the third arbitrator clear.

7) The opposition and concerns of the Republic of Argentina regarding the appointment of the third arbitrator, incumbent and substitute, gave rise to an appeal by the Argentinean representative before the MERCOSUR Permanent Tribunal of Review.

8) The aforementioned Permanent Tribunal, by way of Award 2/2006 of 6 June 2006, expressedⁱⁱ, that the action brought by Argentina was inadmissible but that, nonetheless, this finding did not leave the appellant without recourse given that the decision merely found the appeal inadmissible at this stage in the proceedings and is without prejudice to the merit of the allegations made by the Argentinean Party, which could well be presented again in appeal against the arbitral award rendered.

9) On 7 July 2006 the representative of the Republic of Argentina informed the Secretariat of MERCOSUR that the incumbent arbitrator appointed by the Republic of Argentina, Dr Hectór Masnatta, had tendered his resignation and that his place would be taken by Dr Enrique Carlos Barreira who had been, up to this point, the substitute arbitrator for that country.

10) Consequently, the *ad hoc* Arbitral Tribunal, from that date, was made up as follows: Dr Luis Martí Mingarro (President), Dr José María Gamio (co-arbitrator) and Dr Enrique Carlos Barreira (co-arbitrator).

– I – C –

THE PARTIES AND THEIR REPRESENTATIVES IN THE PROCEEDINGS

11) The Oriental Republic of Uruguay established legal domicile in calle Colonia 1206, second floor, Montevideo (Department for Integration and MERCOSUR Affairs, Ministry of External Relations) and appointed Drs Carlos Amorín, Hugo Cayrús Maurín, Myriam Fraschini and José María Robaina to act as its representatives before this Tribunal and for the purposes of the procedures related to this claim. For its part, the Republic of Argentina established legal domicile in the Argentinean Representation to MERCOSUR and ALADI, situated at Plaza Independencia 759, 6th Floor, Montevideo, Oriental Republic of Uruguay and appointed Dr Juan Vicente Sola as incumbent representative before the Arbitral Tribunal and Dr Nora Capello as substitute representative.

– I – D –

REQUEST FOR SUSPENSION OF THE PROCEEDINGS

12) At that point, the representative of the Republic of Argentina requested the suspension of proceedings due to the fundamental nature of its objections to the constitution of the Tribunal, and taking into account the presentation of an appeal before the MERCOSUR Permanent Tribunal of Review by Argentina.

13) At the point in the proceedings when the representative of the Republic of Argentina requested the suspension of procedures the situation was certainly exceptional, in so far as the representative of that State Party had filed an appeal before the MERCOSUR Permanent Tribunal of Review, which was rejected *in limine*. In considering the request for suspension, the *ad hoc* Tribunal, following the conclusion of the arguments in the appeal, found that, given the findings of the Permanent Tribunal of Review, the request for suspension lacked effect, and, consequently, by unanimous resolution of 26 July 2006 rejected the request for suspension, given that it had become moot.

– I – E –

INVITATION FOR THIRD STATES TO BE PRESENT DURING THE PROCEEDINGS

14) In accordance with the Rules of Procedure, sanctioned by this arbitral process, the parties to the dispute should give their opinion on the possibility of inviting State Parties to the Treaty of MERCOSUR as third parties to the present dispute.

15) On this point, the *ad hoc* Arbitral Tribunal took care to provide the parties with the opportunity to express themselves on this matter. The Republic of Argentina let the Tribunal know in writing, on 1 August 2006, that it did not believe that the participation of third parties was relevant to a dispute that they considered exclusively bilateral. For its part the Oriental Republic of Uruguay, in disposing of the matter, was of the opinion that, given that the parties had already had the initial opportunity provided under section 5 of the dispositive part of Act Number 1 to make their interest known and had said nothing, it was up to the *ad hoc* Tribunal to adopt a relevant resolution as to whether or not to invite Third States. Consequently, by resolution of 8 August 2006, the Tribunal declared that no invitation would be issued to MERCOSUR Member States to appear in the current action on the effects and the objectives of Art. 14 of the Rules of Procedure.

– I – F –

CLAIM OF THE ORIENTAL REPUBLIC OF URUGUAY

16) The representative of the Oriental Republic of Uruguay presented, in good time and in the appropriate form, a written submission, dated 3 July 2006, on which their claim was based.

17) The basis of the claim of the Oriental Republic of Uruguay consisted of the road blocks, in Argentinean territory, of access roads to international bridges linking the country to Uruguay, put in place by the Argentinean environmental movement in protest against the construction of pulp mills on the Uruguay River, on the border between both countries. The road blocks on Route 136, blocking access to the General San Martín international bridge, were put in place on 19 December 2005 and, with suspensions, lasted until 2 May 2006. The Road Blocks on Route 135 blocking access to the General Artigas international bridge were put in place on 30 December 2005 and, with suspensions, lasted until 18 April 2006.

18) In addition, according to the claimant, there were interruptions to free movement, of short duration, on the bridge that links the cities of Concordia (Argentina) and Salto (Uruguay), stressing that, on 22 February 2006, an attempt to block that road was thwarted by the intervention of the Argentinean authorities.

19) According to the Uruguayan claim, aside from the aforementioned situation, the Argentinean authorities failed to take suitable measures to put an end to the road blocks despite the fact that the

number of demonstrators was, in general, very small. They did not even bring the relevant criminal charges as, at some point, the Governor of the Province of Entre Ríos threatened. The President of the Republic himself, according to information in the press, had made it clear that he “could not ask (the demonstrators) that which they would not give”. The Ministry of the Interior had gone further in saying “nothing can be said to the environmentalists”.

20) According to the representative of Uruguay, faced with the road block, the national government of Argentina as much as the provincial government of Entre Ríos fluctuated between timorous dissuasion and unacceptable complacency.

21) The Oriental Republic of Uruguay is of the opinion that the road blocks referred to caused serious damage to the State, as well as to the economic sectors and economic agents of that country fundamentally connected to import and export businesses, tourism and ground transport of passengers and merchandise.

22) For the claimant, the Treaty of Asunción, under which it was decided to establish MERCOSUR, established that the common market entails free movement of goods, services and other factors of production between countries by way of the elimination, among other measures, of non-tariff restrictions on the movement of goods and of “any other equivalent measures” (Article 1).

23) Uruguay submits in its claim that “restrictions” include any administrative, financial, foreign exchange or “other measures” by which a State party unilaterally prevents or “impedes” reciprocal trade (Annex I to the Treaty of Asunción Article 2(b)).

24) The representative of the claimant points out that it is understood that, from 1 January 2000, MERCOSUR consists of a zone of universal free trade (save some exceptions), meaning that from that date all restrictions that obstruct or hinder reciprocal trade constitute barriers and obstructions to trade, incompatible with legal undertakings.

25) The Oriental Republic of Uruguay states that the free movement of services was established by the Protocol of Montevideo, which is in force between the parties, and eliminates measures that affect trade in any way, including arrangements made by provincial, municipal or local authorities and by non-governmental institutions (Article II).

26) For Uruguay, under the aforementioned Protocol, commitments were made by Argentina, among others, those relating to tourism and transport, which have been affected by the measures which gave rise to this controversy.

27) The claimant is of the opinion that with regard to free movement of persons, the road blocks violated commitments in force between the parties by virtue of international legal instruments relating to human rights, as well as requirements under Argentinean domestic norms.

28) The representative of the Oriental Republic of Uruguay also invoked the Agreement on International Terrestrial Transport (ATIT) in force between “countries of the southern cone” of the continent – including, among others, the parties to this dispute – which was incorporated into MERCOSUR instruments as a suitable way to advance integration in the area of territorial transport. The obstruction of the free movement of passengers and cargo affected transport operations under the umbrella of the ATIT Agreement, not only between the parties to this dispute but also with respect to transit from or to third country parties to that agreement.

29) In its claim, Uruguay also mentions the norms of the World Trade Organisation (WTO) which are binding on the parties, such as those relating to most favoured nation treatment, free transit, market access –among others– which have been affected by the measures challenged.

30) In spite of the fact that the material acts presenting as obstacles to free movement are carried out by private individuals, the non-fulfilment imputed by the Oriental Republic of Uruguay to the Argentinean State is its failure to adopt adequate, reasonable and effective measures to prevent the aforementioned

acts. The Regulation of the Olivos Protocol includes in the matters which can be the object of a dispute, among others, “omissions” incompatible with MERCOSUR norms (Article 27).

31) In this vein, Uruguay directs attention to the case decided by the European Court of Justice (Commission v. France – Case C-265/95) in which, faced with road blocks in France put in place by private individuals, the judicial organ established the responsibility of that State for its failure to re-establish free movement.

32) So, according to the claimant, Argentina's continued non-fulfilment by omission of its obligations in respect of the road blocks – put in place and subsequently removed according to the will of private individuals – gives rise to the assumption that, should such acts recur in the future, the said State will conduct itself in the same way, therefore giving rise to a permanent state of doubt and insecurity.

33) Finally the Oriental Republic of Uruguay requests that:

a) the Tribunal decide that Argentina has failed to fulfil its obligations under Articles 1 and 5 of the Treaty of Asunción, Articles 1, 2 and 10(2) of Annex I of that Treaty; Articles II, III and IV of the Protocol of Montevideo on Trade in Services as well as the principles and requirements of international law applicable in this matter; and

b) that the Republic of Argentina, in case of the recurrence of these barriers to free movement in the future, should adopt suitable measures to prevent and/or put an end to this type of obstacle and to guarantee free movement with Uruguay.

– I – G –

RESPONSE OF THE REPUBLIC OF ARGENTINA

34) On 26 July 2006, the written response of the Republic of Argentina, in which Argentina refuted the claim and offered its evidence, was presented in good time and in the appropriate form.

35) The representative of the Republic of Argentina asserts that Uruguay has changed and extended the object of its claim as compared with the object of the request for direct negotiations. While the object of this latter request was “barriers to free movement”, the claim referred to the “failure of the Argentinean State to adopt suitable measures to prevent and/or put an end to the barriers to free movement”.

36) Furthermore, for Argentina, the claim lacks substance given that, on the date of claim, the road blocks had ceased, which situation continues to this day. The claim is, in addition, non-specific and moot because it asks the Argentinean State, on the future recurrence of the demonstrations in question, to adopt measures without specifying what those measures might be.

37) The Republic of Argentina, in its opinion, formulates objections to the fact that the city of Montevideo was chosen as seat of the *ad hoc* Tribunal in so far as this undermines its independence and gives an advantage to one of the parties to the dispute, above all in relation to the production of evidence.

38) Referring to the previous stages of this dispute, the Republic of Argentina asserts that the Uruguay's request to enter into direct negotiations was answered by note 3 of March 2006 in which the Argentinean government demonstrated its willingness to “maintain a frank and exhaustive bilateral dialogue”.

39) Further, the Argentinean representative makes observations about the constitution of the *ad hoc* Tribunal, based on points of procedure.

