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The Mercosur Dispute Resolution System

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A. Introduction

Permeating almost every discussion of Mercosur, so far, has been the concern that there exists a strong institutional framework. A strong institutional framework represents a firm power base for the executive, legislature and judiciary, and it is the latter of these three powers with which this paper concerns itself.

There are some theorists who believe that the development of an institutional framework is not necessary and would not make a difference to the administration of Mercosur s legal obligations. This paper is premised on the contrary belief: A solid institutional regime is imperative to the effective co-ordination of any dispute resolution system. A co-ordinated dispute resolution system is one whose aim is the preservation of the rule-of-law, and one that will provide its actors with a sense of certainty, reliance and consistency.

Why is having an effective, co-ordinated dispute resolution system so important? Primarily, justice must not only be done, but be seen to be done. The practicalities of what this means will become apparent later, needless to say, compliance with this and the rule-of-law (defined below), cut straight to the legitimacy of the administration of justice in Mercosur. The credibility of the system and, therefore, the confidence which it instils in those seeking to employ it, is critical to the respect with which voters, industrialists, economists and politicians (regionally and globally) will afford it.

In real terms the ideal dispute resolution system will display certain qualities, including:

a. A clear procedure which is both accessible and comprehensible to the domestic *and* foreign investor;

b. A standard of administration which is effective in its speed, minimal expense, transparency, and lack of complication;

c. A system which does not digress (erratically or extremely) from broadly recognised public and private international norms and related procedural (or indeed substantive) standards[1];

d. A standard of judiciary which can be entrusted with the just determination of disputes, irrespective of the identity and origin of the affected party;

e. A system which will result in the issuance of a judgment or award which is reasoned, immediately enforceable, of direct effect to all in Mercosur and consistent with previous decisions;

f. A system which permits the development of a uniform jurisprudence; and

g. A system which respects the separation of powers.

The dispute resolution system of Mercosur is on the way to satisfying many of these requirements. However, there is the added complication as it does so, that the growing complexity, inter-dependence and overlapping of national, regional and international commercial arrangements (and the increasing degree of legal regulation in the region), is making the ideal dispute resolution system all the more difficult to achieve. This development is reflected not only in the rising number of standards but also in the emergence and expansion of new legal sub-systems superimposed on existing systems.

[1] See section (D) below.

In order to make sense of the structure, operation and prospects of a dispute resolution system it is necessary to examine the design, scope, effectiveness, environment in which such a system operates, and the external influences on the system. Therefore, the following sections seek to address these issues.

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B. The Mercosur Dispute Resolution System - A Technical Overview

Chapter I of the Treaty of Asunci n (signed on 26 March 1991) sets out what the Member states of Mercosur were obligated to do as part of the establishment of the Common Market. Annex III required that they implement a dispute resolution system. The dispute resolution system to be established was, admittedly, to be a provisional system, until a more definitive one could be formed. A transition period was set down in the Treaty of Asunci n whereby the provisional system (to come into effect within 120 days of the effective date of the Treaty of Asunci n) was to last until 31 December 1994. After the transition period, the Member states obligated themselves to establish a permanent system (Annex III of the Treaty of Asunci n). However, after various Protocols subsequent to the Treaty of Asunci n , there still does not exist a permanent system, and the dispute resolution system in effect remains transitional.

In order to appreciate Mercosur s current dispute resolution system (and understand what in concrete terms it involves), it is necessary to reflect briefly on its origins and evolution over, approximately, the last decade. Today, Mercosur s dispute resolution system is based, in addition to the Treaty of Asunci n, on the 1991 Brasilia Protocol and 1994 Ouro Preto Protocol. The 1991 Brasilia Protocol will be replaced by the 2002 Olivos Protocol when it is ratified by all the Member states.

The provisional dispute resolution system founded in Annex III of the Treaty of Asunci n consisted of three stages: (1) direct negotiations among the parties to the dispute; (2) failing resolution of the dispute pursuant to the first stage, an analysis of the controversy by the Common Market Group[2] (wherein the Common Market Group has power to call a panel of experts to make recommendations within a maximum period of 60 days); and (3) if a resolution had still not been achieved, an analysis of the controversy by the Common Market Council[3] pursuant to which the Common Market Council would be able to adopt any recommendations made. The effect of this system (and the role played by the Common Market Group and Common Market Council) on the implementation of any recommendations, conferred on Members states a right of veto, since any decision must be adopted by consensus and with the participation of all Member states.

The Brasilia Protocol (1991)

On 17 December 1991, the Brasilia Protocol (titled the Protocol of Brasilia for the Resolution of Controversies , and supplemental to the Treaty of Asunci n) introduced specific procedures for the dispute resolution system. The Brasilia Protocol eventually took effect on 22 April 1993. The Brasilia Protocol was designed to facilitate the eradication of inconsistencies in the interpretation, application or non-compliance with the dispositions found in the Treaty of Asunci n , in the agreements signed within the Treaty s framework, as well as the Decisions of the Common Market Council and the Resolutions of the Common Market Group , insofar as such inconsistencies might create insuperable breaches between Member states.

The Brasilia Protocol expanded considerably the scope of issues that can be dealt with, from controversies over implementation of the Treaty of Asunci n to those arising out of the non-compliance and problems

[2] The Common Market Group is the executive body of Mercosur and consists of four official members and four alternates for each country. It also includes representatives of the Ministry of Foreign Affairs, the Ministry of Economy and the Central Bank.

[3] The Common Market Council is Mercosur's highest ranking body in charge of the political aspects of integration. It consists of the Ministers of Foreign Affairs and the Ministers of the Economy of the Member states.

of interpretation. The process incorporates a jurisdictional basis for the resolution of disputes, and is based fundamentally on the referral to *ad hoc* arbitral tribunals[4].

As mentioned above, the dispute resolution system under the Brasilia Protocol will change with the ratification of the Olivos Protocol[5]. Until then, however, the following, currently operative system, is that put in place by the Brasilia Protocol.

The Dispute Resolution System under the Brasilia Protocol

The Brasilia Protocol contains two distinct procedures for the resolution of disputes: (1) between Member states; and (2) between private parties and Member state(s).

(1) Disputes Arising Between Member States

Article 1 of the Brasilia Protocol covers disputes that may arise among Member states concerning:

> ..the interpretation, application or non-compliance of the dispositions contained in the Treaty of Asunci n , of the agreements celebrated within its framework, as well as any Decisions of the Common Market Council and the Resolutions of the Common Market Group. [6]

It is important to note that the Brasilia Protocol does not make allowance for the following: disputes between a Member state and Mercosur itself (or one of its bodies); disputes which centre on inconsistencies between Mercosur rules and regulations, and the legislation of a Member state; disputes between employees of Mercosur institutions and Mercosur bodies; and disputes between Mercosur institutions[7].

The dispute resolution process between Member states consists of three stages:

1. The first stage requires Member states to try to resolve the dispute through direct negotiations within 15 days of the state party originally raising the dispute, unless otherwise agreed by the parties (Article 3 Brasilia Protocol). These are meant to be informal negotiations during which the Common Market Group must be kept informed of developments[8]. If this first stage is unsuccessful, then either of the Member states which is a party to the dispute must refer the matter to the Common Market Group (Articles 4 and 5 Brasilia Protocol).

2. The second stage requires the Common Market Group to make recommendations to resolve the dispute, within 30 days of having the matter submitted to it. In order to formulate these recommendations, expert advice from a panel (selected by the Common Market Group (by mutual agreement or upon a vote) from an agreed list[9]), can be sought (Article 4(2) Brasilia Protocol), although such panels are not juridical bodies and can do no more than make recommendations.

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[4] *See,* comments of R. Olivera Garcia, *Dispute Resolution Regulation and Experiences in Mercosur: The Recent Olivos Protocol,* presented to Queen Mary, University of London, Second Shihata Lecture (2002) unpublished.
[5] *See,* page 8 below.
[6] Pursuant to Article 43 of the 1994 Ouro Preto Protocol, Directives of the Mercosur Trade Commission are also included (see below).
[7] R. Olivera Garcia, *supra.*
[8] Through the Administrative Secretariat of Mercosur in Montevideo. Note that the Administrative Secretariat is the relevant institutional body that oversees the logistical support within the dispute resolution system, in addition to acting as the clearing house for information on the status of dispute resolution negotiations.
[9] The list of experts from which the panel is chosen consists of 24 names of people of recognised competence who can resolve the type of questions that may be the subject matter of a controversy (Article 30 Brasilia Protocol).

3. If the dispute has still not been resolved by this stage, the third stage, of referring the matter to *ad hoc* arbitral proceedings, may take place upon the request of any one of the parties[10]. The arbitral tribunal to which the dispute is referred is an *ad hoc* tribunal consisting of three arbitrators[11]. *Ad hoc* arbitration is conducted without an administering authority and, generally, without the aid of institutional procedural rules[12]. Instead, it relies on the parties co-operation. Of central importance in this arbitral process is the acceptance, by the Member states (by virtue of Article 8 Brasilia Protocol), of the arbitral tribunal s compulsory jurisdiction, whereupon the Member states are obligated to accept the jurisdiction of any appropriately appointed tribunal[13]. Accordingly, the arbitral tribunal will establish its own rules of procedure, subject to allowing the parties a full opportunity to be heard, to present their case, and the proceedings being expeditious (Article 15 Brasilia Protocol).

The arbitral process set out by the Brasilia Protocol requires the tribunal to make an award within only 90 days from the date of the appointment of the third arbitrator (more precisely, an award must be made within 60 days extendible by a maximum of 30 days) (Article 20 Brasilia Protocol). Given that by this third stage, the consequences of the dispute may result in severe and irreparable damage, the arbitral tribunal has the power to issue interim/provisional relief, on the request of one of the parties, (Article 18 Brasilia Protocol). Such relief will only be granted by the arbitral tribunal where there is a well-founded belief that in the absence of the relief being granted, circumstances will give rise to severe and irreparable damage.

The seat of the arbitral tribunal is an important element of international arbitration, since it is customarily regarded as determining the procedural law of the arbitral proceedings. The Brasilia Protocol provides that the seat of the arbitral tribunals can be established in any of the Member states (Article 15 Brasilia Protocol)[14].

All decisions of the arbitral tribunal are made by majority vote and are final and binding on the Member state parties and cannot be appealed (Articles 8 and 20 Brasilia Protocol). No dissenting opinion will be given (Article 20(2) Brasilia Protocol), and the arbitral tribunal will resolve the dispute by reference to the provisions of the Treaty of Asunci n , the agreements executed within the Treaty s framework, the decisions of the Common Market Council and resolutions of the Common Market Group[15]. Principles of public international law must be adhered to by the arbitral tribunal, and, with the agreement of all the parties, the principles of ex aequo et bono (in justice and fairness) (Article 19 Brasilia Protocol).

Following notification of the award to the parties, they have 15 days in which to seek clarification of its terms, if so required. If clarification is sought, the arbitral tribunal has a further 15 days in which to respond (during which time it may temporarily suspend compliance with the award in accordance with Article 22 of the Brasilia Protocol). Otherwise, once the parties have been notified of the award by the arbitral tribunal, the losing party has 30 days to comply with its terms. If the losing party fails to comply

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[10] This is done by notifying the Administrative Secretariat of Mercosur of its intention to do so. Thereafter, the Secretariat will inform the other Member state(s) involved in the dispute.

