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ARTICLE

DISPUTE RESOLUTION IN MERCOSUL: THE PROTOCOL OF LAS LEÑAS AND THE CASE LAW OF THE BRAZILIAN SUPREME COURT

NADIA DE ARAUJO*

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I. INTRODUCTION

The international community is presently in a period of transformation, particularly in the economic and legal spheres. The New World order, unburdened by the Cold War, is witnessing unprecedented growth in international trade and foreign investment. Globalization is imposing intense, economic internationalization through both the World Trade Organization and regional integration efforts like MERCOSUL, NAFTA and the European Union. This internationalization has greatly changed the concept of national sovereignty.

Regulation of cooperation and interaction among nations require the creation of new systems of equitable and functional rules. Because of recent economic integration efforts, we are in the process of developing an entire body of integration law. The European Community, which is close to true political and monetary union, is a useful foil to study the institutional model adopted by MERCOSUL. The more developed European model provides important lessons about the kinds of instruments and rules needed for economic and political integration and enables us to focus more critically on MERCOSUL's problems.

MERCOSUL, the Common Market of the South, was created by the Treaty of Asuncion, signed by Argentina, Brazil, Paraguay and Uruguay on March 26, 1991.¹ MERCOSUL is a democratic reference mark for countries integrating in order to become part of the post-Cold War world of indefinite polarities.² Although many have argued that MERCOSUL should adopt the European model for institutional and jurisdictional integration, that model

1. See THOMAS A. O'KEEFE, *LATIN AMERICAN TRADE AGREEMENTS* A5:1 - A5:15 (1997); Treaty Establishing A Common Market, Mar. 26, 1991, 30 I.L.M. 1041-1063, for the English translation of the text of the Treaty of Asuncion. See CÓDIGO DO MERCOSUL 17-43 (Nadia de Araujo, Frederico Magalhães Marques & Marcio Monteiro Reis eds., 1998)[hereinafter CÓDIGO DO MERCOSUL].

2. Celso Lafer, *Sentido Estratégico do Mercosul*, in *MERCOSUL: DESAFIOS A VENCER* 9 (1994).

was decisively rejected in the Protocol of Ouro Preto.³ Instead, MERCOSUL chose to develop its own model for intergovernmental organization. Since that die has already been cast, there is no point in rehashing the debates about which model MERCOSUL should have followed.

The purpose of this article is much simpler: to analyze from a Brazilian perspective MERCOSUL's experience with dispute resolution. In order to do this, I must set out certain conceptual aspects, discussed in sections II and III, in order to deal with the theme of dispute resolution in section IV.

Section IV analyzes three distinct methods of dispute resolution that may be utilized separately, simultaneously, or sequentially in MERCOSUL. The first is consultation through MERCOSUL's Trade Commission (CCM). The second is ordinary litigation in national courts, utilizing the array of judicial assistance measures available under the Protocol of Las Leñas.⁴ The third is binding arbitration.

This study demonstrates that mechanisms already exist to deal with disputes arising in MERCOSUL. These mechanisms are capable of resolving disputes not only between States, but also between private parties or between a State and a private party.

II. THE MODEL OF EUROPEAN COMMUNITY LAW

The purpose of European Community Law is to study the treaties constituting the European Community, as well as the legal evolution resulting from its regulations and the case law applying provisions of these treaties.⁵ Community Law has

3. Signed at Ouro Preto, Brazil, Dec. 17, 1994. See O'KEEFE, *supra* note 1, at A10:1-A10:13; Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR, Dec. 17, 1994, 34 I.L.M. 1244, for the English language text. See CÓDIGO DO MERCOSUL, *supra* note 1, at 55-75, for the Portuguese text.

4. Protocol of Jurisdictional Cooperation and Assistance in Civil Commercial, Labor and Administrative Matters, Dec. 5, 1992, MERCOSUL, CMC, promulgated in Brazil by Decree 2.067 on Nov. 12, 1996. See CÓDIGO DO MERCOSUL, *supra* note 1, at 107-120, for the full Portuguese text.

5. PAULO BORBA CASELLA, *COMMUNIDADE EUROPÉIA E SEU ORDENAMENTO JURÍDICO* 247 (1994). See ANTONIO TIZZANO, *CÓDIGO DA UNIÃO EUROPÉIA* (1997), for the text of the Treaty of Rome and Community Legislation. See LOUIS DUBOIS and GUEYDAN, *GRANDS TEXTES DE DROIT COMMUNAUTAIRE ET DE L'UNION EUROPÉENNE* (4th ed. 1996) (containing principal examples of European case law with respect to the themes of Community Law);

become an integral part of the domestic law of the Member States, transforming their legal systems. Thus, European Community Law is both national and international law.⁶

This new, complex body of transnational law is integrated at the normative, domestic level of the Member States. Its rules are binding on all. Reception is automatic, with no need for prior ratification. The Communities legal system is founded on legal principles limiting the actions of its administrators.⁷ These principles guarantee citizens the protection of rights established in Community Law.⁸ The heart of Community Law is a set of rules prohibiting the creation or maintenance of trade barriers among the Member States. This goal is a priority of the famous "four liberties": goods, persons, services and capital.⁹ No Member State may restrict movement of these factors of production across its borders, assuring development of a market governed by considerations of demand and efficiency rather than by barriers artificially created by national borders.

The European Community is a union of States with a legal order characterized by supranationality. It lies somewhere between the traditional Nation-State and an international organization. Supranationality signifies that the European Community is a special organization, with its own sovereign rights, supported by a legal order independent of its Member States, to which they are submitted.¹⁰ Among the many attempts

JEAN BOULOIUS and ROGER-MICHEL CHEVALLIER, GRANDS ARRÊTS DE LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES (4th ed. 1997).

6. António Boggiano, *Hacia el Desarrollo Comunitario del Mercosur desde la Experiencia de la Unión Europea*, in O MERCOSUL E A UNIÃO EUROPÉIA 49 (1994).

7. According to Deisy Ventura, the European Community has generated a *sui generis* type of law through the creation of an original community. A ORDEM JURÍDICA DO MERCOSUL 226 (Deisy Ventura ed., 1996).

8. David Stoelting, an American jurist, has described European Community Law as: "A fluorescent body of commercial law in the communitarian ambiance, applicable, in the limits of the Community, by a multiplicity of national judiciaries as well as by the institutions of the European Union." David Stoelting, *The Jurisdictional Framework of the European Court of Justice*, 29 COLUM. J. TRANSNAT'L L. 194 (1991). See generally, Ami Barav, *Recepção da Regra de Direito Comunitário Pelas Ordens Jurídicas Nacionais*, in DIREITO COMUNITÁRIO DO MERCOSUL (Deisy Ventura ed., 1997); STEPHEN WEATHERHILL & PAUL BEAUMONT, EC LAW (2d ed. 1995); PAUL CRAIG & GRAINNE DE BURCA, EC LAW (1997); BERTHOLD GOLDMAN, ANTOINE LYON-CAEN & LOUIS VOGEL, DROIT COMMERCIAL EUROPÉEN (5th ed. 1994); JOEL RIDEAU, DROIT INSTITUCIONAL DE L'UNION ET DES COMMUNAUTÉS EUROPÉENNES (2d ed. 1996).

9. WEATHERHILL & BEAUMONT, *supra* note 8, at 29-30.

10. A ORDEM JURÍDICA DO MERCOSUL, *supra* note 7, at 28 (declaration of

to define Community Law, probably the most useful is by Ami Barav and Christian Philip:

Deprived of the symbols of power that habitually make up the coercive arsenal of the State, the Communities have only the law. A centripetal factor to impose upon the Member States is the success of the integrational design. By themselves, they have created their own law. The Court of Justice uses the expression 'Community of Law.' Hierarchical, this normative production has taken on specific juridical characteristics. It is controlled by the jurisdictional levels constituted for this purpose. More than Community Law, we may speak of a communitarian legal order.¹¹

The European Court of Justice assures uniform interpretation of treaties and other communitarian sources and acts.¹² In the domestic arena, Community Law is applied directly by courts at all jurisdictional levels of the Member States. Even though domestic proceedings are generally governed by the procedural law of the Member States, substantively they may be governed by both domestic and Community Law. National tribunals have the obligation to guarantee direct, immediate and effective protection of rights assured by the Community treaties

Robert Schuman).

11. AMI BARAV & CHRISTIAN PHILIP, *DICIONNAIRE JURIDIQUE DES COMMUNAUTÉS EUROPÉENES* (1993).

12. The Court of Justice, regulated by the Treaty of Rome, has been primarily responsible for the consolidation of a common European space. Its principal function is to harmonize interpretation of Community Law. It has jurisdiction to decide: (1) actions for non-performance designed to control the actions of Member States and to secure performance of their obligations; (2) the recourse of nullity directed against acts of community organs that have exceeded their powers; (3) the action for omission, also directed to community organs; and (4) the action for indemnification, in the event that any community organ has caused unjustifiable damage to a State or an individual. The jurisdiction of the Court of Justice may be invoked by Member States or by individuals since the treaties create directly exercisable subjective rights. Any citizen has access to the European Court. There is also the "prejudicial *renvoi*," an important device for making Community Law as effective as possible. Whenever a national judge, deciding an action brought before its jurisdiction, faces a prejudicial question that involves the interpretation of a rule of Community Law, he may send this question to the Court of Justice so that it can render a decision more adequate to communitarian interests. This *renvoi* is mandatory when rendering a non-appealable decision. See CARTOU, *L'UNION EUROPÉENNE* 83-181 (2d ed. 1996); JEAN BOULOIUS, *DROIT INSTITUTIONNEL DE L'UNION EUROPÉENNE* 81-118 (6th ed. 1996).

and legislation derived therefrom.

