DISPUTE OF SETTLEMENT SYSTEMS: MERCOSUR'S BRASILIA PROTOCOL AND NAFTA'S CHAPTER 20

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INTRODUCTION

Until the Mercosur was created, Latin America had worked for the unification of its commercial market for a long time but usually with negatives results.

In February 25, 1948, the CEPAL (Economic Commission for Latin America) was created with the purpose of studying the international trade and promoting local industries. This treaty put emphasis on the external factors that hindered the development of Latin American countries, instead of looking for internal factors. That was one of the reasons why this treaty failed.

Moreover, in February 1960, Argentina, Brazil, Uruguay, Paraguay, Chile, Mexico and Peru signed the "LAFTA" (Latin American Free Trade Agreement). This agreement required the abolition over the next twelve years of all trade restrictions and custom tariffs among member countries. The objective of this treaty was not to create a "customs union," it only tried to create a "free trade zone." At the beginning this treaty went well. In fact trade among the members increased up to 40%. This increased occurred however only in agricultural trade. In most other areas, members increased the restrictions and protections of their local industries. This was the reason why the LAFTA treaty became inoperable.[1]

[1] "Previous attempts at trade integration, such as the Latin American Free Trade Association ("LAFTA") in 1960, had been dismally unsuccessful. It was only with the signing of a series of approximately twenty-

In May 1969, in Cartagena, Colombia, Peru, Chile, Bolivia and Ecuador signed the "Andean Pact" (Pacto Andino). The purpose of this treaty was to create favorable conditions for investments among the members. This agreement appeared to be successful until Chile withdrew. This, plus international pressures against the agreement, made it ineffective.

In 1975, the "SELA" (Latin American Economic System) was signed, with the purpose of economic and social integration. This treaty did not function.

Finally in 1982, the "ALADI" (Latin American Association Integration) was signed, in order to create a "free trade zone" again.

Until MERCOSUR (Southern Cone Common Market) was created Latin America was full of "good intentions" but never tried to create something with similar characteristics as the European Union.

"This Treaty provides for the establishment, by December 31, 1994, of a Common Market (Mercado Común del Sur, Art. 1, or " Mercosur"). A first effort in that direction was made in 1960, when the Latin American Free Trade Association (LAFTA) was created, with ultimately negligible results. With the Treaty of Montevideo in 1980 [20 I.L.M. 672 (... 1988)]. Uruguay and Paraguay were incorporated into the integration

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four treaties on economic cooperation between Argentina and Brazil, from 1986 until 1990, that the basis for a viable process of integration was established. In 1990, both of these countries signed the Act of Buenos Aires, stipulating a zero tariff by the end of 1994, as well as the coordination of macroeconomic policies. Also in 1990, Paraguay and Uruguay expressed their desire to sign an integration treaty that would include all four countries. A period of transition spanning the next four years culminated with the Protocol of Ouro Preto." Reproduced from the English translation in World Trade Organization, Committee on Trade and Development, Document WT/COMTD/1/Add.1. The Introductory Note was prepared for International Legal Materials by Evelina Teubal Alhadeff, Professor of International Law and Relations at the University of Buenos Aires, and ILM Corresponding Editor for Argentina [34 I.L.M. 1244; (1995)]

process with the signing of the Treaty. The formation of this southern cone market is but the latest in the trend toward regional 'megamarkets.'" [2]

MERCOSUR: DISPUTE OF SETTLEMENTS

To obtain the purposes of the Asuncion Treaty[3], and to avoid any kind of problem in agreement interpretation and in trade among members, the MERCOSUR treaty established a system to solve the dispute of settlements. The Treaty of Asuncion ruled in its Annex III .3 -"Settlement of Disputes"- that "before December 31, 1994, the States Parties shall adopt a permanent dispute settlement system for the common market." Because of this, on December 17, 1991 the Brasilia Protocol was signed, in order to give to the MERCOSUR a "provisory procedure" to solve disputes among the State Members, during the "transition period."