[11] Each Member state party to the dispute selects one arbitrator from a list of 16 candidates previously made by all Member states. The third arbitrator is appointed by agreement of the parties. The third arbitrator is the chairman of the tribunal and cannot be a national of one of the Member state parties involved in the dispute. The appointing authority that will intervene in the event that the chairman cannot be appointed by mutual agreement, is Mercosur's Administrative Secretariat in Montevideo (Articles 9 and 12 Brasilia Protocol). The costs of the chairman are shared by the parties (See Articles 7, 9, 11, 12, 14 and 24 Brasilia Protocol).

[12] *See,* G. Born, *International Arbitration and Forum Selection Agreements: Planning, Drafting and Enforcing,* 1st Ed., Kluwer Law International, The Hague, 44.

[13] Article 8 of the Brasilia Protocol provides: "The State Parties declare that they recognise as obligatory, *ipso facto*, and without need of any special agreements, the jurisdiction of the Arbitral Tribunal which is formed in every case to understand and resolve all controversies to which the present Protocol refers."

[14] However, the Common Market Council, in Decision 28/94, provided (as adopted under the Ouro Preto Protocol) that they are to be located in the city of Asuncion, Paraguay - this has not seemingly been followed in practice.

[15] As well as the Directives of the Mercosur Trade Commission (as added by Article 43 of the Ouro Preto Protocol).

with the award, the prevailing party may adopt temporary compensatory measures including the suspension of preferential tariff treatment or other concessions, for example (Article 23 Brasilia Protocol).

(2) Disputes Arising Between a Private Party and Member state(s)

Article 25 of the Brasilia Protocol provides that an individual or corporation has the right to use the procedures established therein to seek resolution of a dispute with a Member state (or states) where it involves the application of:

> legal or administrative measures which have a restrictive, discriminatory or unfairly competitive effect, in violation of the Treaty of Asunci n , of the agreements celebrated within its framework, the Decisions of the Common Market Council or the Resolutions of the Common Market Group. [16]

The Brasilia Protocol limits the right of individuals to access the dispute resolution system for the purpose of challenging only affirmative actions by a Member state, and does not include omissions (such as the failure of a Member state to comply with its obligations)[17]. Furthermore, it prevents individuals from seeking redress against actions taken by Mercosur s institutional bodies.

The dispute resolution system requires that individuals/private parties lodge their claim with the National Section of the Common Market Group of the country where the claimant resides or has its headquarters/place of business (Article 26 Brasilia Protocol)[18]. The National Section receiving the claim must decide whether it will support it. If the National Section does not agree to support it, the matter ends there vis- -vis the private party s recourse to justice through the Mercosur system. If the National Section does agree to support the claim (in consultation with the private party claimant), the first stage requires the respective National Sections, (i.e. the National Sections of the claimant and respondent) to seek to resolve the dispute between themselves over a period of only 15 days[19]. If the matter is referred by the National Section[20] directly to the Common Market Group it may decide (unanimously and with the attendance of all Member states), that the necessary requirements for processing the claim are not met and reject it (Article 29(1) Brasilia Protocol).

Assuming the National Sections fail to resolve the dispute within 15 days (or, alternatively, if the Common Market Group does not reject the claim at the first instance in accordance with the above), the dispute will be referred to the Common Market Group, wherein it will then refer the matter to a three-person panel of experts[21]. The panel of experts are selected by the Common Market Group (by mutual agreement or upon a vote) from an agreed list[22]. They then have a non-extendible period of 30 days in which to make their recommendations to resolve the dispute (Article 29 Brasilia Protocol). The panel will allow both the private party and the Member state an opportunity to be heard (as if it were a tribunal), although, any decision of the panel will not have legal force.

If the decision of the panel of experts is that the claim is justified, *any* Member state may require the Member state regarded to be at fault to adopt corrective measures or eliminate the measures in dispute. If

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[16] Pursuant to Article 43 of the 1994 Ouro Preto Protocol, Directives of the Mercosur Trade Commission are also included.

[17] Contrast this with the right of Member states as per Article 1 of the Brasilia Protocol.

[18] The members of the Common Market Group appointed by a given Member state will constitute the National Section of the Common Market Group for that particular nation.

[19] The National Section receiving the claim is empowered under Articles 27 and 28 of the Brasilia Protocol, to refer any dispute directly to the Common Market Group without being contacted by its counterpart in the National Section of the country being complained about.

[20] Upon request of the affected party (Article 28 Brasilia Protocol).

[21] None of whom may be a national of the Member state party to the dispute, unless otherwise permitted by the Common Market Group.

[22] *See,* above (Article 30 Brasilia Protocol).

the dispute is not resolved at this stage (i.e., because the Member state fails to adopt the relevant recommendations within a 15 day period, if the panel of three experts does not reach a unanimous agreement, or, if the claim is found to be without foundation), then the dispute resolution system provides for a third stage of binding arbitration, to which a state-party may then refer the dispute on behalf of the complainant. Fundamentally, binding arbitration can only proceed where the private party s claim is supported by a Member state *as its own complaint*, and upon a formal request by the Member state to constitute the three-person *ad hoc* arbitral tribunal (Article 32 Brasilia Protocol). The arbitral process which would then ensue is precisely the same as that described above with respect to disputes arising between Member states.

The Ouro Preto Protocol (1994)

In December 1994, the four Mercosur Member states signed the Ouro Preto Protocol and thereby ratified the transitory dispute resolution system provided for by the Brasilia Protocol. At the end of the transition period provided for in the Brasilia Protocol, the definitive institutions and dispute settlement procedure was meant to be in place, however, in the Ouro Preto Protocol, the Member states effectively agreed to postpone the implementation of a permanent mechanism until the Common External Tariff regime was fully implemented, by 2006 (Article 44 Ouro Preto Protocol).

The important change to the institutional framework that arose out of the Ouro Preto Protocol was the creation of the Mercosur Trade Commission. The Mercosur Trade Commission was authorised, in Article˚21 of the Ouro Preto Protocol, to consider the complaints presented by the National Sections of the Mercosur Trade Commission originating with the State Parties or private parties [that] fall within its jurisdiction. As mentioned above, the Directives issued by the Mercosur Trade Commission were added to the legal norms which any party looking to invoke the dispute resolution system could rely on in order to formulate a claim[23].

The Mercosur Trade Commission functions so as to ensure the application of common trade policy instruments with respect to intra-regional trade and the outside world (Article 16 Ouro Preto Protocol). Annex I to the Ouro Preto Protocol sets out the specific procedure for filing a complaint with the Trade Commission. It has competence to hear claims submitted by National Sections of the Trade Commission on behalf of a private party or Member states[24] (Article 21 Ouro Preto Protocol).

The second paragraph of Article 21 of the Ouro Preto Protocol refers to an Annex entitled General Procedure for Claims Made Before the Mercosur Trade Commission. In that Annex, 7 articles explain the procedure in full. Basically, the President[25] *pro tempore* will receive the complaint and list it for discussion at the next full Trade Commission meeting. If the dispute cannot be resolved at the first meeting, it is referred to one of ten permanent technical committees[26]. The relevant technical committee then has 30 days to make a recommendation or (where there is a lack of consensus), forward the conclusions of the different experts. In the event that the Trade Commission is unable to resolve the dispute the views of the experts are passed onto the Common Market Group for it to decide the matter within 30 days (Annex I, Article 5 Ouro Preto Protocol). If the Common Market Group is similarly unable to resolve the dispute (or if the Member state at fault fails to accept the Common Market Group or

[23] *See,* Article 43 of the Ouro Preto Protocol.

[24] The claims may arise among Member state parties as to the interpretation, application or failure to comply with direct and derived legal provisions, as well as the complaints of individuals/private parties, concerning the imposition or application by any of the Member states of legal or administrative measures which are restrictive or discriminatory in effect or could result in unfair trade competition.

[25] Of the Mercosur Trade Commission.

[26] These are categorised as follows: (1) Tariffs, Nomenclature & Product Classification; (2) Customs Matters; (3) Trade Norms; (4) Public Policies which distort competition; (5) Competition Safeguards; (6) Unfair Trade Practices and Safeguard Measures; (7) Consumer Protection; (8) Non-tariff Barriers; (9) Automobile Sector; and (10) Textile Sector.

Trade Commission s decision), then an aggrieved Member state can proceed to binding arbitration in accordance with the Brasilia Protocol[27].

Other Components of the Mercosur Dispute Resolution System

Article 9(2) of the Protocol of Colonia on the Promotion and Reciprocal Protection of Investments Within Mercosur (1994), also provides for a dispute resolution process between private investors and Member states. The Colonia Protocol s counterpart to resolve disputes between foreign private investors and Member states is Common Market Council Decision 11/94, which deals with foreign investments originating outside Mercosur[28].

In December 1998, the Common Market Council issued a Decision 17/98, which contains the Regulations for fully implementing the Brasilia Protocol[29]. The significance of Decision 17/98 was to permit the final level of the dispute resolution system (i.e. binding *ad hoc* arbitration), to be utilised by interested Member states. Overall, Decision 17/98 did not make serious changes to the Brasilia Protocol, but instead expanded and qualified the procedural rules established therein[30]. Perhaps most importantly, the Regulations in the Decision provide that the Common Market Group can only reject a private party complaint with the consensus of all Member states.

The Next Step - The Olivos Protocol (2002)

On 18 February 2002, the Mercosur Member states[31] approved a new dispute resolution system through the Olivos Protocol, which, once it has been ratified by all four Member states[32], will replace the system embodied in the Brasilia Protocol (and its implementing regulations contained in Common Market Council Decision 17/98). As mentioned above, until the parties review the system before completion of the convergence process of the Common External Tariff, the dispute resolution system provided by the Olivos Protocol, will remain a transitory one (Article 53 Olivos Protocol). Therefore, in anticipation of the coming into effect of this new system, it is necessary to give an overview of the changes it makes to the existing system and assess whether this next step, is one in the right direction.

The distinction between disputes made in the Brasilia Protocol is also made in the Olivos Protocol:

(1) Disputes Arising Between Member states

On the whole, the Olivos Protocol largely maintains the position adopted by the Brasilia Protocol[33]. However, one of the most important amendments is that contained in Article 1, in which the Member

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[27] Annex I, Article 6 and 7 Ouro Preto Protocol. Note that submitting a claim through the Mercosur Trade Commission procedure does not prevent a Member state from seeking redress under the Brasilia Protocol dispute resolution system (Article 21 Ouro Preto Protocol).

[28] *See,* Adriana Dreyzin de Klor, *Dispute Resolution System: Latin American Trade Agreements*, (Thomas O'Keefe), at 7-13.

[29] See www.mercosur.org.uy and Ernesto J. Rey Caro, *Comentario al Reglamento del Protocolo de Brasilia para la Solucion de Controversias en el Mercosur*, 3 Revista del Mercosur, June 1999, for a commentary on C.M.C. Decision (17/98).

