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MERCOSUR: The Emergence of a Working System of Dispute Resolution

Jorge M. Guira*

I. Introduction.

In eight short years, the Common Market of the Southern Cone (Mercado Comun del Cono Sur, hereinafter MERCOSUR) has established itself as the third wealthiest regional trading organization in the world, following the European Union and NAFTA.1

Significantly, MERCOSUR is slowly expanding its membership and trading relationships within Latin America, and beyond, including the above two regional trading blocs. It is therefore poised to provide its membership of the Southern Cone states of Brazil, Uruguay, Argentina, and Paraguay, along with associate members Chile and Bolivia, the ability to broaden their natural economic base beyond their geographic frontiers to many other nations.2


2. See Treaty Establishing A Common Market, Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041 [hereinafter TA] (core membership information). For the relevant MERCOSUR-Chile and MERCOSUR-Bolivia Complementation Accords, these may be accessed at http://www.sice.oas.org/trades.asp#MERCOSUR in Spanish and/or Portuguese [hereinafter SICE 1]. For the most complete overall site, see http://www.mercosur.org.uy/ [hereinafter Official MERCOSUR Web Site]. For a working compendium of sources on MERCOSUR, accessible through the Internet, the following are among the best sites: http://www.guia-mercosur.com; http://www.iadb.org; http://www.alganet.com; http://www.idrc.ca; http://www.geocities.com (MERCOSUR homepage); http://www.invertir.com. See generally http://www.usc.edu/dept/law-lib/legal/journal.html for leading international law commentary. The Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672 (1981) [hereinafter ACE 18] is also important to become familiar with because the Latin American Integration Association “LAIA” is a parallel organization to MERCOSUR. The eleven-member-state LAIA has much broader membership and is intended to oversee various trade agreements including the G-3, and bilateral pacts that eleven Latin American nations, including the MERCOSUR members, have with
It is important to give full weight to Chile and Bolivia's participation in MERCOSUR because their inclusion as satellites to MERCOSUR represents a significant expansion of free trade.

Even though MERCOSUR is large and growing, MERCOSUR Member and Associate States face a substantial challenge in building confidence among nationals and foreign investors alike as the provider of a fair, efficient, and just forum for dispute resolution. This is principally due to historical antipathy in interstate relations between Argentina and Brazil (the "Big Two"), as well as private concern over the treatment of foreign enterprises in each of the respective national forums. Transparency, fairness, and speed in dispute resolution are needed.

Because of MERCOSUR's dramatic growth in interstate commerce, and the centrality of foreign investment to economic development, the building and maintenance of sound relationships is of the highest importance. The presence of a working dispute resolution mechanism is, if not absolutely required, then at least a highly positive factor in developing stronger economic ties through law. Through the end of 1999, the MERCOSUR ad hoc arbitral tribunal resolved various trade matters, reflecting the current reality that the dispute resolution mechanism here deserves increased scrutiny as a working remedy for trade matters.

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3. This broad theme is captured in T.E. SKIDMORE & P.H. SMITH, MODERN LATIN AMERICA (3d ed. 1992). It is also detailed, including discussions of the tortuous processes of sovereign legal responses to foreign dependency, such as the Calvo Clause. See J.J. Jova, et al., Private Investment in Latin America: Renegotiating the Bargain, 19 Tex. Int'l L.J. 3, 12-13 (1984). Particularly relevant discussion with respect to the Southern Cone is provided in Amy L. Chua, The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries, 95 Colum. L. Rev. 223 (1995).

4. See Primero Laudo Arbitral Ad Hoc Laudo sobre Controversia sobre Comunicados N° 37 del 17 de diciembre de 1997 y N° 7 del 20 de febrero de 1998 del Departamento de Operaciones de Comercio Exterior (DECEX) de la Secretaría de Comercio Exterior (SECEX): Aplicación de Medidas Restricciones al Comercio Recíproco [translation-herinafter Laudo I concerning Argentina's claim against Brazil as to certain restrictive reciprocal measures, No. 37 of Dec. 17, 1997, and No. 7 of Feb. 20, 1998 of the Brazilian Department of Foreign Commercial Operations, Brazilian Commerce Secretariat], Apr. 28, 1999. See also Segundo Arbitral Tribunal Ad Hoc Laudo del Tribunal Arbitral Ad hoc Del MERCOSUR Constituido Para Entender En La Reclamacion De La Republica Argentina Al Brasil, Sobre Subsidios A La Produccion Y Exportacion De Carne De Cerdo [translation-herinafter “Laudo II” concerning Argentina's claim against Brazil as to certain pork meat production and export subsidies], Sept. 27, 1999. The latter also includes along side it, Aclaracion Al Laudo Del Tribunal Arbitral Ad Hoc Del MERCOSUR Constituido Para Entender En La Reclamacion De La Republica Argentina Al Brasil, Sobre Subsidios A La Produccion Y Exportacion De Carne De Cerdo. This is essentially a clarification upon rehearing [hereinafter Clarification]. The Administrative Secretariat may be contacted for further referencing of the pending tribunals and are posted as a matter of course in Official MERCOSUR Web Site, supra note 2.
Dispute resolution is also important since MERCOSUR is an economic institutional experiment that is reaching maturity. Many delicate trade matters that were deferred during the initial stages of the MERCOSUR will logically surface. Successful handling of economic crisis, arising from the recent devaluation of the Brazilian Real currency is required to diminish tensions within the trading bloc, and to preserve regional and even global stability.

This article explores the roots of the MERCOSUR dispute resolution system, the core elements in place, and reflects on certain related and key issues in the administration of arbitration. The central underlying question posed is to what extent norms of impartial justice versus power or political norms will drive the arbitral decision making process here, and what effect this may have on building confidence in MERCOSUR as an institution. This is revealed through examining the rules, as well as actual experience, of the trade bloc. The primary focus is a step-by-step review and analysis of the procedural and substantive issues that may arise from a practicing lawyer's standpoint in the dispute resolution process.

II. Roots of the System, the Founders' Intentions, the Institutional and Legal Sources of Authority, and the Accommodation of Expansion.

A. Intentions of the Founders.

MERCOSUR is a customs union. That means that MERCOSUR is intended to subject trade in goods to a common external tariff for shipment between Member States and other entities that are beneficiaries of agreements with it. For its full members, MERCOSUR is not intended to function as the more primitive free trade area, or as a full-fledged organization devoted to comprehensive federal unification in social and economic life, such as the European Union. Moreover, MERCOSUR is generally not as sophisticated and complex in the articulation of rules to cover specific situations, as in the NAFTA model. It is also not institutionally heavy with an extensive administrative structure to carry out the Member States' objectives, as applies to the European Union.

