

2002

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### Recommended Citation

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<https://scholar.smu.edu/lbra/vol8/iss4/3>

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# Dispute Resolution Regulation and Experiences in MERCOSUR: The Recent Olivos Protocol

*Ricardo Olivera García\**

## Table of Contents

- I. Introduction
- II. What is MERCOSUR?
- III. Evolution of Dispute Resolution System
- IV. The Brasilia Protocol System
  - A. DISPUTES BETWEEN PARTY STATES
    - 1. *Sphere of Application*
    - 2. *Stages of the Procedure*
      - a. Direct Negotiations
      - b. Intervention of Common Market Group
      - c. Arbitral Proceeding
    - 3. *Features of the Arbitral Proceeding*
  - B. CLAIMS BY PRIVATE PARTIES
    - 1. *Sphere of Application*
    - 2. *Stages of the Procedure*
- V. Adjustments to the Brasilia System Made in Ouro Preto
- VI. The Experience of the Brasilia Protocol Dispute Resolution System
- VII. Assessment of the Brasilia Protocol System
- VIII. Innovations of the Olivos Protocol
- IX. The Distinction between the Regimen Applicable to Disputes between Party States and Those Deriving from Private Claims Has Been Maintained
  - A. DISPUTES BETWEEN PARTY STATES
    - 1. *Sphere of Application*
    - 2. *Mechanisms Relative to Technical Aspects and Consultative Opinions*
    - 3. *Stages of the Procedure*
      - a. Direct Negotiations

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- b. Common Market Group Intervention
  - c. Ad-Hoc Arbitral Proceeding
  - d. Review Proceeding
  - 4. *Features of Ad-Hoc Arbitral Proceeding*
  - 5. *Review Proceeding Features*
  - 6. *Execution of Awards*
- B. CLAIMS BY PRIVATE PARTIES
- X. Final Consideration

## I. Introduction

The subject chosen for this presentation is dispute resolution under MERCOSUR. This system, like all of MERCOSUR, is in a process of evolution and consolidation. In February 2002, the party States agreed to approve the Olivos Protocol. This protocol provides for the existence of a permanent dispute resolution tribunal, with a view to unifying jurisprudence on matters derived from the MERCOSUR legal framework.

Moreover, to date there have been seven awards by ad-hoc arbitral tribunals (two of which I had the honor of sitting on) from which certain lessons can be drawn regarding current operation of the dispute resolution system. Before beginning my analysis of the subject that brings us here, I believe it is necessary to make some brief comments on the history of MERCOSUR, and the current status of the process.

## II. What is MERCOSUR?

MERCOSUR is a union of States having legal personality under International Law,<sup>1</sup> whose origin is the Asunción Treaty of March 26, 1991. The treaty was executed by the governments of Argentina, Brazil, Paraguay, and Uruguay.

Under the Asunción Treaty, the party States established the bases for the gradual and progressive creation of a subregional common market.<sup>2</sup> These bases are: free circulation of goods, services and factors of production; establishment of a common external tariff and adoption of common trade policies; coordination of macroeconomic and sectorial policies; and commitment by the party States to harmonize their legislations.<sup>3</sup>

MERCOSUR is the world's fourth largest trading power, after the United States, the European Union, and Japan. It covers an area of twelve million square kilometers (70 per cent of the total of South America), and has a population of 200 million inhabitants.

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1. Protocol of Ouro Preto, Dec. 17, 1994, art. 34, 34 I.L.M. 1244 (1995) (Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR) [hereinafter *Ouro Preto*].
  2. Hector Gros Espiell, *El Tratado de Asunción*, MONTEVIDEO: INSTITUTO DE ESTUDIOS EMPRESARIALES DE MONTEVIDEO, 1991, at 25. Professor Héctor Gros Espiell was also Uruguay's Minister of Foreign Affairs who signed the Asunción Treaty.
  3. Treaty of Asunción, Mar. 26, 1991, art. 1, 30 I.L.M. 1041, available at <http://www.mercosur-comisec.gub.uy/DOCUMENT/TRATADOA/Asuncion.htm> (last visited Oct. 2, 2002).
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MERCOSUR's Gross Domestic Product (GDP) of close to one trillion U.S. dollars represents 80 percent of South America's GDP.<sup>4</sup>

The Asunción Treaty, in an excess of optimism, established a transition period through December 31, 1994, to put the common market into operation.<sup>5</sup> Prior to expiration of that term, in view of the status of the market consolidation process, the party States agreed to extend the term for reduction of internal tariffs until 2000.<sup>6</sup> The term for culmination of the process for setting the common external tariff was extended until 2006,<sup>7</sup> with the transitory and primary goal of bringing into operation a customs union amongst the party States.

While the States made major efforts to facilitate circulation of goods and to apply a common external tariff, they paid less attention to coordinating their macroeconomic policies and to harmonizing their legislations. This turned out to be a weakness of the system, since Brazil's devaluation at the outset of 1999, and the collapse of Argentina's economic system in 2001, substantially altered trading conditions in the region. It also led to regression in the integration process, with the States imposing tariff and non-tariff measures as protection against these distortions.

