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DISPUTE SETTLEMENT

REGIONAL APPROACHES

6.2 MERCOSUR



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NOTE

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WHAT YOU WILL LEARN

This module presents an overview of the dispute settlement system of the Southern Common Market (Mercado Común del Sur) – MERCOSUR. The system is concerned with disputes between Member States and those between Member States and private parties.

The history and structure of MERCOSUR are reviewed in Sections I and II. Section III examines the dispute settlement system and section IV describes cases so far adjudicated in arbitration proceedings under the system.

OBJECTIVES

After studying this module, the reader should be able to:

- Identify the main rules and principles governing the formation of MERCOSUR;
- Discuss the normative framework of MERCOSUR dispute settlement; and
- Identify the different ways of submitting a dispute to the dispute settlement mechanism.

INTRODUCTION

MERCOSUR was established in 1991. It is made up of four States: Argentina, Brazil, Paraguay and Uruguay, covering a total area of 11,900,000 km² with a total population of over 208,800,000. This regional bloc is the fourth largest economic entity in the world, after the European Union (EU), the United States and Japan. It has more than 200 million consumers and a combined gross domestic product (GDP) of more than US\$ 1 trillion.¹

¹ *Brazilian Ministry of Foreign Affairs website at: www.mre.gov.br.*

1. HISTORY

A number of Latin American countries realized the advantages of combining efforts on a regional basis to address common problems. These regional efforts, together with the strengthening of the industrial sector have contributed to the growth of their national economies. The integration process can be summarized as follows:

1.1 Treaty of Montevideo of 1960 and the creation of LAFTA

The initial stage of the Latin American integration process was the creation of the Latin American Free Trade Association (LAFTA) in 1960, and of the Latin American Economic System (LAES) in 1975.

LAFTA envisaged the creation of a free trade area in South America within a period of 12 years, with the aim of expanding markets and facilitating trade by eliminating protectionist measures through multilateral negotiations.

Some years later, LAES, a regional organ comprising 26 Member States, was formed with the purpose of promoting economic cooperation and development and encouraging trade. It also sought to reinforce regional integration mechanisms.

1.2 Treaty of Montevideo of 1980 and the creation of LAIA

Political problems posed practical difficulties to the multilateral negotiating process, and the lack of flexibility of the first Treaty of Montevideo gave rise to certain conflicts of interest, which impaired the implementation of the Treaty and the functioning of LAFTA.

In 1980, a second Treaty of Montevideo was signed, instituting the Latin American Integration Association (LAIA), which was more flexible. The objective of the new treaty was the formation of a regional grouping in which Members would provide preferential tariffs to each other. It sought to combine in a single agreement the objectives of promoting and regulating trade and economic cooperation among its Members, with a view to the gradual and progressive establishment, in the long term, of a Latin American common market.

1.3 Brazil-Argentina Economic Integration and Cooperation Program

The new Treaty of Montevideo was unable to overcome the structural problems of the association and could not achieve proper integration.

The early 1980s witnessed the restoration of democracy in several Latin American countries and, despite economic difficulties, the start of a new phase in the relationship between Argentina and Brazil. In 1986, the Presidents of those countries signed the Brazil-Argentina Integration Treaty at Foz do Iguaçu. Also known as the Integration and Economic Cooperation Program, this agreement contained several protocols providing for the facilitation of trade and joint programmes in biotechnology and capital flows.

There followed a period of increasing economic and political convergence between Brazil and Argentina, culminating in their signature of the Integration, Cooperation and Development Treaty in 1988.

In 1990, the Economic Cooperation Agreement no. 14 was signed. This consolidated the protocols in force since 1985 and introduced certain improvements, including setting a time frame for the accomplishment of a common market, establishing rules to govern the economic and commercial relations between Brazil and Argentina in the transitional period, 1991-1994, and the achievement of the free movement of goods, services and production factors in line with the objective of creating a bilateral common market.

The above agreements were the immediate precursors of MERCOSUR. With them, the integration process evolved from bilateralism to multilateralism, as envisaged in the LAFTA model.²

1.4 Adhesion of Uruguay and Paraguay to MERCOSUR

The conclusion of the bilateral agreements between Argentina and Brazil was a matter of concern for the neighbouring countries, Uruguay and Paraguay. They feared that the expansion of free trade between the two larger countries of the Southern cone might cause them to become isolated economically. This led to their adhesion to the agreements signed between Argentina and Brazil, and later to the creation of MERCOSUR.

1.5 Treaty of Asuncion and the creation of MERCOSUR

The Southern Common Market – MERCOSUR – was established by the Treaty of Asuncion between Brazil, Argentina, Uruguay and Paraguay that entered into force in 1991. The objective was to create first a free trade area, and subsequently a common market. From the institutional perspective, MERCOSUR is an intergovernmental organization, developing from a contractual type arrangement into an international structure, but without supranational authority.

² *Baptista, Luiz Olavo. O Mercosul, suas instituições e ordenamento jurídico. São Paulo, LTr; 1998, p. 30.*

1.6 Free Trade Agreements with Chile and Bolivia

In June 1996, a free trade agreement was signed by MERCOSUR with the Government of Chile, and in December of that year a similar agreement was signed by MERCOSUR with the Government of Bolivia, thereby enhancing the geographic scope of the group. Chile and Bolivia are partners, not members, of MERCOSUR.

1.7 Summing up

MERCOSUR evolved from the Latin American Free Trade Association (LAFTA) of 1960, the Latin American Integration Association (LAIA) of 1980, the Integration and Economic Cooperation Program between Brazil and Argentina of 1986, the Brazil-Argentina Integration, Cooperation and Development Treaty of 1988 and the Economic Cooperation Agreement no. 14 of 1990. The latter was the cornerstone of MERCOSUR.

The setting up of MERCOSUR was inspired by the success of other regional economic integration groupings. Members decided to adopt a gradual approach to integration, starting from a free trade area to an eventual customs union, and from a contractual agreement to a structured international organization.

2. THE INSTITUTIONAL STRUCTURE OF MERCOSUR

2.1 The Structure created by the Treaty of Asuncion (TA)

Phases of implementation of MERCOSUR

The Treaty of Asuncion provides for the transitional and progressive integration of the economies of MERCOSUR's Members.

Following the example of the development of the European Community, economic integration within MERCOSUR is to progress in stages, allowing the economies of the Members to adapt gradually to the group's objectives.

Phases of the integration process

The process of economic integration contemplated in the Treaty of Asuncion provided for the following phases:

- First phase: a free trade area,
- Second phase: a customs union, and
- Third phase: a common market.

1st phase

The first phase – a free trade area – has already been achieved, as the free movement of goods and the elimination of internal tariffs among the Members is now a reality.

2nd phase

The second phase – a customs union – which provides for the application of a common external customs tariff is in progress.

A common external tariff was established by Decision/CMC no. 7/94. However, a significant list of exceptions was adopted, due to considerable competition among Members, causing MERCOSUR to be known as an *imperfect customs union*.

3rd phase

A third phase – a common market – is planned. This is expected to go beyond the customs union by adding to it the free movement of capital and labour.

Institutional structure

The structure and contents of the Treaty of Asuncion are essentially based on the clauses and mechanisms of the Economic Cooperation Agreement no. 14 of 1990, incorporating the Common Market Group. This Group comprises representatives of the Ministries of Economy and Foreign Relations, central banks and foreign trade departments, as well as specialized subgroups, such as those responsible for transportation, industrial policies and agribusiness. The Treaty also sets a time frame for the accomplishment of the common market, the rules for the transitional period, 1991-1994, and the goal of achieving the free movement of goods, services and production factors, all of which were provided for in the Economic Cooperation Agreement no. 14 of 1990.

The principles of LAIA have also been incorporated into the Treaty of Asuncion, including the most-favoured-nation clause, for the purpose of assuring Members' compliance with their international commitments to the LAIA and the WTO Agreements.

***Transitional character
of the Treaty of
Asuncion***

The transitional nature of the Treaty of Asuncion is underscored by

- The creation of provisional institutions, which will be replaced by others to be defined in the future, and
- The existence of a number of rules having a limited period of validity, including those concerning relations with other States.³

Also provisional are the General Regime of Origin,⁴ the Safeguard Clauses,⁵ the Dispute Settlement System,⁶ the Trade Liberalization Program⁷ and the creation of the subgroups,⁸ in that their duration is limited to the transitional period.

2.2 The Structure created by the Protocol of Ouro Preto

Institutional structure

The institutional structure of MERCOSUR was established by The Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR, also known as the Protocol of Ouro Preto (POP), which entered into force in 1994. From then on, MERCOSUR became an international organization, assuming new functions and adopting more stable institutions.