Another principle of Community Law is that it prevails over both international law and the domestic law of Member States. Over the years the domestic law of the Member States has had to make a series of adaptations, even at the constitutional level. Today, Community Law constitutes a new species. Because of its specificity, it belongs neither to classic international law nor to international organizations.¹³ Instead, jurists have created a new Law of Economic Integration, which regulates the actions of economic blocs as they affect the process of economic integration.

III. THE SOURCES OF THE INTEGRATION LAW OF MERCOSUL

Contrary to the European Community, MERCOSUL opted to create intergovernmental institutions without supranational character to facilitate and coordinate its integration process. The highest organ of MERCOSUL is the Council of the Common Market, also referred to as the Conselho do Mercado Comum (CMC), which is responsible for the political conduct of the integration process and for assuring attainment of the objectives set forth in the Treaty of Asuncion to establish a common market. It is composed of the Ministers of Foreign Relations and the Ministers of Economy of the Member States. The actions of the CMC are taken through decisions.

Immediately below the CMC is the Common Market Group, also referred to as the Grupo do Mercado Comum (GMC), an executive body charged with application of the policies and deliberations of the CMC. It is composed of the Ministers of Foreign Relations of the Member States. The GMC's powers and jurisdiction are set out in Article 14 of the Protocol of Ouro Preto, and the Protocol of Ouro Preto increased the GMC's functions beyond those described in the Treaty of Asuncion. The GMC's power of initiative is very broad, and its complementary functions are the preparation and supervision of the acts of the CMC. The actions of the GMC are taken through resolutions.¹⁴

13. CASELLA, *supra* note 5, at 247.

14. The GMC also works through eleven subgroups (STG), divided by areas of specific functions. The subgroups are as follows: SGT-1: Commercial Subjects, SGT-2: Customs Subjects, SGT-3: Technical Rules, SGT-4: Fiscal and Monetary Policies Related to Trade, SGT-5: Land Transportation, SGT-6: Ocean Transport, SGT-7: Industrial and Technological Policies, SGT-8: Agricultural Policies, SGT-9: Energy Policy, SGT-10: Coordination of Macroeconomic Policies, and SGT-11: Labor and Employment Relations

A third agency of MERCOSUL is the Trade Commission, also referred to as the Comissão de Comércio (CCM), which acts as the watchdog of the GMC. Its purpose is to implement the customs union, formulate common trade policies with respect to third countries, and to regulate unfair competition. The CCM implements these policies through directives, which are binding upon the Member States. It also utilizes its monthly meetings to analyze the various consultations formulated by the Member States that fall within its jurisdiction. It has established its own mechanism to facilitate consultations. The CCM has nine technical committees, which are responsible for each area of jurisdiction. These committees render present specialized opinions in cases of consultations and other activities.

A fourth agency of MERCOSUL is the Joint Parliamentary Commission, also referred to as the Comissão Parlamentar Conjunta (CPC), which is the representative body of the legislatures of the Member States. It is charged with accelerating the entry into force of common rules and harmonization of legislation in the Member States. The CPC is composed of up to sixty-four parliamentarians, sixteen from each Member State. It, however, does not have the power to approve communitarian legislation, because MERCOSUL has not permitted effective, direct application of supranational rules.

A fifth MERCOSUL agency is the Economic-Social Consultative, also referred to as the Forum Foro Consultivo Econômico-Social (FCES), which is the representative body of the economic and social sectors of the Member States. The Protocol guarantees an equal number of representatives for each Member State. The FCES acts through recommendations. Finally, MERCOSUL has an Administrative Secretariat, created by the Protocol of Ouro Preto, with headquarters in Montevideo. The Secretariat's principal function is safeguarding documents and information on the activities of MERCOSUL. It is presently the sole permanent body in MERCOSUL with the power to render operational support and services for the other agencies, as well as to exercise other purely administrative activities. It has its own budget and employees and publishes the Official Bulletin of MERCOSUL.

The new institutional structure for Mercosul created by the

Protocol of Ouro Preto preserves the Treaty of Asuncion as the principal instrument of integration. It also maintains the flexibility of the organs of MERCOSUL because of the absence of supranationality and its intergovernmental characteristics. The Protocol of Ouro Preto sets out the following sources for the institutional structure of MERCOSUL: (1) the Treaty of Asuncion, including its protocols and additional, complementary instruments; (2) agreements celebrated under the aegis of the Treaty of Asuncion and their protocols; (3) decisions of the CMC; (4) resolutions of the GMC; and (5) directives of the CCM.¹⁵ MERCOSUL's decisions are taken by consensus, which implies complex negotiations within the bloc before adoption of any decision. These discussions must be carried out prior to incorporation of any decision into each country's domestic legal systems.

Even though the Protocol of Ouro Preto makes MERCOSUL's rules mandatory, this does not occur automatically. The European Community model, with direct and primary applicability of community rules over national rules, was rejected during the negotiations and has not been revived during the period of transition. Incorporation of MERCOSUL rules by the Member States requires explicit adoption in accordance with their own domestic legal systems.¹⁶

Once MERCOSUL has adopted a rule, it must pass through three additional stages to have binding force. First, it must be incorporated into the domestic legal order of each State. Second, this incorporation must be communicated to the Administrative Secretariat, which in turn must await arrival of appropriate documentation from all Member States. Third, the Administrative Secretariat must transmit the final document of ratification to the Member States. This document signifies that

15. Deisy Ventura emphasizes that the identification of a legal ordinance in the international area implies the recognition of its very own sources, which differentiates it from national orders. This common perception gives rise to the concepts of the communitarian order. Thus, one classifies the Treaty of Asuncion, the protocols that complemented it, and the law derived therefrom whose rules emanate from the autonomous institutions of the bloc as the original law of MERCOSUR. A ORDEM JURÍDICA, *supra* note 7, at 41-42.

16. See Nadia de Araujo, *A Internalização dos Tratados Internacionais no Direito Brasileiro e a Ausência de Regulamentação Constitucional*, in 3 REVISTA DA FACULDADE DE DIREITO DA UFF 77-90 (1999), for an explanation of Brazil's system for incorporation of treaties and its case law.

the rule will enter into force simultaneously within thirty days in the MERCOSUL area.¹⁷

In practice, however, Member States have displayed a number of variations from this rule in incorporating MERCOSUL provisions into their domestic law. Certain protocols are true treaties and must be legislatively ratified in order to be incorporated into domestic law. Others, such as the Protocols of Las Leñas and Buenos Aires, went into force prior to ratification by all Member States. For example, even though Uruguay did not ratify the Protocol of Las Leñas until 1998, the Protocol was utilized prior to that date several times in Brazil, as will be discussed *infra*. Moreover, some MERCOSUL rules require only a domestic, administrative rule for their adoption, such as a regulation by the Central Bank. Other rules require no domestic procedure, such as the internal regulations of the Trade Commission. Thus, there are two categories of rules: those that enter into force simultaneously, and others that require domestic adaptation. There is no guarantee of uniformity in all MERCOSUL countries.

The sources of MERCOSUL law lack uniformity.¹⁸ If only one Member State refuses to adopt a MERCOSUL rule, its adoption is at risk until establishment of the common market. Article 42 of the Protocol of Ouro Preto provides that the rules emanating from MERCOSUL have an international character but are only transformed into domestic rules through a special act of reception or incorporation.

Francisco Rezek, a Brazilian judge on the International Court of Justice, points out that incorporation of the law of MERCOSUL into domestic law continues to be done in the classic manner of international treaties. Incorporation must include negotiation by governments and ratification by national legislatures. Thus, MERCOSUL law enters into force only after promulgation by national executives, which is typical for

17. See A ORDEM JURÍDICA, *supra* note 7, at 61, for an explanation of why this occurs. The delegations at the Ouro Preto meeting justified this result because of constitutional limitations in various Member States. Brazil, in particular, was in a delicate situation, because its 1988 Constitution constitutes the greatest obstacle to adoption of the European model. A detailed analysis of the constitutional situation of each of the Member States is set out in A ORDEM JURÍDICA.