[30] C.M.C. Decision 17/98 also stressed the abovementioned amendment introduced by the Ouro Preto Protocol, that disputes between Member states over the interpretation, application or non-compliance with Directives of the Mercosur Trade Commission could be referred to the dispute resolution system as could disputes by private parties against a Member state for enforcement of a legal or administrative measure in violation of a Directive. Decision 17/98 also provides for "alternate" arbitrators to be appointed in the event that the chairman of the arbitral tribunal has to be replaced. Other regulations in Decision 17/98, refer to the detail required to be included in any claim filed by private parties with the Common Market Group.

[31] But unfortunately not Chile or Bolivia.

[32] Or rather 30 days after the last Member state has ratified (Article 52 Olivos Protocol), and the Common Market Group has drafted implementing regulations.

[33] Including the amendments made by the Ouro Preto Protocol.

state parties have the option of electing between the Mercosur or WTO[34] dispute resolution systems, with regard to disputes over:

> ..the interpretation, application or non-compliance with the Treaty of Asunci n , the Protocol of Ouro Preto, or the protocols and agreements celebrated within the framework of the Treaty of Asunci n , the Decisions of the Common Market Council, the Resolutions of the Common Market Group and the Directives of the Mercosur Trade Commission.

Once the Member state bringing the claim has made its choice (or the parties have by mutual agreement selected one forum), there is no method of either party thereafter initiating proceedings in another forum involving the same dispute (Article 1(2) Olivos Protocol). In addition, Article 2 of the Olivos Protocol empowers the Common Market Council to launch an expedited procedure for resolving differences in opinion between Member states on technical matters relating to common trade policies[35].

In essence, the stages employed by the dispute resolution system reflect very much those encapsulated by the Brasilia Protocol. In the first instance, the Member states should seek to resolve matters by direct negotiations. This remains an obligatory stage, the procedure and time frame of which has not changed under the Olivos Protocol. If the matter cannot be resolved in this manner, the second stage involving the Common Market Group s intercession may be invoked by reciprocal agreement of the parties - this is no longer an obligatory stage under the Olivos Protocol. Claims can also be brought before the Common Market Group if another Member state, which is not a party to the dispute, legitimately requires that procedure, upon termination of direct negotiations (Articles 6(2) and (3) Olivos Protocol). The procedures adopted by the Common Market Group remain similar to those described in the Brasilia Protocol, as indeed are the procedures for constituting the *ad hoc* arbitral tribunals, the ordering of interim/provisional relief and the issuing of an award.

Overall, the *ad hoc* arbitral proceedings retain the general features contained in the Brasilia Protocol, except perhaps for the following: (a) *Ad hoc* arbitral tribunals can meet in any city of the Mercosur Member states; (b) The issues in dispute are to be determined by the parties respective submissions which are submitted to the arbitral tribunal and cannot subsequently be expanded (Article 14(1) Olivos Protocol)[36]; (c) The Mercosur Administrative Secretariat is responsible for the administrative aspects of proceedings (Article 9(3) Olivos Protocol)[37]; (d) If the *ad hoc* arbitral tribunal grants interim/provisional relief and the award becomes the subject of an appeal before the Permanent Review Tribunal (as defined below), the interim relief will be maintained until a decision is taken by the Permanent Review Tribunal at its first sitting, on whether the relief should continue (Article 15(3) Olivos Protocol) - on the other hand, if the award is subject to review, compliance with the terms of the award is suspended pending the outcome of the review (Article 29(2) Olivos Protocol); and (e) The 60 days to issue an award (extendible by 30 days) will run from the time the Administrative Secretariat informs the parties and the two arbitrators that the chairman of the arbitral tribunal has accepted his/her appointment (Article 16 Olivos Protocol)[38].

The most important addition made by the Olivos Protocol is the creation of a Permanent Review Tribunal (Article 3 Olivos Protocol). The Permanent Review Tribunal shall sit exclusively in Asunci n , Paraguay (although it can also meet in other cities of Mercosur for well-founded, exceptional reasons). The Permanent Review Tribunal will consist of 5 judges[39], one being chosen by each of the Mercosur Member

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[34] Or other preferential trade mechanisms of which the Member state party may individually be members. The WTO dispute resolution system is briefly referred to below.

[35] *E.g.*, Anti-dumping duties.

[36] *See*, the similarity with Article 18 (Terms of Reference) of the Rules of International Arbitration, International Chamber of Commerce, in force as from 1 January 1998.

[37] As if it were an institutional arbitration, as opposed to an *ad hoc* arbitration.

[38] *See*, R. Olivera Garcia, *supra*.

[39] Article 18(1) Olivos Protocol, who must be available on a permanent basis (Article 19 Olivos Protocol).

states (who shall each sit for a 2 year period[40]). The fifth judge (who shall be the President of the Tribunal, sitting for a three year term) will be chosen by consensus of all four Member states[41].

The Permanent Review Tribunal will consider only questions of law and specifically has the authority to confirm, modify or revoke the legal basis of decisions of an *ad hoc* arbitral tribunal. Above all, its role is to ensure the consistent interpretation of the Mercosur legal norms, obligations and previous *ad hoc* arbitral awards. An award made by the Permanent Review Tribunal is final and cannot be appealed (Article 22 Olivos Protocol)[42]. The introduction of this appeal and review process is a substantial step towards the establishment of a juridical body that will offer a uniformity of jurisprudence and a structure of precedent[43].

Once a request for review is made[44] by one Member state party, the other Member state party has 15 days to respond. The Permanent Review Tribunal must issue its decision within 30 days (extendible by 15 days). As with the *ad hoc* arbitral tribunals, the Permanent Review Tribunal will decide by majority vote, however, (still) no dissenting opinions are given. The Olivos Protocol does grant the Member state parties direct access to the review process, if expressly agreed to, in which case the Permanent Review Tribunal shall have the same competence as an *ad hoc* arbitral tribunal (Article 23 Olivos Protocol).

Once the Permanent Review Tribunal issues its decision, the Member state parties must comply with its terms within the time-frame specified, or in the absence of which, within 30 days of its issue: Unfortunately, the Permanent Review Tribunal is in need of the power of *imperium* to force a Member state party to comply with an award. Curiously, the losing Member state party will generally be required to inform the prevailing Member state party of how it intends to comply with the award within 15 days of its receipt. If the prevailing Member state party regards the implementation of the measures intended to comply with the award to be inadequate, it may, within 30 days of the date of their implementation, refer the matter back to the body that issued it[45]. New recommendations must thereafter be issued within 30 days[46].

(2) Disputes Arising Between a Private Party and Member state(s)

With regard to this limb of the dispute resolution process, the Olivos Protocol has made insubstantial progress beyond the position established by the Brasilia Protocol. Crucially, private party disputes are still limited to affirmative acts of Member states rather than their omissions, and there remains no right to challenge the legality of actions carried out by Mercosur s institutional bodies. Moreover, the decision of whether a private party s claim will proceed through the dispute resolution system, is still subject to the support of the relevant National Section.

The Olivos Protocol does revise the position under the Brasilia Protocol to the extent that the National Section of the Common Market Group *must* participate in direct negotiations with the opposing National Section, before bringing the claim before the Common Market Group (Article 41 Olivos Protocol).

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[40] Subject to renewal for two consecutive terms (Article 18 Olivos Protocol).

[41] If no consensus can be reached, the Director of the Administrative Secretariat will select the fifth judge by lottery from a pre-submitted list of 8 candidates. When the dispute involves two countries, the Permanent Review Tribunal shall sit with only 3 judges (one from each country of dispute and the third a non-national, chosen by the Director of the Administrative Secretariat by lottery (Article 20 Olivos Protocol)).

[42] Although clarification can be sought.

[43] This body of law may also inform national courts, tasked with enforcing compliance of Mercosur obligations.

[44] Which, if made, must be done within 15 days of notification of the decision (Article 17 Olivos Protocol).

[45] *I.e.*, the *ad hoc* arbitral tribunal or the Permanent Review Tribunal.

[46] If the Member state party believes that the losing Member state party has not fulfilled its obligations, it is entitled to impose temporary compensatory measures (e.g. the suspension of concessions). The imposition of such measure must be taken within a year from when the date of compliance has passed. The Member state party imposed upon is entitled to refer the matter back to the relevant tribunal to question the excessiveness or legitimacy of the said compensatory measures.

Additionally, the panel of experts must decide unanimously rather than by majority (Article 44 Olivos Protocol).

Until the ratification of the Olivos Protocol, the Mercosur dispute resolution system will remain a procedure predominantly characterised by the pre-jurisdictional stages elaborated by the Treaty of Asunci n , and the *ad hoc* arbitration established by the Brasilia Protocol (as amended by the Ouro Preto Protocol). The strengths and weaknesses of this system have been touched upon already, although the following section seeks to identify the effectiveness of the dispute resolution system.

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C. Effectiveness of the Mercosur Dispute Resolution System

The effectiveness of any dispute resolution system is a very sensitive subject since it reflects considerably on the effectiveness of the integration mechanism itself[47]. The interpretation, application, compliance with and implementation of undertakings, resolutions, decisions, regulations and other legal norms is a sophisticated matter, where legal standards need to be agreed. Otherwise, the imposition of restrictions based on unclear provisions, that can be read in different ways, can become a major obstacle to the integration process. Complacency on the issue of the effectiveness of the dispute resolution system will only favour stronger economies by leaving the resolution of disputes to political negotiations between Member states of unequal power. This is particularly true in Mercosur. Therefore, the legal framework within which the dispute resolution system resides must be strong. It must be clear, predictable, efficient and dependable. It must uphold fundamental principles such as the rule of law, and guarantee the just settlement of disputes between Member states (and private parties), thereby protecting the respective parties bona fide economic interests.

The European Union (EU) (as a comparable trading bloc) has already been through the evolutionary process of establishing such a system. The overriding elements of the EU s particular framework reflect what can be regarded as the shortfalls in Mercosur s own system: Direct accessibility, supra-nationality (independence)[48], direct enforceability of decisions, and a congruent jurisprudence (dealt with in more detail below).

The Effectiveness of the Mercosur Dispute Resolution System - The Initial Signs

By mid-2002, over 20 disputes had been submitted by the Member states of which 8 have lead to arbitral awards, and two expert opinions being made. Despite the lack of any ostensible system of precedent (and the lack of binding force of the awards beyond the particular arbitral proceedings in which it was made), a number of the arbitral awards are regarded as having been grounded on the previous decisions of arbitral tribunals[49].

The 8 arbitral awards made so far consist of[50]:

1. Argentina *vs.* Brazil, 28 April 1999 (elimination of non-tariff restrictions);

2. Argentina *vs.* Brazil, 27 September 1999 (compatibility of obligations with pork production subsidies);

3. Brazil *vs.* Argentina, 10 March 2000 (compatibility of obligations with application of safeguard measures for textile products);

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[47] *See,* Klaus Bodemer "Dispute Settlement in a future E.U.-Mercosur free trade area", *Chaire Mercosur Working Group on European Union-Mercosur negotiations* (May 2000).

[48] *I.e.,* an institutional profile which exemplifies compliance with the separation of powers.