***Legal nature of
MERCOSUR***

The Protocol of Ouro Preto gave MERCOSUR a legal personality under public international law,⁹ with implications both internally and internationally.

The Protocol grants MERCOSUR competence to perform all acts necessary for the accomplishment of its objectives, such as contracting, acquiring and disposing of movable and immovable assets, appearing in court, maintaining funds and making bank transfers.¹⁰

The Protocol of Ouro Preto also authorizes MERCOSUR to conclude headquarters agreements,¹¹ as well as to negotiate and sign agreements with third countries, groups of countries and international organizations.¹²

³ Article 8, TA.

⁴ Annex II, TA.

⁵ Annex IV, TA.

⁶ Annex III, TA.

⁷ Annex I, TA.

⁸ Annex V, TA.

⁹ Article 34, POP.

¹⁰ Article 35, POP.

¹¹ Article 36, POP.

¹² Article 8, IV, POP.

Lack of supranational authority

A particular feature of MERCOSUR, despite its being an international organization, is that its founding Member States did not transfer any part of their sovereignty to MERCOSUR institutions. Consequently, its institutions have no supranational authority.

MERCOSUR's principal institutions – Council of the Common Market, Common Market Group and Trade Commission – are of an intergovernmental nature, as they are composed of representatives of each Member and decisions must be taken by consensus.

MERCOSUR's organs are mainly deliberative, and their powers are generally limited to their own sphere of operation. Although the decisions of the three principal intergovernmental organs are binding, they have no power to enforce them among the Members.

Consensus rule

Owing to the lack of supranational authority, the negotiation and conclusion of treaties require the participation of all MERCOSUR Members. Agreements entered into by MERCOSUR are not directly applicable in the territory of its Members; they require approval or ratification at the national level by each Member.

Internal application of decisions

In order to ensure the simultaneous entry into force in the Members of the decisions adopted by the MERCOSUR organs, the following procedure is to be followed:

Once a decision has been adopted, the Members take the necessary measures to incorporate it into their domestic legislation and inform the Administrative Secretariat accordingly.

The decision enters into force simultaneously for all the Members 30 days after the fourth Member has communicated to the Administrative Secretariat that it has incorporated the decision into its domestic legislation. To this end, the Members, within the time limit mentioned, publish the entry into force of the decisions in question in their respective official journals.

Budget

As a result of the consensus rule adopted by MERCOSUR for the conduct of its work, the Members share in equal parts the expenses of the organization.¹³

Accession of new Members

As in other international organizations, new Members may adhere to MERCOSUR. Their membership is subject to certain conditions, such as consent by all the Members, the prevailing geopolitical situation and acceptance by the new Member of all the international instruments of MERCOSUR.

Summit

The Protocol of Ouro Preto provides that at least once every six months, the Presidents of the Member States will participate in the meetings of Common

¹³ Article 45, POP.

Market Council – a rule that results in the convening of one MERCOSUR summit every semester. The summits consider fundamental policies that should be implemented by MERCOSUR’s political and administrative bodies and problems that could not be solved by other organs of MERCOSUR.

2.3 Organs of MERCOSUR

The institutional structure of MERCOSUR comprises six organs:¹⁴

- The Common Market Council (CMC),
- The Common Market Group (MCG),
- The MERCOSUR Trade Commission (MTC),
- The Joint Parliamentary Commission (JPC),
- The Economic and Social Consultative Forum (ESCF), and
- The MERCOSUR Administrative Secretariat (MAS)

2.3.1 Common Market Council (CMC)

Role

The Common Market Council is MERCOSUR’s highest organ, with powers of political direction and decision-making. It is responsible for ensuring the achievement of the objectives defined by the Treaty of Asuncion, including the establishment of the final phase of the common market.¹⁵

Legal nature

As MERCOSUR’s supreme and representative organ, the Common Market Council is vested with powers of supervision, policy formulation, control and negotiation. But these are of an intergovernmental nature and lack supranational authority.¹⁶

Composition

The Common Market Council is composed of the Ministers of Foreign Relations and the Ministers of Economy (or Ministers of equal rank) of the Members.¹⁷ The Ministers of Foreign Relations coordinate its meetings. Other ministers or authorities of a ministerial level may participate in these meetings by invitation of the coordinators.¹⁸

Functions

The main functions of the Common Market Council are to:

- Ensure the observance of the Treaty of Asuncion, its Protocols and the agreements signed within its framework;
- Formulate policies and promote actions necessary for the development of the Common Market; and

¹⁴ Article 1, POP.

¹⁵ Article 3, POP.

¹⁶ Article 8, POP.

¹⁷ Article 4, POP.

¹⁸ Article 7, POP.

- Negotiate agreements with third countries and international organizations.¹⁹

Decision-making

Decisions, taken in the presence of all its Members, are adopted by consensus,²⁰ and they are binding on the Members.²¹

Delegation of competence

The Common Market Council may delegate its competence to negotiate and sign treaties to the Common Market Group, which in turn may delegate this power to the MERCOSUR Trade Commission.

2.3.2 Common Market Group (CMG)

Role

The Common Market Group, an intergovernmental body, is the executive organ of MERCOSUR.²² It operates on a permanent basis, assisted by the Administrative Secretariat,²³ and reports to the Common Market Council. It may delegate some of its powers to subsidiary bodies.

Composition

The Common Market Group is composed of four members and four alternates for each member, from the Ministries of Foreign Relations, the Ministries of Economy and the central banks. Their respective Governments appoint them. Like the Common Market Council, the Ministries of Foreign Relations coordinate the Group.²⁴

Functions

The functions of the Common Market Group include monitoring compliance with the Treaty of Asuncion as well as the protocols and agreements adopted within its framework; taking measures necessary to enforce the Group's decisions; drawing up a programme of work; approving the budget; proposing draft decisions for adoption by the Council; and supervising the Administrative Secretariat.

Decision-making

The decisions of the Common Market Group, like those of the Common Market Council, are to be taken by consensus, which therefore requires the presence of representatives of all the Members. The Group's norms take the form of resolutions, which are binding on all the Members.²⁵

Participation in dispute settlement

Further, the Common Market Group is competent to participate in the dispute settlement system under conditions set forth by the Protocol of Brasilia, and for such purpose it may convene such meetings as it considers necessary.²⁶ This is discussed in more detail in section 3.3 below.

¹⁹ Article 8, POP.

²⁰ Article 37, POP.

²¹ Article 9, POP.

²² Article 13, TA and Article 10, POP.

²³ Article 15, TA.

²⁴ Article 11, POP.

²⁵ Article 15, POP.

²⁶ Article 4, "g", GMC Internal Rules.

2.3.3 MERCOSUR Trade Commission (MTC)

Role

The MERCOSUR Trade Commission is composed of four members from each Member State, and is coordinated by the Ministries of Foreign Relations.²⁷

Functions

The MERCOSUR Trade Commission is the central organ of MERCOSUR, responsible mainly for the group's trade policies.²⁸ It reports to and assists the Common Market Group.²⁹

Among the common trade policies of MERCOSUR only the common external tariff, an exceptions list and a customs regime have been established so far. A common policy on economic defense measures (e.g. subsidies and dumping) is under preparation. Recently, the Common Market Council issued a decision dealing with anti-trust and anti-dumping measures.

Directives

The decisions of the MERCOSUR Trade Commission take the form of Directives and Proposals, the former being mandatory for Members.³⁰

Participation in dispute settlement

The MERCOSUR Trade Commission participates in the dispute settlement process.³¹ It is competent to consider complaints referred to it by the National Sections, and submitted by Members or private parties – legal or natural persons – regarding the interpretation, application or violation of the provisions of the Treaty of Asuncion and the subsequent agreements and protocols adopted within its framework.

In this case, the MERCOSUR Trade Commission plays the role of first instance in the dispute settlement system. However, the presentation of a complaint to the MERCOSUR Trade Commission for examination does not prevent a Member from having recourse to the dispute settlement bodies of MERCOSUR. This is discussed in more detail in section 3.3 below.

National Sections

The National Sections of the MERCOSUR Trade Commission represent the interface between civil society and the private sector in the Member States on the one hand and the MERCOSUR Trade Commission on the other. The internal organization of each Section is left to the discretion of its Member State.

²⁷ Article 17, POP.

²⁸ Articles 16 and 19, POP.

²⁹ Article 16, POP.

³⁰ Article 20, POP.

³¹ Article 21, POP.

2.3.4 Joint Parliamentary Commission (JPC)

Role

The Joint Parliamentary Commission is an organ of assistance and liaison between MERCOSUR and the parliaments of the Members.³² Its main objective is to accelerate the incorporation of MERCOSUR's treaties and decisions in domestic legislation, and to support harmonization of the trade laws of the Members.³³

The Joint Parliamentary Commission is not a part of MERCOSUR's intergovernmental structure, but a cooperating organ.