40) With respect to the facts, the respondent is aware that the road blocks were preceded by a demonstration on 30 April 2005, known as “*El Abrazo Solidario*”, which gathered more than 40 000 people on the outskirts of the Argentinean city of Gualaguaychú, for five hours, in protest against the construction of a pulp mill on Uruguayan territory.

41) According to the arguments, the opinion of the Republic of Argentina is that the road blocks in place from December 2005, did not cause damage to bilateral trade nor to tourism, which stands in contrast to the assertion of the claimant; both areas saw positive rather than negative growth to Uruguay's benefit, during the period of the road blocks.ⁱⁱⁱ

42) In addition, the Argentinean representative is of the opinion that the economic agents who used the bridges cannot claim damages given that the road blocks were, in general, announced in advance and the economic agents could, therefore, use alternative communication routes between the two countries.

43) The representative of the Republic of Argentina in the arbitral process highlighted that its Government, without encouraging the demonstrations, understood that they constituted the exercise of a legitimate right. This did not prevent steps being taken which stripped the road blocks of all effect.

44) According to the Republic of Argentina these circumstances brought about a conflict between the rights to free expression and association, on the one hand, and the right to free movement of goods, on the other. It must be kept in mind that international norms relating to human rights in force in the Republic of Argentina have constitutional status in the hierarchy of norms whereas the norms of integration have a lower status in that legal hierarchy.

45) Regarding the free movement of goods, the Republic of Argentina suggests that it should be remembered that the goals established in the foundational treaty of MERCOSUR are not fully in force.

46) Further, the Republic of Argentina continues by pleading that, when the process of integration establishes the obligation to eliminate non-tariff restrictions, this refers to government measures. The norms established by the World Trade Organisation and by the European Economic Community have a similar reach.

47) In its opinion, the Republic of Argentina is of that opinion that, with respect to the free movement of services, the Protocol of Montevideo regulating this matter merely establishes the obligation to abstain from adopting governmental measures that affect it.

48) The Republic of Argentina recalls that Uruguay invokes, in addition, the Agreement on International Terrestrial Transport (ATIT) even though this does not establish any freedoms of movement and is rather an administrative agreement for the establishment of technical criteria to grant licences for the international movement of terrestrial transport.

49) For the Republic of Argentina, the free movement of persons, which Uruguay asserts is adversely affected by the road blocks, is not even operative under MERCOSUR as, on the contrary, it is – by way of example – in the European Community.

50) Neither, according to the Argentinean response, does the right to free transit, in so far as it could affect transport of goods from or to third countries, come into force by virtue of this process of regional integration.^{iv}

51) The basis of the opinion of the representative of the Republic of Argentina is that human rights can justify a restriction on the exercise of the rights guaranteed by the treaty of integration. In that vein, reference is made to the precedent of the *Schmidberger* case, handed down by the European Court of Justice, as far as that case gives priority to the rights to freedom of expression and thought over the right to free movement of goods, the latter being affected by the road blocks on an international route put in place by an environmentalist movement (Ruling of the ECJ of 12 July 2003, Case C-112/00).

52) In the area of human rights, the Republic of Argentina asserts, the rights to freedom of expression and association must be recognised as being of special importance along with the inherent right to protest, the latter being a means of demanding the fulfilment of other rights. To these must be added the right to choose the public forum in which the protest can be carried out most effectively.

53) So, the Argentinean representative asserts, accepting the validity of these norms, requiring the opening of access to the bridge would have led to repression unacceptable under the provisions of public law in Argentina.

54) In the light of these considerations, according to the claim of Republic of Argentina, the dissuasion of road blocks was^v the only legitimate alternative for the governors.

55) The Republic of Argentina, in its claim, maintains that the police force present in the provincial territories was the provincial police force. Imposing the intervention of the federal government in the territory of the provinces would only be possible at the cost of changing the system of political democracy in the province.

56) In the current state of international law on responsibility for international wrongful acts, according to the Argentinean representative, the Draft Articles of the UN International Law Commission exclude State responsibility for the actions of private individuals.

57) For the Republic of Argentina, the State can only be held responsible for the behaviour of a person or group of persons if their behaviour results from the fact that they are acting on the instructions of, or under the direction or control of the State (Article 8 of the Draft Articles). This does not cover, in any way, the case currently under consideration.

58) The Argentinean representative makes it clear that all other measures that the country could have adopted would have carried the risk of provoking reactions difficult to control and serious disruptions of public order.

59) The Argentinean representative notes that the claimant asserts that Argentinean authorities mandated public forces to break up other public demonstrations similar to that under consideration. Nonetheless, these demonstrations, unlike those referred to in the present case, were violent, according to the Republic of Argentina.

60) In addition, the Republic of Argentina maintains that the movement of goods and persons between the two countries has always relied on alternative access routes and, in order to facilitate their use, Argentinean customs and migration services were reinforced at those points during the period in question. This demonstrates that there was no omission.

61) Neither was there an omission, according to the Argentinean representative, in the dissuasive action of the Argentinean authorities which, in the end, was revealed to be effective in so far as the demonstrators removed the road blocks.

62) By written submission on 27 July 2006, the representative of the Argentinean Republic identified errors in the written response to the claim identified.

– I – H –

DISCOVERY AND PRODUCTION OF EVIDENCE

63) The parties formulated an evidentiary proposal, which was considered in the Tribunal's Resolution of 28 July 2006 concerning documentary and testimonial evidence and evidence arising from a request for information^{vi} given by both parties, stating that they should present the list of questions to the witnesses at least three days in advance. Reservations to proposing evidence arising from a request for information by both parties were admitted and, in accordance with Article 17 of the Rules of Procedure, the parties were summoned to a session in which they could make brief presentations to establish their respective positions. Finally, the parties were summoned to a hearing to take place on 9 and 10 August 2006.

64) On 9 August 2006 the hearing began, during which the Argentinean representative raised the issue of special and prior ruling based on threats to which the witness, proposed to them by Don Anibal Oscar

Oszust, had allegedly been subject. The Tribunal heard his statement and charged the Secretariat of MERCOSUR to transmit this matter to the Diplomatic Representations of the Republic of Argentina and of the Oriental Republic of Uruguay for them to follow up as necessary.

65) Subsequently, in accordance with the suggestion of the parties and in order to facilitate as far as possible the presence of the witnesses called, taking into account their positions and occupations, the *ad hoc* Tribunal examined the witnesses in the following order: Aníbal Oscar Oszust, Daniel Sica, Ricardo Echegaray, Alejandro García, Raúl Cuence, and Jorge Campaña, all of Argentinean nationality, for the respondent. After that, the examination of the following witnesses began: José Carlos Gonzalvez Huerta, Javier Larrondo, Yanina Corsini, Antonio Carámbula, Benjamín Liberoff, Víctor Sosa Echevarría, Luis Alberto Borsari Brenna, Antonio Serrentino, Pablo Garbarino Lazcano, Leopoldo Cayrús Tarreh and Daniel Sureda Tortosa, all of them of Uruguayan nationality and called by the claimant.

66) The Uruguayan representative said that the witness, Mr José Larramendi, whose statement was presented, could not testify because he had to leave the building before the hearing because of a relative's illness and the witness Gustavo Teske was prevented from attending.

67) Both parties put their respective questions to the witnesses and the Tribunal also questioned the witnesses during the hearing, when it was considered appropriate.

68) During the second part of the meeting which took place on the morning of 10 August, the parties made presentations to establish their respective positions, in the order laid down by the *ad hoc* Tribunal. Tape recordings were made of the witness statements and the parties' pleas, these were given to the parties and attached to the records.

69) The *ad hoc* Tribunal expressed *in voce* the decision to admit all the documentary evidence presented up to that point by the parties, including the document used in Dr Sica's declaration. In accordance with the position of the parties, the Tribunal decided to admit, as documentary evidence and evidence arising from a request for information, evidence presented up to the deadline for submission of the written statements, i.e. 17 August 2006.

– I – I –

FINAL WRITTEN SUBMISSION OF THE ORIENTAL REPUBLIC OF URUGUAY

70) In fulfilment of the provisions of Article 18 of the Rules of Procedure, both parties presented their statements in good time and in the appropriate form.

71) The Uruguayan representative requested that the claim should be accepted in the form in which it had already been filed and that the following finding should be made:

“a) that the Republic of Argentina has not fulfilled its obligations arising under Articles 1 and 5 of the Treaty of Asunción; Articles 1, 2 and 10(2) of Annex I of that Treaty; Articles II, III and IV of the Protocol of Montevideo on Trade in Services, as well as the applicable principles and provisions of international law, as a result of the failure by omission of the Argentinean State to adopt suitable measures to prevent and/or put an end to the barriers to free movement resulting from the road blocks in Argentinean territory of access roads to the General San Martín and General Artigas international bridges, which connect the Republic of Argentina and the Oriental Republic of Uruguay; and

b) that the Republic of Argentina, in case of the recurrence of the barriers to free movement referred to in the above paragraph or of others with similar characteristics, should adopt suitable measures to prevent and/or put an end to such barriers to free movement, and to guarantee free movement with the Oriental Republic of Uruguay.”

– I – J –

FINAL WRITTEN SUBMISSION OF THE REPUBLIC OF ARGENTINA

72) The Argentinean representative asked the Tribunal to find:

“a) that the present controversy is without substance and the basis of the Uruguayan claim is moot;

b) that the right to freedom of expression, exercised by the Argentinean citizens, constitutes a fundamental human right recognised in all constitutional orders and in international treaties on human rights, binding on Argentina and Uruguay, and that, moreover, has constitutional status in the hierarchy of norms in Argentina;

c) that a restriction on freedom of expression – a protected human right – cannot be legitimately invoked to the detriment of another right – freedom of movement of goods and services – which is legally protected but which does not have the quality of a human right;

d) that the demonstrations on the roads put in place intermittently between 6 January and 2 May 2006, constitute a demonstration of the citizens’ freedom of expression publicised sufficiently in advance, and that they do not entail, in any case, a complete obstruction of free movement of goods and services between the two countries;

e) that the Argentinean Government did not adopt any measures that violate the principles of free of movement of goods and services, foreseen in Articles 1 and 5 of the Treaty of Asunción, in Articles I and II, III and IV and Annexes of the Protocol of Montevideo on Trade in Services, in the Agreement on International Terrestrial Transportation (ATIT) and in other applicable principles and provisions of international law;

f) that the Argentinean Government acted, on a national, provincial and municipal level, with the aim of dissuading its citizens from using demonstrations on the roads as an expression of their protest and judged which measures would be necessary to facilitate free movement of goods and services while the demonstrations were ongoing;

g) that such an intervention is reasonable given the circumstances of the case and the constitutional and international norms applicable to the same;

h) that the commitments taken on by Argentina in the context in which this controversy arises cannot be subject to a broad interpretation that gives rise to a limitation on the exercise of a human right in a situation clearly not foreseen in the human rights treaties in force for both countries.”

– I-K-

DEADLINE TO ISSUE THE AWARD

73) On 18 July 2006, the *ad hoc* Arbitral Tribunal agreed unanimously to extend the deadline for issuing the Award in the present case by 30 days, in accordance with the provisions of Articles 16 and 21 of the Rules of Procedure, and as such the deadline was extended until 7 September 2006.