This is important because it provides some perspective on the relatively minimalist form and structure of MERCOSUR compared to the above referenced entities.

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The intentions of the founders are specifically articulated as the free movement of goods, services, labor, and capital in a progressively liberalizing fashion.\(^9\) These objectives have largely been met with substantial increases in the numbers of all goods subject to MERCOSUR law.\(^{10}\) Liberalization, on balance, has been achieved, although the aggregate tariff rate has gone up from fourteen to seventeen percent for goods, due to a desire for more revenue, in response to the Brazilian currency devaluation.\(^{11}\)

**B. INSTITUTIONS TO CARRY OUT THE INTENTIONS, AND THE EXPANSION PROGRAM.**

The institutions within MERCOSUR that exist to carry out policy making are the Common Market Council (Council) and the Common Market Groups (Group).\(^{12}\) The Council is composed of the Economic and Foreign Ministries of the Member States, and is intended to furnish the means for MERCOSUR to speak with one voice on foreign and economic matters. It also has responsibility of implementation and compliance with MERCOSUR treaties and protocols.\(^{13}\) The Group is charged with monitoring compliance with directives and rules, and with proposing changes and appointments to the Council and enforcing its own decisions.\(^{14}\) The directives and rules made here, or through subgroups, are binding on MERCOSUR Member States as law even though none of the state legislatures formally recognize the supra-nationality of MERCOSUR law.\(^{15}\) Group resolutions are also binding, although no express enforcement provision exists.\(^{16}\) This means that a MERCOSUR Member State, as a party to the trade bloc, is subject to the above laws, but that it may ultimately be of little consequence. This is because it may be up to the state legislature to recognize the law as valid; and is up to the state’s judiciary, in accordance with national law, to choose whether it is of any real weight in a dispute being decided in that particular jurisdiction. (Sanctions for non-compliance may also be political.)

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9. See TA, supra note 2, arts. 1-7 and annex I.
10. See id. See also http://www.iadb.org, Regional Integration Section, for special reports on this topic; see also Guira 2, supra note 1, at 442.
11. See Guira 2, supra note 1, at 443-44.
13. See OPP, supra note 12, arts. 3-15.
14. See id. arts. 3-11.
15. The topic of the lack of supra-nationality contains an extensive bibliography. See Guira 1, supra note 1, at 73-82; M.E. Úzal, EN EL UMBRAL DE LA SUPRANACIONALIDAD: EL PROTOCOLO DE OURO PRETO Y SU ANEXO [translation], RDCO 311 (1995).
16. See OPP, supra note 12, art. 15. The author views the text, the intentions of the founders, and the custom and history surrounding the binding nature of resolutions, decisions, and directives as binding in substantive and procedural terms, although there is a view among some commentators that the application of this provision is limited to procedural matters. See Dr. Adriana Dreyzin de Klor, Dispute Resolution System [in MERCOSUR], in O'KEEFE, supra note 7, at 75.
C. SOURCES OF LAW ON WHICH THE MERCOSUR LEGAL FOUNDATION IS BASED.

Other sources of decision-making authority and law are the Administrative Secretariat, the Trade Commission (Commission), the Joint Parliamentary Commission (JPC), and the Economic-Social Consultative Forum (Forum).17

The Administrative Secretariat has overall charge of coordination of MERCOSUR rules and implementation on a day-to-day basis. The Commission, composed of Foreign and Economic Ministry representatives from each Member State, is delegated the power to assist the Group in making trade policy, and also has authority to make binding directives or proposals in certain areas.18 The JPC, in turn, focuses on harmonization of laws with domestic law, among other responsibilities.19 The Forum assists the Group as an advisory body.20

The hierarchy of law within MERCOSUR is a matter of some dispute, although it is clear that the Treaty of Asuncion and its successor documents, as well as the above decisions, resolutions, and directives make up the core law.21

These sources of law have either been ratified as Treaty law by the respective state legislatures, or, if not subject to such processes, are nevertheless intended for implementation in Member States (such as acts agreed to by the sovereign power of the Member States in the collective MERCOSUR forum).22

In addition, there are Protocols for judicial cooperation between Member States that are in force (Las Lenas), and for choice of law (Buenos Aires), that are intended to assist in resolution of private, international, commercial, and other matters.23 International commercial arbitration between private parties is available on an ad hoc basis between private parties, although it should be observed that the New York Convention for Reciprocal Recognition and Enforcement of Judgements is not in force in Brazil.24 This is

17. See generally TA, supra note 2, and OPP, supra note 12, ch. I. Note that the Commission has a variety of technical committees that perform much valuable work in harmonization, in most major trade issues areas.

18. See id. arts. 16-19.


20. See id. arts. 28-29.

21. See EKMEKDJIAN, supra note 6, at 269-73; see also J.V. SOLA, LA JERARQUIA DE LAS LEYES Y REGLAMENTOS NACIONALES CON LAS NORMAS DEL MERCOSUR [translation], La Ley, T1996-E, Sec. Doctrina 739.

22. See id. See also Guira 2, supra note 1, at 452, for a specific discussion of how each of the respective national constitutions treats the place of MERCOSUR law within each of the Member States' borders.


important because, without enforcement, the legal decisions of other countries are rendered potentially meaningless. As shown below, the focus of the MERCOSUR system includes the resolution of private disputes, as well as inter-state matters.

D. ACCOMMODATION OF EXPANSION IN ESTABLISHING NEW ASSOCIATE RELATIONSHIPS.

To expand MERCOSUR, the agreements with associate members Chile and Bolivia have required the creation of free trade areas, but not a customs union with its common external tariff mechanism. These agreements have, nevertheless, retained the core concept of MERCOSUR—the progressive liberalization of trade in goods—thereby permitting increased trade and foreign investment opportunities.\(^{25}\)

The respective free trade agreements (Accords) that MERCOSUR has entered into with Chile and Bolivia include an Administrative Commission. The Administrative Commission is charged with oversight and implementation of the respective Accords. In the case of Bolivia, it is made up of the Common Market Group and a Bolivian National Commission. The National Commission is quite similar to the Group in that the Commission is comprised of officials concerned with foreign economic relations—the Foreign Ministry’s International Economic Relations section. A similar structure is also in place for Chile. The sources of law are, of course, those agreed to in the Accords, such as setting out the trade relationship, including the tariff reduction schedules, rules of origin, unfair trading practice guidelines, and safeguard measures.

As to dispute resolution, the Accords with Chile and Bolivia are, unsurprisingly, substantively similar, if not indistinguishable, from the concepts articulated in the early days of the Treaty of Asuncion. Indeed, it appears that both the structure and the functioning of the system are intended to follow this simple, early model described further in Section III.F below.