MERCOSUR's legal framework is based, in addition to the Asunción Treaty, on two other agreements of the party States: the 1991 Brasilia Protocol on dispute resolution (which will be replaced by the recent Olivos Protocol when it is ratified by all of the parties) and the 1994 Ouro Preto Protocol. The Ouro Preto Protocol primarily regulates MERCOSUR's institutional structure:<sup>8</sup> recognizing MERCOSUR's legal personality; defining the decision-making process;<sup>9</sup> establishing the system for internal application of rules issued by MERCOSUR bodies;<sup>10</sup> and determining their legal sources.<sup>11</sup>

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4. *Id.*

5. *Id.* art. 3.

6. Common Market Council Decision 5/94, available at <http://www.sice.oas.org/trade/mrcsrs/decisions/DEC594.asp> (last visited Oct. 1, 2002).

7. Common Market Council Decisions 7/94, available at <http://www.sice.oas.org/trade/mrcsrs/decisions/DEC794.asp> (last visited Oct. 2, 2002).

8. The Ouro Preto Protocol provides for existence of the following bodies: the Common Market Council (CMC), the Common Market Group (GMC), the MERCOSUR Trade Commission (CCM), the Joint Parliamentary Commission (CPC), the Economic-Social Consultative Forum (FCES), and the MERCOSUR Administrative Secretariat (SAM). See, e.g., Ouro Preto, *supra* note 1.

9. In MERCOSUR decisions are made by consensus and with the presence of all party States. Ouro Preto, *supra* note 1, art. 37.

10. Resolutions by MERCOSUR bodies are not applied directly in the party States, but instead must be incorporated in the respective national legislations. The effectiveness of the rules is simultaneous, 30 days following notification by all of the States of incorporation of the provision. *Id.* arts. 38, 40.

11. The legal sources of MERCOSUR are: 1) the Asunción Treaty, its protocols and additional or supplementary instruments; 2) the agreements executed within the framework of the Asunción Treaty and its protocols; 3) the Decisions of the Common Market Council, the Resolutions of the Common Market Group and the Directives of the MERCOSUR Trade Commission. *Id.* art. 41. To these sources the Brasilia Protocol added the applicable principles and provisions of international law on the subject. Protocol of Brasilia for the Settlement of Disputes, Dec. 17, 1991, art. 19, 36 I.L.M. 69 (1997) [hereinafter Brasilia Protocol].

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### III. Evolution of Dispute Resolution System

The same gradualist and progressive system used by the States in building the MERCOSUR legal framework was applied to the dispute resolution system. Attachment III to the Asunción Treaty established an elementary procedure, of a nonjurisdictional nature, to settle disputes arising between the party States as a consequence of Treaty application. This procedure involved three stages: direct negotiations between the parties; consideration of the controversy by the Common Market Group<sup>12</sup> (which could call on panels or groups of experts and make recommendations within a period of sixty days); and, in the event of failure of the latter, submission of the dispute to the Common Market Council to adopt the pertinent recommendations.<sup>13</sup>

Insofar as all the decisions of the Common Market Council and the Common Market Group must be adopted by consensus and with the presence of all the party States, the system's effectiveness was relative, since it gave the litigant States a sort of veto right. Nevertheless, this regimen was in place from November 29, 1991, the date of effectiveness of the Asunción Treaty, through April 22, 1993, when the Brasilia Protocol took effect.

The Brasilia Protocol, approved directly by the States on December 17, 1991, is formally a supplementary treaty to the 1991 Asunción Treaty. For the first time, it incorporates a jurisdictional procedure for resolving disputes deriving from interpretation, application, or noncompliance with the rules of the Asunción Treaty, the agreements executed within its framework, the decisions of the Common Market Council, and the resolutions of the Common Market Group. This procedure is based fundamentally on the operation of ad-hoc arbitral tribunals.

The Brasilia Protocol, regulated by a Common Market Council decision of December 10, 1998, is the current regimen for dispute resolution. It will be replaced by the regimen approved in the Olivos Protocol on February 18, 2002, thirty days after ratification by all the party States. The big innovations of the Olivos Protocol are the creation of a Permanent Review Tribunal, and the possibility of appealing for review of awards made by ad-hoc tribunals. Within the framework of the Brasilia Protocol, twenty disputes between party States were filed, seven arbitral tribunal awards were handed down, and two expert groups were called to meet.

The Ouro Preto Protocol introduced the only change in the Brasilia Protocol regimen. The latter includes the directives of the MERCOSUR Trade Commission among the provisions that can be the subject of dispute within the Brasilia framework.<sup>14</sup>

In synthesis, the MERCOSUR dispute resolution mechanism includes three stages: the pre-jurisdictional stage under Attachment III to the Asunción Treaty; the ad-hoc

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12. The Common Market Group (GMC), provided for in the Asunción Treaty and reiterated in the Ouro Preto Protocol, is MERCOSUR's executive body and consists of four official members and four alternates per country, representatives of the Ministry of Foreign Affairs, the Ministry of the Economy and the Central Bank.