II

REASONING

– II – A –

THE RESPONDENT’S SUBMISSION SUBSTITUTING AND EXTENDING THE OBJECT CLAIMED

74) The respondent argues that claimant extended the object of its original claim while, under MERCOSUR norms, in particular Article 14(2) of the Olivos Protocol, the written claims and defence determine the object of the plea, which must be based on matters considered in previous stages, adding that in the direct negotiation stages, the dispute was referred to in one way (“*barriers to free movement resulting from the road blocks*”) and once the arbitral proceeding had been initiated, the demonstrations having ceased, Uruguay unilaterally adapted to the new circumstances by referring to the dispute in the way it appears in the Uruguayan written claim (“*omission of the Argentinean State to adopt suitable measures to prevent and/or put an end to the barriers to free movement*”).

75) The Tribunal considers that the indicated change in wording did not prejudice the right of defence of the respondent, as the different wording used in the summons to direct negotiations and the claim in these proceedings refers to the same facts, and even if, in the wording first used, it could be understood as imputing direct acts to the Argentinean Government, it should be taken into account that the knowledge that the road blocks were put in place by private individuals was public and well-known, to which should be added that in the note of 9 March 2006 (submitted by the Minister of External Relations of Uruguay to his counterpart in Argentina, which the claimant joined as item no. 5 without objection from the respondent), the request for direct negotiations was reiterated, making express reference to the road blocks “*put in place by private individuals who occupied them, affecting the free movement of people, goods and services*” adding that “*in the face of this situation, the Argentinean State failed to adopt suitable measures to prevent and/or put an end to the aforementioned road blocks, in order to re-establish free movement between both countries*”.

– II – B –

THE RESPONDENT’S SUBMISSION THAT THE CLAIM IS MOOT FOR LACK OF SUBSTANCE

76) The respondent asserts that the proceedings lack substance, due to the fact that, on the date on which the proceedings were instituted, the road blocks had ceased before the submission of the written claim by the Oriental Republic of Uruguay, a situation that, it is argued, continued until the submission of the response to that written claim.

77) In this regard, the Tribunal notes that those who had previously maintained the road blocks had not issued an explicit assurance that they would not re-occur in the future; neither had the authorities of the respondent issued any assurance that, should the road blocks reoccur, they would adopt a different response to that observed while the aforementioned road blocks were in place.

78) The Tribunal is not ignorant of the fact that it has been maintained that when it is requested that one of the parties leaves certain legal or regulatory rules without effect, because they are incompatible with the commitments made under international agreements that aim to facilitate trade and economic integration, and the respondent derogates from the norm in question before the tribunal is convened or delivers the final award, the proceedings culminate in the assessment that the question became moot from

the time the justification of the obstacle to trade disappeared ⁽¹⁾. It is not necessary, for this, for the contested norm to be put into practice, it being sufficient that there was a risk of harm that could develop into actual harm at any moment. This risk, like a gun pointed at the heart of its potential victim, is sufficient to consider that the maintenance of this state of affairs is contrary to commitments made, and should be resolved by defusing the potential danger.

79) Contrary to the aforementioned assumption, in the case the Tribunal is currently considering, the respondent does not contest the existence of a “norm”, currently or potentially injurious to the existing commitments, but rather contests the alleged omission of the Government of the respondent to restrain part of its population from “conduct” considered incompatible with MERCOSUR norms, while here there is no contested norm and its injurious effects could be neutralised during its derogation. At issue is the threatening situation in which certain private individuals who have already carried out acts whose effects the claimant considers at odds with the commitments made in the scope of MERCOSUR, could resume them at any moment, with the clear possibility that, in such a case, the Argentinean government would maintain its permissive conduct.

80) When dealing with vigilante justice which, despite the complaint of Government of the claimant – such as arises out of the documentary evidence brought by Uruguay without objection from the opposing party ⁽²⁾ – has been tolerated by the Government of the respondent, it seems to follow that, on resumption of the aforementioned vigilante justice, the permissive conduct of the Argentinean government with regard to this matter, which, by virtue of its repetition gains the character of a “*standard*” of conduct, would be resumed. In other words, the repeated and consecutive conduct delineates a “model” or “pattern” of conduct from the respondent that can be expected to be repeated in future cases by virtue of the principle of coherence in the conduct of public administration. This expectation, in a similar (although not identical) manner to the case of a contested norm susceptible of being activated, produces a potentially dangerous situation that the respondent does not have an interest in neutralising, which leads us to consider that in this case we find ourselves faced with the latent danger that new incidents similar to the previous ones may occur, which rules out the notion that we find ourselves asked to consider a merely moot question.

81) Despite the fact that, when dealing with cases of responsibility of States for internationally wrongful acts, the application of that responsibility to cases like the present one which deals with non-fulfilment of a treaty of integration gives rise to doubt, the International Law Commission of the United Nations (from now on ILC) has maintained that the breach of an international norm does not necessarily have to be demonstrated by an instantaneous or continuous act, but can also be demonstrated through a series of actions or omissions that are drawn out – albeit with interruptions – through time, which can be referred to as a “composite act” ⁽³⁾; and the present case does not lack complexity, given the diversity of

¹ In the WTO system, see David Luff, *Le droit de L'Organisation Mondiale du Commerce - Analyse Critique*, 794 (Bruylent, LGDJ, 2004), citing in this regard the panel report *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted (25 November 1997, paragraph 6(12) to 5(15)). In the same line, see 2 WTO *Guía de las Normas y Usos del GATT – Índice Analítico*, 719-720 (WTO Press, 1995). It is stated that in the panel report of 1982 in the matter of *United States, Prohibition imports of tuna imports from Canada*, a prohibition imposed by the United States on 31 August 1979, which was raised during panel proceedings on 4 September 1980, was examined.

² Items number 2, 3, 5, 6 and 7 of the Uruguayan evidence to which the Argentinean Representative has not objected.

³ In the last Special Report of ILC, concerning the Project of International Responsibility of States for illicit facts, when commenting on article 15, first paragraph of the respective work, it is affirmed that: “The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete.” James Crawford, *The International Law Commission's Articles on State Responsibility*, 143 (Cambridge University Press, 2003).

protagonists – groups, assemblies, public powers – and the intermittences, reiterations and continuity of the situations contemplated.

– II – C –

THE SEAT OF THE TRIBUNAL

82) The respondent questioned the decision of the *ad hoc* Tribunal to establish its seat in the city of Montevideo, claiming that this implies a reduction in the Tribunal's independence as it is the capital city of one of the parties to the dispute. The respondent argued that, as this is an arbitral process that leads to public unrest, this could give rise to an unfair decision given that it is being decided in a city where the question arises in daily public debate, which could negatively influence the arbitrators.

83) The Tribunal chose the city of Montevideo as the seat for carrying out the proceedings as well as for its deliberations due to the fact that MERCOSUR Secretariat, which offers important administrative support for its work, is located there, and in accordance with the powers conferred by the final part of Article 38 of the Olivos Protocol.

84) The aforementioned choice in no way impaired the independence of the Tribunal nor conferred any advantage on the claimant, as has been suggested, the evidence from witnesses and from reports having been delivered without incident worth mentioning. In addition to exercising a power expressly provided for by the norms in force, it is notable that this is not the first case of an *ad hoc* Tribunal in which the country in which the MERCOSUR Secretariat is based is involved as litigant, but this has not given rise to procedural inequalities. Although it could well be that public opinion is more focused on this case than on previous cases, this has not influenced the views and freedom of decision of any of the arbitrators making up this Tribunal.

– II – D –

THE FACTS THAT LED TO THE DEMONSTRATIONS BY THE RESIDENTS OF THE ARGENTINEAN SHORE THAT GAVE RISE TO THE DISPUTE

85) The dispute before this *ad hoc* Tribunal today has its origins in the demonstrations by the population of the Argentinean bank of the Uruguay River, particularly the population of the city of Gualeguaychú, in opposition to the construction of two paper paste factories by two private companies in Fray Bentos, on the Uruguayan shore of the same river facing the aforementioned Argentinean city, which are seen as a future hub of environmental pollution, considered a violation of the provisions of the agreement that Argentina and Uruguay concluded in 1975, regarding the administration of the Uruguay River.

86) The respondent refers to the fact that these demonstrations have been occurring since September 2003, organised by the movement known as “*Abrazo Solidario*” with the involvement of the resident Argentinean and Uruguayan populations, who demonstrated against the construction of the paper paste processing plants in the area (point IV- 1 of the Argentinean response, of which the opposing party is aware in its submissions).

87) The organisation known as “Gualeguaychú Citizen Environmental Assembly” made its respective presentations before the Uruguayan Ministry of Foreign Affairs (21 July 2005) and to President Néstor Kirchner, in the latter case with a petition signed by 35,484 inhabitants of that town (Argentinean documentary evidence, Annex II, 1.2 and Annex II, 1.3, of which the claimant is aware). In this petition, they denounced the Argentinean and Uruguayan governments for their non-fulfilment of the treaty that established the Statute of the Uruguay River and requested that both countries bring construction to a halt until an analysis of the environmental impact on the basin is made by a bipartite commission, and if,

based on the results of this analysis, there was a disagreement between the delegations of both countries on this point, that the matter be brought before the International Court of Justice.

88) On 6 October 2005, the request to the Argentinean Minister of Foreign Affairs that the Uruguayan Government immediately bring the works that the companies continued to carry out on the bank of the Uruguay River to a halt was reiterated, asking that in the face of the Uruguayan rejection, proceedings be initiated before the International Court of Justice at the Hague (Annex II. 1.4 of the Argentinean defence, not denied by the opposing party).

89) Meanwhile, as evidenced by a report from the police of the Province of Entre Rios, enclosed by respondent (Annex II.2 of documentary evidence), road blocks were put in place on the three international bridges linking Argentina and Uruguay, although with widely disparate intensity.

90) The first road block was put in place on international route No. 136 and provincial route No. 42 linking Gualeguaychú with Fray Bentos over the General San Martín Bridge on 8 July 2005, from 10 am to 6 pm, followed then by a temporary road block of four hours on 15 August, resuming in the month of December with two road blocks in place on 8 December (three hours), 18 December (five hours), 23 December (10 and a half hours) and 30 December 2005 (13 hours). In 2006 road blocks were put in place on 30 January, and were maintained in a sporadic and temporary manner until 3 February 2006, from which date a road block was in place for 46 days until 20 March of that year and, subsequently, a road block was in place for 26 days, from 5 April at 8 am until 2 May at 4 pm. In this way, the bridge linking Gualeguaychú with Fray Bentos was blocked for approximately 72 calendar days.

91) As regards the road connecting the city of Paysandu with Colon (over the General Artigas Bridge), it was subject to road blocks for 35 calendar days (from 16 February until 23 March 2006), then reoccurring for a period of 8 days (from 11 to 19 April 2006).

92) Finally, on the international bridge across the Salto Grande dam, road blocks were in place on 13 and 14 January and 22 February 2006 for periods of an hour, an hour and a half, and thirty minutes, respectively.