In December 17, 1994, the final agreement was signed in Ouro Preto, Brazil. This agreement, commonly known as "Protocol of Ouro Preto", created in Chapter VI, articles 43 and 44 a permanent way in which disputes will be solved among

[2] Reproduced from U.N. document A/46/155, April 19, 1991. The Introductory Note was prepared for International Legal Materials by Evelina Teubal de Alhadeff, I.L.M. Corresponding Editor for Argentina. 30 I.L.M. 1041; (1991) The big push came from the formation of the southern common market, Mercosur (in Spanish; Mercosul in Portuguese), by Argentina, Brazil, Paraguay and Uruguay in 1991. True, some of the change began, and would have gone on, anyway. Latin American economies could not stay stuck for ever in the age of state industry, state intervention and isolated markets. And Mercosur is only one in a web of international agreements - 31 of them, by the count of ECLAC, the United Nations Economic Commission for Latin America and the Caribbean - signed since 1990 to liberalise trade within the region. Meanwhile, older but moribund sub-regional groups, such as the Andean Group - soon to be "Community" - are reviving. Yet Manuel Marin, the European commissioner who handles relations with the region, is right to call Mercosur the "hard kernel" of its integration. This is the world's fourth-largest integrated market, after NAFTA (the North American free-trade area), the European Union and Japan. It is a dynamic one. Intra-Mercosur trade has soared; combined GDP, despite ups and downs, has grown by an annual average of 3.5% since 1990; and at $5,000 its income per head is 30% above that of Latin America as a whole. Above all, Mercosur is seen throughout the region as the leader in the field. "The end of the beginning", The Economist Survey. http://www.demon.co.uk/Itamaraty/mercosur01.html

[3] This common market shall involve: The free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent .... Art.1 "Treaty of Asuncion".

MERCOSUR members. The way established shall be subject to the settlement procedures laid down in the Brasilia Protocol[4].

BRASILIA PROTOCOL

Brasilia Protocol's Article 1 held that the rule of this protocol shall apply to all the controversies related to the interpretation, application and fulfillment of the Treaty of Asuncion.

The first way of solving disputes against MERCOSUR members is through "Direct Negotiations."[5] Each member state must try to solve controversies with other member states using direct negotiations. Member parties in a controversial matter shall inform the Common Market Group through the Mercosur Administrative Secretariat about the claim, the negotiations and the final disposition of the matter. This negotiation can not exceed the term of fifteen days, unless otherwise agreed to by the parties. The agreement tries to look for the easiest, cheapest and fastest way to solve a dispute. If the state parties do not solve the problem in this step, they can ask for the direct intervention of the Common Market Group.[6]

[4] "Disputes which arise between the States Parties concerning the interpretation, application or non-fulfillment of the provisions of the Treaty of Asuncion and the agreements concluded within its framework or of Decisions of the Council of the Common Market, Resolutions of the Common Market Group and Directives of the Mercosur Trade Commission shall be subject to the settlement procedures laid down in the Brasilia Protocol of 17 December 1991. Sole paragraph. The Directives of the Mercosur Trade Commission are also incorporated in Articles 19 and 25 of the Brasilia Protocol". Article 43 "Protocol of Ouro Preto". **"**Before the Common External Tariff convergence process is complete, the States Parties shall review the present Mercosur dispute settlement system with a view to adopting the permanent system referred to in paragraph 3 of Annex III to the Treaty of Asuncion and Article 34 of the Brasilia Protocol". Article 44 "Protocol of Ouro Preto"

[5] Article 2, Brasilia Protocol.

[6] Article 4, Brasilia Protocol.

The Common Market Group will solve the dispute after hearing the parties involved in the conflict. If necessary, the Common Market Group may ask for the advice of experts. Each party is equally responsible for the expert's fee. In some cases as determined by the Common Market Group different proportions in the payment of expert could apply. The Common Market Group however can only make recommendations to the parties in an attempt to resolve the controversial matter. It shall be done within thirty days since the dispute was submitted for the consideration of the Common Market Group.