18. Werter T. Faria, *Aplicação Interna das Normas Emanadas dos Órgãos do MERCOSUL*, in 1 TEMAS DE INTEGRAÇÃO 15 (1996).

reception of international acts.¹⁹ In a technical sense, MERCOSUL rules may not be denominated Community Law, for they lack hierarchical superiority; automatic reception by domestic, legal orders; and auto-applicability.²⁰

The barriers to domestic applicability of MERCOSUL rules were graphically illustrated by a recent decision of the Brazilian Supreme Court. The case involved an attempt to utilize MERCOSUL's Protocol of Provisional Measures, which had been ratified by Brazil, to implement a rogatory letter in Brazil. Nevertheless, the Brazilian Supreme Court decided that the Protocol was not in force in Brazil because no decree promulgating it had been published. In his opinion, Minister Celso de Mello explained that in order for international treaties and conventions to enter into force in Brazil, they must be approved by Congress and subsequently promulgated by presidential decree. Since the final stage had not yet occurred, the Protocol could not be utilized in Brazil. At no time did the Supreme Court consider the rules of the Protocol of Ouro Preto dealing with the entry into force within the MERCOSUL community of the Protocol in question.²¹

Brazil has no hierarchy between laws and treaties. If there is a conflict between domestic law and MERCOSUL, Brazilian courts apply the rule that the latter in time prevails. If a more recent law is inconsistent with a treaty, the law will prevail, even though this may mean invalidating a treaty and a consequent

19. Francisco Rezek, Conference, DIREITO COMUNITÁRIO DO MERCOSUL 55 (Deisy Ventura ed., 1997). See Nadia de Araujo et al, *Resumos de Jurisprudencia do STF e STJ sobre Conflicto de Fontes*, in 3 CADERNOS DA PUC-RIO II (1997), for a summary of the cases in which the STF or the STJ have dealt with conflicts between the treaty and the law.

20. Horácio Wanderlei Rodrigues, *Mercosul: Alguns Conceitos Básicos Necessários à sua Compreensão*, in SOLUÇÃO DE CONTROVÉRSIAS NO MERCOSUL 29 (1997) (classifying MERCOSUL rules as Cooperative Law).

21. Rogatory Letter 8.279, Argentina, Minister Celso de Mello, President. The headnote of the case states: "The Protocol of Provisional Measures, adopted by the Council of the Common Market at its seventh meeting in Ouro Preto/MG in December 1994, even though approved by the Congress (Legislative Decree No. 192/95), is not formally incorporated into the system of domestic positive law in force in Brazil. Despite having been ratified (instrument of ratification deposited on 3/18/97), it has not yet been promulgated through a decree by the President of the Republic. Doctrinal and case law considerations involving the question of the ability to execute international conventions of treaties in the area of domestic Brazilian law. Precedents: 58 RTJ 70, Reporter Min. Oswaldo Trigueiro - ADI No. 1.480-DF, Reporter Minister Celso de Mello."

violation of international law.²² Although this is of some concern, the Supreme Court believes the last word of Congress should prevail.

IV. DISPUTE RESOLUTION

Economic integration requires more than mere suppression of tariff barriers. It also requires creation of a new and adequate legal order with fully functional common rules in the domestic laws of the Member States. Mere technical rules are not sufficient. What is required is an increase in the levels of association among the MERCOSUL countries. Traditional legal standards need to be restructured, especially with respect to the definition of sovereignty of the Member States and their exercise of jurisdiction.²³

Thus far, MERCOSUL has opted for an integration model without supranational institutions. This has been a critical failure, particularly because a permanent court along the lines of the European Court of Justice is sorely needed.²⁴ Only a supranational tribunal can resolve two fundamental questions for full implementation of the Treaty of Asuncion: control of the legality of the acts of communitarian bodies and Member States, and the uniform interpretation of Community Law. Creation of such a court would require an amendment to the Brazilian Constitution. Even though Brazil has adopted thirty-six amendments to its 1988 Constitution, none of the proposed amendments to permit creation of a supranational court has been adopted.²⁵

This, however, does not signify any lack of litigation or

22. Rezek, *supra* note 19, at 56.

23. PAULO BORBA CASELLA, *COMPARATIVE APPROACH TO COMPETITION LAW IN THE E.C. AND THE MERCOSUL* 39 (1993).

24. A consensus exists that the solution ought to be the creation of a supranational tribunal along the lines of the European Court of Justice or Andean Tribunal of Justice. See Vincente Marotta Rangel, *Solução Pacífica de Controvérsias no Mercosul*, in *CONTRATOS INTERNACIONAIS E DIREITO ECONOMICO NO MERCOSUL* (Paulo Borba Casella ed., 1996); CASELLA, *supra* note 23; Werter Faria, *Estrutura Institucional de Comunidades e Mercados Comuns*, 6 *BOLETIM DE INTEGRAÇÃO LATINO-AMERICANA* (1992); Maristela Basso, *A Estrutura Institucional Definitiva do Mercosul*, 10 *BOLETIM DE INTEGRAÇÃO LATINO-AMERICANA* (1993).

25. Currently, a constitutional amendment to reform the Judiciary is moving towards adoption in Congress, but no mention of MERCOSUL's institutions appears in the proposed amendment.

disputes in MERCOSUL. There are several mechanisms that can be utilized directly for dispute resolution in MERCOSUL. These mechanisms coexist simultaneously in MERCOSUL institutions, as well as in the legal systems of the Member States.²⁶

a. Dispute Resolution Measures within MERCOSUL

The Treaty of Asuncion, in Annex III, Article 3, adopted a two-step dispute resolution system. The first step describes direct negotiations under the auspices of the GMC. If negotiations fail, the second step includes binding arbitration. Three types of disputes are subject to resolution under MERCOSUL: (1) those arising among Member States; (2) those between a Member State and a private party; and (3) those involving only private parties, whether individuals or legal entities, provided they are either domiciled or have their headquarters located within a Member State.

The Protocol of Brasilia for the Resolution of Controversies of December 12, 1991, which went into effect in April 1993, deals only with disputes between Member States, also referred to as government-to-government, and those between private parties and a Member State, referred to as private-government.²⁷ The Protocol establishes a three-stage process for resolution of government-to-government disputes: (1) direct negotiations for a maximum period of fifteen days after request; (2) intervention by the Common Market Group, which must issue its recommendation within thirty days after presentation of the dispute to it; and (3) arbitration before a panel of three, chosen from a list of ten previously submitted by each Member State to

26. Guido Soares, *As Instituições do Mercosul e as Soluções dos Litígios no seu Âmbito - Sugestões de Lege Ferenda*, in MERCOSUL: DAS NEGOCIAÇÕES À IMPLANTAÇÃO 262-319 (Olavo Batista et al. eds., 1994); Eduardo Grebler, *O Mercosul Institucional e a Solução de Controvérsias*, 12 BOLETIM DE INTEGRAÇÃO LATINO-AMERICANA (1994). See also LUIS FERNANDO FRANCESCHINI DA ROSA, MERCOSUL E A FUNÇÃO JURISDICIONAL (1997).

27. The Protocol was ratified by Brazil on September 14, 1993, and published in the Official Gazette on September 15, 1993. MERCOSUR: Protocol of Brasilia for The Settlement Of Disputes, Dec. 17, 1991, 36 I.L.M. 691 (1997) (English translation). See CÓDIGO DO MERCOSUL, supra note 1, at 44. See LUÍS OLAVO BAPTISTA, O MERCOSUL: SUAS INSTITUIÇÕES E ORDENAMENTO JURÍDICO (1998), for dispute resolution and the Protocol of Brasília. The author is one of the defenders of a permanent arbitral court along the lines that Europe had at the time of Benelux.

the Administrative Secretariat.²⁸

Any individual or legal entity, domiciled or whose headquarters are located in one of the Member States and is adversely affected by a legal or administrative measure of another Member State that allegedly violates a MERCOSUL treaty or accord, can formulate a complaint with its own national section of the Common Market Group. If it decides to accept the claim, the national section either tries to resolve the complaint with its counterpart of the Member State that allegedly committed the violation or else transmits the complaint directly to the entire Common Market Group. The full GMC must also decide whether to accept or dismiss the complaint. If it decides to accept it, the GMC appoints a panel of experts, chosen from a list of twenty-four experts whose names were previously submitted by the Member States to the Administrative Secretariat. If the GMC accepts the recommendation of the experts, the Member State whose national section espoused the complaint can demand that the offending State remedy the violation within fifteen days. If the offending State fails to do so, the offended State, not the private complainant may seek binding arbitration.²⁹

These rules are maintained by the Protocol of Ouro Preto of December 17, 1994.³⁰ This Protocol granted the Trade Commission greater participation, giving it jurisdiction to hear complaints by the Member States, especially in the areas of competition and commercial disputes. The procedure for dispute resolution of MERCOSUL at the government-to-government level involves the following institutions: the Trade Commission, the Common Market Group and its advisory organ.

All subsequent Protocols dealing with the institutions of MERCOSUL have contained a chapter relating to their interpretation and to the solution of controversies arising from

28. Each party chooses one arbitrator from its list of ten. The third arbitrator, who cannot be a national of any party to the dispute, is selected by mutual consent. If the parties cannot agree, the third arbitrator is chosen by lottery by the Administrative Secretariat from a list of sixteen drawn up by the Common Market Group. O'KEEFE, *supra* note 1, at 7:5, 7:9.

29. *Id.* at 7:11-7:12.

30. This Protocol went into effect in January 1996. Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR, *supra* note 3 (English version); CÓDIGO DO MERCOSUL, *supra* note 1, at 55 (Portuguese text).

them. All refer back to the solution of the Protocol of Brasília.³¹

The Trade Commission, created in 1995, has become the privileged forum for the prompt treatment of commercial questions, especially those relating to competition.³² The Trade Commission receives consultations about commercial matters, and the clarifications presented at its meetings have produced satisfactory results in numerous cases.³³

The procedure before the Trade Commission is to formulate consultations, which are presented either in ordinary or extraordinary meetings. The Commission has established a consultation formula that includes the description of the problem, the relevant provisions of MERCOSUL, and the relief requested to resolve the problem.³⁴ A technical note from the country sponsoring the consultation must accompany the formula. The consulted State must respond in writing at the next meeting of the CCM. If there are no deliberations, the question is sent to the Technical Committee, which must decide by consensus. If there is no consensus, the question is sent to the Common Market Group, which must issue an opinion within thirty days.