Composition

The Joint Parliamentary Commission consists of an equal number of representatives from each Member's parliament, designated by their parliaments.

Decision-making

The Joint Parliamentary Commission issues recommendations, addressed through the Common Market Group, which forwards them to the Common Market Council.³⁴

2.3.5 Economic and Social Consultative Forum (ESCF)

Role

The Economic and Social Consultative Forum is an organ that represents the economic and social sectors of the Members.

Functions

The functions of the Economic and Social Consultative Forum, which, as the name implies, is essentially a consultative body, are to foster the views of civil society and the private sector concerning issues featuring on the agenda of MERCOSUR.

Decision-making

The Economic and Social Consultative Forum addresses recommendations to the Common Market Group.

2.3.6 MERCOSUR Administrative Secretariat (MAS)

Role

The MERCOSUR Administrative Secretariat provides operational support to the organs of MERCOSUR.

2.4 Summing up

MERCOSUR was created in 1991 by the Treaty of Asuncion, and institutionalized in 1994 by the Protocol of Ouro Preto. The first phase (the free trade area) has already been achieved. The second phase (the customs

³² Article 22, POP.

³³ Article 25, POP.

³⁴ Article 26, POP.

union) is currently under way, and the third phase (the common market) has not yet been accomplished.

MERCOSUR is an international, intergovernmental organization, but without supranational institutions or authority. As a result, the negotiation and conclusion of agreements within the organization require the consensus of all the Members, and international agreements have to be accepted or ratified by each Member in order to become binding.

The main organs of MERCOSUR are the Common Market Council, the Common Market Group, the Trade Commission, the Joint Parliamentary Commission, the Economic and Social Consultative Forum and the Administrative Secretariat.

The Common Market Council is the political body which issues Decisions; the Common Market Group is the executive organ which issues Resolutions; the Trade Commission is the central organ for trade policy which issues Directives and Proposals. The Joint Parliamentary Commission acts as a liaison between MERCOSUR and the parliaments of the Members; the Economic and Social Consultative Forum is the channel between civil society and the private sector on the one hand, and MERCOSUR on the other; and the Administrative Secretariat is responsible for providing operational support to the organization and its organs.

2.5 Test Your Understanding

After studying this section, the reader should be able to answer the following questions:

- 1. What changes were introduced to the structure of MERCOSUR by the Protocol of Ouro Preto?**
- 2. What is the legal nature of the decisions taken by the different bodies of MERCOSUR?**
- 3. What is the competence of the Common Market Council, the Common Market Group and the MERCOSUR Trade Commission, respectively?**
- 4. What is the purpose of the Joint Parliamentary Commission?**

3. THE MERCOSUR DISPUTE SETTLEMENT SYSTEM

3.1 Introduction

In the international arena, dispute resolution among States is traditionally conducted through negotiation, conciliation, mediation and arbitration, with due regard to the equality of States, and therefore no State may be subjected to the jurisdiction of another.

However, the successful completion of economic integration processes requires a dispute settlement mechanism that is more elaborate and permanent than the traditional system offered by public international law. In the case of MERCOSUR, a dispute settlement system is evolving in harmony with the political and economic conditions of its Members.

This evolution has occurred in three stages:

- Treaty of Asuncion (TA), which entered into force on the 29 November 1991;
- The Protocol of Brasilia (PB), which entered into force on the 22 April 1993, and the Protocol of Ouro Preto (POP), which entered into force on the 15 December 1995; and
- The Protocol of Olivos (PO) signed on 18 February 2002. This protocol had not yet entered into force on the 1 January 2003.

3.1.1 *The System Created by the Treaty of Asuncion (TA)*

The Treaty of Asuncion established a skeleton dispute settlement system based on consultation and negotiation.

Any dispute arising between the Members as a result of their interpretation and application of the Treaty of Asuncion was to be settled by means of direct negotiations. If no solution could be found, the Members were to refer their dispute to the Common Market Group which, after an examination of the issues, was expected, within a period of 60 days, to make a recommendation to the Parties. To that end, the Group was empowered to convene a panel of experts in order to obtain the necessary technical advice. If it failed to find a solution, the dispute was to be referred to the Common Market Council to make a recommendation.

At the time of the signature of the Treaty of Asuncion, the negotiators instructed the Common Market Group to propose to the Governments of the Members a more comprehensive and transitional system for the settlement of disputes. To this end the Protocol of Brasilia was adopted.

3.1.2 The System Created by the Protocol of Brasilia (PB)

The Protocol of Brasilia established a dispute settlement system with the following components:

- Direct negotiations between the States to a dispute;
- Participation of the Common Market Group, acting as a conciliator; and
- *Ad hoc* arbitration.

In addition, this Protocol provides that States and private parties shall have access to the dispute settlement system. As a result, the system can deal with:

- Conflicts between the States in respect of interpretation, application or non-compliance with the legal sources of MERCOSUR,³⁵
- Complaints presented by private parties – natural or legal persons – against the sanction or application by any of the Members of legal or administrative measures that have a restrictive or discriminatory effect or result in unfair competition, in violation of the legal sources of MERCOSUR.³⁶

3.1.3 The System Created by the Protocol of Olivos (PO)

In February 2002, the presidents of the four Member States, meeting at a summit of the Common Market Council, adopted the Protocol of Olivos. This Protocol provides for:

- A Permanent Tribunal of Review (see section 3.3.5 below) as a permanent body to hear appeals from the *ad hoc* arbitral tribunals; and
- Compensatory measures and mechanisms for challenging them.

However, as of 1 January 2003, this Protocol had not yet entered into force.

3.2 Legal Sources of MERCOSUR: the applicable law

Legal sources

The Protocol of Ouro Preto establishes MERCOSUR's legal sources, which are:

³⁵ Article 43, POP, and Article 1, PB.

³⁶ Article 25, PB.

- The Treaty of Asuncion, its protocols and the additional or supplementary instruments;
- The agreements concluded within the framework of the Treaty of Asuncion and its protocols; and
- Derived law, comprising Decisions of the Council of the Common Market, Resolutions of the Common Market Group and Directives of the MERCOSUR Trade Commission, adopted since the entry into force of the Treaty of Asuncion.³⁷ An array of such Decisions, Resolutions and Directives has been issued on a variety of subjects such as judicial cooperation, dumping and subsidies, consumers, investments and capital flows, movement of goods and movement of persons and education, to name a few. Some of these, however, have not yet become MERCOSUR law, as they have not been ratified by Members at the national level.

Internal application of the legal sources

The decisions adopted by the organs of MERCOSUR are binding, and, when necessary, must be incorporated into the national legal systems in accordance with the procedures applicable in each Member State. After all the Members have concluded this process, the Administrative Secretariat informs each Member of the actions taken by the other Members in this regard, and the legislation becomes effective simultaneously 30 days later for all the Members.³⁸

If any of the Members should fail to complete this process of incorporating a given norm into their national legal systems, the application of that norm will remain suspended for all the Members.

However, norms which do not affect individuals by creating rights and obligations that can be imposed on them, do not need to be incorporated into national law by each Member in order to take effect. For example, a resolution of the Common Market Group setting up new subgroups or modifying existing ones, or a decision of the Common Market Group approving its rules of procedure, can take effect without the need for domestic legislation.

Relation with national laws

Because MERCOSUR's norms cannot be applied directly, and have no priority over national norms, only those norms and decisions of the common organs that are incorporated in the domestic legal systems, in accordance with the procedures provided for in each Member's legal system, shall become mandatory within their respective territories.³⁹

The legal sources of MERCOSUR are part of a unique body of law, because, despite the mandatory character of the norms,⁴⁰ MERCOSUR does not possess coercive power for enforcing their application on the Members.⁴¹

³⁷ Article 41, POP.

³⁸ Article 40, POP.

³⁹ Article 42, POP.

⁴⁰ Articles 9, 15 and 20, POP.

⁴¹ Reis, *Márcio Monteiro. Op. cit., pp. 242.*

External legal sources

External legal sources, such as the principles and rules of public international law and the internal laws of the Members relevant to the functioning of the regional grouping, are also applicable. Although the Treaty of Asuncion and the Protocol of Ouro Preto make no reference to them, there is no question that they, along with other instruments, such as the Charter of the United Nations, are applicable to disputes within MERCOSUR.