If the Common Market Group resolution is not obeyed by a member, or if it is not possible to solve the dispute using this procedure, any of the Member states may request for the arbitral procedure established in this Protocol.[7] This must be done through the Mercosur Administrative Secretariat. The Secretariat shall inform all the Parties involved of such request.

The arbitral panel jurisdiction is mandatory, "*ipso facto*" and without necessity of any other special agreement, for all the Member states. This article seems to close the possibility, for a Mercosur State Member, to make his claim in the GATT.

The panel is composed of three members. The members' names shall be in a list provided by each member country to the Mercosur Administrative Secretariat. Each member State will submit a list of possible ten arbitrators to the Administrative Office of the Common Market Group.

Each Party will designate an arbitrator, who may be a citizen of the party state. The third member shall be designed for both Parties and he may not be of the same nationality as either of the parties involved in the controversy. This third arbitrator will be the presiding judge. If the parties are not able to select the third member, he/she must be selected by

[7] Article 7, Brasilia Protocol

lottery using the list provided by the countries to the Administrative Secretariat. All the panel members shall be appointed within fifteen days of notice of an arbitration proceeding. If one or both Parties do not selected the panel members. Article 9 provides that the panel member/members shall be designed by the Mercosur Administrative Secretariat.[8]

If two or more Member states make the same claim against a third country, they shall unify their representation.

The Parties shall inform the Arbitral Panel about the progress of negotiations, before going to this step. It is interesting to note that the Arbitral Panel could take provisory measures in order to prevent commercial damages from occurring during the arbitral process. The Arbitral Panel shall decide the question using the disposition regulated by the Treaty of Asuncion and by other agreements signed within the Mercosur.

In a term of sixty days the arbitral panel must have a decision. This term could be extended up to thirty more days. The decision shall be adopted by the majority of the panel members. The voting will be confidential and dissident votes may not be justified. No Party can appeal the decision.[9]

Thus the decision is final and binding on all the parties and the awards must be effected within fifteen days, unless otherwise established by the arbitration court. The Parties could ask for an explanation or clarification of the decision and/or for a better explanation of the way to fulfill the resolution. The Panel must explain it within the fifteen subsequent days.[10]

[8] Article 9, Brasilia Protocol.
[9] Article 21, Brasilia Protocol.
[10] Article 22 , Brasilia Protocol

If one of the countries fails to comply with the Arbitral Panel decision within thirty days, the other States may take temporary compensation steps to cause compliance therewith.

The private commercial dispute settlements mechanisms are ruled in Chapter V of the Brasilia Protocol. Citizens or the legal entities must file a claim in their National Section of the Common Market Group of the member state in which the claimant maintains a regular residence or business headquarters. They must provide sufficient evidence in order to demonstrate the veracity of the violation, threat or loss After hearing the claimant, the complainant's National Section will make direct contact with the National Section of the Common Market Group of the member state charged with having violated the provision, or will forward the claim within 15 days of receipt to the Common Market Group, without further examination.

In addition to the above procedure private members can send a claim directly to the central Common Market Group.

In the first meeting after the claim was received by the Common Market Group, a decision must be made. The Common Market Group can dismiss the claim if it thinks that it does not have the necessary requirement to progress. Otherwise, the Common Market Group Members shall select a group of three experts to consider the claim. The expert group will submit its opinion to the Common Market Group, which will then make a decision. If, according to this opinion, it is found that there are grounds for the claim against the member state, any other member state may call for the adoption of corrective measures or annulment of the measures in dispute.[11]

[11] Article 32, Brasilia Protocol.