Interestingly, both Accords are to phase out this structure no later than four years from the June 25, 1996 enactment with a new one that includes arbitration. Specifically, if no agreement is reached, the Accords call for the substitution of this Treaty of Asuncion-like mechanism, with its successor, the Brasilia Protocol procedure and processes, to serve as the new dispute resolution mechanism.

Of course, this too is subject to some modification, as provided for in the institutional structure of the Accords.

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\(^{25}\) See also the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 (entered into force Jan. 16, 1976). MERCOSUR also has its own Convention on International Commercial Arbitration (1999) that may be accessed through the MERCOSUR Official Web Site, *supra* note 2, Decision 3/98, July 23, 1998. Likewise, Decision 4/98 articulates the International Commercial Arbitration agreement between the Member States, Chile, and Bolivia. The Protocol of Las Lenas on Judicial Co-operation indicates that the states parties will honor each other’s arbitral awards by providing recognition and enforcement. Whether this is intended to include the MERCOSUR arbitral tribunal decisions themselves depends on whether “states parties” in article 18 therein is intended to incorporate MERCOSUR tribunals or the provision is less broad in scope. See also OPP, *supra* note 12, art. 38, encouraging MERCOSUR law to be incorporated by reference as member states’ law. Finally, note that various bilateral investment treaties contain mandatory arbitral clauses that should be consulted. See Treaty Between the U.S. and Argentine Republics Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, 31 I.L.M. 124 (1992).

III. The Core Elements of the System.

A. A Systemic Preference for Negotiation, and Institutional Remedies, Rather Than Adjudication.

The two basic documents that are the focal point of the MERCOSUR inter-state dispute resolution mechanism are the Protocol of Brasilia and the Protocol of Ouro Preto, including its Annex.26 Both documents set out institutional structures as well as procedures.

Also, the Protocol of Colonia on the Protection and Reciprocal Promotion of Investments Within MERCOSUR contains certain provisions that may be applied to resolve disputes between private investors and state parties in a similar way to dispute resolution provisions in bilateral investment treaties.27

To those accustomed to Anglo-Saxon models of jurisprudence, an initial review may misleadingly suggest that MERCOSUR seems to be principally a legalistic system rather than a diplomatic or power-oriented system. This is because it appears principally concerned with a process leading to adjudication rather than negotiation.

Negotiation is, of course, the first option, and obviously most frequent first step, in the process for all disputes, including those relating to the interpretation of the Treaty and successor documents. There is also a so-called "institutional" phase wherein the Group may be called upon to handle certain types of disputes, before the arbitral stage is reached in such disputes. Importantly, experience has shown that nearly all disputes are resolved through negotiation, and do not extend beyond the institutional phase.

Consequently, the arbitral tribunal is only rarely called upon to resolve disputes. This suggests that it is the quality of negotiation skills or diplomatic lobbying with the relevant MERCOSUR Member States that is the single most important focus of the process. The extent to which it is further supported by further remedies of law-based arbitration, undertaken by independent "judges" or arbitrators, and is otherwise enforceable, does, nevertheless, play a strong and increasing role in raising the effectiveness of the process. The efficacy of arbitration in MERCOSUR determines how seriously law is perceived as a real working instrument of trade policy decision-making.

This sub-part will review the above processes used to resolve disputes before analyzing whether the methods employed are sound and workable. The issues of standing and subject matter jurisdiction, settlement, and initiation of a complaint or dispute through its resolution are discussed in turn.28 The core practical concerns that exist at the negotiation, institutional, and arbitral level of the process are then summarized. Finally, a discussion of the specific dispute resolution process aspects of the MERCOSUR-Chile and


27. See Official MERCOSUR Web Site, supra note 2, art. 9(2).

28. See id. The concepts of "standing" and "subject matter jurisdiction" are not articulated as such in the respective Protocols. Nevertheless, these terms are used for reader's convenience because they articulate the concepts of who gets to bring a dispute (standing) and what types of disputes the arbitral tribunal may hear (subject matter jurisdiction) in a manner that encapsulates these issues, without loss of substance.
MERCOSUR-Bolivia trade agreements are treated separately and presented below. A discussion of arbitral decisions (through the end of 1999) is also presented.

B. DISTINGUISHING BETWEEN THE DIFFERENT TYPES OF PROCESSES FOR VARIOUS DISPUTE TYPES.

The Ouro Preto Protocol spells out the parties who may participate and the types of disputes that may be heard. Here, only states can participate as parties with standing in a dispute, although individuals can play a role as participants when their interests are at stake. With respect to disputes concerning the interpretation, application, or non-fulfillment of the provisions of the Treaty of Asuncion or agreements included within its framework, decisions of the Council, Resolutions of the Group, and Directives of the Commission, only state parties can participate (hereinafter Track 1 disputes).

By contrast, there is an additional track or process regarding complaints to the Commission, which complaints can originate from the national sections of the Commission and can initially be brought forward by state parties or individuals, whether natural or legal persons (hereinafter Track 2 disputes).

The subject matter of such complaints likewise can relate to controversies as to the interpretation, application, or compliance with the Treaty and its various successor documents, as well as the decisions of the Council, Resolutions of the Group, and Directives of the Commission.

There is, however, an additional basis for Commission subject-matter jurisdiction, which exists in the form of administrative or illegal actions of the state parties that restrict, discriminate, or otherwise violate the above-mentioned Treaty and successor legal documents and decisions included in the decision-making apparatus.

Although article 1 of the Ouro Preto annex provides for origination of complaints by state parties or individuals, article 2 states only that the complainant state party shall submit its complaint to the Chairman of the Commission. This indicates that individual parties do not have standing by themselves to follow through on complaints made to the Commission, regardless of whether they involve Treaty interpretation or discrimination type issues. Approval of their respective national section is needed to take this next step. Interestingly, complainants before the Commission also have the option of moving directly to the Brasilia Protocol dispute settlement process described below, in addition to the annex of Ouro Preto Protocol resolution mechanism steps, including raising of complaints in a Commission setting.

In both case tracks, arbitration is permissible because the Ouro Preto Protocol provides for it pursuant to the Brasilia Protocol.

In this way, a flexible set of remedies has been articulated, with the path leading ultimately to arbitration if no resolution is otherwise achieved.

29. See OPP, supra note 12, art. 43.
30. See id., art. 21.
31. See BP, supra note 26, art. 1; see also OPP, supra note 12, art. 44.
32. See OPP, supra note 12, art. 25.
33. See id., art. 21(i).
34. See id., art. 45; BP, see also supra note 26, arts. 19, 25.
C. A ROAD MAP THROUGH TRACK I DISPUTES.