3.3 Settlement of Disputes Involving Members

Subject-matter

MERCOSUR's dispute settlement system concerns all controversies between the Members regarding the interpretation, application or non-compliance with the provisions of the Treaty of Asuncion and the agreements made within its framework, as well as the Decisions of the Common Market Council, Resolutions of the Common Market Group and Directives of the MERCOSUR Trade Commission.⁴²

A judgment in equity (*ex aequo et bono*) is possible if the parties have previously authorized an *ad hoc* arbitration tribunal to do so.

Choice of forum

Because all the Members of MERCOSUR are also members of the World Trade Organization (WTO), their disputes relating to a number of rules (i.e. dumping or subsidies) can also be taken to the WTO or another preferential trade arrangement for discussion, negotiation or adjudication according to the rules of the WTO or that other organization.⁴³

When it enters into force, the Protocol of Olivos will rule out the possibility of the same dispute being submitted, either concomitantly or successively, to both fora, thus avoiding the risk of conflicting decisions by two equally competent systems of dispute settlement.⁴⁴ Thus, if a dispute is submitted to a particular forum, the parties will no longer be able to resort to another forum for settling the same dispute.

3.3.1 Direct Negotiations Between States

Members involved in a dispute are expected to try and resolve it first through direct negotiations. Negotiations aim at a rapid settlement of the dispute, with the least possible political friction among the parties involved. During direct negotiations, there is no intervention by any third party, efforts for an amicable solution being limited to the parties themselves.

This initial procedure is mandatory, but must take no longer than 15 days from the date on which one Member submits the complaint to the other Member

⁴² Article 43, POP.

⁴³ In the dispute over the export of chicken in whole by Brazil, the arbitral award favoured Argentina, but Brazil submitted the case to the WTO dispute settlement mechanism, where it still remains unresolved.

⁴⁴ Article 1.2, PO (not effective until entry into force).

– unless that period is extended by mutual consent of the parties. The activities and the results obtained during direct negotiations should be reported by the parties to the dispute to the Common Market Group through the Administrative Secretariat.⁴⁵

The negotiators can call on experts to provide technical support even in this first phase of the procedure.⁴⁶

3.3.2 Intervention of the Common Market Group

If the direct negotiations are unsuccessful, the States Parties to the dispute may resort either directly to the arbitral procedure (see 3.3.4 below) or to the Common Market Group.

The Common Market Group, acting as a conciliator, will assess the situation, hear the parties and, if it deems necessary, request the

assistance of specialists. The Group will then formulate recommendations for a solution to the dispute.

This procedure should last no more than 30 days, beginning from the date on which the controversy was submitted to the Common Market Group.⁴⁷

3.3.3 Complaints to the MERCOSUR Trade Commission

The Protocol of Ouro Preto introduced the possibility of States or private parties (natural or legal persons) to submit complaints to the MERCOSUR Trade Commission. The Commission considers complaints referred to it by its National Sections whenever the cause of the complaint concerns a matter within its competence.⁴⁸ The Commission's mandate is to monitor the application of the common trade policy instruments.

Submission of a complaint to the MERCOSUR Trade Commission

The procedure for submitting a complaint is set out in the annex to the Protocol of Ouro Preto. It is divided into a written and an oral phase.

If no agreement is reached during the direct negotiations, or the controversy is only partially solved, the claimant State may present its complaint to the Chairperson of the MERCOSUR Trade Commission. The Chairperson is required to place the subject on the agenda of the first subsequent meeting of the Commission at least one week before the meeting.

Technical Committee

If no decision is taken at that meeting, the Trade Commission may request the assistance of a MERCOSUR Technical Committee, which will issue a consensus

⁴⁵ Articles 3.1 and 3.2, PB.

⁴⁶ Article 4.2 PB and Article 2, PO (not effective until entry into force).

⁴⁷ Articles 4, 5 and 6, PB.

⁴⁸ Article 21 and Annex to POP.

opinion on the matter within 30 days. If there is no consensus, the opinion or the conclusions of the Technical Committee are to be taken into consideration by the MERCOSUR Trade Commission in its decision on the complaint.⁴⁹

**Decisions by the
MERCOSUR
Trade Commission**

The MERCOSUR Trade Commission is expected to decide the question at the first meeting following its receipt of the opinion of the Technical Committee, and an extraordinary meeting may be held for that purpose.⁵⁰

**Remittance of
complaint to the
Common Market
Group**

If no consensus is reached at the meeting, the MERCOSUR Trade Commission sends the various alternatives proposed, together with the opinion or conclusions of the Technical Committee, to the Common Market Group. The Group then has to reach a decision within 30 days of its receipt of the Trade Commission's report.⁵¹

**Decision by the
Common Market
Group**

If a consensus is reached in favour of the complaining State, the other party must implement the measures approved by the MERCOSUR Trade Commission or by the Common Market Group, within the time determined by it.

If no consensus is reached among the members of the MERCOSUR Trade Commission or the Common Market Group, or if the time assigned in the decision lapses without the State complained against complying with its contents, the claimant State may directly request the initiation of arbitral proceedings provided for in the Protocol of Brasilia, and such a decision is to be reported to the Administrative Secretariat.⁵²

**Powers of the
Common Market
Group and the
Trade Commission**

Both the Common Market Group and the Trade Commission may issue recommendations, but they have no coercive powers to order implementation or enforcement, or to apply sanctions against a Member.

3.3.4 Ad Hoc Arbitration

Members have access to *ad hoc* arbitration in MERCOSUR. When a dispute cannot be resolved by direct negotiations, either by the MERCOSUR Trade Commission or the Common Market Group, a party to the dispute may communicate to the Administrative Secretariat its intention to resort to the arbitral procedure. The Secretariat conveys this to the other party or parties concerned and to the Common Market Group.⁵³ The Secretariat also provides administrative support to the arbitral tribunal.

**Submission to
arbitration**

Members recognize the jurisdiction of the *ad hoc* arbitral tribunal without the need for a special or subsequent agreement between them.⁵⁴ The arbitral tribunal

⁴⁹ Article 3, Annex to POP.

⁵⁰ Article 4, Annex to POP.

⁵¹ Article 5, Annex to POP.

⁵² Article 6 and 7, Annex to POP.

⁵³ Article 7, PB.

⁵⁴ Article 8, PB.

is always *ad hoc* and is composed of three arbitrators chosen from a list previously designated by each Member and on file with the Administrative Secretariat.⁵⁵ (When the Protocol of Olivos comes into force, each Member will designate 12 experts.)⁵⁶

Appointment of arbitrators by the Parties

Each party appoints one arbitrator and, by mutual agreement, they also appoint the third arbitrator, who will chair the tribunal. The third arbitrator can not be a national of the countries that are parties to the dispute.

Each arbitrator must have an alternate, in the event of incapacity or withdrawal of any of the titular arbitrators. The arbitrators are to be appointed within 15 days from receipt of the request for arbitration by the Administrative Secretariat.

Appointment of arbitrators by the Administrative Secretariat

If a State has not appointed its arbitrator within 15 days, the appointment is to be made by the Administrative Secretariat within two days, by drawing lots from among its nationals listed on the established list of arbitrators.⁵⁷

Where the parties do not reach an agreement on the choice of the third arbitrator, this person will be designated by the Administrative Secretariat by drawing lots from among the established list, excluding nationals of the parties in dispute.⁵⁸

The arbitrators must be jurists of recognized competence on the matters featuring in the dispute between the Members.

Competence of the arbitral tribunal to establish its seat, and rules of procedure

In each case, the *ad hoc* arbitral tribunal establishes its seat in the territory of one of the Members and adopts its rules of procedure. The rules should ensure that the parties will have the fullest opportunity to be heard and to submit their arguments and evidence, and that the proceedings will be expeditious.⁵⁹

If a party questions the competence of the *ad hoc* arbitration tribunal, arguing that the subject-matter of the dispute is outside the scope of the Agreements and Protocols of MERCOSUR, the arbitrators will decide on the question of their jurisdiction.⁶⁰

Representation of the Parties

The Members in dispute may appoint counsel and advisers to represent them before the tribunal. Two or more Members having the same position (similar claims) should appoint one arbitrator and a common counsel.

Information on prior remedies

The request for arbitration must present information on previous remedies and relief sought by the parties in an attempt to resolve their dispute (e.g.

⁵⁵ Articles 8 to 10, PB.

⁵⁶ Article 11.1, PO (not effective until entry into force).

⁵⁷ Article 11, PO (not effective until entry into force).

⁵⁸ Article 12, PB.

⁵⁹ Article 15, PB.