NAFTA: CHAPTER 20

Chapter twenty of North American Free trade Agreement (NAFTA) regulates the Institutional arrangements and dispute settlement procedures. Section A of this chapter assigns the two institutions in charge of helping to solve controversial topics: The Free Trade Commission[12] and the Secretariat.[13]

Section B of Chapter 20 introduces the dispute settlement procedure. In this way NAFTA agreement encourages parties to cooperate with each other in order to "to arrive at a mutually satisfactory resolution of any matter that might affect its operation." It is important to establish this first rule, because countries which are ready to share a huge free trade zone should be "open-minded" in contributing to the dispute of

[12] **1.**The Parties hereby establish the Free Trade Commission, comprising cabinet-level representatives of the Parties or their designees. **2**. The Commission shall: (a) supervise the implementation of this Agreement; (b) oversee its further elaboration; (c) resolve disputes that may arise regarding its interpretation or application; (d) supervise the work of all committees and working groups established under this Agreement, referred to in Annex 2001.2; and (e) consider any other matter that may affect the operation of this Agreement. **3**. The Commission may: (a) establish, and delegate responsibilities to, ad hoc or standing committees, working groups or expert groups; (b) seek the advice of non-governmental persons or groups; and (c) take such other action in the exercise of its functions as the Parties may agree. **4**. The Commission shall establish its rules and procedures. All decisions of the Commission shall be taken by consensus, except as the Commission may otherwise agree. **5**. The Commission shall convene at least once a year in regular session. Regular sessions of the Commission shall be chaired successively by each Party. Article 2001, Chapter 20, NAFTA.

[13] **1**. The Commission shall establish and oversee a Secretariat comprising national Sections.**2**. Each Party shall:(a) establish a permanent office of its Section; (b) be responsible for(i) the operation and costs of its Section, and (ii) the remuneration and payment of expenses of panelists and members of committees and scientific review boards established under this Agreement, as set out in Annex 2002.2; (c) designate an individual to serve as Secretary for its Section, who shall be responsible for its administration and management; and(d) notify the Commission of the location of its Section's office. **3.** The Secretariat shall:(a) provide assistance to the Commission; (b) provide administrative assistance to (i) panels and committees established under Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters), in accordance with the procedures established pursuant to Article 1908, and (ii) panels established under this Chapter, in accordance with procedures established pursuant to Article 2012; and 3 (c) as the Commission may direct(i) support the work of other committees and groups established under this Agreement, and (ii) otherwise facilitate the operation of this Agreement. Article 2002, Chapter 20, NAFTA.

settlement procedure instead of hindering the decision that could affect the normal development of their economies.

The dispute settlements regulated by this chapter shall apply "with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004."[14] Dispute settlement in Antidumping and Countervailing Duty Matters are specially regulated by Chapter Nineteen.

This treaty leaves an "open door" to solve disputes under the GATT agreement. Article 2005 provides that one of the parties shall notify any third party of his intention to initiate a dispute proceeding under the GATT, but "...if a third Party wishes to have recourse to dispute settlement procedures under this Agreement..., it shall inform promptly the notifying party and those parties shall consult with a view to agreement on a single forum. If those Parties cannot agree, the dispute normally shall be settled under this Agreement"

Once a country has chosen a forum and has initiated settlement of dispute, the forum selected shall be used to the exclusion of any other, so that there is no having two different decisions on the same matter (one under the GATT and the other under the NAFTA).

[14] Article 2004, NAFTA

Before starting a proceeding under NAFTA, "any Party may request in writing consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement."[15]

The consulting parties must try to make every attempt in order to arrive at a mutually satisfactory resolution. The requesting party shall deliver the request to other parties and to its section of the Secretariat. Parties must provide sufficient information, respect any confidential or proprietary information exchanged in he course of consultations, and seek to avoid any resolution that adversely affects the interest of any other party. If these consultations are not successful, one must initiate the process established in Article 2007.

The first step in this process is to request in writing a meeting of the Free Trade Commission in order to solve the problem.[16] A Party may also request in writing a meeting of the Commission where it has initiated a dispute settlement proceeding under GATT[17].