The first step for a state party in a Track I dispute regarding the Treaty, its successor documents, and the decisions of its organs (hereinafter referred to as Article 2 organs) is to engage in direct negotiation, informing the Ministry of the Secretariat and the Group.\(^\text{35}\)

If such negotiations do not resolve the dispute, then a party may submit the dispute to the Group. The Group will allow each party to present its case, and an expert will be selected from a list provided to the Group.\(^\text{36}\)

Upon conclusion of this process, a recommendation is made and the process is concluded within thirty days of the submission of the controversy for the Group’s consideration.\(^\text{37}\) If the above procedure does not resolve the dispute, then an arbitral procedure is set forth that can be utilized.\(^\text{38}\) No jurisdictional challenge is permissible as long as one party submits a dispute.\(^\text{39}\)

The arbitral panel is composed of arbitrators selected from a list of ten designated arbitrators who are registered with the Administrative Secretariat.\(^\text{40}\) The parties can designate one arbitrator, with the third arbitrator being determined by common assent of the parties.\(^\text{41}\)

Such arbitrator cannot be a national of either of the state parties, and should be named within fifteen days of the date that the Administrative Secretariat communicates the intention to commence arbitration. Other substitute arbitrators can also be named in the event of incapacity. If the parties cannot agree on any of the arbitrators within a fifteen-day period, the Administrative Secretariat will appoint their own arbitrator from the respective lists submitted.\(^\text{42}\)

Moreover, if the parties agree, the Administrative Secretariat may appoint an arbitrator from a list of sixteen arbitrators available through the group.\(^\text{43}\) Such selection can be made at the request of either party. (Provision is also made for multi-party disputes in the sense that two state parties with the same position can also take sides against another party.)\(^\text{44}\)

The arbitral tribunal will fix its own rules of procedure, guaranteeing a fair and equal opportunity to be heard in an expeditious manner.\(^\text{45}\) Parties are to submit the terms of reference and may have the assistance of lawyers to present their case.\(^\text{46}\) The tribunal also has the power, in the event of irreparable harm, to award interim relief.\(^\text{47}\)

The parties’ legal sources can consist of the Treaty, successive provisions, as well as applicable principles of international law and an ex aequo et bono power of the arbitrators,

\(^\text{35}\) See BP, supra note 26, arts. 2, 3.
\(^\text{36}\) See id. art. 4.
\(^\text{37}\) See id. arts. 5, 6.
\(^\text{38}\) See generally id. ch. IV.
\(^\text{39}\) See id. arts. 7, 8.
\(^\text{40}\) See id. art. 10.
\(^\text{41}\) See id. art. 9(ii).
\(^\text{42}\) See id. art. 11.
\(^\text{43}\) See id. art. 12.
\(^\text{44}\) See id. art. 14.
\(^\text{45}\) See id. art. 15.
\(^\text{46}\) See id. arts. 16, 17.
\(^\text{47}\) See id. art. 18.
if the parties agree. If the decision of the arbitral tribunal is to be written within sixty days and the majority decision is to be adopted.

The voting is confidential and no dissent is allowed. There is also no appeal and the party should comply within fifteen days of the arbitral decision or order. Fifteen days are available for clarification of the tribunal's decision, which response is due back from the tribunal within fifteen days thereafter.

If the parties do not comply within thirty days, the parties to the dispute can take compensatory measures, such as suspending concessions. Each party pays for their own costs.

D. Understanding Track 2 disputes.

Track 2 disputes regarding legal or administrative sanctions by one party, as discussed in article 25 of the Brasilia Protocol, have a separate mechanism. Affected parties of a state can refer to the national section of the Group their complaint for the national section's review of its true nature. If this controversy has not been subject to negotiation or arbitration pursuant to the chapter II, III, or IV arbitral process above described, then the national section can look for an immediate solution within the Group. If fifteen days lapse without further action being taken to resolve the matter, the Group, on presentation by the national section, can review the matter.

If the Group does not reject the matter, a group of experts can be convened within thirty days to hear evidence regarding the particular claims. The panel of experts will consist of three members designated by the Group from a list of twenty-four persons.

Each of the state parties will submit the names of six persons who are well known and deemed objective by them to review the controversy. There is also an additional procedure for bringing in experts if the parties do not agree. The experts then state their position to the Group and the state party that is the subject of corrective measures. If this does not resolve the dispute, either party may call upon arbitration fifteen days later.

Next, the procedure for complaints submitted to the Ouro Preto Protocol, for the Commission's review by national section members, begins when the complainant state party takes its complaint to the Chairman of the Commission.

If no decision is reached, the Commission passes the file on to a technical committee that shall prepare a joint opinion on the matter within thirty calendar days.

48. See id. art. 19.
49. See id. art. 20.
50. See id. art. 21.
51. See id. art. 22.
52. See id. art. 23.
53. See id. art. 24.
54. See id. arts. 25, 26.
55. See id. art. 29(ii), (iii).
56. See id. art. 30(i).
57. See id. art. 30(ii).
58. See id. at Annex, arts. 2, 3.
Commission shall rule on the complaint at its first ordinary meeting, although the con-
clusions of the experts making up the technical committee are not binding. Moreover, the
experts can submit differing opinions (dissent is allowed).  

If consensus cannot be reached, the Commission shall submit to the Group various
alternatives proposed to the Group, which shall give a decision within thirty calendar days
of receipt. If there is agreement by the Group that the complaint is justified, the state
party shall, within a reasonable time fixed by the Commission or the Group adopt such
measures. In the event of noncompliance, the complainants may initiate arbitration.
Moreover, complainants of the state party may go directly to this procedure and
bypass the Group, if they so desire.

E. SUMMARIZING THE CORE PARAMETERS OF THE NEGOTIATION, INSTITUTIONAL, AND
ADJUDICATION STAGE WITHIN MERCOSUR.

For state parties who are not involved in Trade Commission matters, a review of the
above suggests that it can be summarized as requiring the following steps. First, there is
negotiation within fifteen days between the parties, followed by submission to the Group
and mediation, and the possibility of a recommended set of findings within thirty days.
Next, if all else fails, arbitration may be called upon, and a decision is to be reached with-
in sixty days (absent the agreement of the parties to the contrary). In this regard, it should
be noted that although the Group has limited juridical authority to bind the disputants, it
does possess special legislative or diplomatic competence since it is the very entity
charged with the responsibility of implementing MERCOSUR law.