The Trade Commission's consultation process is simple and democratic.³⁵ The procedure has three phases: (1) direct

31. See, e.g., CÓDIGO DO MERCOSUL, *supra* note 1, at 205. The following article from the Protocol is repeated literally in numerous other texts:

Article 8:

Dispute Resolution among the Contracting Parties

Disputes that arise among the contracting parties with respect to the interpretation or application of this Protocol shall be submitted to the dispute resolution proceedings established by the Protocol of Brasília for Dispute Resolution of December 17, 1991, hereinafter denominated "Protocol of Brasília," or to the system that is eventually established in its place under the aegis of the Treaty of Asunción.

32. The CCM's first meeting approving its internal regulations was in October 1995, in Rio de Janeiro. See 15 BOLETIM DE INTEGRAÇÃO 141-143, for the text thereof. By the second semester of 1998, twenty-seven ordinary meetings had taken place. This means that the CCM has met more or less every two months. The consultations and responses to them are published in the Bulletin of Latin American Integration, published by the Ministry of Foreign Relations. In Brazil this publication is regarded as the official channel of information about MERCOSUL.

33. José Botafogo Gonçalves, *A Consolidação do Mercosul: O Primeiro Ano de Vigência da União Aduaneira*, 17 BULETIM DE INTEGRAÇÃO LATINO-AMERICANA 8 (1995).

34. Directive 13 (1995). See 18 BOLETIM DE INTEGRAÇÃO 124-125 (1996), for the text of this directive; CÓDIGO DO MERCOSUL, *supra* note 1.

35. See José Botafogo Gonçalves, *Os Tribunais do Mercosul*, 18 BOLETIM DE

negotiations through consultations in the Commission; (2) intervention by the executive body of MERCOSUL through a decision on the complaint in the Common Market Group; and (3) binding arbitration through an *ad hoc* tribunal. Use of the consultation mechanism does not prevent later utilization of other dispute resolution mechanisms provided for in the Protocol de Brasilia.

The system of dispute resolution carried out by the Trade Commission is non-binding, depending upon the will of the parties. It is quite similar to the consultation mechanism of the World Trade Organization, albeit in simplified form.³⁶

In 1999 and 2000, three arbitral awards have been rendered under the Brasilia Protocol's system of *ad hoc* arbitration.³⁷ Although each Tribunal had a different set of arbitrators, both the second and third awards quoted extensively from the first award, which shows development of an embryonic case law. All three panels reaffirmed the need to look at the Treaty's

INTEGRAÇÃO LATINO-AMERICANA 6 (1996).

36. All members of MERCOSUL are signatories to the World Trade Organization (WTO) and therefore have tried to create rules compatible with the legislation already in force in that organization. The obligation to consult was part of the tradition of GATT and was continued by the WTO. According to Prosper Weil, in international economic law, consultation is a technique as much in the elaboration as it is in the application of rules, creating legal standards rather than rigid classifications of conduct. Consultations are an opportunity for fact finding. They are a structured form of joint inquiry that can lead to conciliation of interests. The practice of the GATT in these matters, which has been continued by the WTO, obeys the logic of peaceful, dispute resolution, taking into account the specificity of the economic contentions. Celso Lafer, *A OMC E A REGULAMENTAÇÃO DO COMÉRCIO INTERNACIONAL: UMA VISÃO BRASILEIRA* 112 (1998).

37. The first case of arbitral decision under MERCOSUL, *Argentina v. Brazil*, dealt with the application of "Comuniques Nos. 37/97 e 7/98" of Brazil's Department of Foreign Commerce (DECEX), of the Secretariat of Foreign Commerce (SECEX). Argentina contended that these Brazilian rules interfered with free trade protected by the Treaty of Asuncion. The final award, rendered April 28, 1999, held that Brazil had to adapt some of its rules to the treaty obligations until the end of 1999. The award was promptly complied with. The second arbitration, also *Argentina v. Brazil*, concerned Brazilian subsidies for the exportation of pork. The final award, rendered on September 27, 1999, declared that the Brazilian PROEX Program had to halt these subsidies. On the other hand, the Arbitral Tribunal upheld two other challenged Brazilian programs (ACC and ACE).

The third arbitration between Brazil and Argentina involved the legality of Resolution No. 861/99 of the Ministry of Economy of Argentina, which applied safeguard measures to textile imports coming from Brazil. In the final award, rendered on March 10, 2000, the Tribunal found that the Argentine Resolution was inconsistent with the Treaty provisions and, therefore, should be revoked. The awards will soon be published by the Mercosur Official Bulletin.

principles as a whole and take into consideration the aims of MERCOSUL, mainly the integration process. Small inconsistencies and technicalities about the provisions under discussion were viewed in light of the bigger picture, preservation of the integration process.

b. Litigation in the Courts of the Member States

The domestic legal systems of the Party States are an important forum for resolution of MERCOSUL disputes. Complaints involving application of integration law can be filed in the courts of one of the Member States. MERCOSUL rules, once ratified and promulgated, are an integral part of the domestic legal order. None of the members of MERCOSUL restrict access to justice by non-nationals. Unfortunately, there is no mechanism to ensure uniformity of pronouncements on MERCOSUL law in the courts of the Member States.

Numerous MERCOSUL protocols deal specifically with legal procedures. These protocols, which have been neither abrogated nor replaced by the Protocol of Brasilia, facilitate use of national courts, especially for transnational litigation. Among the most important of these protocols is the Protocol for Cooperation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative Matters, known as the Protocol of Las Leñas.³⁸ Two other important measures are the Protocol of Buenos Aires on International Jurisdiction in disputes relating to contracts³⁹

38. Ratified and promulgated in Brazil by Decree No. 2067 on November 12, 1996.

39. MERCOSUR: Protocol of Buenos Aires on International Jurisdiction In Disputes Relating To Contracts, Aug. 5, 1994, 36 I.L.M. 1263 (1997) (English version); CÓDIGO DO MERCOSUL, *supra* note 1, at 147 (Portuguese version) [hereinafter International Jurisdiction]. This Protocol, signed in Buenos Aires on August 5, 1994, specifically permits the parties to an international contract to select a forum. The forum selection clause must be in writing. It, however, can be made after the date of the contract, or even after the dispute has arisen. International Jurisdiction, arts. 4,5, *supra* note 39, at 1267. Forum selection clauses obtained abusively are invalid. *Id.*

The Protocol permits extension of jurisdiction after the filing of the complaint if the defendant affirmatively submits to the jurisdiction in a non-fictitious fashion. This means that jurisdiction may be extended if the defendant appears without questioning jurisdiction, but not if the defendant is simply declared in default. International Jurisdiction, art. 6, *supra* note 39, at 1268.

The Protocol of Buenos Aires applies not only when both parties are domiciled in States that are parties to MERCOSUL, but also if only one party is domiciled in a Member State. However, the parties must have agreed upon the jurisdiction of a State that is a party to MERCOSUL. International Jurisdiction, art. 1, *supra* note 39, at 1266.

and the Protocol on Provisional Measures, both of which have been incorporated into the domestic law of Brazil.⁴⁰

One must differentiate between application by a national judge of MERCOSUL Community Law and general transnational litigation unrelated to Community Law. A typical example of a MERCOSUL dispute involves whether collection of a particular customs duty conformed to the limits imposed by the Common External Tariff (CET) for the MERCOSUL bloc. This case could have been resolved either by the MERCOSUL system for institutional dispute resolution or by a suit before a national court to force a governmental authority to carry out a duty imposed by Community Law. Therefore, the Protocol of Las Leñas does not need to be utilized. Recently a Brazilian Federal Judge in Rio Grande do Sul denied a motion by rice farmers to halt importation of rice coming from Uruguay and Argentina on the ground that the price represented an unfair trade practice. The motion was initially denied, but this decision was reversed by the Appellate Court for the 4th Region. President Costa Leite of the Superior Tribunal of Justice, however, revoked the Appellate Court's granting of the motion on the grounds that it interfered with Brazil's Mercosul Treaty obligations.⁴¹

A typical example of a general transnational dispute involves a Brazilian and an Argentine company concerning performance of an international sales contract. The Argentine company files suit against the Brazilian company in Argentina. In order to serve the defendant in Brazil, the Argentine plaintiff asks the court to send a rogatory letter requesting judicial assistance from the court where the defendant is located. Additionally, suppose a

If there is no agreement between the parties, the Protocol of Buenos Aires may not be applied to determine international jurisdiction in contractual matters between persons domiciled in MERCOSUL countries and persons domiciled in third countries. *Id.* This implies that one must adhere to the rules of international jurisdiction found domestically in each one of the countries.

On the other hand, the Protocol of Buenos Aires does not apply to labor contracts, contracts involving sales to consumers, transportation contracts, insurance contracts, nor to agreements celebrated in the areas of creditors' arrangements in bankruptcy, family law, inheritance, social security, real property rights, or administrative contracts. International Jurisdiction, art. 2, *supra* note 39, at 1266-1267.