[49] *See,* R. Olivera Garcia, *supra*.

[50] Full texts of the arbitral awards is available in Spanish or Portuguese at www.mercosur.org.uy.

4. Brazil *vs.* Argentina, 21 May 2001[51] (compatibility of obligations with anti-dumping measures against exportation of whole chickens);

5. Uruguay *vs.* Argentina, 29 September 2001 (value of origin certificate and right not to recognise);

6. Uruguay *vs.* Brazil, 9 January 2002 (compatibility of obligations with prohibition of re-treaded tyres);

7. Argentina *vs.* Brazil, 19 April 2002 (incorporation of internal law of rules on phytosanitary products and scope of non-tariff restriction); and

8. Paraguay *vs.* Uruguay, 21 May 2002 (applicability of (IMESI) tax to the commercialisation of cigarettes).

The common features which have emerged from this small number of awards, in the opinion of Professor Ricardo Olivera Garcia[52] include: the independence of arbitrators (given that the vast majority of the awards were issued unanimously); formal adherence to procedure (although the extension of time available to the arbitral tribunals was called upon in all cases); the effective use of the Administrative Secretariat for the notification and receipt of formal communications; confidentiality of all proceedings (except for the published arbitral awards); reference to precedents of previous arbitral awards; absence of contradictory awards issued thus far; a consistent approach to the interpretation and application of the Treaty of Asunci n , the agreements executed within its framework and the other Mercosur legal norms (including principles of international law (*pacta sund servanda;* reasonableness and good faith)); consistent restrictive interpretation of all limitations on the free movement of goods; and evidence of a process of harmonisation of Mercosur rules with other provisions of international law to which the Member states are also subject.

If the above brief appraisal of the efficacy of the respective arbitral proceedings (and awards issued so far), is exact, the dispute resolution system is already displaying extremely encouraging signs. Nonetheless, we must not forsake objectivity. If there is any enthusiasm felt as a result of the above critique[53], it must be acknowledged as relating to an institutional system which is far from ideal and in need of much reform. The broad criticism of the Brasilia Protocol dispute resolution system, which is particularised below, is testament to that fact.

Appraisal of the Current Mercosur Dispute Resolution System

The Brasilia Protocol

The Brasilia Protocol clearly favours bilateral negotiations as the first stage of any dispute resolution. In some commercial dispute resolution circles, such provision for negotiation is often frowned upon as a rather superfluous, preliminary step to inevitable arbitration or litigation. The value in obligating the parties to engage in negotiations that are already likely to have been attempted, before instigating the dispute resolution process, is sometimes considered dubious. However, in present circumstances, there is clearly a larger political dimension which necessitates at least the stipulation of such dialogue[54], which

[51] In what is regarded as indication of a weak dispute resolution system, Brazil also raised this complaint before the WTO.

[52] Arbitrator in the Uruguay *vs*. Argentina (29 September 2001) arbitration and Chairman of the arbitral tribunal in the Argentina vs. Brazil (19 April 2002) arbitration, *supra*.

[53] *I.e.,* the summary from R. Olivera Garcia.

[54] Roberto Bouzas and Hernan Soltz, *Institutions and Regional Integration: The Case of Mercosur*, Regional Integration in Latin America and the Caribbean: The Political Economy of Open Regionalism (Victor Bulmer-Thomas (ed)), 2001, refers to the negotiations mechanism as enabling member states to exchange information

may or may not legitimately be probed before invoking the resolution procedure. Furthermore, it tracks closely the approach one would normally expect to see in bilateral investment treaties, which is regarded as critical to allowing either party the opportunity to step back from the potential intransigence litigation sometimes induces.

However, the process has been the subject of criticism due to the often substantial (indeed indefinite) delays which can arise if the Member state parties agree to extend the mandatory 15 day negotiation period, to undertake bilateral negotiations in the Common Market Group. As a result, the arbitral process may be put off by political bargaining[55]. This uncertainty is particularly concerning for private parties who (as was explained above) are reliant on the National Sections to support their claim and the commencement of arbitral proceedings[56].

The Role of Common Market Group in General

The Common Market Group plays an important role in the resolution of disputes, and albeit limited, is considered by some to be of benefit[57]. Its role in Mercosur s institutional fabric means that it should be well placed to understand the problems that can arise from the application or interpretation of the appropriate legal norms of Mercosur (and its institutional bodies)[58]. However, due in part to the absence of authority to search for common ground in contentious matters, it has come under criticism recently for a lack of effectiveness. Combined with an overworked staff, the credibility of the Common Market Group s administration has suffered, and whilst the inter-governmental structure of Mercosur may make the process flexible and cost-effective at the initial stages, the absence of non-governmental actors at the decision-making level is a cause for concern[59].

The Shortfalls of the Mercosur System

The principal criticisms levelled against the Mercosur dispute resolution system are, unsurprisingly, focussed on the shortfalls mentioned above (i.e. direct accessibility, supra-nationality, direct enforceability of decisions, and a congruent jurisprudence).

(i) Accessibility of the Dispute Resolution System and Disadvantage of Political Influences

The Brasilia Protocol offers a solution for disputes arising between Member states as to the interpretation, application or non-fulfilment of the provisions of the Treaty of Asunci n , agreements executed within its framework and the decisions/regulations (as appropriate) of particular Mercosur bodies, however, it does not extend to complaints which might arise between a Member state and Mercosur itself (or one of its bodies); conflicts over provisions of Mercosur legal norms and the laws of one of the Member states; disputes between Mercosur employees and Mercosur bodies, and disputes between Mercosur bodies themselves[60].

With regard to disputes arising between a private party and Member state(s), the Brasilia Protocol granted private parties the right they did not have under the Treaty of Asunci n, i.e. the right to seek redress against a Member state in certain circumstances. Previously, private parties had no standing at all. Nevertheless, even under the current system, private parties cannot gain direct access to the dispute

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through the request of explanations and to manage trade frictions that do not warrant launching a claim or "judiciary" proceedings (page 99).

[55] The Olivos Protocol will also address this failing.

[56] Bouzas & Soltz, *supra*, page 110.

[57] Dreyzin de Klor, *supra*. It was also considered to be a suitable medium through which national officials, in the early stages, could develop working relationships and necessary skills (Bouzas & Soltz, *supra*, page 105).

[58] *See*, O'Keefe *supra*.

[59] Bouzas & Soltz, *supra*, page 105.

[60] Opertti Badan, D., (above) at page 458.

resolution mechanisms and to do so they are wholly reliant on the relevant National Section adopting the political decision to support the claim, as its own[61]. There is said to be a state of defencelessness of the private individual [62]. This disadvantage of political influence/dependency is identified by Roberto Bouzas and Hernan Soltz as one of the major institutional traits prevalent within Mercosur, i.e. its strong inter-governmental bias and the fact that all decision-making authority rests in the hands of government officials[63]. Equally, the lack of an alternative tribunal/court for the resolution of disputes between private parties denies the actors in the integration process the ability to seek redress, on a day-to-day basis, on economic, commercial, tourism and community issues (to name a few) which are so vitally important to every sector of society[64]. The disappointment felt over the Olivos Protocol is how, despite the stated aims which are to depoliticise disputes among the Members, give them a measure of institutional predictability and advance toward a uniform interpretation of Mercosur s body of law and the creation of a common jurisprudence , it seemingly fails to remedy this problem.

The accessibility of the system is additionally limited in other substantive ways, not least for the reason that private parties are unable to challenge the legality of the actions carried out by the institutional bodies of Mercosur. However, to the extent that the rights of private parties to seek redress against Member states is impeded by the fact that only affirmative actions can be challenged[65], there *does* always remain the right of private parties to use the national court system in the event that a Member state has failed to comply with its Mercosur obligations. Conspicuously, when this route has been elected, (as it has been frequently[66]), it has led to unfortunate situations where one national court will deliver a judgment inconsistent with a decision of another national court (even where the facts have been similar)[67].

(ii) Absence of an Independent (or Supra-National) Judicial Body

The lack of provision for a supra-national tribunal in the Ouro Preto Protocol was, at the time, a disappointment to many[68]. Instead, the *ad hoc* arbitral tribunal system remains[69]. And the fact that the *ad hoc* arbitral system requires the appointment of different arbitrators in each case is the main objection

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[61] Both in terms of bringing the claim and defending claims (Opertti Badan, D., *Sistema de Solucion de Controversias en el Mercosur,* in *Avances del Derecho Internacional Privado en America Latina. Liber Amicorum Jurgen Samtleben,* Max Planck Institut - Fundacion de Cultura Universitaria, Montevideo, 2002, page 458 at 465.

[62] *See,* Dr. Jorge Fernandez Reyes, *Resolution of Controversies in the Mercosur*, Bado, Kuster, Zerbino & Rachetti - Montevideo, Uruguay (at http://www.bomchilgroup.org/urumay01.html).

[63] *See,* Dreyzin de Klor, *supra,* at page 103.

[64] *See,* Dr. Jorge Fernandez Reyes, *supra*.

[65] This is contrary to the position of the E.U. Dreyzin de Klor, *supra,* notes, however, that this limitation is not particularly egregious given that Mercosur's institutional bodies lack supranational authority to issue norms that are directly binding on the Member states and their citizens.

[66] Thomas O'Keefe, *Dispute Resolution in Mercosur,* Journal of World Investment, 2002.

[67] This happens because the respective constitutions of the Member states differ in that in Argentina, for example, international law takes precedence over conflicting or non-existent domestic law, while it does not in Brazil or Uruguay. (*See,* O'Keefe, *supra*).

[68] *See,* Dreyzin de Klor, *supra,* for an explanation of why the supra-national court did not find favour with certain Mercosur Member state delegates. This is a second trait attributed by Bouzas and Soltz to the institutions of Mercosur.

[69] An alternative to *ad hoc* arbitration is institutional arbitration. Both have strengths. Institutional arbitration is conducted according to a standing set of procedural rules and supervised, to a greater or lesser extent, by a professional staff. This reduces the risk of procedural breakdowns, particularly at the beginning of the arbitral process, and technical defects in the arbitral award. Similarly, the institution lends its standing to any award that is rendered, which enhances the likelihood of voluntary compliance and judicial enforcement. On the other hand, *ad hoc* arbitration is typically more flexible and less expensive (since it avoids often substantial institutional fees). Moreover, the growing size and sophistication of the international arbitration bar, and the international legal framework for commercial arbitration, has reduced somewhat the benefits of institutional arbitrations. Nonetheless, many experienced international practitioners prefer the more structured, predictable character of institutional arbitration, at least in the absence of unusual circumstances arguing for an *ad hoc* approach. (G. Born, *International Commercial Arbitration in the United States,* 1st Edn., Kluwer (1994)).

raised by critics of the system, since it hinders the development of a consistent jurisprudence[70]. While the Olivos Protocol has granted the right of appeal and created a Permanent Review Tribunal, which will pioneer some degree of standardisation, the establishment of a supra-national court remains some way off[71].