⁶⁰ Rosa, Luis Fernando Franceschini da. *Mercosul e função judicial: realidade e superação*. São Paulo, LT; 1997, pp. 95.

direct negotiations or negotiations in the Common Market Group), and should provide a brief description of the principles of fact and law supporting their respective positions.⁶¹

Definition of the issues in dispute

The issues in dispute are defined in the memorials and counter-memorials of the parties. They cannot subsequently be altered.⁶²

Provisional measures

If a party provides evidence that there are well-founded grounds to believe that the continuation of the current situation will cause severe and irreparable damage, it may request the *ad hoc* arbitral tribunal for provisional measures to prevent such damage. The provisional measures must be complied with immediately, and until such time as a decision on the merits is issued.⁶³

The *ad hoc* arbitral tribunal may revoke the provisional measures at any time. If, however, the measures are not revoked in the final award, they will be maintained until the first hearing of the Permanent Tribunal of Review (PTR),⁶⁴ which will decide on their continuation or abrogation.

Applicable law

See section 3.2 above.

Arbitral decision

The *ad hoc* arbitral tribunal is expected to deliver its decision within 60 days from the date of appointment of its chairperson. This period may be extended by 30 days.⁶⁵

The decision should be made by majority vote, should be supported by reasons, and be signed by the chairperson and the other arbitrators. In order to ensure the independence of the arbitrators, decisions may not mention a dissenting vote, and each arbitrator's opinion is kept confidential.⁶⁶

The decision of the *ad hoc* arbitral tribunal is binding on the parties and has the effect of *res judicata*.⁶⁷ The decision should be complied with within 15 days, unless the tribunal fixes a different time limit.

Request for clarification

Within 15 days following the decision, a party to the dispute may request the tribunal to give a clarification of the contents of the decision, or request a clarification as to how it should be complied with. The tribunal is expected to give a reply within 15 days.⁶⁸

Expenses

The State which appointed the arbitrator is responsible for his or her fees, while those of the chairperson, as well as the other expenses necessary for the functioning of the *ad hoc* arbitral tribunal, will be borne in equal parts by the Members involved in the dispute, unless the *ad hoc* arbitral tribunal decides otherwise.⁶⁹

⁶¹ Article 16, PB.

⁶² Article 14, PO (not effective until entry into force).

⁶³ Article 18, PB.

⁶⁴ Article 15.3, PO (not effective until entry into force).

⁶⁵ Article 20.1, PB.

⁶⁶ Article 20.2, PB.

⁶⁷ Article 21, PB.

⁶⁸ Article 22, PB.

⁶⁹ Article 24, PB and Article 36 (1) PO (not effective until entry into force).

3.3.5 *Permanent Tribunal of Review*

Upon the entry into force of the Protocol of Olivos, the Permanent Tribunal of Review (PTR), headquartered in Asuncion,⁷⁰ will hear appeals from decisions made by *ad hoc* arbitral tribunals. Only Members will have access to this tribunal.

Procedure and object

An appeal to the PTR should be presented within 15 days from the date the award is notified to the parties by the *ad hoc* arbitral tribunal.

Only matters of law raised and the legal interpretation developed in the arbitration award can be subject to an appeal. An arbitration award made in equity (*ex aequo et bono*) cannot be appealed.

Composition

The PTR is to be composed of five arbitrators and their alternates.⁷¹ Each Member will designate an arbitrator for a term of two years, renewable for two consecutive terms. The fifth arbitrator will be appointed by mutual agreement of the Members for a term of three years, not renewable unless all the Members agree otherwise.

The PTR's chairperson will be chosen from a list of eight persons compiled by the Administrative Secretariat (each Member will designate two persons). The chairperson should be a national of a Member State. In case of disagreement among the Members, the chairperson will be designated by drawing lots from among the eight persons on the list.

The composition of the PTR in a particular case will vary with the number of Members involved in the dispute: if two States are involved, the PTR will have three arbitrators, but if more than two States are parties to the dispute, the PTR will consist of four arbitrators and the chairperson.⁷²

Response to appeal

The State appealed against will be required to respond to the appeal within 15 days from the date of the notification of its filing. The PTR will have to make its decision within 30 days, which can be extended for another 15 days. The tribunal may affirm, modify or vacate the award of the *ad hoc* arbitral tribunal. The decision shall have immediate effect as *res judicata* and shall not be subject to further appeals.⁷³

Direct access

The Protocol of Olivos authorizes direct access to the PTR.⁷⁴ If the parties so desire, they may, by mutual agreement, elect the PTR as a sole instance for the settlement of the dispute, in which case the PTR will have the same competence as an *ad hoc* arbitral tribunal. In that case, the PTR will act as the final arbitral tribunal, and no appeal of its award will be accepted.

⁷⁰ Articles 17 et seq., PO (not effective until entry into force).

⁷¹ The composition of the PTR will be subject to alteration as new members adhere to MERCOSUR, since the PO refers to the designation of one arbitrator by each Member.

⁷² Article 20, PO (not effective until entry into force).

⁷³ Article 26.2, PO (not effective until entry into force).

⁷⁴ Articles 23 et seq., PO (not effective until entry into force).

Arbitration awards

The award should be made by a majority vote of the arbitrators and the reasons for the award should be provided. It should be signed by all the arbitrators. A dissenting arbitrator may not explain his/her vote, and the deliberations will be confidential and closed to the parties.⁷⁵

The PTR award will be binding on the parties to the dispute from the moment it is notified to them, and the parties will be required to comply with it within 30 days.⁷⁶

Clarification of the award

A party to a dispute may request the PTR for a clarification of its award as regards the manner in which it should be implemented. The request should be made within 15 days after the notification of the award.⁷⁷

Means for coercive imposition

In order to ensure compliance with the arbitral award, the Protocol of Olivos provides for the application of temporary compensatory measures (i.e. the suspension of concessions or other equivalent obligations). The purpose of such measures is to make the defending State comply with the award. Such measures may be taken by the claimant Member for a period of one year from the date the award becomes *res judicata*.

Compensatory measures should in principle be taken in the economic sector that constitutes the object of the dispute, but if they prove to be ineffective they may be applied in another economic sector. The claimant State should inform the defending State 15 days in advance of the application of the measures.⁷⁸

Term for implementation of the award

The award of the *ad hoc* arbitral tribunal or the PTR, as the case may be, shall be implemented within 30 days of its notification, unless the tribunal decides otherwise.

The State that has to implement the award shall inform the other party to the dispute and the Common Market Group of the measures it plans to take to implement the award, within 15 days of its notification.⁷⁹

Differences over implementation

If the claimant State believes that the measures adopted by the defending State do not comply with the award, the former will have 30 days from the adoption of the measures to submit the matter to the *ad hoc* tribunal or the PTR, as the case may be, which shall give an opinion within 30 days.⁸⁰

Challenging compensatory measures

The States Parties to a dispute may disagree on the adequacy of the compensatory measures (a) if the measures adopted by the defending



⁷⁵ Article 25, PO (not effective until entry into force).

⁷⁶ Article 29.1, PO (not effective until entry into force).

⁷⁷ Article 28, PO (not effective until entry into force).

⁷⁸ Article 31, PO (not effective until entry into force). This provision applies to awards of an *ad hoc* tribunal and to awards of the PTR.

⁷⁹ Article 29, PO (not effective until entry into force).

⁸⁰ Article 30, PO (not effective until entry into force).

State are insufficient (in the view of the claimant State), or (b) if the measures adopted by the claimant State are excessive (in the view of the defending State).

The matter should be brought within 15 days to the *ad hoc* tribunal or the PTR, as the case may be, which will have 30 days to take a decision on the matter. The State that adopted the compensatory measures will have 10 days to adapt them to the decision of the tribunal.⁸¹

3.4 Settlement of Disputes between Member States and Private Persons

Access of private parties

Although the dispute settlement system is aimed essentially at resolving disputes between the Members of MERCOSUR, the Protocols of Brasilia and Olivos also provide for the possibility of complaints by private parties, individuals or corporations, provided that they are channelled to the Common Market Group through the National Section of the country of origin of the complaining party (place of usual residence or seat of business). Upon acceptance of the complaint by the National Section, the litigating party will be the Member that is the country of origin of the private party.

Object

The private party's complaint may refer to the application by a Member of legal or administrative measures that have a restrictive or discriminatory effect, or have the effect of unfair competition, in violation of the Treaty of Asuncion, the agreements made within its framework, the Decisions of the Common Market Council, the Resolutions of the Common Market Group or the Directives of the Trade Commission.⁸²

Procedure

The intervention of the MERCOSUR Trade Commission is also possible in complaints made by private parties, using the procedural rules for the settlement of conflicts between Members.

Once the National Section of the Common Market Group processes the complaint, the private party plays an active role in the proceedings related to it.⁸³ The active involvement of the interested private party has also been normal practice where the dispute is settled in the negotiation phase or within the Common Market Group.⁸⁴

⁸¹ Article 32, PO (not effective until entry into force).