For private parties not involved in Trade Commission matters, the above procedure
highlights certain constraints. Specifically, private parties cannot directly challenge a
state’s noncompliance with MERCOSUR obligations. This is logical because of the lack of
supra-nationality in law. Member States, although bound by MERCOSUR, do not have to
respect such a law in the particular State, unless so deemed by the respective State legisla-
ture or judiciary. One noted commentator suggests that this limits parties to challenging
certain acts, such as rules and regulations that are inconsistent with MERCOSUR.  

Private complainants must then have the national section of the Group agree to take
up their cause within fifteen days, or go to the Group without such express support. The
Group’s acceptance of the complaint furnishes the private party with an expert panel that
may recommend corrective measures including annulling a rule or regulation found to be
in violation. If the Group agrees with the recommendation, then the state must comply
within fifteen days. If it does not do so, the state in which the private party resides, rather
than the private party affected, has the choice as to whether to call for a mandatory arbi-
tral hearing.

63. See id. at Annex, arts. 3, 4.
64. See id. at Annex, art. 5.
65. See id. at Annex, art. 7.
66. See de Klor, supra note 16.
F. Adapting the MERCOSUR Dispute Resolution System to the Associate Members Chile and Bolivia.

For both Chile and Bolivia, the subject matter is issues concerning interpretation, application, and noncompliance arising under the Accords.67 There is a negotiation stage and institutional stage, but arbitration is not yet available. State parties to the Accord have standing to directly pursue the remedies currently available. As to the Chilean Accord, the negotiation phase is thirty days, with thirty more days available, if a motion for extension of time is set out and agreed to by the parties involved.68 At that point, the dispute is referred to the Administrative Commission, based upon claims articulated in a written petition.69 A decision must be reached within sixty days, unless the parties agree to an extension.

If no decision is reached, each party may choose experts to sit as a board of ad hoc experts who will review the matter.

Each party chooses one expert, and both choose the third expert.

This ad hoc expert group is to be called immediately upon expiration of the Commission's sixty-day mandate to resolve the matter, or as the parties may so deem.

The experts have forty-five days to issue recommendations to the Administrative Commission, which then must make final determinations in a public report fifteen days thereafter.70

As to the Bolivia Accord, the negotiation phase likewise contains a thirty-day initial period, followed by thirty days for possible extension.71

The Administrative Commission, absent any request of the parties, must also work to resolve the matter within sixty days, or it shall be referred to experts. The ad hoc experts may be chosen, in a manner similar to the above, and also face similar time constraints.

The internal process is, however, substantially more specific in laying out procedural rules. The Administrative Commission receives the findings of the experts within forty-five days, and is to issue a public report within fifteen days.

A review of the above processes set out in the Accords shows that they are much simpler than the current MERCOSUR system, and consequently afford the parties much more limited remedies. By comparison, they may, therefore, be deemed more diplomacy-oriented, and appear to be rule-oriented rather than rule-based, to reflect this focus.

III. Analyzing the Logic of the Dispute Resolution System and Reflecting on the Realities.

A. Harmonizing the Intentions of the Founders with the Actual Working of the System.

The primary intention of the above dispute resolution mechanisms is to help resolve trade and related foreign investment disputes amicably. They are intended to serve as a

67. See R. Lavagna, The Future Course of MERCOSUR, in O'KEEFE, supra note 7, at 4-8.
68. See Chilean-MERCOSUR agreement, in SICE Web Site, supra note 2 [hereinafter CM].
69. See id. at Annex 14.
70. See Bolivia-MERCOSUR agreement, in SICE 1, supra note 2 [hereinafter BM].
71. See id. at Annex 11.
strong signal to foreign investors, including those of other MERCOSUR Member and Associate States, of the presence of a stable system for protecting their interests. This is vitally important for attraction of all foreign capital, particularly direct foreign investment, as is involved, for example, in the building of manufacturing plants.

The present MERCOSUR dispute resolution system, including the Chile and Bolivia Accords, should assist in advancing this crucial core objective. The above “core” dispute resolution mechanism is to some extent modeled on the U.S.-Canada Free Trade Area (CFTA) approach later used in NAFTA, which has been highly successful in that region.72

Importantly, the current Ouro Preto modification provides full members with a critical adaptation from the approach used in the Brasilia Protocol, namely that arbitral panel decisions are no longer confidential.73

This, therefore, permits the development of a body of jurisprudence that can guide potential disputants as to how the legal sources of MERCOSUR are interpreted in the various forums provided.

Although the discussion below focuses on the dispute resolution system for Member States, the reasoning set forth in subsections C and D is equally applicable to MERCOSUR’s relationships with the associate member states, except as noted in the final subsection.

B. ENHANCING FLEXIBILITY: THE OURO PRETO REFORMS AND THE OVERALL PROCESS.

In the Ouro Preto modifications, the complaint system of the Commission continues the general process of favoring institutional review of disputes over adjudication for resolving these types of complaints. Many of the types of disputes brought to the Commission, such as disputes regarding discrimination, are technical in nature. The special expertise and sensitivity of the Commission, its appointed experts, and the technical committees, may be an advantage here, although the disadvantage of an impartial tribunal is present. The Commission itself, or the technical committees, is intimately familiar with the nuts and bolts of the rules, since they draft many of them (particularly the directives).

Also, the Ouro Preto Protocol continues the previous framework of allowing broader issues relating to Treaty interpretation and related issues to be reviewed using the Brasilia Protocol process. This means that issues relating to broader, more fundamental concerns will be subject to negotiation first, again reflecting a preference for a more political process at this end.

As shown above, there are various types of disputes and means of resolving them within the MERCOSUR system. Article 1 and article 25 of the Brasilia Protocol set forth the type of disputes involving complaints by national sections on behalf of citizens of the respective states parties. It also identifies more general controversies relating to interpretation, application, or compliance with the Treaty and its successor documents and decisions of its decision-making bodies, as well as actions of the parties relating to restrictive practices, anti-discrimination, or competition law.74

72. See de Klor, supra note 16, at 7-6.
73. See OPP, supra note 12, art. 39.
74. See id. art. 21; see also BP, supra note 26, arts. 1, 25.
On the other hand, the state parties also have the opportunity to resolve disputes through negotiation first and bypass the Commission as to disputes relating to interpretation, application, and non-fulfillment of the provisions of the Treaty of Asuncion, its successor agreements and actions of article 2, Ouro Preto organs. This appears to provide options for a party that prefers taking the more technical Commission route.

It is logical that cases involving interpretation, application, and non-fulfillment of Treaty provisions are the kinds of matters that are designed by the Treaty founders to be pursued in a flexible manner. It is in the interests of any party to try to settle a dispute without engaging any kind of adjudication, if possible. (Time and money are saved).