93) The aforementioned dates of the road blocks on the three international bridges correspond, with only a minor difference as to the days, with the statement by the Uruguayan representative in its submission (section IV, page 20).

94) Because of the road blocks, the Argentinean General Customs Directorate, by way of e-mail No. 47 of 8 February 2006 (Argentinean documentary evidence Annexes II.3 and II.4), apprised customs of an emergency operation to ensure the regular flow of international trade, increasing the number of customs officers at Concordia and Colon in order to respond to the increase in work generated by the diversion of operations from customs at Gualeguaychú.

95) From the aforementioned documentary evidence, as well as from the testimonies collected at the oral hearing, it appears that the residents of Gualeguaychú sought to attract the attention, as much of the Oriental Republic of Uruguay for its failure to prevent the continuation of construction works that they considered potentially harmful, as of the Republic of Argentina for its lack of definitive reaction in the face of this, which inclines this Tribunal to appreciate the residents' feeling of alarm and ensuing protest, regardless of the greatest or least justification for their actions.

96) It should be kept in mind that the lifting of the road blocks by the residents of Gualeguaychú came two weeks after the speech of the President of the Nation of Argentina on 19 April 2006, in which he made it clear to them that he did not agree with the road blocks and in which he asked them to remove them (Argentinean documentary evidence Annex II.6, not denied by the Uruguayan representative).

97) Two days after the lifting of the road blocks, that is to say, 4 May 2006, Argentina formally registered the initiation of proceedings against Uruguay before the International Court of Justice in The Hague on the dispute arising under the Statute of the Uruguay River.

98) Prior to the latter and in the face of the road blocks, on 16 January 2006 the Minister of Foreign Affairs of the Oriental Republic of Uruguay sent the Argentinean Ambassador in that country a note (item No.1 of the Uruguayan documentary evidence) in response to a note of 12 January 2006 from the Secretary of Foreign Affairs of the Republic of Argentina referring to the authorisation granted by Uruguay to two companies for the construction of their respective industrial plants for production of cellulose on the left bank of the Uruguay River, as well as an authorisation for the construction and operation of a port terminal for the exclusive use of one of these industrial plants, reiterating a previous note. In the second part of this note, the Uruguayan Foreign Minister expressed concern over the road blocks on access routes to border crossings in Argentinean territory, which hindered the free movement of people and goods in violation of the MERCOSUR agreements, causing significant harm to both countries.

99) On 13 February 2006, the President of Uruguay addressed himself to the Argentinean President requesting the lifting of the road blocks (item No. 2 of the Uruguayan documentary evidence).

100) On 22 February 2006, the (acting) Uruguayan Minister of Foreign Affairs addressed a note to his Argentinean counterpart saying that that country had decided to bring a case relating to the violation of freedom of movement in violation of MERCOSUR norms and provisions and principles of international law, requesting the initiation of direct negotiations as provided for in arts. 4 and 5 of the Olivos Protocol.

101) On 3 March 2006, the Argentinean Minister of Foreign Affairs responded, stating that the Uruguayan note did not establish which precise actions were attributed to the Argentinean Republic, nor did it identify which international norms that country considered to be violated, stating that Argentina had not hindered freedom of movement on the access routes that link both countries.

– II – E –

ON THE EXISTENCE OF A BREACH BY OMISSION OF MERCOSUR NORMS

102) The question has been raised as to whether, under MERCOSUR, the free movement of goods referred to in the Treaty of Asunción and its complementary norms are fully in force, as well as the free movement of services referred to in the Protocol of Montevideo. In this regard it has been argued that the goals of the Treaty of Asunción have not yet been achieved in their fullness (respondent's response, p. 47).

103) Economic integration can be considered as either a “situation” or a “process”. Given that integration arises from the existence of different economic zones in which goods or other economic factors originating from outside the zone are no longer discriminated against, as a “situation” integration consists of the absence of forms of discrimination between national economies, but as a “process” it consists of a set of measures to progressively abolish discrimination between economic units belonging to different nations ⁽⁴⁾ with the objective of shaping a new economic unit.

104) Consequently, it cannot be denied that as a “process”, MERCOSUR is under constant development. Nevertheless, it is also possible to point out that, except for identified exceptions, from 31 December 1999, MERCOSUR has constituted a free trade zone⁵ and that, without prejudice to the fact that commitments are being established in a dynamic manner, it is also clear that the ground covered up to now has generated clear and legally binding ties that entail commitments enforceable against State Parties.

105) With respect to the free movement of services, neither the binding nature of the Protocol of Montevideo, which governs this subject, nor the full force of that Protocol as regards the services affected

⁴ Ricardo X. Basaldúa, *MERCOSUR y Derecho de la integración*, 23 (Abeledo Perrot, 1999).

⁵ Stated in this way in *Communications Nos. 37 and 7*, Award I, 1999, § 85(vii) (28 April) and in *Application of anti-dumping measures*, Award IV, 2001, § 135 and § 138 (21 May).

by the road blocks (transport, tourism, etc.) are in question, and its effects are analysed in this case. On the other hand, the applicability of the International Agreement on Terrestrial Transportation to the question at hand will not be considered, given that its subject matter is already covered by the aforementioned Protocol of Montevideo. Lastly, neither will the free movement of people under the Protocol of Montevideo be specifically analysed, given that this right is covered indirectly by the freedoms of movement already dealt with.

106) Article 1 of the Treaty of Asunción in expressing the decision of the State Parties to create a Common Market, establishes that this Common Market, *“shall involve: the free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures”*.

107) Annex 1, Article 2(b) of the Treaty of Asunción gives a definition of the residual character of “restrictions” –as complementary to “duties and charges”– including therein *“any administrative, financial, foreign exchange or other measures by which a State Party unilaterally prevents or impedes reciprocal trade”*. It remains to be determined whether the definition cited (*“any other equivalent measures”*) covers the measures at issue. These provisions require some clarification.

108) First, the verb “involve” mentioned in the chapeau of Article 1 of the Treaty of Asunción, which means “to contain” or “to include within” indicates that the aforementioned freedom of movement is a critical objective of the agreement, to the point that the Common Market is inconceivable without this requirement, to which must be added the undertaking to eliminate tariff and non-tariff barriers which impede or prevent that freedom of movement, expanded upon in the other dispositions of the Treaty.

109) Secondly, while road blocks do not constitute a non-tariff restriction in the strict sense, as this presupposes an administrative regulation, it is not necessary that an obstacle is a restriction in this strict sense of the term for it to be considered an objective restriction to freedom of movement, as the reference the provision makes to customs duties, non-tariff barriers and all other equivalent measures is merely by way of illustration.

110) Thirdly, the movement of goods referred to is “economic”, that is the goods will remain or be consumed, used or used in manufacturing in the economic zone into which they are introduced⁽⁶⁾, and while this may be a concept that goes beyond mere transit or border crossing, as the latter has a spatial sense (whether related to political or physical geography) referring to the possibility of crossing a given economic space without being subject to, for this reason alone, direct or indirect restrictions, barriers to movement entail barriers to trade and, consequently, barriers to free economic movement.

111) It emerges from the evidence produced by the parties that the measures challenged would create – during the period considered– significant difficulties for reciprocal exchange, above all for economic agents, which reveals itself in the need to look for alternative routes for crossing the border, generally, with increased distance to travel and a consequent increase in costs. In some cases, it has been necessary to suspend transport services and, in others, businesses fundamentally linked to transit over the General San Martín bridge would suffer serious difficulties. In other words, these acts would undermine the freedom of movement that Article 1 of the Treaty of Asunción considers a basic element of the undertaking between the State Parties.

112) From all the high quality evidence produced during trial, the *ad hoc* Tribunal has had the opportunity to obtain a deep understanding of the various repercussions that the road blocks at the bridges have had on more general economic flows that have been affected, as well as the way in which the activities of economic operators, citizens and public entities in one or other country continue to be disrupted, all of whom have been obliged to modify their decisions and plans, change their ways of working, take on the

⁶ Ricardo X. Basaldúa, *MERCOSUR y Derecho de la integración*, 113 (Abeledo Perrot, 1999).

differences in customs administration charges, reorganise not only itineraries but also means of transport used, etc.

113) At the time of the road blocks, their arbitrary and unforeseeable nature, the variability in their introduction and duration has been of such significance that the *ad hoc* Arbitral Tribunal cannot but consider the resulting restrictions on freedom of movement of goods and services as an infraction of Article 1 of the Treaty of Asunción.

114) Therefore, whatever the figures and sectoral balance sheets and financial statements brought in evidence before the *ad hoc* Tribunal, it is certain that the exercise of the right to protest by the residents of Gauleguaychú has, in its exercise, surpassed the limits of respect that they, just as much as the States, in this case Argentina, owe to the fulfilment of the norm which requires the guarantee of the freedom of movement of goods and services. The intermittent, persistent and continuous nature of the road blocks strips this freedom of movement of all effect for those who are forced, by these abnormal economic circumstances, to alter their decisions as citizens or as economic agents of MERCOSUR. Providers and users of services may have had to alter their decisions because of an external and unlawful factor, changing their strategies for providing touristic or transport services, or for using them; altering the times and means of buying or supplying goods; adjusting prices and delivery times: in short, altering the freedom of movement of goods and services that the Treaty of MERCOSUR puts in place and which has, for a large number of people, remained without effect for a period of time, leading to remarkable economic losses^{vii} and constituting a very serious situation for all those who have to make up their losses as a result of the offending road blocks.

115) And this is so in every case even where it is not clear from the final balance of economic flows, nor perhaps can it be clear, taking account of the fact that the fluctuations have been dispersed over sectors, time, and affected actors; and in any case, their being unforeseeable, discontinuous, and not always registrable, the difficulty of measuring their monetary value is not a factor which undermines the reality of the freedom of movement disturbed nor of the infraction which this entails.

116) Nevertheless, in the case which concerns us, private individuals and not the State were responsible for blocking the communication route and, in principle, the State is not responsible for the actions of private individuals, but only for the acts or omissions of its own agents (⁷). Nevertheless, the State can also be considered responsible, if not for the actions of others, for its own action, if it fails to adopt the “*required conduct*”, that is for “*lack of due diligence*” in preventing or correcting the actions of private individuals which could harm the interests of another State (⁸). In such a situation, “... *we are not discussing vicarious or indirect responsibility, but responsibility for one’s own acts*” (⁹).

117) We are not dealing with a rule that specifically prescribes that, in the event that certain individuals block the international passage of vehicles, the Government of the corresponding State Party is obliged to prevent or put an end to such barriers. Nevertheless, not all behaviour need be clearly linked to a specific normative prescription.

118) The “*required conduct*” derives from the commitment of State Parties to maintain freedom of movement between the States of MERCOSUR as an innate element of the objective pursued. This gives rise to the obligation to use “*means*” to achieve the said objective even though the “*necessary measures*” to obtain this objective are not specified, and, as such, the State under obligation has an ample margin of

⁷ Eduardo Jiménez de Aréchaga, *Manual de Derecho Internacional Público*, 530 (Max Sorensen, 1985).