⁸² Article 25, PB and Article 43, POP.

⁸³

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, in which the claimant company participated actively, supported by the Uruguayan delegation.

⁸⁴ *Baptista, Luiz Olavo.*

O Mercosul, suas instituições e ordenamento jurídico
, São Paulo: LTr, 1998., p. 168.

3.4.1 Procedure for Complaints to the National Sections of the Trade Commission or the Common Market Group

Initiation of action

The party must address the National Section of the MERCOSUR Trade Commission⁸⁵ or the Common Market Group⁸⁶ of the Member where the claimant has its habitual residence or its seat of business, formalizing the complaint through a reasoned petition. The petition will include evidence showing the damage suffered or the threat of damage, and the effective violation of a legal norm of MERCOSUR.

A complaint can be made against Members who have the obligation to promote free competition and impede unfair competition in their territories in accordance with the constitutive and derived norms of MERCOSUR.

Admissibility of complaint

The National Section of the Trade Commission or of the Common Market Group will assess the claim. For it to be admissible, the complaint must be made in the form of a reasoned petition, accompanied by evidence of the existence of a violation of a norm, and present or imminent damage.

Option

The National Section which accepts the complaint, in consultation with the private party, can either (a) request direct consultations with the National Section of the Member against which the complaint is made, with the aim of finding a solution to the matter, or (b) refer the complaint directly to the Common Market Group.

Direct consultations

In the case of direct consultations, the private party is represented by its country's National Section. If the two National Sections do not reach agreement within 15 days, the private party may request its country's National Section to forward the complaint to the Common Market Group. However, the National Section has discretionary power to decide whether or not to forward the complaint.

3.4.2 Consideration by the Common Market Group

The Common Market Group assesses the admissibility of the complaint submitted by the National Section.⁸⁷ The Group can reject the complaint if it concludes that there are insufficient grounds to sustain it. If the complaint is accepted, the Group convenes a group of three experts, one of which must not be a national of the States Parties to the dispute.

The affected private party and the States involved have the right to be heard and to submit evidence. The involvement of the private party in the proceedings is quite significant at this stage.

⁸⁵ Article 1, Annex to POP.

⁸⁶ Article 26, 1, PB.

⁸⁷ Article 29, PB.

Opinion of the panel of experts

The conclusions of the panel of experts must be issued within 30 days of their designation, a period which cannot be extended. If, in their opinion, the complaint is without merits, the case is terminated. Conversely, if the decision is in favour of the claimant, the Member who sponsored the complaint has the right to demand from the other State that corrective measures be adopted or that the disputed measure be annulled within 15 days. If this demand is not met within this time period, the claimant State can then proceed directly to the arbitral procedure.⁸⁸

The costs of the experts are shared equally by the parties directly involved in the procedure, unless the Common Market Group decides otherwise.⁸⁹

3.5 Summing up

MERCOSUR's dispute settlement system was initially created by the Treaty of Asuncion, and later implemented by the Protocol of Brasilia of 1991, which was to be in force during the transitional period. The system will further evolve as the Protocol of Olivos of 2002 enters into force.

The system applies to conflicts between Members with regard to the interpretation, application or non-compliance of legal norms of MERCOSUR, and to complaints presented by private parties against Members due to the application of legal or administrative measures that are restrictive, discriminatory or create unfair competition, in violation of the legal provisions of MERCOSUR.

MERCOSUR's legal sources are the Treaty of Asuncion and the protocols, agreements, additional and complementary instruments adopted by the Members, and the Decisions, Resolutions and Directives adopted by the intergovernmental organs, all of which are obligatory for the Members. Generally recognized principles and rules of public international law are also sources of law applicable to MERCOSUR Members.

The system currently in force relies strongly on diplomatic solutions, and recommends that the parties initially attempt to settle their differences through consultations and direct negotiations. Where the parties cannot resolve their disputes directly, the Common Market Group as a conciliator, or the MERCOSUR Trade Commission as a technical body will intervene, again at a diplomatic level. If no agreement is reached, arbitral jurisdiction is available for the resolution of the disputes.

Arbitration is always *ad hoc*, and the tribunal is composed of three arbitrators chosen amongst a list of persons previously appointed by each Member, each party designating one arbitrator and the third arbitrator being chosen by consensus of the parties. If consensus is not achieved, the choice is made by drawing lots from a list previously established by the Common Market Group.

⁸⁸ Article 32, PB.

⁸⁹ Article 31, PB.

The *ad hoc* arbitration tribunal has the competence to establish its rules of procedure, to decide on its seat and to rule on its own competence. Due process rules must be observed. The tribunal may order provisional measures if there is sufficient evidence that irreparable damage is unavoidable.

Decisions of the *ad hoc* arbitral tribunals must be based on MERCOSUR's sources of law; equity awards are allowed only by mutual agreement of the parties. Awards must be made by a majority vote within 60 days, an extension of 30 days being possible. The award is obligatory and requires compliance within 15 days unless the tribunal fixes another term.

Private parties who have a complaint against a Member do not have direct access to the dispute settlement system. They can request the National Section of their country in the Common Market Group or in the MERCOSUR Trade Commission to consult with the National Section of the accused Member, or to submit the complaint directly to the Common Market Group for examination. Specialists may be requested by the Common Market Group to issue an opinion within 30 days. The case will be dismissed if the complaint is deemed to be without merit, otherwise the Member complained against must correct the situation within 15 days; or the case may be submitted to arbitration according to the same procedure that applies to arbitration between Members.

An instance of appeal has been created by the Protocol of Olivos – the Permanent Tribunal of Review, headquartered in Asuncion – comprising five arbitrators: It will have the competence to review judgments made by the *ad hoc* arbitral tribunals. The PTR will be composed of a group of three appellate arbitrators for disputes involving two Members, or five appellate arbitrators if there are more than two parties concerned by the dispute.

The PTR may only review matters of law, and it will make a decision by majority vote within 30 days after both parties have filed their briefs. This period may be extended for another 20 days. The tribunal may affirm, vary or totally vacate the initial arbitration award.

The parties may, by mutual agreement, decide to submit their dispute directly to the PTR, acting as the sole instance, instead of referring it to *ad hoc* arbitration proceedings. In such a case the PTR will act as if it were the final arbitration tribunal, and no appeal of its award will be admitted.

3.6 Test Your Understanding

- 1. What are the different phases of the MERCOSUR dispute settlement system?**
- 2. What types of controversies are included in the MERCOSUR dispute settlement system?**
- 3. How is the MERCOSUR Trade Commission involved in the dispute settlement process?**
- 4. What is the jurisdiction of the *ad hoc* arbitral tribunal in respect of conflicts involving Member States of MERCOSUR?**
- 5. When and how can private parties use the MERCOSUR dispute settlement system?**
- 6. Can the *ad hoc* arbitral tribunal grant provisional measures?**
- 7. What are the differences between the system created by the Protocol of Brasilia and the system introduced by the Protocol of Olivos?**

4. CASES

Since the inception of MERCOSUR, eight arbitral awards have been issued by its dispute settlement system. A brief description of each case, including identification of the parties, arbitrators, the cause of action and the decision of the arbitrators, is presented below.

4.1 Application by Brazil of Restrictive Measures to Reciprocal Trade with Argentina

Claimant: Argentina

Defendant: Brazil

Arbitrators: Juan Carlos Blanco, Chairman (Uruguay)
Guillermo Michelson Irusta (Argentina)
João Grandino Rodas (Brazil)

Subject-matter:

Purported incompatibility of Communiqués no. 37 and 7, issued by the Department of Foreign Trade Operations of the Secretariat of Foreign Trade of Brazil, with the norms of MERCOSUR. This implies non-compliance with the undertakings established in the Treaty of Asuncion and its Annex I, in the Economic Cooperation Agreement no. 18 (ACE 18) and in Decisions of the Common Market Council no. 3/94 and no. 17/97, violating the obligation assumed by Member States to eliminate restrictions to reciprocal trade or measures of equivalent effect. Argentina claimed that those Communiqués harmed access to the Brazilian market, causing insecurity to exporters and creating a non-tariff barrier to internal acquisitions in Brazil.

Proceedings:

On 1 February 1999 the arbitral tribunal was established. Its seat was at the headquarters of the Administrative Secretariat in Montevideo, Uruguay. The tribunal adopted its rules of procedure. The parties appointed their representatives and elected domicile in Montevideo. The parties submitted written briefs of claim and response to the tribunal, which admitted the documentary evidence produced. On March 15, 1999 the tribunal extended for 30 days the term for issue of the award, in accordance with Article 20 of the Protocol of Brasilia and Article 21 of the Rules of that Protocol. The parties informed the tribunal about earlier efforts made by them to resolve the dispute at the MERCOSUR Trade Commission (Session XXVIII, April 1998) and at the Common Market Group (Session XXXI). The arbitral award was issued on 28 April 1999 in Montevideo.