13. The Common Market Council (CMC), provided for in the Asunción Treaty and reiterated in the Ouro Preto Protocol, is MERCOSUR's highest ranking body and consists of the Ministers of Foreign Affairs and the Ministers of Economy of the party States.

14. The Attachment to the Ouro Preto Protocol also establishes a non-jurisdictional procedure for claims by party States and private parties before the MERCOSUR Trade Commission.

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tribunal stage under the Brasilia Protocol; and the Permanent Review Tribunal under the Olivos Protocol. We will now analyze the regimen of the Brasilia Protocol, and the problems posed by its application, pointing out the changes introduced by the Olivos Protocol, and concluding with a general assessment of the system.

#### IV. The Brasilia Protocol System

The Brasilia Protocol establishes two different procedures; depending on whether the disputes are controversies between MERCOSUR party States or claims by private parties.

##### A. DISPUTES BETWEEN PARTY STATES

###### 1. *Sphere of Application*

This Protocol applies to disputes arising between party States as to the interpretation, application or nonfulfillment of the provisions of the Asunción Treaty and the agreements executed within its framework. It includes the Decisions of the Common Market Council, the Resolutions of the Common Market Group, and the Directives of the MERCOSUR Trade Commission.<sup>15</sup>

Consequently, the Brasilia Protocol regimen does not include disputes between a party State and MERCOSUR or one of its bodies, conflicts of provisions between MERCOSUR rules and the legislations of each party State, controversies between MERCOSUR employees and MERCOSUR bodies, or conflicts between the bodies of MERCOSUR itself.<sup>16</sup>

###### 2. *Stages of the Procedure*

The Brasilia Protocol provides for three stages, each of which must be completed before moving on to the next. The stages are: direct negotiations; intervention of Common Market Group; and arbitral proceedings.<sup>17</sup>

###### a. Direct Negotiations

These are informal negotiations between the States in an effort to find a solution for the dispute by mutual agreement. The States must keep the Common Market Group informed, and cannot exceed fifteen days in such negotiations.<sup>18</sup>

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15. Brasilia Protocol, *supra* note 11, art. 1, Ouro Preto, *supra* note 1, art. 43.

16. Badan D. Operti, *Sistema de Solución de Controversias en el MERCOSUR*, in AVANCES DEL DERECHO INTERNACIONAL PRIVADO EN AMÉRICA LATINA. *Liber Amicorum Jürgen Samtleben*, Max Planck Institut—Fundación de Cultura Universitaria, Montevideo, 2002, p. 458.

17. Brasilia Protocol, *supra* note 11, art. 3.

18. *Id.* art. 3.

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### b. Intervention of Common Market Group

When no agreement is reached via direct negotiations, either of the party States may submit the dispute to the consideration of the Common Market Group. The Common Market Group does not adopt a Resolution that is binding upon the party States, but instead is limited to making recommendations to surmount the dispute, and can also obtain expert advice.<sup>19</sup> This stage of the procedure cannot take more than thirty days.<sup>20</sup>

### c. Arbitral Proceeding

After completing the previous non-jurisdictional stages without the dispute being settled, either of the party States involved in the controversy can bring an arbitral proceeding.

### 3. Features of the Arbitral Proceeding

The main features of the arbitral proceeding established by the Brasilia Protocol are as follows:

- It is an ad-hoc Arbitral Tribunal, consisting of three arbitrators: one appointed by each party State and the third by mutual agreement between them. If no agreement is reached, the third arbitrator may be appointed by drawing of lots by the MERCOSUR Administrative Secretariat, from among a list of sixteen arbitrators previously drawn up by all of the party States.<sup>21</sup>
- The Tribunal establishes its own rules of procedure. The provisions require that each party must have full opportunity to be heard and to present its arguments, and that the proceedings must be expeditious.<sup>22</sup> The Arbitral Tribunal must issue its award within a term of sixty days, extendible for a maximum of thirty days, from the date of appointment of the Presiding Arbitrator.<sup>23</sup>
- At the request of the interested party the tribunal may issue provisional measures when there are well-founded presumptions that maintenance of the situation would give rise to serious and irreparable damages for one of the parties.<sup>24</sup>

The Arbitral Tribunal will decide the controversy on the basis of the provisions of the Asunción Treaty, the agreements executed within the framework of the treaty, the decisions of the Common Market Council, the resolutions of the Common Market Group, and the applicable principles and provisions of international public law.<sup>25</sup> To these sources the Ouro Preto Protocol added the directives of the MERCOSUR Trade Commission.<sup>26</sup> The Tribunal may also decide "ex aequo et bono," if the parties so agree<sup>27</sup>

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19. *Id.* arts. 4, 5.