The Commission shall convene within ten days of delivery of the request and shall endeavor to resolve the dispute promptly. In this way, the Commission may call technical advisers, have recourse to good offices, conciliation, mediation or such other dispute resolution procedures, or make recommendations.

If the Commission has convened pursuant art. 2007(4) and the matter has not been resolved within 30 days, or 30 days after the Commission has convened in respect of

[15] Article 2006.1 NAFTA

[16] If the consulting Parties fail to resolve a matter pursuant to Article 2006 within: (a) 30 days of delivery of a request for consultations, (b) 45 days of delivery of such request if any other Party has subsequently requested or has participated in consultations regarding the same matter, (c) 15 days of delivery of a request for consultations in matters regarding perishable agricultural goods, or (d) such other period as they may agree, any such Party may request in writing a meeting of the Commission. Article 2007.1 NAFTA

[17] See art.2006.2 NAFTA. for exceptions

the matter most recently referred to it, or such other period as the consulting parties may agree, any consulting party may request in writing the establishment of an arbitral panel. The requesting party shall deliver the request to the other parties and to its Section of the Secretariat.

The Commission shall establish an arbitral panel. It is interesting to note that if a third party does not join the proceedings as a complaining party, in accordance with Art. 2008.3 that party normally must refrain thereafter from initiating or continuing a dispute settlement procedure under this Agreement, or a dispute settlement proceeding in the GATT. Thus, by non participation the third party forfeits the right of complaint.

Parties shall establish and maintain a roster of up to 30 individuals who are willing and able to serve as panelists. Roster members shall have expertise or experience in different areas of law and must be independent. The panel is comprised of five members. First, the parties select the chair of the panel. It shall be within fifteen days of the delivery of the request for the establishment of the panel. If the disputing parties are unable to agree on the chair within this period, the disputing Party chosen by lot shall select within five days as chair an individual who is not a citizen of that Party. Then each disputing Party shall select two panelists who are citizens of the other disputing Party.

This process is the same regardless of the number of parties. Article 2011.2b provides that if the disputing parties are unable to agree on the chair within this period, the party or parties on the side of the dispute chosen by lot shall select within 10 days a chair who is not a citizen of such party or parties. I really don't understand this. For example, if Canada and Mexico made a claim against the USA and they do not agree to appoint on the chair of the panel, what could be the solution? (you do not have any other

country in which look for the chair of the panel). Finally, panelist shall normally be selected from the roster.

The procedure assures a right to at least one hearing before the panel as well as the opportunity to provide initial and rebuttal written submissions; and the panel's hearings, deliberations and initial report. All written submissions to and communications with the panel shall be confidential. Unless the disputing parties otherwise agree, the Model Rules of Procedure shall be used. It is interesting to note that a third party could attend all the hearings, making written and oral submissions to the panel and receiving written submissions of the disputing parties.[18]

The participating parties shall be provided advance notice of, and an opportunity to provide comments to the panel on, the proposed factual issues to be referred to the scientific review board; and a copy of the board's report and an opportunity to provide comments on the report to the panel. The panel shall take the board's report and any comments by the Parties on the report into account in the preparation of its report.

When all these things are done, the Panel shall make the Initial Report. This report must be based on the submissions and arguments of the Parties and on any information before it. The Panel shall, within 90 days after the last panelist is selected or such other period as the Model Rules of Procedure established pursuant to Article 2012, provide to the disputing Parties an initial report containing the finding of facts, its determination as well as its recommendations, if any, for the resolution of the dispute. Panelists may furnish separate opinions on matters not unanimously agreed. If a disputing party submits written comments to the panel on its initial report the panel, on its own initiative

[18] Article 2013, NAFTA.

or on the request of any disputing Party, may request the views of any participating Party, reconsider its report ; and make any further examination that it considers appropriate.[19]