⁸ *Id.*

⁹ José A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, 584 (Ed. Tecnos, 1994). The Tribunal of Justice of the Andean Community has similarly held that vigilante justice carried out by which individuals or State Members is not permitted and by no means can justify the adoption of unilateral measures: Trial 2.AI-97, Judgment 391, 1998 Tribunal of Justice of the Andean Community (11 September); Trial 15-AI-2000 and 16-AI-2000, 2000 Tribunal of Justice of the Andean Community (November).

appreciation within the boundaries of which it must chose that which it considers most appropriate in the circumstances.

119) As we can see, the “required conduct” emerges from the interpretation of general rules of conduct. The norm is an example of the “open texture” of legal language (¹⁰), that is, a rule formulated in the abstract in a very general way, which creates legitimate doubts about the specific forms of conduct required by it. In such a case, it is left to the discretion of whoever is subject to the rule to opt for the best means to achieve the ends.

120) Given that all conflicts of law imply the need to decide between different and conflicting values, the duty of the government official who is faced with such a dilemma consists in taking suitable measures, applying the “precautionary principle” in the choice of what might be best, given the circumstances and taking into consideration all the values at play, in order to cause as little harm as possible to the competing interests; that is, it does not imply an overly large sacrifice for other worthwhile interests for which precautions must be taken to avoid substantial harm (¹¹).

121) If there are no clear criteria for the elaboration of MERCOSUR norms in respect of the behaviour which, concretely, should be adopted in the circumstances arising in real life, it remains to be asked whether the Government of the respondent adopted some sort of measures to protect the commitments assumed as a member of^{viii} that organisation and, if it has, if the measures that have been put in place are appropriate in the circumstances to achieve the proposed aim and at the same time respect the other interests in play.

122) In relation to the respondent’s argument that it cannot be required to suppress its citizens in order to prevent the demonstrations, the Tribunal considers that there is no question that measures could be required from the respondent State without compensation for the costs (whether social or individual) that they may entail, and that it cannot be ignored that citizens from an entire community are affected and bring claims that, in themselves, cannot be considered unjust in so far as, from their point of view, they consider themselves threatened with a future involving a decrease in quality of life; it therefore remains for us to step back and determine whether the respondent has proven in these proceedings that it was impossible to adopt more efficient measures, which they do not seem to have done.

123) The respondent considers that measures which “obstruct or hinder” exchange should result from a positive decision of a State Party but, as we have said before, State responsibility can be engaged by acts of private persons, if it fails to observe the “*required conduct*” aimed at preventing damage to another State as a result of those acts, as is the case with the road blocks, without the State Party taking suitable measures to remove the aforementioned obstruction (¹²).

– II – F –

ON THE REFERENCE TO HUMAN RIGHTS

124) The respondent has attempted to refute the charge it has allegedly incurred by omission, in this case, by referring to the repeated attempts of its authorities – both national and provincial – to dissuade the protestors from erecting road blocks. Firmer action could not have been taken without risking the violation of human rights in force or of provoking a serious disturbance of public order.

¹⁰ H. L. A. Hart, *The Concept of Law (El concepto de derecho)*, 157-159 (Genaro Carrió trans., Abeledo Perrot, 1995).

¹¹ *Id.* at 165.

¹² I L. Oppenheim, *Tratado de Derecho Internacional Público*, 387-388 (Bosch, 1961).

125) The jurisdictional competence of the Arbitral Tribunal to hear a case invoking aspects of human rights which, as such, are legally distinct from^{ix} MERCOSUR norms, has been called into question (oral evidence of the representative of the respondent on 10 August 2006).

126) The members of the Tribunal are from countries which have experienced the subjugation of recognised human rights at the heart of the normative plexus that protects that which is most intimately connected to human dignity, for which reason the claim is of the highest sensitivity for them.

127) The respondent invokes the impossibility, faced with the road blocks, of adopting measures which are firmer than that of dissuasion in so far as such measures would violate human rights like freedom of expression, of assembly and to protest which have constitutional ranking in its domestic law, while the right of integration only has legal ranking in its domestic law. In that sense, the respondent seems to rely on the fact that the content of the international commitment depends on the legal means on offer under domestic human rights law in Argentina.

128) Accepting that the fulfilment of the international obligation assumed under the Treaty of MERCOSUR, consisting in maintaining freedom of movement, depends on possibilities under domestic law itself, is in opposition to the principle that States cannot evade their international commitments by invoking domestic legal norms, which arises from Article 27 of the 1969 Vienna Convention on the Law of Treaties.

129) With respect to this, it is important to keep in mind what Article 27 of the 1969 Vienna Convention on the Law of Treaties – a treaty in force between both parties – sets out, in so far as it establishes that “*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*” In this respect it has been highlighted that the “domestic law” referred to in Article 27 includes, therefore, not only domestic laws which could be in conflict with an international treaty, but also the Constitution itself⁽¹³⁾. This opinion is also supported by international legal decisions⁽¹⁴⁾. In order to justify the course of action followed, the respondent also argues that every other action of the State – above and beyond dissuasion – “*would have entailed reactions difficult to control ... violent acts on the part of the demonstrators ...*” (response of the respondent, p. 109). On this point, the Tribunal warns that this claim rests on a hypothesis which is not supported by the evidence produced at trial.

130) The representative of Argentina maintains that the government of that country has always endeavoured to avoid, in the sphere of its domestic policy, the application of measures which could be interpreted as violating human rights in so far as they repress demonstrations including road blocks on communication routes, except where they become violent. In this respect, the discourse of the President of that nation at the signature of the agreement on the construction of housing in the Province of Buenos Aires on 19 April 2006, included in the documentary evidence by the Argentinean representative (Annex II.6 of which the representative for Uruguay is aware), is illustrative.

131) From this it emerges that, despite its critical attitude, tolerance of the road blocks seems to have been a policy of the executive branch in Argentina. Judging by the response to the claim presented by Argentina in this dispute, the explanation for and significance of this policy derives from the respect for the right to protest which that representative considers a human right protected by the Argentinean National Constitution.

¹³ Julio Barboza, *Derecho Internacional Público*, 76 (Ed. Zavalía, 2004); DE LA GUARDIA, Ernesto de la Guardia, *Derecho de los Tratados Internacionales*, 196 fn.11 (Ed. Abaco, 1997); 2 Ruda Podesta Costa, *Derecho Internacional Público*, 112 § 194 (Ed. TEA, 1985).

¹⁴ [TRANSLATE CASE NAMES] *Tratamiento de los nacionales polacos en el territorio de Danzig*, 1933 P.C.I.J. 44 at 4. See *S.S. Wimbledon*, 1923 PCIJ 1; *Comunidades greco-búlgaras*, 1930 P.C.I.J. 17 at 32; *Zonas Francas y el Distrito de Gex*, 1930 P.C.I.J. 24 at 12 and 1930 P.C.I.J. 46 at 96, 167; *Caso de las Pesquerías*, 1951 I.C.J. ¿??, at 116-137; *Nottebohm*, Preliminary Ruling, 1953 I.C.J. at 111-123; *Reparación de daños sufridos al servicio de Naciones Unidas* 1949 I.C.J. at 176-180; *Elettronica Sicula S.p.A. (ELSI)*, 1989 I.C.J. at 15.

132) In the matter of agreements for trade cooperation and facilitation, international law and domestic law as well as the legal institutions of both orders in matters of economic affairs (as is the case in MERCOSUR) are inextricably interwoven and it is impossible to understand the functioning of one of these branches of law separately from the other (¹⁵).

133) This Tribunal is aware of the fact that, in the context of multilateral trade facilitation agreements and with special reference to the WTO regime, it has been maintained that it is necessary to set aside commitments under multilateral trade agreements whenever principles and values accepted by the international community are invoked (¹⁶) and that, in cases where it is insurmountably difficult or impossible to harmonise the rights in play, the rights which are highest in the hierarchy must inevitably be protected as best as possible, as “legal goods” are none other than objects of value susceptible to hierarchical classification, with the more valuable rights privileged over the less valuable (¹⁷). However, the Tribunal considers that, even if, hypothetically, we would find ourselves before such a case, some degree of restriction would be accommodated, but never the complete annulment of the value considered less important sacrificed for the sake of the value considered more important.

134) Restrictions on transit which, as we have seen, culminate in a restriction of free economic movement within integrated zones, can be tolerated wherever the necessary precautions have been taken to minimise the inconvenience caused and where the restrictions have been adopted for short periods so as not to cause a hindrance nor serious or continuous harm, which is not the case in the situation at hand as the road blocks have been drawn out over more than three months in the middle of the summer holiday season during which the tourism industry in both countries suffers the consequences more seriously.

135) Article 75 inc. 22, second paragraph (relevant section) of the Constitution of the Argentinean Nation specifies that international declarations and conventions on human rights that the Republic of Argentina has signed and agreed to and that are therein listed are of *constitutional hierarchy, do not cause any article in the first part of the Constitution to be repealed, and must be understood as complementary to the rights and guarantees recognised by the Constitution*.

136) In relation to the claim that these instruments do not cause the rights and guarantees listed in the non-derogable core of the Basic Law to be repealed, it has been stated that the Constituent Assembly has put in place a verification procedure under which the treaties and the constitutional articles are compared and that, under this procedure, it has been verified that they do not cause any provision from the first part of the Constitution to be repealed, which means that the harmony or concordance of the treaties and the Constitution is established by judgment of the constituents which the constituted powers cannot challenge (¹⁸).

137) This suggests, then, that the rights delineated by these international treaties, along with the others enumerated by the Constitution of Argentina (Article 14 and related), are understood not as negating other unenumerated rights and guarantees but rather as giving rise to the principal of the sovereignty of the people and of the republican form of government (cf. Article 33 of the Constitution of the Argentinean Nation) and as being enjoyed by the inhabitants of the Nation “*in accordance with the laws which regulate their exercise*”, although such laws cannot alter those rights (cf. Article 28 of the Constitution of

¹⁵ John Jackson, *The World Trading System*, 26 (MIT Press, 2nd ed. 2000).

¹⁶ José Luis Pérez Gabilondo, *Manual sobre solución de controversias en la OMC*, 30-31 (Ed. Eduntref, 2004).

¹⁷ Luis Rechassens Siches, *Filosofía del Derecho*, 63 (Ed. Porrúa, 2003) states: “*Los valores presentan el espectáculo de guardar entre sí relaciones de rango o jerarquía,. Hay especies de valores que valen más que otras clases - por ejemplo, los valores éticos valen más que los utilitarios - y además, dentro de cada familia de valores, también ocurre que unos valen más que otros, por ejemplo, vale más la pureza que la decencia, vale más la sublimidad que la gracia*”. In relation to the hierarchy of values, see also Manuel García Morente, *Lecciones Preliminares de Filosofía*, 380 (Ed. Losada, 1963); Risieri Frondizi, *¿Que son los valores?*, 94 and following (Fondo de Cultura Económica, 1958).