To focus on the existing arbitral process - at the moment it disadvantageously ends with the issuance of the award, rather than subsisting until such time as the parties are assured that the losing party has complied with the terms of the award[72]. Furthermore, another criticism which has been raised against the arbitral process, is the fact that there are no dissenting opinions[73]. The lack of dissenting opinions arguably prohibits the development of a body of Mercosur law, although in the realm of international arbitration, it is a standard omission due to the exposure it creates in terms of providing ammunition to the losing party who may seek to appeal the award or otherwise frustrate its enforcement before national courts. Nevertheless, dissenting opinions undoubtedly make whole the intellectual analysis fundamental to an accountable dispute resolution system. Moreover, they establish a helpful interpretive guide to others invoking the said system. Indeed, the benefit of precedent can focus the minds of parties to controversies or provide insights to those in similar predicaments on whether the dispute resolution system should be invoked in the first place[74]. It may not be until the Mercosur dispute resolution system adopts a truly supra-national approach, that dissenting opinions will emerge.

(iii) Incomplete Character of Mercosur s Organs Legal Acts [75]: The Enforceability/Direct Effect of Decisions

Implicit in the formation of a supra-national court, is the direct and immediate efficacy of communitarian norms in each Member state, without the need to internalise (i.e. ratify respective domestic legislation changes). Effectively, the creation of a supra-national tribunal not only means the creation of a physical institution, but more importantly implies the delegation of both juridical and legislative powers to a new independent court[76]. At the moment, there is no such court to monitor the application and enforcement of its own decisions, and the only effective sword to wield as part of the enforcement regime, is the threat of trade retaliation[77]. At the very least, the Permanent Review Tribunal will make some amends.

Although the legal acts undertaken by Mercosur decision-making organs are mandatory, they are neither immediately applicable, nor have direct effect[78]. In practice, this means that Member states undertake the commitment to internalise the acts, but not necessarily to enforce them. They can be conceived, therefore, as incomplete legal acts, equivalent to signed by not yet ratified international agreements[79]. Moreover, the arbitral awards issued do not have an equivalent standing over domestic legislation in all the Member states, and enforceability is subject to different practical (legal) requirements[80]. In particular, the enforceability of foreign arbitral awards in Latin America has been

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[70] *See,* Marti Mingarro, L., *Perfeccionamiento del sistema de solucion de controversias en el Mercosur,* in *Solucion de Contraversias en el Mercosur,* Compilaer: Ruiz Diaz Labrano, R. Asuncion, 1991, page 17.

[71] This is dealt with in greater detail in section (D) below.

[72] *See,* Blanco, J.C., *Solucion de Contraversias en el Mercosur,* Compilaer: Ruiz Diaz Labrano, R. Asuncion, 1991, page 71.

[73] *See,* Dreyzin de Klor, *supra*.

[74] *See, e.g.*, R.R. Geneyro, *El Mercosur Una Transicion Juridica Compleja,* 2 Publicaciones 11, 18 (Institute de Relaciones Internacionales de la Universidad Nacional de La Plata, Dec. 1992).

[75] This is a third trait attributed by Bouzas and Soltz (*supra*) to the institutions of Mercosur.

[76] According to Reyes, *supra*, it provides a mechanism whereby the interpretation of Mercosur legal norms can be enforced in a uniform manner in the internal juridical order of the Member states.

[77] Article 23(2) Brasilia Protocol.

[78] Bouzas & Soltz, *supra,* at page 107.

[79] *Id.*

[80] In Argentina and Paraguay, obligations acquired under international law become automatically part of domestic legislation under the monist approach. Contrastingly, in Brazil, in accordance with the dualist approach,

somewhat of a hot-topic in recent years, and is considered further below. Needless to say, subject to the particular jurisdictional constraints of certain Member states, there do, generally, exist mechanisms regulating the enforcement of such awards[81]. However, without the concept of supremacy, Mercosur law may not necessarily control how the Member states interpret the legal rights and obligations created therein[82].

(iv) Rapidity, Efficiency and Certainty

Finally, in terms of the basic characteristics which are critical to any dispute resolution system, the current system mandated by the Brasilia Protocol can be said to encompass the following: flexibility (due to the different methods available to resolve disputes, including the Olivos Protocol proposals which will allow referrals to the WTO); quick response times (brief deadlines and relative simplicity of the system[83]); binding nature (Article 8 of the Brasilia Protocol makes the procedure binding on the Member states and the jurisdiction of the arbitral tribunal compulsory); and non-permanency (consistent with the transitory nature of the dispute resolution system, although other than the low costs of operating *ad hoc* arbitral tribunals[84], this is hardly a positive feature in light of the above critique[85]).

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D. Factors Affecting the Future Development of the Dispute Resolution System

Once the Olivos Protocol is ratified by the Member states of Mercosur, the new system will be an improvement on the existing one. However, unfortunately, it will remain a transitory system and one seriously deficient in that it does not satisfactorily embrace the fundamental principles of direct accessibility, supra-nationality, direct enforceability of decisions, and consequently, a uniform jurisprudence. What prospect is there of a permanent dispute resolution system introducing the same? What sort of legal environment exists in the Mercosur Member states (and in the region in general) to promote the design and implementation of an appropriate, non-political dispute resolution system? The following section will approach these issues, while the final section (E) will briefly consider some other external influences which might be brought to bear on the process. Neither section is intended to be an exhaustive analysis of the respective areas, but merely informative.

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international law obligations have no domestic force until internalised. Some believe that enforcement does not require a domestic act in Brazil, although others do (Gonzalez, 1999).

[81] If the history of recent Mercosur arbitral awards is anything to go by, the need to engage in formal enforcement proceedings, fortunately, remains theoretical.

[82] The weakness of the need to transpose all norms through domestic legislation is the lack of mandatory time limits and procedures to ensure it. Consequently, the process of internalisation (of legal acts in general) has historically been slow, uneven and highly vulnerable to the goodwill and legal, political and administrative obstacles faced by each government, subsequently leading to delays in enforcement. Bouzas & Soltz, *supra*, at page 107. Furthermore, delays in internalisation have also arisen due to the failure of the decision-making organ to take into account the administrative, legal or constitutional obstacles faced by each national government. On the other hand, the process of internalisation is arguably a necessary process, as occurred with the European Community and the adjustments member states had to make regarding the loss of sovereignty.

[83] On the one hand, delays are capable of being introduced by inviting bilateral negotiations, while on the other hand, the time periods for each respective stage, when compared to the procedures customarily encountered in other international commercial disputes, are extremely short, perhaps to the extent of being counter-productive. What is beyond doubt is that domestic court systems in Latin America have been heavily criticised for displaying gross inefficiency and suffocating levels of bureaucracy (*See,* comments of Argentina's Ministry of Justice on 10 February 1998 before the Council of the Americas).

[84] As opposed to an institutional arbitral process or a supra-national court.

[85] See section (B) above, where reference is made to lack of uniform jurisprudence.

Are the Appropriate (Legal) Conditions in Evidence in the Region?

This is by no means a simple question. Moreover, it is perhaps misconceived to expect that there is a possible answer. Unfortunately, it is beyond the scope of this paper to summarise either the Member states respective constitutions, or the specific conflict of laws position regarding the Mercosur agreements and legal norms which are already in place. Likewise, there is no scope to entertain the political calculations of Mercosur and the Member states, and how they will inform any evolving system. What is possible is contemplation of whether the underlying rights, prevalent in so many other well-established dispute resolution systems, are indeed present in Mercosur.

The Rule of Law

The starting point in this regard has to be the rule of law. The rule of law[86] embodies three concepts: (1) the absolute predominance of regular law, so that government has no arbitrary authority over the citizen; (2) the equal subjection of all (including officials) to the ordinary courts; and (3) the fact that citizens personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations. On first impression, it might be perceived as unnecessary to raise the issue of the rule of law in the context of reform of the Mercosur dispute resolution system, particularly because of the Member states legal sophistication. Nevertheless, for the reasons explained above[87], the importance of the task to ensure that the dispute resolution system incorporates, unreservedly, the rule of law, cannot be underestimated[88].

Many countries can look to the implementation of the rule of law as the first easy phase of change through constitutional change, however, far-reaching institutional change is more arduous and slow[89], and requires a cultural change of approach[90]. It is beyond doubt that the processes of globalisation and integration feed the rule of law imperative by putting pressure on Mercosur to offer the stability, transparency and accountability that international investors demand. Such is the mobility of trade, finance and personnel that the equitable administration of any economy is essential to continuing trust in the marketplace. At the same time, reform required at the Mercosur institutional level, necessarily implies, first, reform of the laws amongst Member states, secondly, reform of the dispute resolution system institutions and, thirdly, reform of the Member states compliance[91].

Is There Scope for a Supra-National Court?

In light of the ostensible weaknesses of the Mercosur system, reform at the Mercosur institutional level necessitates the establishment of a supra-national court[92]. Such a court would have the power to resolve

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[86] As defined in the context of the UK's constitution, by Professor Dicey, *Law of the Constitution*, 1885.

[87] *See*, section C, above.

[88] For example, a crucial component of the rule is that government is embedded in a comprehensive legal framework, whilst it is evident from the above appraisal of the dispute resolution system that it is far from comprehensive.

[89] Thomas Carothers, *The Rule of Law Revival*, Foreign Affairs, c. 1998, Vol. 77, No. 2 1998

[90] Most Latin American governments have acknowledged the need for rule-of-law reform. Chile has made progress in judicial reform, whilst the political will has been questioned in Argentina (Thomas Carothers, *supra.*). *See e.g.*, the training initiatives of the Organisation of American States (OAS) in Latin America and the work of the Inter-American Judicial Committee. There have also been various judiciary training programmes instigated in Latin America (Thomas Carothers, *supra*).

[91] In order to achieve these goals, Member states must reach agreement on: rules of jurisdiction; rules of treatment such as national treatment or most favoured nation treatment; rules of proportionality of national law; rules of (mutual) recognition of foreign regulation; harmonisation of laws; and institutions that will, legislatively or adjudicatively, effect these tasks in the future. *See*, Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. Pa. J. Int'l Econ. L. 33 (1996) at page 46.

[92] Such as the European Court of Justice. See also the Central American Court of Justice ("CACJ") (which is discussed in detail in Thomas O'Keefe, *The Central American Integration System (SICA) at the dawn of a new century: Will the Central American Isthmus finally be able to achieve economic and political unity?* Volume XIII,

disputes and issue decisions that would have legal effect in the domestic courts of the Member states. It is in fact true that most other economic integration arrangements have opted for arbitration systems instead - yet it is said by some that there is an inherent danger in surrendering profound law-making power to a constantly changing cast of jurists. What must not be underestimated is that the creation of a supra-national tribunal requires not only a huge political impulse for change, and a favourable environment into which such change must be welcomed, but a substantive commitment from all participants to ensure that its objectives are faithfully implemented. Given these basic (yet stringent) requirements, it is hardly surprising that such supra-nationality has been avoided by integration associations. Close to home, the Central American Integration System s (SICA) court, the Central American Court of Justice[93] on the face of it, at least, seems to exhibit supra-national characteristics[94]. However, while regulations issued by SICA s institutions are in theory directly applicable, practice has suggested otherwise. Additionally, all legal norms issued, prior to implementation, require Member state ratification: Indeed, SICA s inadequate dispute resolution system[95] and its process of implementation on the whole has been the subject of criticism[96].