20. *Id.* art. 6.

21. *Id.* arts. 9, 12

22. *Id.* art. 15.

23. *Id.* art. 20.

24. *Id.* art. 18.

25. *Id.* art. 19.

26. Ouro Preto, *supra* note 1, art. 41.

27. Brasilia Protocol, *supra* note 11, art. 19.

- Regarding the seat of Tribunals, while the Brasilia Protocol provided that they could be established in any of the party States,<sup>28</sup> CMC Decision 28/94, adopted under the Ouro Preto Protocol, provided that they are to be located in the city of Asunción (Paraguay).
- The Arbitral Tribunal's award must be issued by a majority.<sup>29</sup> The award can not be appealed. It is binding upon the litigant party States, and vis-à-vis same shall have the force of *res judicata*.
- It must be fulfilled within a period of fifteen days, unless the Arbitral Tribunal sets a different term.<sup>30</sup> Within fifteen days following notice of the award, any of the parties may request clarification thereof, or an interpretation as to how it must be fulfilled. The Tribunal must respond within the following fifteen days, and may temporarily suspend compliance with the award.<sup>31</sup> If a State does not comply with the award within thirty days, the other party States may adopt temporary compensatory measures, such as suspension of concessions, tending to obtain compliance.<sup>32</sup>
- Each party State is obligated to pay the expenses of the arbitrator it appoints. Monetary compensation to the Presiding Arbitrator and the Tribunal's expenses shall be shared equally by the litigant party States, unless the Tribunal distributes them otherwise.<sup>33</sup>

## B. CLAIMS BY PRIVATE PARTIES

### 1. Sphere of Application

The Brasilia Protocol does not provide for any procedure whereby private individuals or legal entities of any of the party States, or other States, can bring claims against acts by MERCOSUR bodies. The Protocol establishes a special regimen only for claims deriving from sanction or application by any of the States of legal or administrative measures having an effect of restriction, discrimination, or unfair competition in violation of the Asunción Treaty. The protocol also establishes a regimen for claims deriving from agreements executed within its framework, decisions by the Common Market Council, or resolutions by the Common Market Group.<sup>34</sup>

In the MERCOSUR dispute resolution system, however, private parties do not have direct access to justice. Instead private parties must submit their claims to the National Section of the Common Market Group, which must support the claim. Additionally, if the claim is accepted, it will be the competence of the party States to request action thereon.

Unlike party States, private parties will always have the possibility of settling their differences with other private parties of the party States, or with the States themselves through the judicial or arbitral procedures, provided for in extra-MERCOSUR legislation.

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28. *Id.* art. 15.

29. *Id.* art. 20.

30. *Id.* art. 21.

31. *Id.* art. 22.

32. *Id.* art. 23.

33. *Id.* art. 24.

34. *Id.* art. 25.

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## 2. Stages of the Procedure

The stages provided for in the Brasilia Protocol for private claims are as follows:

- Claims must be submitted by private parties to the National Section of the Common Market Group in the State of their habitual residence or place of business.<sup>35</sup>
- If the National Section decides to support the claim, in consultation with the affected private party, it may establish direct contacts with the National Section of the Common Market Group of the party State to which the violation is attributed, or bring such claim without further ado before the Common Market Group.<sup>36</sup>
- If the direct contacts between the National Sections do not solve the problem within fifteen days, or if the issue is submitted directly, the Common Market Group may decide (unanimously and with the presence of all the States) that the requirements for processing the claim are not met and reject the claim.<sup>37</sup>
- If it does not reject the claim, the Common Market Group is to call a Group of Experts. Three experts are to be appointed by vote, from the list of candidates proposed by the States. The Group of Experts will give the private claimant, and the State against which the claim is being made the chance to be heard. The Group of Experts must then issue a decision within a nonextendible term of thirty days.<sup>38</sup>
- If the Group of Experts decides the claim is justified, any party State may require the State against which the claim was brought to adopt corrective measures, or eliminate the questioned measures. If the requirement is not met within a term of fifteen days, the claim can be submitted directly to the arbitral procedure.<sup>39</sup>

## V. Adjustments to the Brasilia System Made in Ouro Preto

The Ouro Preto Protocol ratified the Brasilia dispute resolution system, underscoring that it is a transitory system. Therefore, prior to culminating the process of Common External Tariff convergence, the party States will review the Brasilia dispute resolution system with a view to establishing a permanent system.<sup>40</sup> The Ouro Preto Protocol defines the organic structure of MERCOSUR. It incorporates new bodies, including the MERCOSUR Trade Commission, which has rule-setting powers through the issuance of Directives, and in that framework establishes a non-jurisdictional dispute resolution mechanism.

The MERCOSUR Trade Commission was created for the purpose of ensuring application of the common trade policy instruments agreed to by the party States for the customs union.<sup>41</sup> In the areas of its competence, it can hear and decide claims submitted

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35. *Id.* art. 26.

36. *Id.* art. 27.