The fact that such matters are reviewed within this type of internal diplomatic lobbying process allows the state party to find some kind of face-saving measure before it is faced with the reality of violation of its own rule. At this point, it seems that whichever way a party goes the law provides essential guidance.

C. POTENTIAL DANGERS OF APPLYING LAW IN INTER-STATE TRADE DISPUTES.

Some authors have said that subjecting a trade dispute to a transparent legal process is a bad idea in principle because “wrong cases” are brought forward. Wrong cases are those matters in which domestic politics can box in the options of the Member State that has taken up the cause of its national industry or sector, even if it has a losing cause. It is argued that in this situation the state party is in a lose-lose position; the state party loses in the relevant MERCOSUR body and on the domestic front.

The kind of argument that this author would raise is that this is precisely the point of dispute resolution mechanisms. A dispute resolution mechanism’s function is to give voice to disputes and provide an opportunity for their resolution.

In any event, as critics of the “wrong cases” school point out, the airing of such differences does not appear to have hurt, for example, in the development of GATT.

Further, over-politicization of the process defeats the purpose of establishment of stable, predictable norms. Parties must, therefore, be sensitive to the political or diplomatic as well as legal reality. Whether the remaining system is rule-based in that it is formally driven by the rules or merely rule-oriented in that politics plays a background role, the problem of how to accommodate ‘losers’ is always ever present.

D. RESOLVING THE TENSION BETWEEN LAW AND DIPLOMACY.

Resolving this tension obviously requires a delicate balancing act at times because disputes escalate, and the atmosphere between the Member States is poisoned. All in all, it seems more sensible to side with the view that open airing of differences is better than the alternative when such differences are unavoidable. This is especially true when their very public nature will probably lead to a reasonable compromise.

Generally speaking, some of the more important controversies that have emerged in MERCOSUR involve the treatment of the automobile, sugar, and information technology sector. Without detailing their substance, these disputes have all been resolved amicably, despite the presence of significant turmoil. This is true for the period before the devalua-

tion of the Brazilian Real caused MERCOSUR to reassess customs issues. This was precipitated, of course, by the imbalance in inter-MERCOSUR imports and exports caused by the suddenly cheaper Real products going across the border, as well as the concomitantly expensive products coming into Brazil (as in dollar-pegged goods from Argentina).

It seems, therefore, that the presence of a dispute resolution mechanism that offers the opportunity for a body of jurisprudence that attracts foreign investment, functions in a manner that promotes economic growth and development. To the extent that this continues to take place, national interests can be subordinated within its proper legal context and trade tensions that may exist can be mediated through the dispute resolution process. The way in which politics affects dispute resolution must, of course, be watched closely to see what types of informal or formal norms or customs develop as the operational code for dispute resolution.

E. HOW THE CHILE AND BOLIVIA ACCORDS FIT WITHIN THIS FRAMEWORK AND THE FUTURE OF EXPANSION.

The Chile and Bolivia Accords reflect the MERCOSUR’s focus on developing sound dispute resolution frameworks. It will be interesting to see what the near future brings as these relationships mature and the consequent deepening expected brings more remedies, including the emergence of arbitration as an alternative to the negotiation table and the institutional phase. The analysis in subsections C and D above is, therefore, of increasing relevance as time goes on. These free trade agreements may also be of some interest to other states and entities, including the Andean Community, which is soon looking forward to inclusion within or closer association with MERCOSUR.76

In MERCOSUR itself, recent trade policy developments are highlighted by the recent arbitral decisions, set out in Section IV, below.

76. See Aline Sullivan, Free Trade Fever Grips an Ever Ambitious Continent, INT’L HERALD TRIB., Mar. 22, 1999, available at http://www.iht.com/iht/siz/031599/sr031599e.html. The Andean Community was to commence negotiations as to a free trade zone on September 30, 1999, and to conclude them no later than December 31, 1999. Mexico is also expected to fully join in the next few years as an associate member. A Free Trade zone between MERCOSUR and the ANDEAN COMMUNITY with relevant final or provisional rules is not in evidence in either the usual repository of record, the official LAIA Web site, http://www.aladi.org, or in the Official MERCOSUR Web Site, or the OAS foreign trade information service site http://www.sice.oas.org/trade/Mrcsr/MrAnCo_s.asp.
Recent events suggest that the deadline for finalizing any agreement may take much longer, but that the process is ongoing. See http://www.comindadandina.org, Brasilia Communiqué, Oct. 1, 2000 (Statement of South American Presidents expressing support for conclusion of Free Trade Area between Andean Community and MERCOSUR). There are, of course, ongoing negotiations for a de jure merger with NAFTA to be concluded in the Summit of the Americas process, by 2005. See http://www.oas.org. The European Union has negotiated a framework agreement (Madrid 1996) and is considering its own closer affiliations by early in the next century as well, based on recent understandings in June EU-MERCOSUR meetings. See http://www.irela.org.

A. Striking a Balance in the Unique MERCOSUR Context.

As the above shows, the MERCOSUR system is open to criticism by commentators who perceive that a less political, and more impartial or legal decision-making process, is preferable as a means to achieve justice and fairness. It is also subject to criticism by those who fear that trade disputes require more politics than law in the decision-making process in that they involve the sovereign. This polarity of views leads to the conclusion that there may be the need to strike a balance between the interests of politics and law in dispute resolution here. Of course, each party here, depending on its own perspective, may stake a claim to superior wisdom or truth, including the need for little to no compromise or balance in the design of the dispute resolution system here.

Although one cannot disprove a negative, it does not seem to be the case that the lack of a more legally based system, where negotiation and institutional remedies are in the background rather than the fore, has materially impeded the development of MERCOSUR as an institution thus far. Indeed, it may be fair to say that to judge whether MERCOSUR is a proper legal institution with a strong dispute resolution system based upon whether it leads to arbitration frequently is simply to confuse the issue. Law does play an important role here; it merely does so as a device for institutional mediation, conciliation, and fact-finding, most of the time, rather than in a formal arbitration setting. Further, the record shows that the controversies that have emerged have been amicably resolved, and there is no clamor for reform. The legal decisions that are set below in the Laudo I and II suggest that arbitral panels have made serious efforts to realize comprehensive legal frameworks and focused solutions that can help resolve remaining differences and provide guidance as to how MERCOSUR law is to develop.

B. Recent Arbitral Decisions: Laudo I and II.

The first dispute between the plaintiff Argentina and the defendant Brazil (Laudo I) was convened pursuant to the Protocol of Brasilia, articles 21 and 22. It has already proceeded down track 2 in that it involved a legal or administrative provision of a Member State and had been the subject of consideration by the Commission, Technical Committee, and the Group, as Brasilia Protocol article 25 requires. The main issue was whether Brazilian Foreign Commercial Operations Department Communications 37/97 (superseded by 23/98) and 7/98 of their Foreign Commerce Secretariat were unduly restricting cross-border trade through a series of classification schemes. The relevant products involved ranged from wheat, to textiles, to milk, and to manufacturing equipment.