40. Executive Decree No. 2.626, June 14, 1998, D.O. June 16, 1998.

41. Agravo Regimental No. 2000.04.01.034280-1/RS, Tribunal Federal, 4th Region, Reporter: Silvia Goraieb (April 25, 2000) (preliminary injunction conceded), *rev'd*, Petition No. 1273/RS, Registry No. 2000/0040618-0 (June 8, 2000) (reversed by President of the STJ, Costa Leite, at the request of the Federal Government).

decision rendered in Argentina that has been executed in Brazil, or suppose a Brazilian court needs information with respect to foreign law.⁴² In all three cases, the provisions of the Protocol of Las Leñas apply. Yet the issues may have nothing to do with Community Law. This is not the case, however, in a suit contesting the application of the CET.⁴³

The Protocol of Las Leñas contains various measures to facilitate litigation between MERCOSUL countries. Thus, Article 3 guarantees access to justice; Article 4 prohibits the requirement of a bond for litigants residing in another Member

42. No foreign judgment is effective in Brazil without homologation by the Brazilian Supreme Court. See *Petição Avulsa No. 11*, Reporter: Minister Celso de Mello, President, with the following headnote:

Foreign Judgment of Divorce. Request for confirmation of this judgment directed to a state magistrate, alleging the lack of necessity for prior homologation in view of Article 15, sole paragraph of LICC. . . Action for homologation of a foreign judgment. . . Indispensability of prior homologation of any foreign judgment whatever be the effects postulated by the interested party.

It is important to emphasize with respect to all of these matters that regional international conventions promoted by the OAS through Specialized Conferences in Private International Law are also in force in Brazil. See *INTEGRAÇÃO JURÍDICA INTERAMERICANA: AS CONVENÇÕES INTERAMERICANAS DE DIREITO INTERNACIONAL PRIVADO (CIDIPS) E O DIREITO BRASILEIRO* (Nadia Araujo & Paulo Borda Casella eds., 1998) [hereinafter *INTEGRAÇÃO JURÍDICA INTERAMERICANA*], for the original text of these conventions, the extent to which they are in force in Brazil, and an analysis of their impact upon the domestic legal order. In the above cited volume see Nadia Araujo, *A Convenção Interamericana sobre Cartas Rogatórias e as Consequências de sua Adoção para o Brasil*; Ricardo Ramalho Almeida, *A Convenção sobre Obtenção de Provas no Exterior e a Convenção Interamericana sobre Prova e Informação do Direito Estrangeiro*; Lígia Maura Costa, *Convenção Interamericana sobre Competência na Esfera Internacional para Eficácia Extraterritorial das Sentenças Estrangeiras*, for Inter-American conventions with themes dealt with by the Protocol of Las Leñas.

43. In Europe, these questions were regulated by the Brussels' Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of September 27, 1968. The ultimate version is dated Nov. 29, 1996, with the affiliation of Austria, Finland and Switzerland. Besides being broader than the Protocol signed under MERCOSUL, the Brussels' Convention is subject to prejudicial *renvoi* by the Tribunal of Justice of the European Community. See Julio D. Gonzalez Campos & Jose Carlos Fernandez Rozas, *Derecho Internacional Privado Espanol, Textos Y Materiales*, in *DERECHO JUDICIAL INTERNACIONAL* 136-164 (2d ed. 1992); PIERRE GOTHOT & DOMINIQUE HOLLEAUX, *LA CONVENCION DE BRUSELAS DEL 27 DE SEPTIEMBRE DE 1968* (1986) (translation of the 1985 French edition); MICHAEL BOGDAN, *THE BRUSSELS JURISDICTION AND ENFORCEMENT CONVENTION* (1996); ALFONSO-LUIS CALVO CARAVACA, *COMENTARIO AL CONVENIO DE BRUSELAS RELATIVO A LA COMPETENCIA JUDICIAL Y A LA EJECUCION DE RESOLUCIONES JUDICIALES EN MATERIA CIVIL Y MERCANTIL* (1994); Maria Blanca Nodt Taquela, *Mercosur-Unión Europea - Questiones de Derecho Internacional Privado*, XVI Jornadas Nacionales de Derecho Civil, Buenos Aires (1997) (lecture).

State; Article 5 provides for transmittal of rogatory letters; Articles 19 and 20 provide for extraterritorial effects of judgments and arbitral awards of the Member States; and Articles 28 and 31 create mechanisms for information and consultation among the central authorities charged with transmittal of requests from foreign courts. Like similar agreements of this nature, the Protocol creates a procedural system with central authorities in the various Member States. These central authorities are entrusted with receipt and forwarding of requests for judicial assistance in matters covered by the agreement. Thus, the body designated as the central authority is responsible for receipt and processing of the required measures, as well as for the flow of information between the court that is to execute the measure and the central authority of the country that is requesting it.⁴⁴ Central authorities also have authority to remit gratuitously for public purposes a request for certificates as to matters in civil registries and information about the law in force.⁴⁵

Procedural guarantees contained in the Protocol of Las Leñas are not only rules of international judicial assistance, but are also procedural rules applicable to purely domestic cases. These guarantees include free access to justice for all citizens and residents of the Party States.⁴⁶ They also include a guarantee of equality of treatment among parties domiciled in MERCOSUL.⁴⁷ Furthermore, both guarantees apply to legal entities that have been properly organized, authorized or registered within MERCOSUL countries.

The Protocol has made the bond requirement of Article 835 of the Brazilian Code of Civil Procedure inapplicable to MERCOSUL residents.⁴⁸ Litigants domiciled in any of the

44. CÓDIGO DO MERCOSUL, *supra* note 1, at 108, 112.

45. *Id.* at 116-117. See the *Inter-American Convention on Rogatory Letters of 1975*, promulgated in Brazil by Decree No. 1899/96 of May 9, 1996, for information pertaining to rogatory letters. See also Decree No. 2002/96 of Oct. 7, 1996; INTEGRAÇÃO JURÍDICA INTERAMERICANA, *supra* note 42, (1998) (analysis of the different Inter-American Conventions and their impact on Brazilian law).

46. CÓDIGO DO MERCOSUL, *supra* note 1, at 109.

47. *Id.*

48. Article 835 of the Code of Civil Procedure provides:

835. A plaintiff, whether a national or foreigner, who resides outside of Brazil or absents himself during the pendency of the complaint, shall post a bond sufficient for the costs and the attorney's fees of the other party. . . unless he [the plaintiff] has real property in Brazil to assure payment.

signatory countries of MERCOSUL are no longer required to post a bond sufficient to pay the costs and fees of the other party's lawyer. In a recent decision, the Court of Appeals of the São Paulo Court of Justice confirmed that bond cannot be required from residents of MERCOSUL countries because of the Las Leñas Protocol.⁴⁹

The Protocol of Las Leñas deals with procedures relating to three types of international jurisdictional cooperation: (1) rogatory letters for service, notification and taking of evidence; (2) recognition and enforcement of foreign judgments and arbitral awards, in which transmittal curiously may be done through rogatory letters; and (3) furnishing of information on the law currently in force. The Brazilian Supreme Court has already utilized the Protocol several times. For example, in a 1997 case coming from Argentina, the Supreme Court reversed its prior position of denying *exequatur* to executory rogatory letters because of the Protocol of Las Leñas.⁵⁰ The Supreme Court deemed homologation of a rogatory letter as the functional equivalent of homologation of a foreign judgment. Pursuant to

49. Tribunal of Justice of São Paulo, Reporter: Júlio Vidal, headnote: In the terms of the Protocol of Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters, annexed to Decree 2.067 of 1996, a legal entity whose headquarters are in a country that is a participant in Mercosul and that brings an action in national territory is not obligated to post a bond to guarantee cost and attorney's fees in accordance with Article 835 of the Code of Civil Procedure, for it may not be considered as a mere foreign firm. One cannot speak of a violation of procedural rules in face of the constitutional principle, found in Article 5, § 2 of the Federal Constitution, which safeguards regulatory rules in international treaties to which Brazil is a signatory. AgIn 099.289-4/1, 7th Chamber, Dec. 2, 1998.

50. Agravo Regimental of Rogatory Letter No. 7613, decided by the full STF on April 3, 1997, D.J. of May 9, 1997. The headnote states:

Foreign Judgment: Protocol of Las Leñas; homologation through letter rogatory. The Protocol of Las Leñas. . . does not affect the requirement of every foreign judgment - to which one equates an interlocutory decision conceding a provisional measure. In order to become executable in Brazil, a foreign judgment must be previously submitted to homologation by the Brazilian Supreme Court, which is an obstacle to its incidental recognition in the international convention referred to, when providing in article that homologation (stated as recognition) of the judgment coming from Party States shall be done through rogatory letter. This implies permitting the initiative of the judicial authority. . . in the forum of origin and that *exequatur* may be conferred independently by serving the defendant, without prejudice to later manifestation by the defendant by means of a special form of appeal [agravo] of the conceding decision or a form of injunction [embargoes] against its enforcement.