¹⁸ *Chocobar*, *Sixto* 1996, Argentinean Supreme Court, Fallos 319:3241.

the Argentinean Nation). That is, “*the value-driven interpretation of the Constitution in accordance with the human rights contained therein should give rise to the assumption that: a) these rights are ontologically limited because they are rights “of man in society” ... (b) these rights are relative and, consequently, can be limited in so far as is reasonable according to what the Constitution authorises on this point. It will be necessary to keep in mind in interpreting such limitations that they may not exceed a reasonable limit, that is to say, they cannot destroy or alter the right they limit*”¹⁹).

138) On a related note, general international human rights treaties of constitutional hierarchy themselves recognise the relativity of the individual rights of each person, before the individual rights of others, and the possibility of their limitation by the common good. In this way, the Preamble of the Inter-American Declaration of Human Rights (Bogotá, 1948) specifies, “*the fulfilment of duty by each individual is a prerequisite to the rights of all*” and, “*rights and duties are interrelated in every social and political activity of man*”. As such, Article XXVIII of that Declaration states, “*the rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.*” For its part, Article 29.2 of the Universal Declaration on Human Rights, specifically states, “*in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*” Finally, Article 32.2 of the Pact of San José de Costa Rica states, “*the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society*”.

139) As such it must be concluded that, not even under the law of Argentina is the right to protest an absolute right and it must be limited when it affects the rights of others as per Article 29(2) of the 1948 Universal Declaration on Human Rights, Article 32(2) of the Inter-American Convention on Human Rights (Pact of San José de Costa Rica), 22 January 1969²⁰) and, regarding freedom of expression in particular, Article 19(2,3) and Article 21 of the United Nations’ International Covenant on Civil and Political Rights, 19 December 1966, which have been an integral part of the Constitution of the Argentinean Nation since 1994, having been incorporated under Article 75(22).

– II – G –

THE REQUIRED CONDUCT IN RESPONSE TO THE PRESENT CIRCUMSTANCES

140) The problem with judging questions where established institutions of domestic law are intimately linked to constitutional guarantees, as in the case of human rights, and to commitments assumed under international agreements of crucial importance, as in the case of the economic integration of South America, is rooted in the fact that, by virtue of Article 1(1) of the Olivos Protocol, the *ad hoc* Arbitral Tribunal must limit its examination to the interpretation, application and fulfilment of the norms of MERCOSUR, running the risk of exceeding its jurisdictional competence if it interprets domestic laws of one or other of the State Parties, particularly constitutional rights which citizens enjoy and the power of the State to determine its internal policy. This concerns the margin of appreciation, related to policies which the government of Argentina establishes internally, inherent in political sovereignty and which the principle of non-intervention guards against all interference by a foreign State.

141) In the case at hand, those subject to the law must find themselves confronted with the need to adopt measures subject to domestic law and involving a significant exercise of discretion, such that the issue of reasonableness and good faith can be distinguished from the issue of possible non-compliance, so that the

¹⁹ Germán J. Bidart Campos, *Teoría General de los Derechos Humanos*, 407 (Ed. Astrea, 2006).

²⁰ This states, “*The rights of each person are limited by the rights of others, by the security of all and by the just requirements of the common good, in a democratic society*”.

violation of a norm by a State Party does not necessarily mean that the State Party has acted in bad faith⁽²¹⁾.

142) There must be a presumption of good faith and it does not emerge from the accompanying evidence that Argentina provoked or encouraged the stance adopted by the residents. Furthermore, by their stance the residents wished to call the attention of the Argentinean government to the problem. Therefore, it does not emerge that the Argentinean authorities had the intention of impeding freedom of movement and evading the commitment made under Article 1 of the Treaty of Asunción, given that the policy of tolerance adopted by the Argentinean government in relation to the demonstrations by the residents of Gualeguaychú seems not to differ from that adopted in relation to other conflicts in cities or on roads in the interior of Argentina. This leads this Tribunal to conclude that there was no discriminatory intent on the part of the Argentinean government to jeopardise commercial traffic with Uruguay.

143) In addition, while the road blocks put in place by the local population and the permissive stance of the government of Argentina have produced undeniable inconvenience, they affect Uruguayan trade just as much as Argentinean trade, given that the demonstrators responsible for the road blocks do not treat goods of Uruguayan origin differently from goods of Argentinean origin, nor do they distinguish between imports or exports of one country or the other.

144) Given that this is the state of affairs, the Tribunal considers that the Argentinean government could have had reason to believe that it acted within the law in tolerating the demonstrations of the residents that blocked the roads in question, by considering that disrupting the activity of those residents by force could encroach upon their fundamental rights, and because these claims were judged worthy of consideration due to the belief (whose correctness or incorrectness cannot be judged without the benefit of hindsight) that the works at issue on Uruguayan territory would give rise to negative repercussions on Argentinean territory for quality of life and for the economic prospects of the area.

145) Nonetheless, in the specific case at hand, the effects of the actions have transcended borders and affected freedom of movement between the State Parties of MERCOSUR; that is, they have affected a legal good that Argentina committed to respecting.

146) Nevertheless, in spite of the “good faith” that could have inspired the respondent’s point of view, the choice of “required conduct” does not depend on the intention of the party, however well intentioned, but rather on the effectiveness of the adopted measures to achieve the required result, in fulfilment of commitments assumed internationally.

147) As has already been expressed, the basis of the responsibility of the State for the illegal actions of the private individuals who reside in the territory under its jurisdiction is not rooted in a supposed complicity with them, but only in the fact that the State has failed to fulfil its international obligations to prevent the potential consequences of the aforementioned harmful act⁽²²⁾.

148) States, from the time they are recognised as such under public international law, have a monopoly on coercion in order to enforce the fulfilment, with the persuasiveness that such power entails, of duties prescribed under their domestic laws and of those arising under international treaties they are party to. This power can be exercised without the necessity of bloody repressions, it being sufficient to be definitive in respecting the identified timeframe of the demonstrations, the demarcation of the physical space used for that end, with the goal of balancing the competing interests in play in order to render them

²¹ *Dumping of Chicken, Fourth Award*, 2001 MERCOSUR *ad hoc* Tribunal (21 May) in which the Tribunal said that the violation of a norm by a State Party does not necessarily mean that there was bad faith. Subsequently, this criterion was established in the decision of the WTO Appellate Body in *United States – Continued dumping and Subsidy Offset Act of 2000 (Byrd Amendment)*, 2003 WT/DS217/AB/R, WT/DS234/AB/R (27 January) at paragraph 297.

²² Eduardo Jiménez de Aréchaga, in Max Sorensen, *Manual de Derecho Internacional Público*, 530 (Fondo de Cultura Económica, 1973).

compatible with the international commitment assumed by the countries in one of the most important and noble endeavours that the countries of South America have undertaken and which it is the mission of this Tribunal to defend.

149) In this context, it does not seem compatible with the MERCOSUR regime that movement across a bridge which is the main commercial artery between Argentina and Uruguay be interrupted for a duration of more than two months without a lasting solution and that, after a hiatus of two weeks, such movement was interrupted again, for more than one month, without any measures being taken by the Argentinean government to prevent the recurrence of such acts.^x

150) The Tribunal considers none of the precedents of the European Court of Justice invoked in the claim and in the response to be applicable to this case. Not only is European Community law qualitatively different, being clearly supranational while the law of MERCOSUR is of an international nature, but also the applicable norm is different from that which governs our case, and in addition the cases are different on the facts.

151) The judgment of 9 December 1997 rendered in the case “Commission of the European Communities against the French Republic about the Free Circulation of Goods” (Case C-265/95) concerned the obstruction by private individuals of vehicles coming from another country in the Community, preventing them from circulating in French territory, but in that case the intent that drove the private individuals responsible was clearly discriminatory against the entry of goods from other countries. To this it must be added that acts of violence were carried out against the drivers and cargo, which did not occur in the case at hand.

152) The judgment of 12 June 2003 rendered in the case “Eugen Schmidberger, International Transport und Planzugue against the Republic of Austria” (Case C-112/00), concerned a road block, in Austria, on the transit route that connected German and Italy. But, in contrast to the case under analysis, that case concerned an application for damages lodged directly by a private individual and not a declaratory complaint of non-fulfilment by one State against another State, to which it should be added that the period during which traffic was obstructed was only 28 hours and not three months as in the case at hand, that it only happened once and that it concerned road blocks announced and authorised by the authorities in advance, with the time of commencement and conclusion specified.

153) Each sovereign State has full national sovereignty^{xi}, freely regulates its form of state and government, its internal organisation and the conduct of its constituent parts^{xii}, its internal and external policy⁽²³⁾, and other States cannot interfere in the concrete measures that a State adopts in its internal legal order to fulfil its international commitments. The counterpart of this right is the duty of “due diligence” in the prevention of acts of those individuals⁽²⁴⁾, a corollary imposed by international law, prescribing identified results⁽²⁵⁾, without indicating the means that must be used to obtain them, and without requiring their attainment in a specific way or by a certain organ. In this sense, it should be highlighted that each State preserves its freedom to choose the means of execution that considers appropriate, in accordance with its traditions and the fundamental principles of its political structure⁽²⁶⁾.

²³ Alfred Verdross, *Derecho Internacional Público*, 135 (Antonio Truyol y Serra trans., Aguilar, 1969). In the same line: 1 L. Oppenheim, *Tratado de Derecho Internacional Público*, 305-6 (López Olivan and Castro Rial trans., Bosch, 1961); Charles Rousseau, *Derecho Internacional Público*, 87 (Fernando Gimenez Artigues trans., Ed. Ariel, 1960); Meter James Nkambo Mugerwa, in *Manual de Derecho Internacional Público*, Max Sorensen, *Manual de Derecho Internacional Público*, 264 (Fondo de Cultura Económica, 1973).

²⁴ Eduardo Jiménez de Aréchaga, in Max Sorensen, *Manual de Derecho Internacional Público*, 531 (Fondo de Cultura Económica, 1973); Charles Rousseau, *Derecho Internacional Público*, 368 (Fernando Gimenez Artigues trans., Ed. Ariel, 1960); 2 L. Oppenheim, *Tratado de Derecho Internacional Público*, 387 (López Olivan and Castro Rial trans., Bosch, 1961).

²⁵ Alfred Verdross, *Derecho Internacional Público*, 75 (Antonio Truyol y Serra trans., Aguilar, 1969).

²⁶ Paul Reuter, *Introducción al Derecho de los Tratados*, 35 (Fondo de Cultura Económica, 1999).

154) The Tribunal, more than judging whether a government could have had justifiable reasons to consider that it acted reasonably, must consider to what extent its conduct was wise in light of all the values in play, among which not only the rights and the legitimate claims of the border citizens under threat should be taken into account, but also the restrictions that their stance gave rise to in respect of the rights and freedoms of the economic operators that carry on their crucial activities in the confidence that effective public order will guarantee the efficacy of the commitments assumed by all the State Parties of MERCOSUR.