Decision:

Affirming its competence, the tribunal decided, by unanimous vote, that:

- In the context of the integration processes and the normative system that governs them, unilateral measures adopted by Member States, in matters for which the norms of MERCOSUR require multilateral procedures, are incompatible;
- The regime adopted by Brazil should be harmonized with the regulatory system of *MERCOSUR*, particularly with Article 50 of the Treaty of Montevideo of 1980, no later than 31 December 1999.

4.2 Subsidies on the Production and Export by Brazil of Pork to Argentina

Claimant: Argentina

Defendant: Brazil

Arbitrators: Jorge Peirano Basso, Chairman (Uruguay)
Atílio Aníbal Alterini (Argentina)
Luiz Olavo Baptista (Brazil)

This case was initiated by Argentine private parties, who presented a complaint to the National Section of the CMC in Argentina.

Subject-matter:

Purported incompatibility of Brazilian procedures and norms with the undertakings assumed by Member States of the Treaty of Asuncion, in particular those referring to the obligation to ensure equitable conditions of competitiveness to the economic actors in the region. Argentina claimed that Brazil was subsidizing the export of pork, thereby harming the competitiveness of Argentine products.

Proceedings:

On 27 April 1999 the arbitral tribunal was formed. After two requests for postponement, one filed by each party, written briefs were submitted stating the arguments of the parties, who also informed the tribunal about the earlier efforts made towards a resolution of the dispute. On 7 September 1999 a hearing was held, in which the parties made depositions and submitted their evidence. The tribunal decided that only the arguments submitted in the earlier phases of a search for a settlement should be considered, and not the new ones presented during the arbitration proceedings. The award was made on 27 September 1999, in Asuncion, Paraguay.

Decision:

The tribunal affirmed its competence. It decided that the private party did not present sufficient evidence that the instruments of export financing used by the Brazilian Government and the tax benefits provided for in the Brazilian legislation were the cause of damages to the Argentine producers of pork. The tribunal consequently resolved:

- By majority vote, to reject the complaint by Argentina against the use of the CONAB system for corn stocking by Brazil;
- By unanimous vote, to accept the complaint by Argentina relating to the use of the PROEX programme for export financing, and established that, as of 29 March 1999 only capital goods exported to MERCOSUR may be financed in the long term by PROEX, with interest rates compatible with those prevailing internationally for operations of the same type;
- By unanimous vote, to reject the complaint by Argentina relating to the financial mechanisms of advances on exchange contracts and export contracts applied by Brazil.

Argentina submitted a request for clarification, and the tribunal issued a clarification award by unanimous decision on 27 October 1999, in Buenos Aires.

4.3 Application by Argentina of Safeguard Measures on Textiles from Brazil

Claimant: Brazil

Defendant: Argentina

Arbitrators: Gary N. Horlick, Chairman (United States)
José Carlos de Magalhães (Brazil)
Raúl E. Vinuesa (Argentina)

Subject-matter:

Purported incompatibility of Resolution 861/99 of the Ministry of Economy, Public Works and Services of Argentina – authorizing the application of safeguard measures and setting quotas on cotton textiles from Brazil – with the free-trade rule agreed among the Member States of MERCOSUR and with the provisions of the WTO Agreement on Textiles and Clothing. Brazil argued that the measure taken by Argentina had a discriminatory character, because it favoured other countries that were not members of the customs union, causing damage to Brazilian exporters. It therefore requested the tribunal to order the Government of Argentina to cancel Resolution 861/99 and the administrative rules based on it.

Proceedings:

On 30 December 1999 the arbitral tribunal was established and it adopted its rules of procedure. The parties' representatives and the election of their domicile were duly accredited. Written briefs were submitted in due time to the tribunal, and documentary evidence was admitted and presented by the parties. On 23 February 2000, a hearing was held at the Office of the Administrative Secretariat in Montevideo, in which the parties made depositions, and the tribunal granted a period for the presentation of the final arguments. On 9 February 2000, the arbitral tribunal decided to extend for 30 days the term for the issue of the award, which was finally issued on 10 March 2000, in Colonia, Uruguay.

The defendant raised a preliminary question on the competence of the arbitral tribunal to decide the matter. It claimed the inapplicability of the MERCOSUR dispute settlement system (Protocol of Brasilia), in view of the fact that there was no MERCOSUR norm regulating the subject-matter of the dispute, and therefore that there was no conflict of norms or of interpretation to be decided by the arbitration tribunal.

Decision:

The arbitral tribunal decided the following by a unanimous vote:

- First, it affirmed its competence and jurisdiction to adjudicate the controversy submitted to it. It concluded that the existence of different positions by the parties in respect of the legality of the safeguard measures applied by Argentina in the light of the norms of MERCOSUR offered sufficient grounds to consider the controversy in accordance with the dispute settlement system provided for in the Protocol of Brasilia;
- On the merits, it stated that there were no legal grounds for the imposition of safeguard measures on textile products within MERCOSUR (an indispensable requisite, according to Article 5 of Annex IV to the Treaty of Asuncion that deals with the application of safeguard measures by other Member States) and that there was no "legal gap" on the subject, finding no normative ground for the application of safeguard measures to imports of textile products within the customs union;
- As a result, it ruled that Resolution no. 861/99 of the Ministry of Economy, Public Works and Services of Argentina, and the administrative acts implemented on the basis of this resolution, were incompatible both with Annex IV of the Treaty of Asuncion and with the norms of MERCOSUR in force, and therefore that they should be revoked within 15 days.

Brazil requested from the tribunal clarifications on the arbitral award. These were given by unanimous vote of the tribunal on 7 April 2000.

4.4 Application of Anti-dumping Measures by Argentina against the Export of Chicken in Whole by Brazil

Claimant: Brazil

Defendant: Argentina

Arbitrators: Juan Carlos Blanco, Chairman (Uruguay)
Henrique Carlos Barreira (Argentina)
Tércio Sampaio Ferraz Junior (Brazil)

Subject-matter:

Application of anti-dumping measures by Argentina against the export of chicken in whole by Brazil, pursuant to Resolution no. 574/2000 of the Ministry of the Economy of Argentina, leading to restrictions on the import of such product from Brazil.

Proceedings:

On 7 March 2001 the arbitral tribunal was formed and adopted its rules of procedure. The representatives and the domicile of the parties were duly accredited, and written briefs were submitted within the time set by the tribunal. A hearing was held on 3 May 2001, in Asuncion, with depositions by the parties and their witnesses; briefs containing the final arguments of the parties were presented. On 10 April 2001, the arbitral tribunal decided to extend for 30 days the term for issuing the award, which was made on 21 May 2001, in Montevideo.

The defendant raised a preliminary question regarding the competence of the arbitration tribunal to decide the matter, in view of the absence of any MERCOSUR norm on the investigation of dumping and the application of countervailing duties applicable to intraregional trade.

Decision:

The arbitration tribunal decided, by a unanimous vote, that:

- It was competent and had jurisdiction to adjudicate the controversy, because the existence of different positions between the parties, resulting from a conflict of interpretation of the norms of MERCOSUR, was sufficient ground for the application of the dispute settlement system provided for by the Protocol of Brasilia;
- There were no specific norms in force in MERCOSUR regulating the procedure of investigation of dumping and the application of anti-dumping measures within the customs union;
- On the merits, Brazil's request to declare that Argentina violated the norms of MERCOSUR, approved by the Decision CMC no. 11/97,



was rejected. Furthermore, the tribunal refused to grant an order revoking the Argentine Resolution no. 547/2000;

- The request made by Argentina, for a declaration by the tribunal that Argentine domestic legislation was fully applicable to the controversy, was rejected.

Brazil requested clarifications on the arbitral award, and on 18 June 2001 the arbitration tribunal by unanimous decision clarified the points raised.

4.5 Restrictions on Access to the Argentine Market of Bicycles imported from Argentina

Claimant: Uruguay

Defendant: Argentina

Arbitrators: Luiz Martí Migarro, Chairman (Spain)
Atílio Aníbal Alterini (Argentina)
Ricardo Oliveira García (Uruguay)

Subject-matter:

Purported incompatibility of Argentine legal provisions concerning the customs authorities' determination of the value of bicycles imported from Uruguay (Resolutions AFIP nos. 335/1999, 857/2000, 1044/2001 and 1008/2001), implying a violation of the regime of dispatch and valuation of goods adopted by MERCOSUR (Decisions no. 16 and 17/94 of CMC).