Article 19 of the Protocol,⁵¹ a foreign court can send a rogatory letter via the Central Authority for transmittal to the Supreme Court of a request for homologation of its judgment. Adhering to the opinion of the Federal Public Ministry, the Brazilian Supreme Court determined that the Protocol simplified the homologation procedure provided for in Articles 218, *et seq.* of its Internal Rules. The Supreme Court interpreted the term "recognition" used in Article 19 of the Protocol to mean the procedure for homologation of a foreign judgment, as regulated by Brazilian law. This understanding was also based upon its reading of the subsequent articles of the Protocol. In defining the requirements for recognition, these articles set out requirements for concession of *exequatur* without substantial innovations.

The Supreme Court recognized that the wording of the Protocol does not clarify its recognition proceeding for execution of the rogatory letter. In view of the Brazilian Constitution, which grants to the Supreme Court original jurisdiction to homologate foreign judgments and to concede *exequatur* to rogatory letters, it is difficult to conceive of the Supreme Court accepting recognition through rogatory letter.⁵² Because homologation under Brazilian law has a constitutional dimension, a Protocol cannot dispense with it. Nevertheless, this innovation, as noted by Minister Sepúlveda Pertence, is significant because it creates a new, more direct path for recognition of judgments coming from the countries that are parties to MERCOSUL. Under this new system, judgments are sent directly and no longer depend upon the initiative of the parties. Thus, the Protocol created a means to facilitate homologation by rogatory letter.⁵³

51. Art. 19 of the Protocol of Las Leñas provides:

"Request for recognition and enforcement of judgments and arbitral awards by judicial authorities shall be transmitted by way of rogatory letter through the Central Authority."

52. Constituicao Federal, art. 102(h) (1988). Unlike other civil law countries, where *exequatur* refers to confirmation of foreign judgments, in Brazil *exequatur* refers exclusively to the order issued by the President of the STF directing the lower courts to perform rogatory letters. Homologation is the term used for recognition of a foreign judgment by the President of the STF.

53. This position was consolidated in another rogatory letter case, also stemming from Argentina, Ag. Reg. in Rogatory Letter No. 7618, Apr. 3, 1997. The Supreme Court's headnote stated:

The Protocol of Las Leñas... does not affect the requirement that every foreign judgment - to which one equates an interlocutory decision conceding a preventive measure - has to be previously submitted for homologation to the Supreme Court in order to become

Foreign judgments may now be homologated in Brazil in two ways. If entered by a court in a MERCOSUL country, the judgment will go directly to the Brazilian Supreme Court for *exequatur* of the rogatory letter itself. If entered by a court in a non-MERCOSUL country, the prevailing party must seek homologation of the judgment from the President of the Supreme Court.⁵⁴ This signifies the effective creation of a more rapid channel for decisions stemming from the member countries of MERCOSUL.

The Protocol provides for authentic homologation, externally dressed in the form of a rogatory letter transmitted through the Central Authority. The significant innovation is that recognition and execution are done in a single transmittal initiated by the requesting Central Authority. This must be communicated to the requested Central Authority. Unlike other countries, where rogatory letters are determined by judges of the first instance, Brazil still requires that its Supreme Court decide whether to honor the foreign court's request. The time has come for the Supreme Court to stop deciding whether to permit the lower courts to comply with rogatory letters. However, in the proposed constitutional amendment for judicial reform currently before Congress, this change has not been adopted. Instead, the proposed amendment will transfer jurisdiction to decide whether to comply with rogatory letters and to recognize foreign judgments from the Supreme Court to the Superior Tribunal of Justice (STJ). This reform already has the support of the President of the STF.⁵⁵ If this amendment is adopted, the

enforceable in Brazil. This is an obstacle to its submission for incidental recognition in Brazilian courts by the judge asked to order its execution. The international convention, however, created an innovation, providing in Article 19 that homologation (recognition) of a judgment coming from Party States may be done via a rogatory letter. This implies permitting the initiative of the competent judicial authority in the forum of origin and that *exequatur* be independent of the service on the requested party, without prejudice to later manifestation by the requested party by means of an appeal (*agravo*) of the decision or attachment for its execution.

More recently, other cases were decided in the same way. See Rogatory Letter No. 8267, Mar. 5, 2000 (rogatory letter from Argentina came with a divorce decree and was homologated under the rules of the Las Leñas Protocol).

54. See SERGIO MOURÃO CORREA LIMA, *TRATADOS INTERNACIONAIS NO BRASIL E INTEGRAÇÃO* 152 (1998), for homologation procedures.

55. CARLOS MARIO DA SILVA VELLOSO, *TEMAS DE DIREITO PÚBLICO* 117 (2d ed. 1997) ("There is no reason to justify the jurisdiction of a Constitutional Court in

proceedings will continue to be centralized in Brasilia in the penultimate federal appellate court.

The traditional position continues in force. Recently, the STF reaffirmed its traditional jurisdiction when a lower court granted immediate performance of a rogatory letter from Uruguay, relying upon the Protocol of Las Leñas. The STF reversed on appeal, making it clear that only the STF had the power to decide whether to execute a rogatory letter from a foreign court.⁵⁶ This understanding, which confers absolute hierarchical, normative precedence to jurisdictional allocations in the Federal Constitution despite international treaties and agreements celebrated by Brazil, has prevailed as much in the doctrine as in the case law of the Supreme Court.⁵⁷

Another area in which there has been a significant change is acceptance of rogatory letters of an executory character coming

the case. Homologation of a foreign judgment seldom provokes any constitutional discussion. The questions raised are, as a rule, matters of procedural law. The same thing may be said with respect to the concession of *exequatur* for rogatory letters. Therefore, this jurisdiction should be with the STJ.”)

56. Reclamation No. 717, Dec. 20, 1997. The Reporter: Minister Celso de Mello, wrote:

This deals with a reclamation formulated against the act of a law of the District of Santana do Livramento/RS. Having allegedly conceded *exequatur* to a rogatory letter sent directly by . . . Judge de Rivera of Uruguay, the judge usurped the jurisdiction of the President of the Federal Supreme Tribunal . . . whose powers include that of determining execution in Brazilian territory of . . . rogatory letters directed to the Brazilian judiciary. The state judge from Rio Grande do Sul had invoked the Protocol of Las Leñas as the legal basis authorizing his decision.

In this case, the act impugned clearly invades the sphere of original and single judge jurisdiction of the President of the Federal Supreme Tribunal, to whom it is incumbent upon, in the terms of Article 102(h), and 102(i), of the Constitution, to homologate foreign judgments and to concede *exequatur* to rogatory letters emanating from judicial authorities in other countries.

The Protocol of Las Leñas in no way changed this constitutional rule of jurisdiction. In our legal system acts of public international law, such as treaties or international conventions, are subject to the supremacy and the normative authority of the Constitution of the Republic.

57. PONTES DE MIRANDA, 4 COMENTÁRIOS À CONSTITUIÇÃO DE 1967 COM A EMENDA NO. 1 DE 1969, 146, No. 35 (2d ed. 1974); JOSÉ FRANCISCO REZEK, DIREITO DOS TRATADOS 462-463 (1984); GILMAR FERREIRA MENDES, JURISDIÇÃO CONSTITUCIONAL 155, 168 (1996); CLÉMERSON MERLIN CLÈVE, A FISCALIZAÇÃO ABSTRATA DE CONSTITUCIONALIDADE NO DIREITO BRASILEIRO 142 (1995); ANTONIO PAULO CACHAPUZ DE MEDEIROS, O PODER DE CELEBRAR TRATADOS 277 (1995); ADIn 1.480-DF, Reporter: Minister Celso de Mello, 84 R.T. 724; Reporter: Minister Djaci Falcão, 121 R.T. 270-276.

from MERCOSUL countries.⁵⁸ Until the Protocol of Las Leñas, the case law of the STF repeatedly denied *exequatur* to rogatory letters that were not merely procedural steps. Even after signing the Protocol of Las Leñas, but prior to its entry into force, the STF summarily rejected a rogatory letter from Argentina.⁵⁹

Subsequently, CR 7.613, a decision discussed *supra*, modified this understanding and accepted an executory rogatory letter because of the Protocol of Las Leñas. The Supreme Court, however, has refused to modify its traditional case law position for executory rogatory letters from non-MERCOSUL countries. In a case involving a rogatory letter of an executory nature issued by an Italian court, the STF made it plain that its position has been modified only when treaties and international agreements on international judicial cooperation with an express provision on this matter are in force in Brazil.⁶⁰

58. Under the Brazilian system all rogatory letters received from abroad are processed by the STF as matters of original jurisdiction, defined in the Federal Constitution. For outbound rogatory letters, however, the procedure is simpler. The judge may send them directly to the requested country, which will then process them in accordance with its own law. See PET-15/RS, Reporter: Minister Celso de Mello, 10.30.1997. D.J. 11.6.1997. The headnote states:

Order: The state judge of the first instance sent a rogatory letter to the President of the Supreme Federal Tribunal requesting that a judge in the Federal Republic of Germany, serve the defendant in a traditional proceeding of a civil nature. The measure was requested by the illustrious Brazilian magistrate, supported as a typical active rogatory commission. Nothing in it includes the jurisdictional powers of the Supreme Federal Tribunal, whose original jurisdiction in the matter is restricted solely to passive rogatory letters, which means those directed by foreign judiciaries to the Brazilian judiciary.