37. *Id.* art. 29.

38. *Id.* art. 29, paras. 2, 3.

39. *Id.* art. 32.

40. Ouro Preto, *supra* note 1, art. 21.

41. *Id.* art. 16.

by National Sections on behalf of party States or private claimants.<sup>42</sup> The main feature of this system is that, while the decisions of the MERCOSUR Trade Commission must be adopted by consensus, their regulation does not require the presence of all the party States, and the Commission can function with only three members. Analysis of claims within the framework of the MERCOSUR Trade Commission does not prevent action by the party State that made the claim under the regimen of the Brasilia Protocol<sup>43</sup>

## VI. The Experience of the Brasilia Protocol Dispute Resolution System

Beyond the precariousness and transitory nature of the regimen, the Brasilia Protocol dispute resolution system was an efficient route for resolving numerous controversies between the party States of MERCOSUR. To date, twenty disputes have been submitted by party States, seven of which ended in Arbitral Tribunal awards, and two in Expert Group opinions. The arbitral awards issued have covered diverse areas of the relationships among the party States, and have established precedents of jurisprudence in the disputes submitted by them. The binding force of such awards is limited to the arbitral proceeding in which they are issued. However, the awards have frequently been grounded, regarding specific points, on the precedents of the decisions by previous Arbitral Tribunals (which, *de facto*, contributes to shaping community jurisprudence.)

The issues resolved in the awards have been as follows:

Number	Date	Parties	Issue
Award 1	4/28/99	Argentina v. Brazil	Obligation to eliminate non-tariff restrictions in the light of postponement of the project for formation of a common market and right to apply non-tariff restrictions under the 1980 Montevideo Treaty (art. 50).
Award 2	9/27/99	Argentina v. Brazil	Compatibility of MERCOSUR regimen with existence of subsidies for pork production and exportation.
Award 3	2/10/00	Brazil v. Argentina	Compatibility of MERCOSUR regimen with application of safeguard measures for textile products.
Award 4	5/21/01	Brazil v. Argentina	Compatibility of MERCOSUR regimen with application of antidumping measures against exportation of whole chicken.
Award 5	9/29/01	Uruguay v. Argentina	Value of origin certificate issued by authorized certifying authorities and right of States to not recognize origin certificate.
Award 6	1/9/02	Uruguay v. Brazil	Compatibility of MERCOSUR regimen with prohibition of importation of retreaded tires.
Award 7	4/19/02	Argentina v. Brazil	Term for incorporation in internal law of rules on phytosanitary product registration and scope of the non-tariff restriction under the 1980 Montevideo Treaty (art. 50).

42. *Id.* art. 21.

43. Ouro Preto, *supra* note 1, art. 21.

Beyond the specific issues considered in the awards, a series of characteristic features can be noted in them:

- The independence of the arbitrators, including those appointed by the party States, as is clearly evidenced by the fact that six of the seven awards issued were unanimously approved.
- Formal adherence to a contradictory procedure, with guarantees for the defense of all parties. Notwithstanding this fact, in all cases the Tribunals had to use the extension of time provided for in the Brasilia Protocol.
- Use of the MERCOSUR Administrative Secretariat for notices and communications to the parties, as well as to receive documents and communications from the parties.
- Confidentiality of all proceedings, with the exception of the contents of the arbitral award.
- Reference to precedents of previous awards by Arbitral Tribunals.
- Absence of contradictory solutions among the awards issued.
- Application of teleological criterion for interpretation of the provisions of the Asunción Treaty, the agreements executed within its framework, and the decisions of MERCOSUR bodies, in all cases in line with the regimen's integrationist purpose.
- Upholding of the general principle of free trade and restrictive interpretation of all limitations on free traffic of goods.
- Application of the general principles of international law: *pacta sunt servanda*, reasonability and good faith, as criteria for interpretation and integration of the MERCOSUR legal framework.
- Harmonization of MERCOSUR rules with the other provisions of international law to which the party States are subject.

## VII. Assessment of the Brasilia Protocol System

The Brasilia Protocol dispute resolution system has been criticized frequently. The main objection focuses on its ad-hoc arbitral system, which implies the appointment of different arbitrators in each case. This ad-hoc system, in contrast with a Permanent Tribunal, hinders existence of unified and constant jurisprudence.<sup>44</sup> It has also been said that the ad-hoc Brasilia system terminates with issuance of the award. There is no provision for the Tribunal's subsistence for the purposes of resolving any controversies that may arise during compliance with the award.<sup>45</sup>

The Brasilia Protocol system is limited to providing a solution for disputes arising between party states as to interpretation, application or nonfulfillment of the provisions of the Asunción Treaty, the agreements executed within its framework, and the decisions of MERCOSUR bodies. The Brasilia Protocol does not cover controversies that

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44. Mingarro L. Marti, *Perfeccionamiento del sistema de solución de controversias en el MERCOSUR*, in SOLUCIÓN DE CONTROVERSIAS EN EL MERCOSUR, COMPILAEER: RUIZ DIAZ LABRANO, R. Asunción, 1991, p. 17 et seq.