As touched on above, the Ouro Preto Protocol was hoped by some to represent a sea of change, supporting the inauguration of a supra-national court. The Uruguayan National Commission of Jurists[97] was in favour, yet, the prevailing opinion of the Brazilian delegation was that circumstances were not right and, in any event, Brazil s constitution would not permit the enforcement of such a court s decisions[98].

Intrinsic in the establishment of a supra-national court is the voluntary surrender of sovereignty. An often cited institutional ideal of supra-nationalism, is the EU (and the European Court of Justice).

No. 3 Florida Journal of International Law (Spring 2001) pp. 243-261. Note that recent proposals made in order to circumvent limitations of the CACJ suggested changes to the CACJ dispute resolution process reflecting the three stage process of Mercosur's system.

[93] Whose active participants are El Salvador, Honduras and Nicaragua.

[94] Article 22 to the Statute of the Central American Court of Justice provides the powers of the Court to include the following: Resolve disputes that may arise among the member states (except for territorial or border disputes which can only be resolved by the Court if all the concerned parties so agree) and for which the respective Foreign Ministries are unable to reach an acceptable resolution; Nullify decisions made by the SICA institutional bodies that are not in conformity with the treaties, agreements, and protocols that create SICA as well as declare an institutional body not to be in compliance with those obligations; Determine whether a SICA member has issued norms, regulations, and administrative rulings that detrimentally affect SICA s legal order and institutional decisions; Act as an arbitration panel in any matter that all the parties to a dispute have specifically asked the Court to resolve; Offer advisory opinions to the Supreme Courts of the individual SICA member states on any matter, as well as issue advisory opinions to all other Central American courts on specific questions dealing with SICA, so as to insure the uniform interpretation and application of all SICA obligations; Offer advisory opinions to the different SICA institutional bodies regarding the interpretation and application of the Protocol of Tegucigalpa and other legal instruments that are compatible with or derived therefrom; Resolve disputes that may arise among and between the different branches of government within a SICA country or whenever a national court s decision is ignored by another institutional body within that country; Entertain complaints brought by persons affected by the actions of any SICA institution (including serving as the court of last resort with respect to administrative decisions undertaken by one of those bodies against an employee); Resolve disputes that may arise between a SICA member and a non-member state if all the parties so agree; and, carry out comparative studies of Central American legislation in order to harmonize and encourage uniformity in the laws of the Central American states. (In addition, dissenting opinions are permitted.)

[95] The 1999 Honduras/Nicaragua dispute (which attracted much adverse attention to what became recognised as a fragile system) is arguably distinguishable on the basis that the nature of the dispute (territorial) is excluded from the jurisdiction of the CACJ, unless all parties to the dispute consent (See O'Keefe, *supra*, (*The Central American Integration System (SICA) at the dawn of a new Century.*).

[96] *See,* the ECLAC & IADB report on SICA's institutional framework (1998). In addition to the 1999 Honduras/Nicaragua dispute which is arguably distinguishable on the basis that the nature of the dispute (territorial) is excluded from the jurisdiction of the CACJ, unless all parties to the dispute consent (See O'Keefe, *Id.*).

[97] In conjunction with the report "The Foundations for the Creation of a Mercosur Tribunal of Justice".

[98] *See,* Dreyzin de Klor, *supra.*

Nevertheless, to compare Mercosur with the EU today (in the context of what standards must be met immediately in order to successfully advance Mercosur s dispute resolution system), is to compare apples with pears. In terms of their state of origin, motives for development and respective stages of evolution, it is unrealistic to expect Mercosur to keep pace with the EU. Arguably, Mercosur is a victim of its own success, in that integrationists frequently (either expressly or impliedly) expect the relatively infantile Mercosur to track the institutional growth of the EU. Certainly, it indirectly compliments Mercosur on the (economic and/or legal) sophistication and political maturity[99] of either Mercosur or its Member states, that so soon after its inception, Mercosur should sets its sights so high.

Setting one s sights so high is no bad thing, but the teething process for the EU was a painful one in terms of the voluntary surrender of sovereignty. And upon entering the next (dare we say inevitable) stage of development for Mercosur s dispute resolution system (and integration process overall), this issue will have to be addressed against the backdrop of ever-changing political and economic conditions. On the assumption that the state of the global and regional legal environment (in which the Mercosur dispute resolution system finds itself at the time a decision comes to be taken), will inform Member states of whether there is a need to take such a significant step into supra-nationality, the following considerations will be relevant.

What Legal Environment Exists in the Region?

The Brasilia, Ouro Preto and Olivos Protocols all heartily embrace the concept of international arbitration - which is precisely the area of law that Latin America has witnessed substantial transformation over recent years. It is, therefore, perhaps useful to consider briefly the implications of this change from the point of view of how responsive Member states are to surrendering their sovereignty and what is the region s amenability to alternative dispute resolution systems. Furthermore, on the assumption that a proposed permanent dispute resolution system maintains some component of international arbitration (as opposed to the establishment of a strictly supra-national Mercosur court), this might give us an insight into how such a proposal would be received[100].

The Growth of International Arbitration in Latin America

Many Latin American countries have a strong tradition of compliance with international agreements, however, contrastingly, until relatively recently, the region has shown hostility to efforts to develop the practice of international arbitration. This is partly due to the traditional resistance, shown by some of the dominant countries in the region, to ratify international treaties or accept arbitration (or indeed other means of alternative dispute resolution)[101]. Arbitration is certainly not as well known in Latin America as it is in Europe and the United States[102].

The resistance can be traced back to a lack of trust in submitting disputes with foreign investors to a foreign jurisdiction. This originated from the importance given by Latin American countries to national jurisdiction and national law as a way to reject principles such as intervention and diplomatic protection used by other states in favour of their national investors. Consequently, Latin American countries developed the Calvo doctrine [103], named after Carlos Calvo, an Argentine diplomat who rejected capital-

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[99] Mercosur is not a colonial imposition but an organic development, founded on considerable political maturity from the outset.

[100] A comprehensive analysis of the legal environment of Mercosur would, ideally, also address constitutional attitudes to change and questions of domestic law, yet unfortunately, this falls beyond the scope of this paper.

[101] *See,* Guido Santiago Tawil, *The role of international, regional, sub-regional and bilateral treaties in Latin America*.

[102] *See,* Dr. M. Rosa Cattaneo, *Recent Developments of Arbitration in Latin America - Focus on Mercosur Countries: Argentina and Brazil* (2002).

[103] The typical Calvo clause (incorporated into the constitutions of Mexico, Ecuador, Peru, Venezuela, Bolivia, Honduras, Nicaragua, Cuba, El Salvador and reads as follows: Disputes and controversies which may arise with regard to the interpretation or execution of this contract shall be resolved by the tribunals of the Republic in

exporting countries abuses of diplomatic protection in the late 1800 s: The resolution of disputes was the domain of the state courts. No doubt perpetuated by economic deceleration, which tends to feed protectionist sentiments such as the Calvo doctrine, it is not until recently that the region has begun to rid itself of the constitutional obstacles which were excluding the operation of international arbitration.

Ironically, the almost uncontrolled proliferation of treaties and international instruments, new laws, and rules that has taken place over the last decade, has lead to considerable overlapping and inconsistencies[104] which in the immediate, demands careful navigation by practitioners[105]. Today, the advantages of international arbitration are becoming more and more apparent: appropriateness to deal with both Member state disputes[106] and private investor disputes[107]; ability to choose a neutral forum (and neutral arbitrators[108]); flexibility of procedures; speed; cost effectiveness; confidentiality and finality[109] are some of the advantages arbitration has over litigation.

Although this is considered in more detail below, the NAFTA, various multilateral treaties, inflows of foreign direct investment (seen since the 1990 s), and the silent explosion of bilateral investment treaties, (all part of the willingness to create an economic and legal environment attractive to foreign investment[110]), has without doubt facilitated the cultivation of appropriate arbitration laws and a greater willingness of states to thereby surrender the control, previously enjoyed by the national courts. In addition, the manner in which national legislation is changing indicates a pattern of conformism to generally accepted international standards[111]. For example, on a procedural level, a process of harmonisation is being fostered by the proliferation in use of the UNCITRAL Model Law[112] and the

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accordance with the laws of the nation, and shall not in any case be considered as a motive for international reclamations. *Also see,* Manuel Garcia Mora, *The Calvo Clause in Latin American Constitutions and International Laws*, 33 Marq. L. Rev. 205, 206-7 (1950).

[104] *See,* Henri Alvarez, *Recent Developments in International Commercial Arbitration in Latin America*, LCIA News Vol. 7, Issue 1, February 2002.

[105] The treaties and international instruments which may affect the conduct of international arbitration or the enforcement of arbitral awards in Latin American countries, could include: The Inter-American Convention on Extra Territorial Validity of Foreign Judgments and Arbitral Awards (the Montevideo Convention of 1979); Mercosur Agreements and Protocols: 1992 Protocol on Cooperation and Judicial Assistance in Civil, Commercial, Labour and Administrative matters (the Las Leñas Protocol); Protocol of International Jurisdiction in contract matters and Protocol of Caution Rules (both enforced since 1994); 1998 Mercosur Agreement on International Commercial Arbitration (which includes Bolivia and Chile as signatories under the Bolivia/Chile Agreement - Decision 3/98 and 4/98); 2000 Model Rules for International Commercial Arbitration for Arbitral Institutions in the Mercosur Region, Bolivia and Chile; Cooperation Agreement in regard of Alternative Dispute Resolution between the Chambers of Commerce of the Andean Group and the Mercosur; The Colonia and Buenos Aires Protocols on Investment Dispute.

[106] As indeed happens regularly in ICSID (World Bank's International Centre for the Settlement of Investment Disputes); and UNCITRAL (United Nations Commission on International Trade Law) arbitrations, for example, which already have been employed in Mercosur Member states.

[107] As catered for by the ICC (International Chamber of Commerce); LCIA (London Court of International Arbitration); and AAA (American Arbitration Association), to name just a few of the well-established international commercial arbitration institutions, previously employed in Mercosur Member states. International arbitration also permits the parties to influence the constitution of the tribunal, depending on the nature of the dispute.

[108] Who under Mercosur's rules are to be "jurists of recognised competence in all matters which can be the subject matter of a controversy."

[109] Most Latin American countries now recognise arbitral institutions, principles of *kompetenz-kompetenz*, separability of arbitration agreements and the enforcement of foreign arbitral awards.

[110] *See,* Karl Joachim, *The Promotion and Protection of German Foreign Investments Abroad,* ICSID Review, Foreign Investment Law Journal, ICSID, Vol.11, No. 1, Spring 1996, p. 2.

[111] *See,* Tawil, *supra.*

[112] The United Nations Commission on International Trade Law has formulated a Model Law on International Commercial Arbitration (1985) which operates as a textual foundation for any country to internalise arbitral procedure, and the recognition and enforcement of awards, into domestic legislation. *See,* G. Born, (2nd Edition) *supra,* and Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* Third Edition, Sweet &

International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration. Consequently, practice in international arbitration is converging and there is a growing consensus on the most appropriate way of achieving a binding resolution of controversies between parties of differing nationalities who engage in international trade[113]. The UNCITRAL s Model Law has been a significant influence on the enactment of national arbitration legislation, particularly amongst Mercosur Member states[114].