155) On the other hand, the interpreter of the law should not apply legal norms without considering the consequences. To legitimise the road blocks would entail, on the one hand, divesting the Treaty of Asunción of an essential part of its *raison d'être* and, on the other, encouraging the reproduction of these facts in the context of disputes that will not always have the same importance as those currently under consideration, giving rise to a state of unpredictability that may lead to legal uncertainty, and establishing a counterproductive precedent for the future development of MERCOSUR.

– II – H –

THE RESPONSIBILITY OF THE FEDERAL STATE IN RELATION TO THE OMISSIONS OF THE PROVINCIAL GOVERNMENTS

156) The respondent has also stated that “*security police, in the territory of the provinces, are under the authority of^{xiii} the provinces*”, as a result of which it is not appropriate to demand of the Federal State that which does not fall within the scope of its competence (response, p. 99). Nevertheless, by the application of the general principles of international law specifically referred to in the Protocol of Olivos as normative basis for the *ad hoc* tribunals to rule on disputes, the actions of all organs of the State must be considered acts of the State, whether they involve legislative, executive, judicial or any other functions and whether they are carried out by the central government or by a territorial division of the State (²⁷).

– II – I –

THE STANCE OF THE RESIDENTS OF GUALEGUAYCHÚ

157) As we have seen, the fact that construction did not cease on the Uruguayan shore, while the population of the Argentinean shore considered construction to be an attack on the environment, and that it was not prevented by the Uruguayan Government, gave rise to a stance of protest on the part of the

²⁷ The France-Mexico Mixed Claims Commission declared that international responsibility “... no puede ser denegada, ni aún en los casos en los cuales la Constitución Federal niega al gobierno central el derecho de control sobre sus Estados miembros o el derecho de requerirles conformarse en su conducta con las normas de derecho internacional” (*Pellat Case*, 1929 U.N.R.R.I.A. V at 534-536). [*Translators’ note : The original language from the decision is ‘ne saurait être niée, pas même dans les cas où la Constitution fédérale dénierait au Gouvernement central le droit de contrôle sur les Etats particuliers, ou le droit d’exiger d’eux qu’ils conforment leur conduite aux prescriptions du droit international’*]. It has also expressed that “el Estado Federal no se puede refugiar en su Constitución, que organiza la autonomía de sus elementos componentes, para librarse de su responsabilidad internacional ...”: Nguyen Quoc Dinh, *Droit International Public* 752 (Ed. Librairie Générale de Droit et Jurisprudence, eds. Dailler and Pellet, 1992). [*Translators’ note : The original language from the decision is ‘L’État fédéral ne peut s’abriter derrière une constitution qui organise l’autonomie de ses éléments composants pour dégager sa responsabilité internationale.’*]. In the same sense, the draft articles of the International Law Commission on the international responsibility of the States; art. 4(1).

residents of the Argentinean bank and, in time, to the road blocks described earlier which gave rise to the dispute under consideration in this tribunal. The threat of harm which the aforementioned population perceive as certain and imminent and the initial lack of attention paid to their petitions by both governments, allows us to understand that in an organised manner, said population adopted an evident stance to spread, through mass media coverage of high impact demonstrations, the arguments in defence of their legitimate rights.

158) Nevertheless, the aforementioned demonstrations lost their original legitimacy insofar as the acts of vigilante justice undertaken resulted in attacks on the rights of other people who, ultimately, found themselves prevented from travelling and trading across international transit routes due to the road blocks on the same, without advance warning nor a precise time limit, for disproportionately extensive periods and during the period of the greatest trade and tourist traffic between the two countries, as we have previously seen. This entailed a factual restriction of the trade of Argentina and other countries that trade with Uruguay over this route of primary importance between the two countries.

159) The understandable feelings of the population that protested in this way on the Argentinean shore, cannot, all the same, be justifiable insofar as, as the MERCOSUR *ad hoc* tribunals expressed in Award VIII on the application of specific internal tax (IMESI) to trade in cigarettes and in Award IX on wool subsidies, under MERCOSUR law the breach of commitments by one State Party does not justify the breach of commitments by the other.

160) In a civilised society, disputes must be handled through peaceful means and not through vigilante justice. As such, it followed, albeit with a delay that led to the local residents on the Argentinean shore getting out of control, that the conflict was channelled through the corresponding institutional mechanisms by way of the claim brought by the Argentinean Republic against the Oriental Republic of Uruguay before the International Court of Justice in the Hague, invoking the violation of the Statute of the Uruguay River.

161) The said dispute implicates a bilateral norm the object of which goes beyond that of economic integration alone, which is the reason for it to be considered before another jurisdiction. The case at hand, in contrast, concerns the obstruction of transit over the bridges on the Uruguay River, with the consequent barrier to free economic movement jeopardising the fulfilment of the objectives that were undertaken under the MERCOSUR Treaty and, secondly, gives rise to distortions in Uruguayan trade not only with Argentina but also with other countries, members and non-members of MERCOSUR, with which that country trades across the terrestrial transit route through Argentinean customs territory; for both of these reasons the applicable jurisdiction is that of this court.

– II – J –

THE ISSUE OF DAMAGES

162) The claimant has stated that it does not intend to claim compensation in this action, which is without prejudice to raising the issue before a different jurisdiction; nonetheless, a large part of the evidence produced in this action refers to damages caused by the road blocks.

163) The MERCOSUR dispute resolution system, which is inspired by the regimes prevailing under the North American Free Trade Agreement (NAFTA or TLCAN in its Spanish abbreviation) and under the WTO Dispute Settlement Understanding, privileges the removal of barriers to trade over the imposition of a second retaliatory trade barrier ⁽²⁸⁾.

²⁸ Andreas Lowenfeld, *International Economic Law*, 156 (Oxford University Press, 2003) citing John Jackson; Ricardo Alonso García, *Tratado de Libre Comercio, MERCOSUR y Comunidad Europea: Solución de*

164) In this way, the obligation to make good shall be interpreted in a forward-looking sense, so as to secure the removal of the inconsistency of the illegal act and so as to limit future harm ⁽²⁹⁾, such that compensation is only foreseen if the decision handed down in the resolution of the dispute is not complied with within a reasonable time limit ⁽³⁰⁾, as arises, in the case of MERCOSUR, from Article 31 of the Olivos Protocol.

165) Finding that a national measure has violated MERCOSUR law entails no more than the obligation to come into compliance with that law. MERCOSUR norms do not bind the party in breach to make good any damages that may be caused by the illicit measure ⁽³¹⁾.

166) Consequently, the evidence referring to the harm to which the road blocks gave rise must be considered as relevant to the existence of the self-same infringement denounced as well as to the proof of a legally protected interest that actively legitimises the claimant before these courts. On the contrary, the violation could be innocuous which would mean that the claimant would not have sufficient interest in the matter to have standing to bring an action.^{xiv}

- I - K -

THE REQUEST TO REQUIRE THE RESPONDENT TO TAKE APPROPRIATE MEASURES TO PREVENT AND/OR PUT AN END TO THE ROAD BLOCKS SHOULD THE SITUATION BE REPEATED IN THE FUTURE

167) The claimant maintains that the actions of private individuals and the Argentinean inaction are incompatible with the commitments assumed by Argentina under MERCOSUR and requests that the respondent provide adequate guarantees that the circumstances occurring in the past will not be repeated.

168) The determination of future conduct to which one of the contending States would be bound would entail the Tribunal assuming legislative power, and a drawback of such a determination is that the aforementioned obligation would bind only one of the parties and not the other members of MERCOSUR, which would violate the principle of equality and reciprocity that prevails in the Treaty of Asunción.

169) Without prejudice to what was previously said and in relation to the request for future guarantees, the establishment of clear rules with which countries must comply from the moment of their pronouncement, which were previously lacking as this type of circumstances is not regulated under MERCOSUR, will identify clearly the line between what it is permitted and what it is prohibited and, as such, it is hoped that this type of dispute will not be repeated.

III

CONCLUSIONS

170) The terminological modification made by the claimant, consisting of substituting the wording used at the beginning of the negotiation stage, from “*barriers to free movement resulting from the road blocks*” to “*omission of the Argentinean State to adopt suitable measures to prevent and/or put an end to the*”

Controversias e interpretación uniforme, 63 (Mc Graw Hill, 1997), citing R. Bloch, *Aportes para la resolución de conflictos en el MERCOSUR*, Revista Comercio Exterior 25 (1995).

²⁹ This is clearly stated in Arts. 19(1) and 22 of the 1994 Marrakech Dispute Settlement Understanding.

³⁰ José Luis Perez Gabilondo, *Manual sobre Solución de Controversias en la OMC*, 232-3 (Buenos Aires, 2004).

³¹ David Luff, *Le droit de L'Organisation Mondiale du Commerce - Analyse Critique*, 295 (Bruylent, LGDJ, 2004).

barriers to free movement”, used shortly before initiation of the arbitral proceedings, did not affect the respondent’s right to a defence.

171) The Tribunal’s decision to establish its seat in the city of Montevideo, as well as being based on the legitimate exercise of a power expressly conferred by the final part of Article 38 of the Olivos Protocol, is also based on the practicality of the administrative support available in this city from the MERCOSUR Secretariat. It is worth noting that this is a decision that has been taken over and over again by successive MERCOSUR *ad hoc* Tribunals in the past, whichever parties were involved in the conflict, and to the fact that, up to now, this has never undermined the independence of the Tribunal or any of its members, nor has it ever put the claimant at an advantage.

172) The *ad hoc* Arbitral Tribunal disagrees with the contention that we find ourselves asked to consider a moot question. Even though the road blocks put in place by the residents on the Argentinean bank of the Uruguay River had already been removed at the time of the first written submission by the claimant, it is clear that it cannot be said that the respondent’s permissive stance was abandoned, despite the claimant’s request that communication routes be reopened. The repeated and continuous nature of the respondent’s tolerant attitude builds up a “*standard*” of behaviour in response to the problem, which leaves open the expectation that it could be repeated in the future, given the same or similar circumstances.

173) This *ad hoc* Tribunal expresses its understanding of the feeling of alarm and consequent protest of the residents of the Argentinean bank of the Uruguay River. They tried to draw attention to potentially harmful constructions, and did not manage to get a definitive reaction to what was going on from either government, Argentinean or Uruguayan. It is not possible for this Tribunal to enter into considerations of the solution that the law should find to the aforementioned concerns and aspirations.

174) Nevertheless, the demonstrations, which were rooted in the understandable feelings of the population that demonstrated in this way, lost their original legitimacy insofar as the acts of vigilante justice undertaken resulted in cumulative attacks on the rights of other people who, ultimately, found themselves prevented from travelling and trading across international transit routes due to the road blocks on the same, without advance warning nor a precise time limit, for disproportionately extensive periods and during the period of the greatest trade and tourist traffic between the two countries; in a civilised society conflicts must be handled by peaceful means and not through vigilante justice.

175) Without prejudice to the fact that that the conduct of blocking communication routes was carried out by private individuals, the respondent remains responsible to the extent to which it failed to fulfil its duty to adopt suitable measures to prevent or correct the acts of private individuals subject to its jurisdiction who caused damage to another Member State of MERCOSUR by violating the rules of its constitutive treaty.