59. Rogatory Letter No. 7128, Dec. 13, 1995. The STF relied on the following opinion of the Federal Public Ministry:

The present rogatory letter has the purpose of registry of a pledge decreed on real property specified in the text of the rogatory letter. This measure, which has a purely executory character, makes concession of the *exequatur* non-viable in terms of the case law of the Supreme Court. We, therefore, are of the opinion that the *exequatur* should be denied and the letter returned to the court of origin.

Minister Sepúlveda Pertence's short opinion then stated: "I accept the opinion. See CR 3.237, 95 R.T.J. 46; CR 5.705, CR 5.707 and CR 5.715, D.J.U 8.30.1991; CR 6.957 and CR 6.958, D.J.U. 3.7.1995; CR 6.779, D.J.U 3.13.1995; CR 6.681, D.J.U 4.6.1995, which refuse to grant rogatory letters that are of executory character, I deny *exequatur*."

60. Reporter: Minister Celso de Mello, 02.19.1998, D.J.U. 03.04.1998, p. 00010, which stated:

Order: Contrary to what has been suggested by the learned Procurator General of the Republic. . . it is not viable to recognize in the case as a rogatory letter the instrument set out in pages 3-7 for the effect of the procedure requested. This deals with judicial request of an executory

Supreme Court case law in this area of executory measures is still changing. Although the above decision said it would grant an executory rogatory letter if a convention exists, in Rogatory Letter No. 9024,⁶¹ *exequatur* was denied because an Argentine court requested the breaching of bank secrecy, a measure that can only be allowed in Brazil by a specific court order. Curiously, the Protocol of Las Leñas was not mentioned.

Nonetheless, it appears that the Supreme Court has changed its position. In more recent decisions, the STF has utilized the Protocol of Provisional Measures in addition to the Protocol of Las Leñas. In Rogatory Letter No. 8240, the Supreme Court decided that a measure requiring the apprehension of a minor, held by his father in Brazil, in accordance with an order rendered by an Argentine court, should be granted.⁶² Also, in Rogatory Letter No. 9194, a motion granted by an Argentine court to inform the Real Property Registry of a pledge on certain property for purposes of execution was granted by the Supreme Court.⁶³

Progress is being made in using the Protocol of Las Leñas to hasten recognition of foreign decisions through the use of rogatory letters. Even though the status of provisional measures is still unclear, they can be accepted through the use of the Provisional Measures Protocol, as in the case cited above.

Presently, two systems are in force in the Supreme Court with respect to rogatory letters: the traditional system and a simplified system applicable only to cases coming from MERCOSUL or countries with which Brazil has a judicial assistance treaty or convention in force. Rogatory letters received by the Brazilian courts must still pass through the filter of the STF. Rogatory letters issued by Brazilian courts, however, are governed by the law of the country to which the requests are sent, and the Brazilian judge must direct the rogatory letter directly to the proper court or other authority in that country.

There is growing uncertainty about the rules that are in

character, which can only be adhered to at the place where enforcement of the rogatory letter is requested, if it has been expressly consented to a treaty of judicial cooperation in civil matters, which although signed between Brazil and Italy in 1989, has been in force in Brazil only since its promulgation by Decree No. 1476 of May 2, 1995.

61. Letter Rogatory No. 9024, (Dec. 2, 1991).

62. Letter Rogatory No. 8240, (Nov. 16, 1998).

63. Letter Rogatory No. 9194, (June 6, 2000).

force and applicable in a determined country with respect to proof of and information about foreign law. More effective mechanisms are needed to enable courts to determine what are the relevant rules of foreign law. The Protocol of Las Leñas imposed upon Central Authorities the duty to report on the law in force.⁶⁴ This obligation was extended to diplomatic and consular authorities, through the jurisdiction of the party State.⁶⁵ It would be better, however, if this obligation were extended to private parties, considering the burden of proving any foreign law they allege.⁶⁶ Each Member State has agreed to full and reciprocal collaboration in helping the courts of other Member States determine its own law at no expense, always respecting public policy,⁶⁷ and without any of the parties being bound by the information rendered or received, especially if the subject of the information refers to the meaning or reach of a legal rule.⁶⁸ Considering the peculiarities of official information of this order established by the Protocol, the judge is not obligated to apply the law in conformity with the response received, nor is the State Party that furnishes the information obliged to apply its own law

64. CÓDIGO DO MERCOSUL, *supra* note 1, at 117.

65. *Id.* Although many do not consider this Protocol as a modality for international judicial cooperation, the information on foreign law is an important element for the development of international juridical relations. Extraterritorial application of law leads to difficulties in determining what is the law in force and applicable to the concrete case in a foreign country. In Brazil, the Law of the Introduction to the Civil Code deals with the possibility of the extraterritorial application of the law. The Brazilian legislature, following the German model, concentrated in an introductory set of provisions to the Civil Code, the principal rules of private international law in force in our legal system. This introduction provides for various hypotheses for application of foreign law by Brazilian judges when there is a conflict of laws with respect to transnational litigation.

66. Article 14 of the Law of Introduction to the Civil Code provides that when the judge is not familiar with foreign law, he may require the party who alleges it to prove its text and that it is in force. Article 337 of the Code of Civil Procedure contains the same requirement. Article 401 of the Bustamante Code provides that proof of the law in force in a determined country be done by means of certification by two lawyers in practice therein.

67. It is difficult to conceive of any situation in which the rendering of information about positive law in force in a country could possibly offend public policy. Similarly, it does not seem possible that application of positive rules of law of a State by the judge of another State may in any manner be contrary to public policy of the first State, no matter how immoral the foreign proceedings may seem in the application of such rules. There is no situation in which a State can revoke its current law except by its own legislation or its own judiciary. Similarly, there is no situation in which there could be a violation of public order in concealing information in that respect.

68. The text of Article 30 of the Protocol contains an obvious error: it provides "the meaning of the legal reach of its law." What it refers to is the meaning and the legal reach, the hermeneutic exegesis of the rule.

as reported.⁶⁹ In fact, the Central Authority that does the reporting may not definitively announce a theory of law in force that in any way binds other organs of the government. On the other hand, the court that requests the information in no way loses its power or duty to say what the law is, even when that law is foreign law. The option followed by the Protocol properly made the Central Authority an organ for communication of positive law without conferring on it the power to certify that a determined rule is in force.⁷⁰

c. Binding Arbitration

Independently of whether private parties present their disputes to organs of MERCOSUL or to a national judiciary, they may still resort to private arbitration. Arbitration as an alternative resolution mechanism for MERCOSUL state to state disputes is clearly contemplated in the system elected by the Protocol of Brasilia.

Brazilian law has had two recent modifications with respect to arbitration. One was adoption of a new Arbitration Law, Law No. 9.307 of September 23, 1996, which not only makes domestic arbitration more efficacious, but also makes it easier to enforce foreign arbitral awards in Brazil. Second, Brazil has ratified the Inter-American Convention on Commercial Arbitration, which is similar in many respects to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁷¹

69. CÓDIGO DO MERCOSUL, *supra* note 1, at 117.

70. See Nadia Araujo, Ricardo Ramalho Almeida, & Carlos Alberto Salles, *Cooperação Interjurisdicional no Mercosul*, in MERCOSUL (Maristela Basso ed., 2d ed. 1998), for a comparison of the Protocol of Las Leñas with the Inter-American Conventions with respect to this question.

71. The Inter-American Convention, published in the Diário Oficial of the Union on Sept. 24, 1996, Section I, pgs. 18.897 to 18.900, gives great weight to the autonomy of the parties. It confers ample liberty upon them to choose the applicable rules, be they procedural or substantive. It also permits them to opt for decision of any disputes in accordance with the uses and customs of international commerce. The compromise became, in addition to autonomy with respect to the principal contract, a factor for exclusion of state jurisdiction so long as the parties retained recourse to the judiciary by way of an action itself, provided for in Article 7 of the law. The Inter-American Convention on International Commercial Arbitration was promulgated by Decree No. 1902 of 1996, published in the DO of May 10, 1996. See Lauro Gama e Sousa, Jr., *A Convenção Interamericana sobre Arbitragem Comercial Internacional*, in INTEGRAÇÃO JURÍDICA INTERAMERICANA, *supra* note 42, for analysis of this Convention.

Chapter VI, Articles 34-40 of the Arbitration Law, deals with recognition and enforcement of foreign arbitral awards. Article 35 substantially facilitates recognition of foreign arbitral awards by eliminating a requirement in prior legislation that every foreign arbitral award be reduced to judgment in the place where it was rendered and then homologated in the STF. Now the foreign arbitral award can be presented directly to the STF for homologation. This reform eliminated an expensive, time-consuming and unnecessary step in the country where the award was rendered.⁷²

Brazil's adoption of this modern Arbitration Law reflects important progress in the country's quest for universal access of justice.⁷³ This represents a consistent response to the world tendency towards facilitation of the international extension of the effects of judgments or arbitral awards,⁷⁴ a movement that directly affects MERCOSUL. The new law attempts to modernize domestic arbitration in order to make it easier to recognize and execute foreign arbitral awards. If the losing party fails to comply with a definitive arbitral award, the prevailing party has the right to request judicial recognition and execution of the decision.