45. J. C. Blanco, *Solución de controversias en el MERCOSUR*, p. 71 et seq.

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may arise between a party State and MERCOSUR, or one of its bodies; conflicts of provisions between the MERCOSUR legal framework, and the law of each party State; disputes between MERCOSUR employees and MERCOSUR bodies; and conflicts between the bodies of MERCOSUR itself.<sup>46</sup>

Critics have also pointed out that private claimants cannot access dispute resolution mechanisms directly, and that to gain access, the party State must adopt the political decision to support their claims. Moreover, the pertinent National Section must resolve to put the dispute resolution mechanism into motion, and actively defend the claims within the framework of the established procedure.<sup>47</sup>

From the procedural standpoint, critics have pointed to the shortness of the sixty-day term (even if extendible for an additional thirty days) to carry out the total arbitral proceeding and issue the award. Also criticized is the lack of a procedure in the event of the nullity of the award. This would occur if the award is issued beyond that term, or on matters not submitted to its decision.<sup>48</sup> Some of these criticisms were addressed in the changes to the dispute resolution system approved in the Olivos Protocol, while others are still pending consideration. Nevertheless, it is important to note that, beyond its imperfections and shortcomings, the Brasilia Protocol dispute resolution system represented, and continues to represent, an efficient procedure for resolving controversies within the framework of MERCOSUR.

## VIII. Innovations of the Olivos Protocol

On February 18, 2002, the MERCOSUR party States approved a new dispute resolution regimen called the Olivos Protocol. It is based on the Brasilia Protocol, but makes some significant changes in the functioning of the system. The Olivos Protocol system continues to be a transitory regimen, which the parties have agreed to review prior to the completion of the common external tariff convergence process.<sup>49</sup> The Olivos Protocol will take effect thirty days following submission of the last ratification instrument.<sup>50</sup> Submission of ratification instruments requires the approval of the Parliaments of the party States.

As to its effectiveness, the Olivos Protocol will derogate the Brasilia Protocol, and the new system will apply to disputes raised after the Olivos Protocol takes effect.<sup>51</sup>

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46. Opertti, *supra* note 16.

47. *Id.*

48. MICHELSON, G., Perfeccionamiento del Protocolo de Brasilia, in *Solución de Controversias*, p. 23 et seq.

49. Protocolo de Olivos Para la Solucion de Controversias en el MERCOSUR, Feb. 18, 2002, art. 53, available at [http://www.mercosur.org.uy/espano1/snor/varios/protocolo\\_olivos\\_2002](http://www.mercosur.org.uy/espano1/snor/varios/protocolo_olivos_2002) (last visited Oct. 2, 2001) [hereinafter Olivos Protocol].

50. *Id.* art. 52.

51. *Id.* art. 55.

## IX. The Distinction between the Regimen Applicable to Disputes between Party States and Those Deriving from Private Claims Has Been Maintained

### A. DISPUTES BETWEEN PARTY STATES

#### 1. *Sphere of Application*

The Olivos Protocol substantially maintains the rules of the Brasilia Protocol, with the adjustments that had been made by the Ouro Preto Protocol. The Olivos Protocol dispute resolution regimen applies to: disputes arising between the party States on the interpretation, application or non-fulfillment of the Asunción Treaty, the Ouro Preto Protocol, the protocols and agreements executed within the framework of the Asunción Treaty; the Decisions of the Common Market Council; the Resolutions of the Common Market Group; and the Directives of the MERCOSUR Trade Commission.<sup>52</sup> The Olivos Protocol adds a special solution for those cases where the disputes raised can also be submitted to the dispute resolution system of the World Trade Organization, or other preferential trade mechanisms of which the party States may individually be members.

In these cases the Protocol establishes that the party making the claim must choose to submit to one forum or the other, without prejudice to the fact that the litigant parties may, by mutual agreement, choose the forum. Nevertheless, once the dispute resolution proceeding has begun, neither of the parties may resort to the mechanisms established in the other forums regarding the same matter.<sup>53</sup>

#### 2. *Mechanisms Relative to Technical Aspects and Consultative Opinions*

The Olivos Protocol delegates to the Common Market Council the authority to establish two special procedures not provided for in the previous regimen: establishment of expeditious mechanisms to resolve differences between the party States, as to technical aspects regulated in common trade policy instruments,<sup>54</sup> and establishment of mechanisms for requesting consultative opinions from the Permanent Review Tribunal.<sup>55</sup>

#### 3. *Stages of the Procedure*

The Olivos Protocol provides for four procedural stages, although not all of them are mandatory. The four stages are: direct negotiations; Common Market Group Intervention; ad-hoc arbitral proceedings; and review proceedings.

##### a. Direct Negotiations

This is an obligatory stage, with the same features as the Brasilia Protocol.

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52. *Id.* art. 1, para. 1.