The Argentine’s specific claim was that the above Brazilian import-export regulations provided for automatic or conditional licenses for cross-border trading of products that unduly burdened Argentine exports. This was contrary to the Treaty of Asuncion’s intention to promote ongoing trade liberalization and violated successor protocols and agreements to effect this end.
Further, it was argued that the Brazilian government violated CMC Decision 3/94 and Decision 17/97. It was alleged that this had provided for a standstill agreement wherein no further trade restrictions were to be put in force greater than those applied to nationals of the Member States or relevant foreign parties (essentially those to whom national or most-favored-nation treatment was owed). The new classification scheme breached this standstill agreement understanding.

One example mentioned of a burdensome restriction was that imposed on wheat, which, it was alleged, had been listed in the above Decisions as an export product that was unrestricted in foreign trade but was now being subjected to certain "conditions." Such conditional licensure, including meeting certain public health requirements as well as complying with certain ministerial business requirements constituted an administrative process or regulatory rule that made trade between Argentina and Brazil much more complicated. In total, Argentina claimed that over sixty-one percent of its exports were being unfairly impacted by the Brazilian scheme.

Brazil responded that the regulations as applied actually diminished the relevant burden on Argentine exporters. It said the new rules were not restrictions but merely Brazil's attempt to modernize and indeed automate much of its foreign trade processing system. It further stated that even the "conditions" Argentina was now complaining of, such as the public health standards, essentially newly codified the law as it preceded the enactment of the 37/97 and 7/98 restrictions. It also said that the organizational requirement set out in 23/98 was purely operational in nature, and therefore outside the ambit of the tribunal's consideration.

Brazil said also that even if the scheme was somehow deemed as constituting new restrictions this was permissible, because pursuant to the Treaty of Asuncion, gradual liberalization was to be achieved in trade, but public policy exceptions were expressly allowed. Moreover, Decision 3/94 did not provide a blanket prohibition on all further trade restrictions, but rather allows them on a case-by-case basis. In any event, only 2.7% of Argentine products are affected, and a distinction between a mere classification scheme (as has been enacted) and an outright restriction on trade existed. Such classification scheme is actually permitted under 17/97.

The tribunal disposed of the issues presented by the Argentine claimant, but decided that despite the diligent efforts of both parties, the correct analysis as to whether the classification scheme violated the Member States' Treaty and other obligations to each other had not been presented. It therefore provided guidance as to how to ensure conformance with MERCOSUR law by addressing the arguments presented by Argentina as well as providing the Member States with a comprehensive legal framework for resolving the underlying issue of how the licensing scheme comported with MERCOSUR law. Accordingly, it concluded that to the extent certain criteria established by the Treaty of Montevideo had not been met, Argentina's claims had merit. It did not specify how the claims might prevail item by item, however, nor did it appear to remand the matter for specific oversight in implementation of its criteria, (apparently relying on their good offices and ability to counteract non-compliance with compensatory measures).

79. See id. at 8-17.
As to the issues presented, the tribunal's decision foremost included a recognition that the Brazilian automatic and conditional licensing scheme was not per se in violation of the Treaty of Asuncion, Decision 3/94 and 17/97. Indeed, the panel found no specific evidence had been brought out that the Brazilian scheme violated the Treaty of Asuncion or ACE 18 with any measures (or restrictions) that impeded trade in this respect. The panel further agreed with the Brazilians that Decision 3/94 was not a standstill agreement but merely an understanding for the Member States to provide each other with national or most-favored-nation treatment. It also stated that Decision 17/97 was not at all relevant as no restrictions, properly defined, were at issue. The panel further agreed with the Brazilian position that Decision 23/98 was outside the scope of the issues presented it and, in any event, merely reassures that transparency in foreign trade regulations should be put in place.

Nevertheless, the panel concluded that it was the obligation of Brazil, consistent with the Treaty of Asuncion to eliminate trade restrictions that might be found to exist along certain criteria suggested, no later than December 31, 1999. As such, it concluded automatic licenses were in accordance with MERCOSUR to the extent that they did not contain any limiting conditions or procedures. But the conditional license scheme had to comply with the Treaty of Montevideo/ACE 18 standards articulated in article 50 and as otherwise noted in the panel decision, and such should not otherwise constitute commercial burdens.

The core of the panel's reasoning was that its job in concluding the above was to examine how well the law measure or restriction at issue was in harmony with the founder's intentions and objectives of progressive liberalization. These intentions and objectives were concrete guides to decision making rather than abstract principles. The Treaty of Asuncion and Ouro Preto Protocol are to effect such aims and along with Annexes and specific decisions provide both broader provisions and more specific concrete standards. (Certain tariffs are expressly set for elimination or reduction by predetermined dates; and non-tariff barriers are likewise to be correspondingly eliminated, all pursuant to article 5a and article 10, Annex I, Treaty of Asuncion, and article 11, ACE 18).

The panel observed that the objective of establishing a true common market by December 31, 1994, including the driving of tariffs to zero through the 1991-94 transitional period had not been met. Nevertheless, the obligations of the Member States with respect to reducing or eliminating tariff and eliminating non-tariff barriers was not expressly canceled. Rather, the Ouro Preto Protocol reaffirmed the Common Market establishment objective, as well as Colonia did in Decision 2/93, and Decisions 13/93, 3/94, 5/94, and 24/94. Given the fact that the institutional system was still in place, and the core founders' intentions were reaffirmed, the fact that the objectives of the commercial trade liberalization program were not achieved by December 31, 1994 did not affect the Member States obligations. Such imperfection in execution could not be said to minimize the obligation of the Member States to carry forward in appropriate fashion.

Indeed, Decisions 5/94 and 24/94 established that the commercial liberalization program was still to be completed by a new extended deadline of December 31, 1999. As the elimination or reduction of tariff and elimination of non-tariff barriers go hand in hand, these two aspects of the commercial trade liberalization objectives remain in force (subject to any further MERCOSUR extensions or modifications).

The Treaty of Montevideo includes ACE 18, article 50. This specifically outlines the public policy exception criteria that may be applied to allow non-tariff barriers to remain in force. Absent restrictions or measures to protect such articulated public policy interests
as security, public morality, nuclear materials control, or artistic patrimony, conditions may not be established to distort commerce and any measures adopted by Member States must be harmonized to 3/94 and 17/97. This is, of course, not intended to preclude applying information technology systems to existing import-export legal and administrative processes.