Proceedings:

On 23 July 2001 the arbitral tribunal was formed and adopted its rules of procedure. The parties appointed their representatives and submitted their written claims and responses. The tribunal accepted the documentary evidence and witness depositions, but refused the expert evidence requested by Uruguay. On 10 September 2001 a hearing was held, in which the witnesses gave evidence, the parties produced additional documents and counsel offered their oral representations, followed by written briefs. On 23 July 2001, the tribunal decided to extend by 30 days the term for issuing the award, which was proffered on 23 September 2001, in Asuncion, Paraguay.

Decision:

By unanimous vote, the arbitral tribunal ruled that:

- Argentine Resolutions violating the MERCOSUR norms be revoked within 15 days, and that bicycles exported by Motociclo S/A from Uruguay be given unrestricted access to the Argentine market as



intraregional goods, provided that they have certificates of Uruguayan origin;

- No opinion was given on the procedure of selection used by the customs' authorities.

Both parties requested clarifications, which were given by the arbitration tribunal in a unanimous decision.

4.6 Prohibition by Brazil on the Import of Remoulded Tyres from Uruguay

<i>Claimant:</i>	Uruguay
<i>Defendant:</i>	Brazil
<i>Arbitrators:</i>	Raul Emilio Vinuesa, Chairman (Argentina) Maristela Basso (Brazil) Ronald Herbert (Uruguay)

Subject-matter:

Purported incompatibility of Regulation no. 8/00, issued by the Brazilian Foreign Trade Secretariat of the Ministry of Development, Industry and Trade with the MERCOSUR general rules, and specifically those contained in Decision CMC no. 22/00. The regulation prohibited the importation of remoulded used tyres, thus restricting the access of such goods to the Brazilian market.

Proceedings:

On 17 September 2001 the tribunal was formed, and on 12 October 2001 its rules of procedures were adopted. The parties accredited their representatives, established domicile and submitted their written briefs and responses. On 18 December 2001 a hearing was held at the Office of the Administrative Secretariat, in which the parties presented their final arguments. On 28 November 2001 the arbitration tribunal decided to extend by 30 days the period for issuing the award. On 28 December 2001 the tribunal requested an additional postponement, and on 9 January 2002 the award was issued in Montevideo, Uruguay.

Decision:

By unanimous vote the tribunal decided that:

- Regulation no. 8/00 issued by the Foreign Trade Secretariat (SECEX) of the Ministry of Development, Industry and Trade of Brazil was incompatible with the norms of MERCOSUR;
- In view of such incompatibility, Brazil was required to adapt its internal legislation, within 60 days from the date of notification of the decision.

4.7 Barriers to Entrance of Argentine Phytosanitary Products into the Brazilian Market

Claimant: Argentina

Defendant: Brazil

Arbitrators: Ricardo Olivera García, Chairman (Uruguay)
Héctor Masnatta (Argentina)
Guido Fernando Silva Soares (Brazil)

Subject-matter:

Purported obstacles to the access of phytosanitary products from Argentina to the Brazilian market, and non-compliance by Brazil with the obligation to incorporate into its legislation Resolutions GMC nos. 48/96, 87/96, 149/96 and 71/98, thus violating the principle of free movement of goods in the region. Purported non-compliance by Brazil of its obligations of reciprocity, having regard to the fact that the other Member States of MERCOSUR had complied with the obligation of facilitating trade in phytosanitary products.

Proceedings:

On 27 December 2001 the arbitral tribunal was formed and its rules of procedure adopted. On 4 January 2002 Argentina submitted its written memorial. On 11 January 2002 Brazil requested additional time to respond, which was granted by the arbitral tribunal with the consent of the other party. On 8 February 2002 Brazil filed its response, and on 1 May 2002 a hearing was held in which witnesses made depositions and documentary evidence presented by the parties was accepted. Final submissions were made, and the parties agreed to extend the time for the issuing of the award to 9 April 2002. On 15 March 2002 the arbitral tribunal denied, by unanimous decision, Brazil's request to submit additional documentary evidence.

Decision:

By unanimous vote, the arbitration tribunal decided:

- To declare Brazil's non-compliance with the obligation imposed by Articles 38 and 40 of the Protocol of Ouro Preto to incorporate into its internal legal order the provisions contained in Resolutions 48/96, 87/96, 149/96, 156/96 and 71/98 of the CMC;
- To determine that Brazil must take the measures necessary to incorporate such Resolutions into its internal legal order within 120 days from the date of notification of the arbitral decision, without prejudice to the application of the restrictions provided for by Article 50 of the Treaty of Montevideo of 1980.

4.8 Application of the Specific Internal Tax of Uruguay on the Sale of Paraguayan Cigarettes

Claimant: Paraguay

Defendant: Uruguay

Arbitrators: Luiz Olavo Baptista, Chairman (Brazil)
Evelio Fernández Arévalos (Paraguay)
Juan Carlos Blanco (Uruguay)

Subject-matter:

Purported incompatibility of Uruguayan norms on the application of a Specific Internal Tax (IMESI), thereby violating the principle of equality of treatment and restricting the access of Paraguayan products to the Uruguayan market, in contradiction of Article 7 of the Treaty of Asuncion.

Proceedings:

On 18 March 2002 the arbitral tribunal was formed and its rules of procedure adopted. The parties submitted their written submissions of fact and law, and communicated to the tribunal their earlier efforts to resolve the case. The arbitral tribunal decided to extend the period for issuing the award until 21 May 2002.

Decision:

The arbitral tribunal decided:

- By majority vote, that the discriminatory effects resulting from the application of the Uruguayan administrative rules on cigarettes of Paraguayan origin should cease;
- By unanimous vote, that the discriminatory effects with regard to Paraguayan cigarettes, based upon the fact that it is a non-bordering country, should cease within a period of six months.

In view of the inability of one of the arbitrators to be present in Asuncion for the issuance of the award, the arbitral tribunal met in São Paulo to issue it, but it was published in Asuncion, Paraguay.

Both parties requested clarifications, which were given by a unanimous decision of the arbitration tribunal, on 19 June 2002.

5. FURTHER READING

5.1 Books

- **Baptista LO** (1998). *O Mercosul, suas instituições e ordenamento jurídico*. São Paulo, LTr.
- **Branco LGB** (1997). *Sistema de solução de controvérsias no Mercosul*. São Paulo, LTr.
- **Casella PB**, ed. (1996). *Contratos Internacionais e direito econômico no Mercosul após o término do período de transição*. São Paulo, LTr.
- **Haines-Ferrari M**, ed. (2000). *The Codes of the MERCOSUR*. London, The British Institute of International and Comparative Law.
- **Mercadante A and Magalhães JC** (1998). *Solução e Prevenção de Litígios Internacionais*, vol. I. São Paulo, NECIN-CAPES.
- **Mercadante A and Magalhães JC** (1999). *Solução e prevenção de Litígios Internacionais*, vol. II, São Paulo and Porto Alegre: NECIN-CAPES and Livraria do Advogado
- **Reis MM** (2001). *Mercosul, União Européia e Constituição: a integração dos estados e os ordenamentos jurídicos nacionais*. Rio de Janeiro, Renovar.
- **Rosa LF** (1997). *Mercosul e função judicial: realidade e superação*. São Paulo, LTr.

5.2 Articles

- **Araújo N** (2001). Dispute resolution in MERCOSUL: The Protocol of Las Leñas and the case law of the Brazilian Supreme Court, 32 U. *Miami Inter-American Law Review*, (32): 25.
- **Badan DO** (2002). Sistema de Solución de Controversias en el MERCOSUR. In: Kleinheisterkamp J and Idiarte GAL, eds. *Avances del Derecho Internacional Privado en America Latina*. Montevideo, Fundación de Cultura Universitaria, p. 457–468.
- **Noodt Taquela MB** (1997). Solución de Conflictos em el MERCOSUR. In: *La Solución de Controversias em el Hemisfério*. Bogotá, Cámara de Comercio de Bogotá.

5.3 Official Documents

- Treaty for the Constitution of a Common Market among the Republic of Argentina, the Federative Republic of Brazil, the Republic of Paraguay and the Republic of Uruguay (Treaty of Asuncion)
Protocol of Brasília for the Settlement of Disputes (Protocol of Brasilia)
- *Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR (Protocol of Ouro Preto)*

- Protocol of Olivos for the Settlement of Disputes in MERCOSUR (Protocol of Olivos)

5.4 Websites relating to MERCOSUR

- *www.MERCOSUR.org.uy*
- *www.MERCOSUR-comisec.gub.uy*
- *www.eurosur.org/eurOsur*
- *www.planalto.gov.br/paginas_governo/23.htm*