53. *Id.* art. 1, para. 2.

54. *Id.* art. 2.

55. *Id.* art. 3.

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### b. Common Market Group Intervention

This has to be converted into an optional stage, which the parties can access by mutual agreement. Controversies can also be brought before the Common Market Group if another State, not a party to the dispute, justifiably requires that procedure upon termination of direct negotiations.<sup>56</sup>

### c. Ad-Hoc Arbitral Proceeding

This proceeding is maintained with features substantially similar to the Brasilia Protocol.

### d. Review Proceeding

The new protocol incorporates the recourse for review against ad-hoc Arbitral Tribunal awards, on questions of law, before the Permanent Review Tribunal. The new regimen, deriving from the harmonization of both proceedings, requires special analysis.

#### 4. Features of Ad-Hoc Arbitral Proceeding

The basic structure of the arbitral proceeding maintains the general features of the Brasilia Protocol, with the following changes:

- Institutionalization of the participation of the MERCOSUR Administrative Secretariat, which is responsible for the administrative procedures required for the proceedings.<sup>57</sup>
- Ad-hoc Arbitral Tribunals can meet in any city of the MERCOSUR party States, and Asunción is the exclusive obligatory location for the Permanent Review Tribunal.<sup>58</sup>
- The subject of the dispute is determined by the submission and response briefs submitted to the ad-hoc Arbitral Tribunal and cannot be expanded subsequently.<sup>59</sup> This resolves the doubts arising in connection with some of the arbitral awards as to whether the subject of the dispute was limited to the submission and response briefs, or the questions raised in the initial mandatory stages.
- If the ad-hoc Arbitral Tribunal issues provisional measures and the award is the subject of an appeal for review, the measures will be maintained until they are taken up at the first meeting of the Permanent Review Tribunal, which must decide on continuation or termination thereof.<sup>60</sup>

The sixty-day term for issuance of the arbitral award, extendible for a maximum of thirty days, has been maintained. Nevertheless, this term is now counted as of the communication by the MERCOSUR Administrative Secretariat to the parties and the other arbitrators, informing them of acceptance by the Presiding arbitrator of his or her appointment.<sup>61</sup>

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56. *Id.* art. 6, paras. 2, 3.

57. *Id.* art. 9, para. 3.

58. *Id.* art. 38.

59. *Id.* art. 14, para. 1.

60. *Id.* art. 15, para. 3.

61. *Id.* art. 16.

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### 5. Review Proceeding Features

The procedure for review and creation of the Permanent Review Tribunal are two major innovations of the Olivos Protocol. Ad-hoc arbitration ceased to be a single-instance proceeding, and now an appeal for review can be brought, on questions of law, before a Permanent Tribunal. This is undoubtedly a very important step in the MERCOSUR dispute resolution process, which seeks to create a jurisdictional body that provides for uniformity of jurisprudence, making the regimen foreseeable and certain. This solution, based on a proposal presented by Uruguay,<sup>62</sup> seeks to align MERCOSUR procedures with the successful model of the Court of Justice of the European Union. The Court of Justice has played and continues to play a fundamental role in the development and consolidation of basic principles of the European community system.<sup>63</sup>

The Permanent Review Tribunal is to consist of five arbitrators,<sup>64</sup> who must be available on a permanent basis,<sup>65</sup> and has its seat in the city of Asunción.<sup>66</sup> Each party State is to appoint one arbitrator and an alternate for a two-year period, renewable for up to two successive periods.<sup>67</sup> The fifth arbitrator must be of the nationality of one of the party states, and will be appointed by unanimous decision of the States. If no unanimous agreement exists, she or he will be appointed at random from among candidates included in the lists provided by the party States.<sup>68</sup> When disputes involve two party States, the Tribunal will consist of two national arbitrators of the party states, and a third and Presiding Arbitrator of the Tribunal will be designated at random from among the remaining arbitrators appointed.<sup>69</sup> In essence, the tribunal continues to be ad-hoc, since its composition can vary from one controversy to the other. When the dispute involves more than two party States, the Permanent Review Tribunal shall consist of the five arbitrators.<sup>70</sup> The Permanent Review Tribunal may confirm, modify, or renew the legal foundations and decisions of the ad-hoc Arbitral Tribunal, and its award is final.<sup>71</sup> The Olivos Protocol also provides the possibility of the parties' direct access to the Permanent Review Tribunal, if expressly agreed to by them. In this case, the Permanent Review Tribunal shall have the same competencies as the ad-hoc Arbitral Tribunal.<sup>72</sup>

### 6. Execution of Awards

In general terms, the Olivos Protocol follows the regimen established by the Brasilia Protocol regarding adoption, the binding nature of the awards, and appeal for clarification and term for compliance with the award. The Olivos Protocol clarifies, if an appeal

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62. Opertti, *supra* note 16, at 467-68.