In conjunction with the abandonment of restrictive doctrines, there is arguably a trans-national, substantive law developing, most notably in the context of international arbitration. This is, for example, bridging the gap, between civil (Latin American) and common law (U.S.) doctrines, and shaping common principles in commercial law. However, to participate in this global homogenisation (of commercial laws) requires a minimum infrastructure of these laws and institutions necessary to enforce them[115].

The most important factor for anyone commencing any kind of international arbitration is the ability to enforce a favourable award in a foreign country. The New York Convention on the Enforcement of Foreign Arbitral Awards (1958) (the New York Convention) is the primary international instrument, whose ratification by Latin American states is approaching complete coverage[116], whilst the Inter-American Convention on International Commercial Arbitration (1975) (the Panama Convention) implements a number of the same, or similar, provisions of the New York Convention[117]. To the extent that there remain frailties in investors ability to enforce awards, parties should also consult the Mercosur Agreement[118]. In this context, reform has at long last reached Argentina and Brazil, who have been perhaps two of the most reluctant countries to change. In recent months, Brazil has ratified the New York Convention, thereby completing the Mercosur Member states acceptance of international standards on the enforcement of foreign arbitral awards[119].

In conclusion, Mercosur Member states have shown an increasing willingness to remove constitutional obstacles to the convergence of international arbitration laws and practices. Whilst it may be premature to conclude that this is indicative of a profound acceptance of the internationalisation of dispute resolution, it is a positive trend which suggests a growing confidence and degree of trust in international trade and its systems.

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E. Other Influences on the Development of the Mercosur Dispute Resolution System

Pursuant to the above, it is worth contemplating other contributory factors which might come into play in shaping any future permanent dispute resolution system. Change will much depend on the degree of integration to take place in Mercosur as it tracks the traditional route from free trade zone to customs union, common market and ultimately political union.

Maxwell, London, 1999, who explain that the influence of the UNCITRAL Model Law has given a certain degree of homogeneity in international arbitration practice.

[113] *See,* Tawil, *supra.* This has already been addressed by systems such as UNIDROIT and principles of *lex mercatoria*.

[114] Bolivia, Brazil and Paraguay have adopted laws inspired by the UNCITRAL Model Law, as has proposed legislation in Argentina. Chile's proposed legislation would adopt the Model law with only minor amendments.

[115] *See, The Lessons of Law-and-Development Studies,* 89 Am. J. Int'l L. 470 (1995), page 483.

[116] *See,* Appendix I (list of Latin American countries that have ratified the New York and Panama Convention).

[117] The interplay between the New York Convention and the Panama Convention illustrates the inconsistencies between treaties mentioned above. *See,* Henri Alvarez, *supra*. *See,* Albert Jan Van Den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?* Arbitration International, Vol. 5, No. 3, 1989, pp.214-229.

[118] 1998 Mercosur Agreement on International Commercial Arbitration.

[119] *See,* Decree No. 4.311 (23 July 2002). Argentina ratified the New York Convention in 1989.

The reality of international law is that it is embodied in the principle of consent - a question of political will at both a domestic and global level. However, a broader analysis of the respective political motivations amongst the Member states, in respect of further institutional development, (as mentioned above) is beyond the scope of this paper[120]. The following, therefore, is an eclectic assessment, which at the very least will hopefully offer some indication of the forces operating in relation to any progression of the permanent dispute resolution system.

The Natural Evolution Over Time of Mercosur s Institutions

It is perhaps inevitable that, as the political and economic landscape adapts with an increasingly accomplished (institutionalised) Mercosur, the dispute resolution system will edge towards achieving the goal of permanency[121]. Coupled with increasing political maturity[122] comes the expectation, at least, that the institutional framework will be devised in such a way as to nurture the rule of law into maturity[123]. Whilst it could be said that self-indulgent pessimism plagues many law and development commentators[124] over the question of whether the rule of law is in fact fostered in modern-day systems, there is some comfort to be gained from the Olivos Protocol and the step (albeit small) in the right direction that it takes, to confirm the belief that over time, dispute resolution systems must either embrace the principle or expire.

Some External Influences on the Future Dispute Resolution System

Leaving aside specific cases of Member state lobbying on what form the dispute resolution system should take, there is a myriad of forces at work in Mercosur, which will (some more than others) have a bearing on the creation of a future, permanent system.

Foreign Investors

To a practitioner, the most audible voice in the debate is that of the client who will look to use the dispute resolution process (i.e. the private investor who instigates a claim and Member states, to the extent they become involved). Unquestionably, foreign investors will take considerable comfort from the existence of an institutional framework which offers security, certainty and recourse to protect their assets, and the pressure that they can bring to bear on the design of a trade-related system ought not be underestimated. However, in the same way that the tail does not wag the dog, any concerns that foreign investors may have (over the effectiveness of a dispute resolution process), at the time when they are thinking of investing in the region, may not necessarily direct their decision-making process. Rather, the legal environment and its receptivity to foreign investors (and the extent to which it is regarded as offering certainty etc.), is, at most, a factor for consideration, and, at the very least, an indication of the experience the investor is likely to have once they invest in the region.

The United States Perspective of Mercosur

The U.S. is a huge influence on the region, whose political and economic influences cannot be ignored. The end of the Cold War, heralded a profound change in Latin America s external relations, leading to a thawing of relations with the U.S., which in turn has led to a more co-operative inter-American system[125].

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[120] Given current economic conditions, neither is this an insignificant task.

[121] If not in form, at least in practice.

[122] See for example, the Belo Horizonte Third Ministerial Meeting of the FTAA and simultaneous business forum, May 1997, which was seen as something of a watershed for Mercosur's representation (*See*, Jeffrey Cason, *On the road to Southern Cone economic integration*, 1 April 2000 JISW Vol. 42, Issue 1, 2342).

[123] International law is largely an extension of the principles of the liberal rule of law tradition to the international arena.

[124] *See, Law and Crisis in the Third World*, edited by Sammy Adelman and Abdul Paliwala, London, New York : Hans Zell 1993.

[125] *See*, Jeffrey Cason, *supra*.

The U.S., rather like others, did favour protectionism and rather tolerated preferential trade agreements such as the Treaty of Rome, the European Unification Act (1986) and the threat of Fortress Europe . The trend has changed though, and an explosion of new initiatives in economic integration, including the prospective FTAA, have introduced new dimensions to the hemisphere s trade and administration[126].

The U.S., for economic reasons (rather than purely strategic or political ones), engaged in preferential liberalisation with Canada and Mexico (to form the NAFTA), during a period that can best be described as a silent (bilateral) revolution. During this revolution, the changing U.S. administrations have left distinct impressions on the Southern Cone s broader plans for global integration. (*It is hoped that Robert Novick (former general counsel in the Office of the US Trade Representative), and partner of Wilmer, Cutler & Pickering, will contribute some thoughts to this section of the paper*).

The NAFTA / FTAA and Other Integration Arrangements

The influence of other integration arrangements (from the western hemisphere) on Mercosur will vary depending on whether or not there is any common interest between them, or any intention for the groups to merge in some way. Following the inception of the NAFTA, the U.S. pressure on Mercosur was arguably the exploitation of Mercosur s fear of not joining. There was possibly more than a positive incentive to entering preferential negotiations with the U.S., which was the defensive motivation to take part in discriminatory arrangements to avoid the costs of exclusion[127]. NAFTA s impact on Mercosur was to occur by virtue of the hub and spoke accession of Mercosur to NAFTA, as part of the FTAA initiative. However the politics of the negotiating process since NAFTA s inception have put paid to this notion[128].

Given this example of shifting political forces, it would, perhaps, be a futile exercise to try to construe how different dispute resolution systems would emerge from any merger between Mercosur and another integration arrangement[129]. However, while shifting economic and political forces will dictate where the fusions occur (if at all), there remains the theoretical considerations which can (and ought to) be applied to any possible situation whereby trading bloc regimes amalgamate.

In the first instance, thought must be given to whether the stated objectives of merging integration associations are compatible. Even assuming any conceptual obstacles can be overcome, the impediments that remain to establishing a common dispute resolution system are formidable. During negotiations, for example, any sub-regional arrangement will inevitably continue to carry out its respective mission, and over time, compound differences between its laws and institutions with those of any prospective counterpart[130]. There is also no guarantee that concurrent development will be compatible, or that an eventual synchronisation of sub-regional systems would be easy, if possible[131]. Fundamentally, integrated markets rely on the elimination of legal obstacles and a co-ordinated effort would be necessary to identify and resolve such potential conflicts, if any merger were to work.

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[126] *E.g.,* The Canadian-US Free Trade Agreement (CUSFTA) was introduced amid U.S. dissatisfaction with the evolving multilateral trade regime (*See,* Roberto Bouzas, *Preferential Trade Liberalisation in the Western Hemisphere: NAFTA and Beyond,* (Regionalism and the Global Economy (Jan Joost Teunissen (ed.)), at page 135.

[127] NAFTA is a large market for exports and a significant source of foreign investment. *See,* Roberto Bouzas, *Preferential Trade Liberalisation in the Western Hemisphere: NAFTA and Beyond,* (tab 17) at page 144.

[128] *See,* Dr. N. Phillips, *Reconfiguring Subregionalism: The Political Economy of Hemispheric Regionalism in the Americas*.

[129] Such as NAFTA, the Group of Three, CACM, CARICOM, the Andean Community, and Central America/Dominican Republic.

[130] And thereby increase the resistance to being supplanted by another system.

[131] Despite the bonding effect bilateral investment treaties may arguably have on the region.

Beyond the question of the constitutionality of accession to another integration regime[132], there exists the issues of the integration of institutions, and the harmonisation of laws, regulations and legal standards of the respective Member states. If a weak institutional structure exists, high level integration becomes difficult as a result of which, so too does the ability to enforce or implement Mercosur derived laws/decisions. Importantly, the creation of a supra-national tribunal could preserve the uniformity of application of institutions laws and ensure that the laws promulgated by the Member states are consistent with their Mercosur obligations - although supra-national bodies do also prompt constitutional problems, as has been witnessed in the Andean Court of Justice[133].

Finally, in terms of the harmonisation of laws and legal standards between merging arrangements, the abovementioned trends of legal harmonisation[134] (both of substance and procedure) are encouraging. However, there is likely to be a fundamental problem in the likely event that any possible merger preserves the respective institutional structures, and the treaty of accession establishes their respective relationship and functions: The ..coexistence of two or more lawmakers in a unified (but not unitary) system creates the potential for conflicts which require rules to determine which of two conflicting laws will apply in a given situation. [135] This potential problem is made worse in the absence of a supra-national body.