176) The “required conduct” from the respondent in response to these facts arises from the commitment to assure and maintain free movement under MERCOSUR, which gives rise to the obligation to apply the measures necessary to achieve this goal.

177) Accepting that the fulfilment of the international obligation assumed under the MERCOSUR Treaty, consisting of maintaining freedom of movement, depends on possibilities under domestic law itself, is in opposition to the principle that States cannot evade their international commitments by invoking domestic legal norms, which arises from Article 27 of the 1969 Vienna Convention on the Law of Treaties, provisions which, in accordance with the provisions of Article 34 of the Olivos Protocol, are applicable law for MERCOSUR arbitral tribunals.

178) The respondent government’s policy of tolerance with regard to the road blocks put in place by the residents of the Argentinean bank of the Uruguay River, the consequences of which being the object of this dispute, finds its explanation and meaning, according to the respondent’s written response, in human rights, particularly those of expression and assembly, protected by the Argentinean Constitution, which incorporates in its articles various international treaties which establish these rights. Nevertheless, both

the Constitution of the Argentinean Nation and the international treaties invoked recognise that these rights are not absolute and that their exercise is susceptible to limitations in so far as they affect the individual rights of others, as human rights cannot exceed the bounds of reasonableness, destroying or altering the rights of other members of society.

179) Restrictions on transit which, in this case, culminate in a restriction on free economic movement within integrated zones, can be tolerated whenever the necessary precautions have been taken to minimise the inconvenience caused, so that it does not entail too great a sacrifice for other interests that are to be respected; this did not occur in this case, since the road blocks, in addition to recurring in various forms and intensities, have been drawn out over more than three months during the period of greatest commercial and tourist activity.

180) This Tribunal concludes that there was no discriminatory intent on the part of the Argentinean government to jeopardise commercial traffic with Uruguay. Good faith must be assumed and it does not emerge from the accompanying evidence that the respondent's Government promoted or encouraged the stance taken by the residents.

181) The respondent's government could have had reason to believe that it acted within the law in tolerating the demonstrations of the residents that blocked the roads in question, by considering that disrupting the activity of those residents by force could encroach upon their fundamental rights and because these claims were judged worthy of consideration due to the belief (whether true or false) that the works at issue on Uruguayan territory would give rise to negative repercussions for the quality of life and for the economic prospects of the area for the people settled on Argentinean territory.

182) In spite of the "good faith" that could have inspired the respondent's viewpoint, the choice of "required conduct" does not depend on the intention of the party, however well intentioned, but rather on the effectiveness of the adopted measures to achieve the required result, in fulfilment of commitments assumed internationally.

183) The road blocks put in place by the local population and the permissive stance of the government of Argentina have produced undeniable inconvenience that affected Uruguayan trade just as much as Argentinean trade, given that the demonstrators responsible for the road blocks do not treat goods of Uruguayan origin differently from goods of Argentinean origin, nor do they distinguish between imports or exports of one country or the other.

184) The *ad hoc* Arbitral Tribunal, in the evidentiary stage, has had the opportunity to understand the repercussions that the road blocks on the bridges have had on more general economic flows that have been affected, as well as the way in which the activities of economic operators, citizens and public entities in one or other country continue to be disrupted, all of whom were obliged to modify their decisions and plans, change their ways of working, take on the differences in the burden of customs administration charges and reorganise not only their itineraries but also the means of transport used, with the corresponding additional costs.

185) Each sovereign State has full national sovereignty^{xv}, freely regulates its form of state and government, its internal organisation and the conduct of its constituent parts^{xvi}, its internal and external policy, and other States cannot interfere in the concrete measures that a State adopts in its internal legal order to fulfil its international commitments. The counterpart of this right is the duty of "due diligence" in the prevention of acts of private individuals subject to its jurisdiction, a corollary imposed by international law, prescribing identified results, without indicating the means that must be used to obtain them.

186) The interpreter of the law should not apply legal norms without considering the consequences. To legitimise the road blocks would entail, on the one hand, divesting the Treaty of Asunción of an essential part of its *raison d'être* and, on the other, encouraging the reproduction of these facts in the context of disputes that will not always have the same importance as those currently under consideration, giving rise

to a state of unpredictability that may lead to legal uncertainty, and establishing a counterproductive precedent for the future development of MERCOSUR.

187) The actions of all organs of the State must be considered acts of the State, whether they involve legislative, executive, judicial or any other functions and whether they are carried out by the central government or by a territorial division of the State, which means that the respondent's Federal State is answerable even for the acts or omissions of the provincial governments that may entail failure to comply with international obligations assumed by that country.

188) The MERCOSUR dispute resolution system privileges the removal of barriers to trade over the imposition of a second retaliatory trade barrier. In this way, the obligation to make good shall be interpreted in a forward-looking sense, so as to secure the removal of obstacles and difficulties and overcoming occasional failure, as in the instant case, and limiting future harm. Compensation is only foreseen if the decision handed down in the resolution of the dispute is not complied with within a reasonable time limit.

189) The proof that a national measure has violated MERCOSUR law entails no more than the obligation to come into compliance with that law. MERCOSUR norms do not bind the party in breach to make good any damages that may be caused by the illicit measure.

190) The evidence referring to the harm to which the road blocks gave rise must be considered, in the present case, as relevant to the existence of the self-same infringement denounced as well as the proof of a legally protected interest that actively legitimises the claimant before these courts.

191) In response to the petition for the *ad hoc* Arbitral Tribunal to rule on future conduct to which the respondent would be bound, the tribunal finds it impermissible to assume legislative powers with a view to regulating the future conduct of the State Parties; with the insurmountable drawback, in such a case, that an obligation thereby created would bind only one of the parties and not the other members of MERCOSUR, which would violate the principle of equality and reciprocity that prevails in Treaty of Asunción.

192) Clear rules with which countries must comply from the moment of their pronouncement which fall to be established in the instant case, will identify clearly the line between what it is permitted and what it is prohibited and, as such, it is hoped that this type of dispute will not be repeated.

193) The Arbitral Tribunal has not found merit in changing the system of attribution of costs established in Article 36, first paragraph, of the Olivos Protocol, stressing that both parties have defended their respective positions vigorously and loyally.

IV

DECISION

By everything put forward and in accordance with the Olivos Protocol, its regulations and the applicable norms and principles, this *ad hoc* Tribunal constituted to hear the dispute brought by the Oriental Republic of Uruguay over the “failure of the State of Argentina to adopt suitable measures to prevent and/or put an end to the barrier to free movement caused by the road blocks in Argentinean territory of access routes to the international bridges General San Martín and General Artigas, which link the Republic of Argentina with the Oriental Republic of Uruguay” and in accordance with the foundation laid down in the precedents considered, this Tribunal unanimously **DECIDES**:

FIRST: That it has jurisdiction to hear and decide on the object of the dispute brought.

SECOND: That, partially accepting the claimant's claim, the Tribunal declares that the absence of due diligence that the Respondent should have undertaken, to prevent, put in order or, if necessary, correct the

road blocks on the routes linking the Argentinean Republic and the Oriental Republic of Uruguay, put in place by the residents of the Argentinean bank of the Uruguay River and that have been described in paragraphs 90, 91 and 92 of the reasoning of this award, is not compatible with the commitment assumed by the State Parties in the foundational treaty of MERCOSUR, to guarantee the free movement of goods and services between the territory of the respective countries.

THIRD: That, partially rejecting the claimant's claim, it is declared that, considering the circumstances of this case, the *ad hoc* Tribunal does not have the authority to adopt or promote rulings on the future conduct of the respondent.

FOURTH: In accordance with paragraph 193 of this award, no exception is made regarding the imposition of costs, in accordance with what is prescribed in this respect by Article 36, first paragraph, of the Olivos Protocol. The corresponding payments must be made by the parties through the MERCOSUR Secretariat within a non-extendable limit of thirty (30) days from notification.

FIFTH: The interventions in these arbitral proceedings will be filed with the MERCOSUR Administrative Secretariat.

Dr Luis MARTÍ MINGARRO
Presiding Arbitrator

Dr Enrique C. BARREIRA
Arbitrator

Dr José María GAMIO
Arbitrator

ⁱ What we have translated as 'duly' can also be translated literally as 'in good and required form' ("en buena y debida forma").

ⁱⁱ What we have translated as 'expressed' can also be translated literally as 'expressed, for the most part' ("expresó, por lo mayoría").

ⁱⁱⁱ What we have translated as 'both areas saw positive rather than negative growth to Uruguay's benefit, during the period of the road blocks' can also be translated literally as 'both areas, in the period of the road blocks, far from decreasing, increased in favour of Uruguay' ("ambos rudos, en el period de los cortes, lejos de disminuir, aumentaron a favor de Uruguay").

^{iv} What we have translated as 'does the right to free transit, in so far as it could affect transport of goods from or to third countries, come into force by virtue of this process of regional integration' can also be translated literally as 'is binding in this process of regional integration the right to free transit in so far as it could affect the transport of good from or to third countries' ("está vigente en este proceso de integración regional el derecho al libre tránsito en cuanto puede afectar a los transportes de bienes desde o hacia terceros países").

^v We have translated 'no constituye sino' as 'was'.

^{vi} What we have translated as 'documentary and testimonial evidence and evidence arising from a request for information' can also be translated literally as 'documentary, testimonial and information evidence' ("la prueba documental, testimonial e informativa").

^{vii} What we have translated as 'leading to remarkable economic losses' can also be translated literally as 'in an extraordinarily significant economic volume' ("en un volume economic extraordinariamente significativo").

^{viii} What we have translated as 'as a member of' can also be translated literally as 'in the heart of' ("en el seno de").

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- ^{ix} What we have translated as ‘legally distinct from’ can also be translated literally as ‘alien to’ (“ajenos a”).
- ^x What we have translated as ‘any measures being taken by the Argentinean government to prevent the recurrence of such acts’ can also be translated literally as ‘the stance of the Argentinean before such recurrence being to take measures that would prevent the repetition of these facts’ (“la actitud del Gobierno argentino ante esta reiteración haya tomado medidos que impidieran la repitición de esos hechos”).
- ^{xi} What we have translated as ‘national sovereignty’ can also be translated literally as ‘self-government’ (“autogobierno”).
- ^{xii} What we have translated as ‘constituent parts’ can also be translated literally as ‘members’ (“miembros”).
- ^{xiii} What we have translated as ‘under the authority of’ can also be translated literally as ‘belong to’ (“corresponde a”).
- ^{xiv} What we have translated as ‘which would mean that the claimant would not have sufficient interest in the matter to have standing to bring an action’ can also be translated literally as ‘a dispute with these characteristics, under this scenario, would violate the principle of requiring sufficient interest in a matter in order to have standing to bring an action’ (“una contienda de estas características en ese escenario transgrediría el principio de que se require interés para impulsar las acciones”).
- ^{xv} What we have translated as ‘national sovereignty’ can also be translated literally as ‘self-government’ (“autogobierno”).
- ^{xvi} What we have translated as ‘constituent parts’ can also be translated literally as ‘members’ (“miembros”).