After this the panel shall present, within thirty days, the final report to the parties. This report must include any separate opinions on matters not unanimously agreed. No panel may, either in its initial report or its final report, disclose which panelists are associated with majority or minority opinions. The parties must transmit to the Commission the final report and unless the Commission decides otherwise, the final report shall be published 15 days after it is transmitted to the Commission.[20]

The disputing parties shall agree on the resolution of the dispute and shall notify their Sections of the Secretariat of any agreed resolution of any dispute. If the party complained against has not reached agreement with any complaining party on a mutually satisfactory resolution, within 30 days of receiving the final report, such complaining party may suspend the application to the party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.[21]

Section C of Chapter 20 establishes the Domestic Proceedings and Private Commercial Dispute Settlement Mechanism. This section establishes that "No Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement."[22]. It also establishes the possibility of an Alternative Dispute Resolution. This proceeding encourages the parties

[19] Article 2016.1,2,3,4,5 NAFTA.
[20] Article 2017 NAFTA
[21] Article 2019 (1) NAFTA
[22] Article 2021, NAFTA

to use arbitration and other means of alternative dispute resolution in order to achieve the settlement of international commercial disputes between private parties in the free trade area. To achieve this goal the Commission shall establish an Advisory Committee on Private Commercial Disputes. This Committee must comprise persons with expertise or experience in the resolution of private international commercial disputes. "The Committee shall report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area."[23]

SIMILARITIES AND DIFFERENCES

There are many similarities and only a few differences between the Brasilia Protocol and Chapter 20 of NAFTA. Both treaties establish direct negotiation among the members before start of any other proceeding, in order to solve the controversy. (See article 2006 of NAFTA and article 2, Brasilia Protocol). If direct negotiations fail, both treaties establish the possibility to solve the controversy using arbitral panels. The way of appointing members for the arbitral panel is almost the same. There is only a difference in the number of panel members. NAFTA provides that the panel members shall be five and Brasilia Protocol provides that the members shall be three. In neither case can the head of the panel be a citizen of any disputing party.

In this step - arbitral panel - the NAFTA agreement establishes an interesting difference: The Initial Report (article 2012). I think this is a way to provide better defense rights to the parties when they are involved in a controversial process because parties could submit to the panel written comments related to the initial report in order to make a

[23] Article 2022 NAFTA

better examination if this is considered appropriate. MERCOSUR does not provide such alternative. Once the arbitral proceeding is triggering the parties can not know what is the “first opinion” of the panel.

Both treaties avoid disclosing which panelists are associated with the majority or minority of the decisions taken by the arbitral panel. (NAFTA 2017, Brasilia Protocol art.21). Moreover, the NAFTA and MERCOSUR agreements establish possible sanction to the party which do not fulfill - usually in a short term - the decision of the arbitral panel.

Two other interesting differences are that NAFTA encourages the parties to use arbitration and other means of alternative dispute resolution in order to achieve the settlement of international commercial disputes and to cooperate with each other in order to “arrive at a mutually satisfactory resolution of any matter that might affect its operation”. The Brasilia Protocol does not address this issue. NAFTA provides the possibility to solve the controversies using the proceeding established by GATT. The Brasilia Protocol avoid to speak about it, but I think that anyway each country member has the possibility to use the GATT proceedings if it is considered necessary. I think that MERCOSUR is primarily aimed at solving internal controversies in order to make a full union among its members.

CONCLUSION

World trade is going now in one direction, and that direction seems to be the creation of “megamarkets.” MERCOSUR, NAFTA, the European Union and the Asian Tigers are all adopting this model to improve their commercial trade. One could choose between a “custom union” or a “free trade zone,” but the important thing in both cases is “unification” not only of markets but also of members. I am not referring to a “one

country union"; I am referring to the "friendship union" that must exist among members of a commercial treaty in order to solve their disputes. This union obviously must exist and is necessary to solve in a "civilized" way if members are seriously looking for establish a successful commercial integration.

After all we have only one world, and this world could be, in a near future, one market.

MAY 1997