63. RIECHENBERG, K., *El Tribunal de Justicia de la Unión Europea, in Solución de controversias*, p. 89 et seq.

64. Olivos Protocol, *supra* note 49, art. 18, para. 1.

65. *Id.* art. 19.

66. *Id.* art. 38.

67. *Id.* art. 18, para. 2.

68. *Id.* art. 18, para. 3.

69. *Id.* art. 20, para. 1.

70. *Id.* art. 20, para. 2.

71. *Id.* art. 22.

72. *Id.* art. 23.

is brought for review, compliance with the award of the ad-hoc Arbitral Tribunal will be suspended while the review is underway.<sup>73</sup> Nevertheless, the Olivos Protocol incorporates the possibility for the Tribunal that issued the award to continue its competence during the period of compliance with it. There are two major provisions on this issue:

- If the State benefited by the award considers that the measures adopted do not comply with the award, it can appear again before the ad-hoc Arbitral Tribunal or the Permanent Review Tribunal, as applicable.<sup>74</sup>
- It also provides that if the State benefited by the award has imposed compensatory measures on the opposing State, because it understands that the award has not been complied with, the latter can petition the Tribunal to rule on whether the measures adopted to comply with the award are satisfactory, and whether the compensatory measures adopted are appropriate and in line with the noncompliance attributed to it.<sup>75</sup>

Both solutions imply a major qualitative change in the current system, where the action of the Arbitral Tribunal ends with issuance of the award and, in some cases, a clarifying award. Under the Olivos Protocol, the competence of the Tribunal can extend during the period of compliance with the award.

While the Tribunal continues to lack the power of *imperium* to force the party States to comply with the award, the Olivos Protocol continues to give it the competence to resolve conflicts, as to whether there has been compliance with the award, and whether compensatory measures imposed by the State demanding compliance are appropriate.

## B. CLAIMS BY PRIVATE PARTIES

For submission of private disputes to the MERCOSUR Tribunals, the resolution system continues to require the respective party State to adopt a political decision. The political decision must support the claim, and bring the pertinent actions through the inter-State dispute resolution system. The Olivos Protocol does not facilitate an effective system to provide direct access by private parties to the MERCOSUR dispute resolution bodies. Instead, it substantially maintains the regimen established by the Brasilia Protocol, while incorporating some small changes that further reduce the system's effectiveness:

- The National Section of the Common Market Group—once it has decided to admit the claim—must go through the process of direct consultations with the National Section of the Party State, to which the violation is attributed, before bringing the claim before the Common Market Group.<sup>76</sup> Yet under the Brasilia Protocol it had the possibility of direct access.<sup>77</sup>
- Only unanimous opinions of Expert Groups can be brought to bear against the State against which the claim is brought,<sup>78</sup> while under the Brasilia Protocol this was also possible in the case of opinions adopted by a majority.<sup>79</sup>

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73. *Id.* art. 29, para. 2.

74. *Id.* art. 30.

75. *Id.* art. 32.

76. *Id.* art. 41.

77. Brasilia Protocol, *supra* note 11, art. 27.

78. Olivos Protocol, *supra* note 49, art. 44.

79. Brasilia Protocol, *supra* note 11, art. 32(a).

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In essence, the new Protocol maintains and strengthens the concept that private access to MERCOSUR dispute resolution mechanisms depends on the political will of the States.

## X. Final Consideration

The Olivos Protocol undoubtedly constitutes progress toward establishment of an appropriate dispute resolution system in MERCOSUR. It seeks to resolve two of the main criticisms of the Brasilia Protocol system: first, the lack of a Permanent Tribunal to set the course of jurisprudence in MERCOSUR; and second, the establishment of a legal oversight mechanism to assess compliance with awards and any compensatory measures adopted when awards are not fulfilled. Nevertheless, the Olivos Protocol leaves pending an unquestionably important issue that MERCOSUR must necessarily come to terms with: private access to justice. MERCOSUR has evolved as an eminently commercial agreement that seeks to enhance and foster trade among economic agents in an integrated market. Thus, the real protagonists of this process are not the States, but instead the economic agents operating within the framework of the agreed to regulations. From this standpoint, for proper development of the market, it is fundamental for economic agents to have a mechanism for protection of their commercial and economic rights that allows them to directly defend their own interests. Subjecting these defense mechanisms to the political will of the States constitutes a very important limitation for ensuring appropriate protection.

It is undeniable that, to date, the Brasilia Protocol system made possible the solving of numerous problems, some of which ended in awards by ad-hoc Arbitral Tribunals, and others of which were resolved amicably by the States at earlier stages. This system, of a provisional nature, made it possible to start out on the difficult road of acknowledgment by the States, of the existence of restrictions on their sovereignty, deriving from the process of integration on which they have embarked. It is to be expected that the innovations deriving from the Olivos Protocol will improve the system's operation, surmounting some of its imperfections. However, we must not lose sight of the fact that this transitory system must be replaced by a permanent one, whose discussion and design must necessarily take into account the jurisdictional protection of private parties.