On a practical level, with specific regard to the FTAA[136], amongst the negotiating groups at work, is one dealing with the settlement of disputes (Negotiating Group on Dispute Settlement (NGDS)). In accordance with the San Jos Ministerial Declaration, the objective is to establish a fair, transparent and effective mechanism for dispute settlement among FTAA countries, taking into account *inter alia* the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes[137]. The NGDS shall design ways to facilitate and promote the use of arbitration and other alternative dispute settlement mechanisms, to solve private trade controversies in the framework of the FTAA.

The WTO

In light of the Olivos Protocol (and the above proposals in respect of the FTAA), the dispute resolution system of the WTO takes on added importance. The WTO system[138] provides for a compulsory and binding procedure with flexible deadlines. It opens with a requirement to consult or mediate for 60 days, in pursuit of which a panel shall be constituted by the Dispute Settlement Body. Submissions are made by the parties to the panel, and within approximately 6 months after its appointment, a panel will submit a final report to the parties[139]. The Dispute Settlement Body of the WTO thereafter adopts the report as a

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[132] *See, e.g.,* D. Evigrenis, *Legal and Constitutional Implications of Greek Accession to the European Communities*, 17 Common Market Law Review, 157, 159 (1980). Mercosur Member states' constitutional acceptance of Mercosur rulings has yet to be extensively tested, let alone submission to legal principles derived from "foreign" integration associations.

[133] *See,* R. Barros Charlín, *Parametros Juridico-Institucionales de la Integracion Latinoamericana,* Integracion Latinoamericana, Sept. 1993, at 29.

[134] *I.e.,* the promotion of UNCITRAL Model laws, trans-national standards in international arbitration between common and civil law jurisdictions, and the Inter-American Specialised Conferences on Private International Law (CIDIPs) (an OAS Inter-American Juridical Committee initiative to promote the progressive development and codification of private international law and to draft uniform laws to serve as a basis for the harmonisation of national legislation). There is also a view that Latin American countries are reluctant to join international conventions (and therefore subscribe to harmonising laws) on the basis that they were not founders of the relevant institutions. *See,* Paul A. O'Hop, *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-based system*¸ 36 Harv. Int'l L.J. 127 (1995) at page 165. See above.

[135] *See,* R. Barros Charlín, *supra.* at 225.

[136] In relation to which, entry into force is to be no later than December 2005.

[137] At the Panama City meeting last July the relationship between FTAA and other institutions was discussed. It is an agreed principle of the negotiations that the FTAA is to be consistent with WTO rules and disciplines.

[138] *See,* www.wto.org.

[139] 3 weeks after that, the panel will report to the WTO members.

ruling, provided there is no appeal (on the law). The Uruguay Round agreement made it impossible for a losing country to implement provisions to block the adoption of the ruling, which are automatically adopted unless there is a consensus[140] to reject it. In any case, the Dispute Settlement Body will monitor how adopted rulings are implemented.

Given the significance of the WTO procedure under the Olivos Protocol (and its growing significance under the FTAA), it will be interesting to observe whether the long term effect of Mercosur opening the route to electing the WTO process, will ultimately lead to the side-lining of the specific Mercosur *ad hoc* arbitral procedure.

Multilateralism and Globalisation

In the same way that there has been a bilateral revolution[141] there is also evidence of a multilateral one, and the influence of this process, and that of globalisation in general, has (and will continue to be) an influence on the region. Indeed, one example of the regional and global arrangements that have been pursued (other than the abovementioned), is the Multilateral Agreement on Investment (MAI), an initiative of the Organisation for Economic Co-operation and Development (OECD), that had sought to provides its members with a dispute resolution procedure[142].

The proliferation of overlapping agreements in the Western hemisphere is ultimately counter-productive, although it is hoped that the WTO dispute resolution system will improve multilateral disciplines. The upsurge in multilateral agreements[143] and negotiations, echoes the advent of globalisation - exemplified by the opening of Latin American economies in the aim of achieving stronger international involvement. The structural transformation of the international economy brought about by rapid technological change and globalisation of markets and production is, in fact, one factor which contributed to the change of policy in Latin American countries and the growth of trade liberalisation in the 1990 s.

The process of globalisation, in turn, makes fresh demands on the process of democratisation, and institutional innovation, of which the corollary is the promotion of the rule of law, stability/credibility, technical skill and representativeness. The bi-product is the globalisation of law[144]. The debate over whether the effective forces behind the globalisation of law, are derived from processes of globalisation or regionalisation , is one which is eloquently dealt with by other contributors, and, in addition, is not one which filters down well into the ranks of legal practitioners.

The Trend of Bilateralism

As mentioned above, there has been a silent revolution of bilateralism in recent years (i.e., the formalisation of bilateral relations between countries under bilateral investment treaties (BITs)). The question is whether this will have any impact on the development of Mercosur s dispute resolution system. The first BIT was conceived in 1959, between Germany and Pakistan[145]. Now Mercosur

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[140] Including its adversary in the case.

[141] See below.

[142] Which depending on the circumstances refers to PCA, ICSID, UNCITRAL or ICC rules. *See,* www.oecd.org. The MAI has been characterised as the "multilateralisation" of bilateral investment treaties, with some additional provisions (*See,* Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 Int'l Law. 1033 (2000)).

[143] *See, e.g.*, Central American Common Market (CACM), the Andean Group and the Caribbean Community (CARICOM), Mercosur, the Group of Three trade agreement between Mexico, Colombia and Venezuela, and NAFTA.

[144] Evidenced by the developing uniformity of legal regimes (as explained above) in areas such as contract law, commercial law and constitutional law.

[145] The first BIT concluded within the region was between the U.S. and Panama in 1982.

Member states alone account for many such agreements as can be seen from Appendix II[146]. An obstacle to their emergence in Latin America was the Calvo doctrine[147] as most BITs offer foreign investors the possibility of solving their disputes with the host countries through international arbitration[148]. However, following the shift in attitude over recent years to international arbitration, the resulting increase in the number of BITs has been impressive[149].

From the perspective of promoting the acceptance of international arbitration, and accustoming Member states to foreign investors seeking to enforce their rights against the Member state, BITs have and continue to offer huge benefits. In fact, the frequency with which investors are resorting to the dispute resolution provisions of BITs is increasing (such as in the case of the current Argentinean economic crisis[150]). Contrastingly, it is said that BITs, of themselves, provide a mechanism for dispute resolution but are frustratingly imprecise as to the applicable substantive legal standards.

At the same time, they may promote the homogeny of international arbitration institutions such as ICSID, they do not commit Member states to employing Mercosur s own dispute resolution system, and, therefore, arguably serve to frustrate the development of its own jurisprudence.

Economic Volatility

As is apparent from previous economic crises, Latin American countries (like those elsewhere) have sometimes succumbed to protectionist sentiments in times of hardship. The region has raised its barriers in troubled times, and the state has undertaken a much more direct role in the economy in order to stimulate investment and growth[151]. It remains to be seen whether in the current economic climate, the door is closed on Mercosur and whether the steps towards a permanent dispute resolution system suffer as a result.

F. Conclusion

Whilst the Mercosur dispute resolution system remains in a transitional phase, the issue that will remain outstanding is whether or not there is the motivation to take Mercosur into a new chapter of supra-nationalism. There naturally remains work to be done on the lack of accessibility to the mechanism currently in place, but, above all, the lack of autonomy from national administrations is the greatest stumbling block to achieving a truly effective dispute resolution system.

The Mercosur dispute resolution system (as is evident from the Olivos Protocol), has edged closer to the precipice of supra-nationalism. The Permanent Review Tribunal is indeed a very positive development. However, the decision over whether the leap is ultimately taken is such a fundamental one that it will

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[146] BIT's provisions change substantially from case to case. For example, most of them deal with the scope of the treaty, general treatment standards such as fair and equitable treatment, national treatment and most favoured nation treatment.

[147] See above.

[148] Typically, the procedures involve, first, friendly consultation and negotiation, and thereafter one of the following: (i) exhaustion of local jurisdictional proceedings and if there is no resolution within a prescribed timeframe, recourse to international arbitration under ICSID's rules or an *ad hoc* arbitration in accordance with the UNCITRAL Arbitration Rules, or other previously agreed procedure; or (ii) submittal of the dispute to local jurisdictional proceedings, *or* to international arbitration under ICSID's rules or an *ad hoc* arbitration in accordance with the UNCITRAL Arbitration Rules, or other previously agreed procedure. Since the BIT with France on 3 July 1991, all new BITs signed by Argentina allow investors to choose to submit the dispute to international arbitration *without* the need to exhaust local remedies.

[149] The impetus for increased bilateralism from the US perspective, was the insubstantial progress it felt had taken place during the early years of the Uruguay Round. NAFTA reinforced the trend.

[150] As a result of which there have been 10 ICSID filings made against Argentina since 1997 (4 concluded/6 pending - including 5 commenced since March 2001), out of a total of 66 concluded/41 pending since 1965.

[151] *See, Global Positioning of the European Union and Mercosur: Towards a New Model of Inter-regional Cooperation,* Annual Lecture of the Mercosur Chair, Institut d'Etudes Politiques, Paris, France, 4 April 2002.

inevitably be based on political and economic motives[152]. In light of the current economic difficulties in the region, the concern is that Brazil s previous reluctance will return with a re-emergence of protectionism.

If the leap is not taken, the current institutional framework may instead evolve to, first, meet the shortfalls highlighted above as best it can[153] and, secondly, adapt itself to accommodate any prospective merger with another integration arrangement (such as the FTAA)[154]. This it must do in a co-ordinated fashion. If there is a lack of co-ordination between groups, the resulting complex web of laws and institutions will prove an obstacle to pan-American integration. Therefore, it is apparent that at the very least, the increased deepening of Mercosur s institutional framework is critical to avoiding drifting into irrelevance.

In any event, finding a solution to what is the most appropriate permanent dispute resolution system is not easy. As some consolation, the comfort that can be drawn from the current transitional phase we find ourselves in, is that the initial signs from the Mercosur arbitral tribunals are positive, and the broader international trend of harmonisation is reaching Latin America.

[152] Which to date, has been the reluctance of Brazil to adopt a supra-national court.

[153] As was attempted by the Olivos Protocol.

[154] If this happens, there is perhaps an increased risk of Mercosur's dispute resolution system being supplanted by an alternative one.

Appendix I

	New York Convention		Panama Convention	
State	**Signature**	**Ratification, Accession (A), Succession (D)**	**Signature**	**Ratification, Acceptance (A), Succession (D)**
Argentina	26 August 1958	14 March 1989	15 March 1991	03 November1994
Bolivia		28 April 1995 (A)	02 August 1983	08 October 1998
Brazil	-	7 June 2002 (A)	30 January 1975	31 August 1995
Chile		04 September 1975 (A)	30 January 1975	08 April 1976
Colombia		25 September 1979 (A)	30 January 1975	18 November 1986
Ecuador	17 December 1958	03 January 1962	30 January 1975	06 August 1991
French Guiana	-	-	-	-
Guyana	-	-	-	-
Paraguay		08 October 1997 (A)	26 August 1975	02 December 1976
Peru		07 July 1988 (A)	21 April 1988	02 May 1989
Suriname	-	-	-	-
Uruguay		30 March 1983 (A)	30 January 1975	29 March 1977
Venezuela		08 February 1995 (A)	30 January 1975	22 March 1985