Consequently, the panel further said, the Member States are obliged to continue with the commercial liberalization program, including as set out in the Treaty of Asuncion and the Treaty of Montevideo. Therefore, to the extent any Member States' measures fall under article 50 (public policy exceptions), Treaty of Montevideo, they must be harmonized with the above normative system. Licenses must not be incompatible with the above and the matter is, therefore, left to the parties to ensure that the relevant Brazilian foreign trade rules are not inconsistent with this decision.

From a facial review, it appears that this decision of the arbitral tribunal is careful and measured, as meticulously and comprehensively set out in the panel's opinion. It has therefore provided commentators with a positive signal that the system is working and functional, as required when differences are irreconcilable. How the Brazilian authorities determine whether the conditions are illegal and how the Member States will work to effectuate this purpose, or resolve their differences, if implementation is not agreed, represents the next chapter of this issue. It is, of course, most important to see if MERCOSUR can not only ably produce competent legal decisions in theory, but provide solutions that can be implemented (including when necessary providing a special master or other oversight mechanism). This deserves close monitoring as the Member States work out whether compliance with the decision takes place.

Laudo 2 appears to be another track 2 dispute. It arises from the national section of Argentina's complaint that after failure to resolve the issue through the Commission, a panel should be convened directly pursuant to the Brasilia Protocol, article 7 (and the Ouro Preto Protocol, article 21). The Argentine republic claimed on behalf of the national section that the Brazilian government had adopted illegal beef and pork export subsidies. These were alleged to be in violation of the Treaty of Asuncion's Member State obligations to guarantee equivalent competitive conditions. The initial argument presented was as to Brazil's practice of keeping certain stocks of corn public (CONAB), as well as another claim relating to participation in a program involving certain forward exchange and export contracts (ACC and ACE program). The petition was later amended to include a new claim relating to Brazil's credit provision and trade financing program (PROEX) promoting the above meat products.

As to CONAB, Brazil's public stocks of corn stabilizes prices for this, providing an unfair subsidy for local Brazilian farmers when the products are exported to Argentina (and other Member States). This incentive, it is alleged, violates 10/94.

As to the PROEX export-financing scheme, the issue is likewise whether an illegal subsidy is being provided, contrary to 10/94, in that a government finance subsidy on the export of goods is provided. Next, Argentina complained that certain exchange and export contracts used by the Brazilian farmers with commercial banks allowed a twelve to fifteen percent annual interest rate rather than a thirty percent interest rate for eligible exporters in the so called ACC and ACE programs. This is possible only due to certain Brazilian government financial market interventions. This use of contracts allows interest rate arbitrage, along with other impermissible benefits.
The Brazilian government replied that the CONAB public corn stocks were merely that and not intended to subsidize pig and cattle farmers for export. Such measures as it has taken were neutral because it allowed farmers to benefit from lower prices and thus sell their products accordingly on both the domestic and the export market. As to PROEX, the government said that its own laws specifically prohibited the use of such financing for agricultural export products. As to the ACC and ACE program related allegations of improper financial intervention, the Brazilian government was not involved in such private commercial matters as what commercial banks do, so it could not be held liable for any interest rate deals that may have been offered.

In reviewing the matter, the arbitral tribunal first observed the back and forth manner in which the dispute had been handled below, including that it had finally gone through not only the Commission but also the Technical Committee, the Group, and a bilateral settlement meeting of the Member State parties. The tribunal said that it was the duty of the complaining party to prove that an illegal sanction or anti-competitive measure had been enacted, notwithstanding any argument below. Moreover, harm must be shown. The question of certain credit programs that were alleged illegal, in addition to the above detailed three issues described were deemed outside the scope of the tribunal's jurisdiction as they had not been through the relevant MERCOSUR process below. The tribunal then disposed of the three questions regarding CONAB, PROEX, and the ACC and ACE program that it determined were properly before it.

As a preliminary matter, the tribunal said that 10/94 as the Decision of the Council regarding harmonization of export incentives was the proper law that needed to be considered. It further cited the previous arbitral decision, Laudo I, as offering appropriate guidance as to how MERCOSUR law should be interpreted as to its concrete terms and broader intentions. It pointed out though that in subsidy matters the question did not stop there, as the Member States were part of the LAIA, which was to comply with certain World Trade Organization (WTO) subsidies rules. It then went on to lay out the three conditions that had to be in place for a subsidy to be permissible under the General Agreement on Trade and Tariffs (GATT), and then what categories existed under the successor WTO as to permitted subsidies therein.

Turning to issue one regarding CONAB, the tribunal noted that the illegal condition of a specific industry subsidy rather than just a general form of aid had not been met, as required by GATT. Further, Decision 10/94 was also not implicated in that the corn stocks program was not an illegal subsidy, as so defined there. Therefore, Argentina's claims of an illegal subsidy were without merit.

As to issue 2 regarding PROEX, Brazil had already admitted that if the program was used for agricultural products, as here, that it would violate its own law, subject to certain exceptions. This meant that Argentina prevailed on the merits as the issue had now become moot. As to issue 3 concerning the ACC and the ACE program, the tribunal said that specific harm had not been shown as to how the above was implicated in pork and beef exports, but that it was not ruling out that such might be the case in theory. Absent sufficient evidence, the claim failed.

This commentator is of the view that Laudo II further supports that MERCOSUR is developing a body of jurisprudence. The tribunal was very helpful to this end by providing guidance as to what was required to prove up the case including damages and also in fleshing out the GATT/WTO/LAIA aspects further. It will, nevertheless, be interesting to see what, if anything, comes of the third issue in any further proceedings.
C. CONCLUDING OBSERVATIONS.

Strong lobbying at the Group and Commission level is obviously particularly crucial for trade lawyers, given the strong bias in the MERCOSUR for negotiation and internal institutional resolution of trade matters. When matters go beyond that stage, present procedural safeguards to ensure arbitral panel impartiality and neutrality appear to have been carefully observed, resulting in a growing measure of confidence as to MERCOSUR’s functionality. Indeed, Laudo I builds on Laudo II in this respect by providing another well-drafted opinion.

The issue remains as to how well the parties go about their task of executing the arbitral panel’s decisions. This, along with how MERCOSUR handles the continuing fallout from the Brazilian Real devaluation that has disrupted existing patterns of cross-border trade, are key points to look out for.

The MERCOSUR dispute resolution system is intended to provide fairness, certainty, and stability. The Member States’ willingness to faithfully execute the charge of the arbitral tribunal, and to otherwise provide a reasonably speedy and efficient forum for resolving disputes, will remain foremost in practitioner’s minds.