Unfortunately, the constitutionality of the new Arbitration Law has been placed under a cloud by a pending confirmation action in the Brazilian Supreme Court. In 1995, the prevailing party requested homologation in Brazil of a foreign arbitral award without its having been reduced to judgment in the country where the award was issued. The Brazilian party resisted recognition claiming that Article 35 of the Arbitration Law, which dispensed with the need to reduce the award to judgment, was unconstitutional. The Reporter, Minister Sepúlveda Pertence, rejected that contention and voted to

72. See ARBITRAGEM, A NOVA LEI BRASILEIRA E A PRAXE INTERNACIONAL (Paulo Borda Casella ed., 1997) (particularly Lauro de Gama e Souza, Jr., *Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras* 309-324 and André de Carvalho Ramos, *O Reconhecimento de Sentença Arbitral Estrangeira e a Cooperação Jurisdicional no Mercosul*).

73. Mauro Cappelletti, *Os Métodos Alternativos de Solução de Conflitos no Quadro do Movimento universal de Acesso à Justiça*, 326 REVISTA FORENSE 121-130 (translation of Jose Carlos Barbosa Moreira).

74. See José Carlos Barbosa Moreira, *Problemas e Soluções em Matéria de Reconhecimento e Execução de Sentenças e Laudos Arbitrais Estrangeiros*, in TEMAS DE DIREITO PROCESSUAL 243-290 (4th ed. 1989).

recognize the award. However, *sua sponte*, he declared unconstitutional Article 6 and all of Article 7 of the new Arbitration Law. These provisions permit judicial enforcement of an agreement to arbitrate disputes in advance of their arising. Making agreements to arbitrate future disputes specifically enforceable was deemed unconstitutional upon the dubious theory that it violated the right to access to justice. This issue was unrelated to the merits of the dispute.⁷⁵

In a recent case, Minister Maurício Corrêa, in his vote to homologate an arbitral award from the United Kingdom without need for reducing it to judgment, went out of his way to disagree with the decision taken by Minister Sepúlveda Pertence and declared that the Arbitration Law was not unconstitutional because it did not deny anyone access to justice.⁷⁶ Neither vote has been finalized by the Brazilian Supreme Court, which is still studying the question. For the time being, the constitutionality of the Arbitration Law is still in doubt.⁷⁷ Hopefully, this issue will soon be resolved by the STF. In the meantime, old doubts about the institution of arbitration have returned and have complicated the lives of those who would like to utilize it.

None of these Brazilian problems with arbitration has troubled MERCOSUL, which provides for arbitration for the resolution of disputes, both for institutional and private levels. A Protocol was recently approved on arbitration, but it has not yet entered into force domestically. This Protocol reaffirms arbitration as the means of resolving immigration disputes in the Southern Cone.⁷⁸

75. Vote of Minister Sepúlveda Pertence, S.E. No. 5206 of May 8, 1997.

76. S.E. No. 5847-1 - United Kingdom, vote of May 20, 1999.

77. These decisions and their implications are analyzed in more detail in Arnaldo Wald, Patrick Schellenberg & Keith S. Rosenn, *Some Controversial Aspects of the New Brazilian Arbitration Law*, 31 U. MIAMI INTER-AM. L. REV. 223 (2000).

78. See MERCOSUR, RMJ/Acuerdo 1/98: Acuerdo sobre arbitraje comercial internacional del Mercosur. The preamble of this accord states:

Reaffirming the desire of the Member States of MERCOSUR to find common legal solutions for strengthening the process of integration of MERCOSUR, setting forth the necessity for according the private sector of the Member States of MERCOSUR alternative methods for resolution of disputes arising from international commercial contracts entered into between individuals or legal entities of private law;
Convinced of the necessity of making uniform the organization and functioning of international arbitration in the Member States to contribute to the expansion of regional and international trade;
Desirous of promoting and granting incentives to the extrajudicial

Curiously, until 1999, none of the numerous trade disputes among MERCOSUL countries were resolved by arbitration. Only in 1999, were the first two arbitrations under MERCOSUL, both involving Brazil and Argentina, decided.⁷⁹ In the beginning of 2000, a third dispute between the same two countries was resolved by arbitration.⁸⁰ There, however, have been numerous disputes among the MERCOSUL countries that have never been resolved by MERCOSUL dispute resolution mechanisms.⁸¹ Indeed, the series of trade disputes between Argentina and Brazil in the wake of Brazil's January 1999 devaluation have been primarily handled by direct presidential negotiations rather than the formal dispute resolution mechanisms established under MERCOSUL. The inability to resolve this series of disputes successfully by that route underscores the institutional fragility of MERCOSUL and makes clear the need for a Court of Justice and a common currency.

solution of private disputes by means of arbitration in MERCOSUR, a practice that is in accordance with the peculiarities of international transactions;

Considering that protocols were approved in MERCOSUR that provide for the election of arbitration and the recognition and execution of foreign arbitral awards and judgments;

Taking into account the Inter-American Convention on International Commercial Arbitration of January 30, 1975, concluded in the city of Panamá, the Inter-American Convention on the Extraterritorial Effects of Foreign Arbitral Judgments and Awards of May 8, 1979, concluded in Montevideo, and the Model Law on International Commercial Arbitration of the United Nations Commission for International Commercial Law of June 21, 1985;

Article I Purpose

The present accord has as its regular object the arbitration as an alternative private means for solution of controversies stemming from international commercial contracts between individuals or legal entities of private law. . . .

Article 23 Enforcement of Foreign Arbitral Awards

For enforcement of a foreign arbitral award one shall apply, where pertinent, the provisions of the Inter-American Convention on International Commercial Arbitration of Panamá of 1975; the Protocol for Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative matters of MERCOSUL, approved by the decision of the Council of the Common Market No. 5192, and the Inter-American Convention on the Extraterritorial Effects of Foreign Arbitral Judgments and Awards of Montevideo of 1979.

79. See *supra* note 37.

80. *Id.*

81. See David Lopez, *Dispute Resolution under MERCOSUR from 1991 to 1996: Implications for the Formation of a Free Trade Area of the Americas*, 3 NAFTA: L. & BUS. REV. AM. 3, 22-27 (1997).

V. CONCLUSION

MERCOSUL, contrary to the European Community, does not have a system that guarantees uniformity of decisions for the solution of disputes stemming from the rules created by the process of integration. On the contrary, the three means that have been discussed are superimposed on each other and can all be utilized at the same time without any specific criteria. MERCOSUL also does not have an effective means for the control of the legality of the acts of community institutions. It lacks a supranational institution with powers to enforce its rule. To a limited extent, this function is today exercised by the judiciaries of the Member States under their domestic legislation. This does not, however, assure uniformity in interpretation and application of community rules. The incorporation of community acts into domestic legal orders is still done in accordance with rules of classic international law and the pertinent rules of domestic law. Community rules enter into force only after legislative approval and executive promulgation in each of the countries of MERCOSUL. Hence, resolution of controversies is at sea, depending upon the initiative of the interested or prejudiced parties. Lack of a uniform system for resolution of these disputes provides a futile ground for forum shopping.

On the positive side, the experience of the CCM, resulting from an empirical analysis of its published consultations, has been satisfactory and has usually avoided the need to resort to arbitration. The experience of the CCM, which needs more profound study, indicates that it is a useful forum for direct negotiations to resolve community differences amicably. Often the Member States have reached agreements that have benefited private parties, since the cost of the consultations are borne by the governments themselves. In the great bulk of cases, agreements have been reached in a short period of time because of the specialization of the agents involved and the practice of directing the consultations to the domestic, governmental organs responsible for regulation of the questioned activities.

The non-existence of many lawsuits in Brazil involving questions of MERCOSUL rules is attributable to three factors: (1) the high costs of transnational litigation, (2) the uncertainty about the likely result due to the judiciary's lack of information on communitarian questions and the specificity of transnational

litigation, and (3) lack of confidence in utilization of arbitration by lawyers and magistrates.⁸² In addition to these transmittal problems, one must consider the notoriously long delays in resolving legal disputes in the Brazilian courts.⁸³

MERCOSUL has not reached a satisfactory solution for transnational dispute resolutions. This requires a supranational tribunal for dispute resolution whose decisions can be executed without great problems in the member countries. Today this is not possible due to the peculiarities of the constitutional system of Brazil. This situation is not likely to change, as can be seen in the proposed Brazilian Constitutional Amendment for Judiciary Reform, currently under way in Congress, which does not attempt to change any of these issues.

Another solution would be the creation of mechanisms of cooperation among the judiciaries to deal with these questions and to guarantee uniformity in the application of community law and in resolving transnational questions. One positive aspect is the current use and interpretation by the Supreme Court of the Protocol of Las Leñas and the Protocol of Provisional Measures, signaling that Brazil's highest court is sensitive to MERCOSUL's needs of fast judicial response in transnational cases. While there is no uniformity among member countries in dealing with the issues of transnational litigation, Brazil has changed its prior position and has opened a special path for MERCOSUL cases.

82. This field of law is in full expansion and highly technical, as demonstrated by analysis of the case law of the European Court, which for the most part has dealt with problems relating to competition.

83. See Keith S. Rosenn, *Judicial Reform in Brazil*, 4 NAFTA: L. & BUS. REV. AM. 19, 29-31 (1998); Carlos Mário da Silva Velloso, *Do Poder Judiciário: Como Torná-lo mais Ágil e Dinâmico. Efeito Vinculante e Outros Temas*, 35 REV. INFORM. LEGIS. 75-87 (No. 138, 1998).