International Economic Law Clinic

ASSESSING MERCOSUR'S DISPUTE SETTLEMENT SYSTEM:
Comparative Analysis and Suggestions for Improvement

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To : Confederação Nacional da Indústria (National Confederation of Industry)
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List of Abbreviations

AHAT	Ad Hoc Arbitration Tribunal
CCM	MERCOSUR Trade Commission
CMC	Common Market Council
GMC	Common Market Group
EU	European Union
DRS	(MERCOSUR) Dispute Resolution System
DSS	(WTO) Dispute Settlement System
GATT	General Agreement on Tariffs and Trade
MERCOSUR	Mercado Comum do Sul
NAFTA	North American Free Trade Agreement
NCI	National Confederation of Industry
PARLASUL	MERCOSUR Parliament
PCR	Permanent Court of Revision
SAM	MERCOSUR Administrative Secretariat
STF	Supreme Court of Justice
USA	United States of America
USMCA	United States-Mexico-Canada Agreement
USP	University of São Paulo
WTO	World Trade Organization

EXECUTIVE SUMMARY

The resolution of disputes is a central pillar of any trading system. Without an effective mechanism for settling disputes, the effectiveness of the applicable rules could be reduced, which could negatively affect the commercial integration process. In its 30 years, the MERCOSUR's Dispute Resolution System (DRS) has been rarely used.

The purpose of this report is to analyze possible reasons for the relatively limited use of MERCOSUR's DRS, as well as to propose potential solutions or tools to encourage its use when necessary. The report highlights how MERCOSUR countries have had a historical preference for solving their disputes through diplomatic negotiations rather than by means of legal procedures within the bloc or at the World Trade Organization (WTO). The report also shows that the limited use of dispute settlement in MERCOSUR, alongside questionable decisions in certain cases, have resulted in a vicious cycle: inasmuch as reliable case law is not developed, trust in the system remains limited and it is not used by member States.

The research points to a culture of fostering diplomatic consultations within the region, reflecting a view that political solutions are preferable for the relationship between neighbors than legal discussions. Although MERCOSUR's DRS does not present major structural flaws, there are specific reforms that could potentially improve its effectiveness and provide member States and stakeholders with greater confidence in the system, paving the way for its reactivation.

In that light, this report proposes ten suggestions that could strengthen the MERCOSUR's DRS, both institutionally and procedurally. While some suggestions may seem ambitious, they would tend to develop and legitimize case law, improving the confidence of stakeholders in the available mechanisms to resolve disputes in MERCOSUR and ultimately increasing the effectiveness of the system.

The proposals elaborated in the report are summarized as follows:

Enhancing awareness of the DRS

- Develop national practices that could contribute to the proactivity of the Brazilian government within the MERCOSUR's dispute settlement mechanisms, such as by encouraging the use of the 'Sem Barreiras' (*No Barriers*) system as a means of justifying the initiation of bilateral consultations and trade disputes;
- Increase the awareness of Brazilian stakeholders, including the private sector and national judges, about the possibilities of use of the MERCOSUR dispute settlement mechanisms to deal with trade barriers, such as promoting seminars and other capacity-building initiatives.

Improving procedures

- Reform the arbitral procedure in order to select arbitrators on an *ad hoc* basis, allowing the choice of arbitrators on the basis of their expertise to deal with specific matters;
- Create a mechanism to allow the choice of arbitrators in consultation with the private sector;

- Establish clearer deadlines for each stage of the MERCOSUR's DRS;
- Improve the DRS' transparency, establishing a mechanism to require the Secretariat of the Permanent Court of Revision (PCR) to track complaints and publish information on any bilateral consultations initiated;
- Expand the authority of the PCR to issue Advisory Opinions beyond "ongoing cases";
- Eliminate the necessity of approval of the highest courts (in Brazil, the Supreme Court) of requests for Advisory Opinions, thus allowing lower courts (e.g. Federal Courts in Brazil) to directly request them;
- Consider the establishment of a "Private Claims Instrument", which could allow private sector entities to directly access and present their complaints to the Common Market Group (GMC);
- Create a mechanism similar to the binational panels of the USMCA Chapter 10, with authority to review antidumping decisions of the authorities of each member State.

PART 1: INTRODUCTION

This report was requested by Brazil's National Confederation of Industry (NCI), the largest representative organization of the Brazilian industry. From the perspective of NCI, MERCOSUR is one of the most relevant initiatives of international integration of Brazil. Data developed by NCI shows that Argentina, Paraguay and Uruguay are the destination of US$20.9 billion in Brazilian exports, corresponding to 8.7% of the country's total sales in 2018, and the origin of $13.4 billion in imports.[1] In addition, MERCOSUR is noted to be an important destination to Brazilian industrialized goods. Brazilian producers export around 20% of manufactured products and 25% of high and medium-high technological intensity products to other members of the bloc.[2] Thus, both in terms of job creation and in terms of intensifying stimulus to innovation, MERCOSUR promotes industrial gains that would be difficult for Brazil to achieve by means of other trade networks.

The starting point of this report is to understand the current context of MERCOSUR and the main challenges faced by its Dispute Resolution System (DRS). Such system has been developed with great expectations as a positive way to settle disputes within the trade bloc, but reliance on it has been somewhat frustrating: since the establishment of MERCOSUR in the early 1990s, the DRS has been used only 16 times, the latest of them almost a decade ago, in 2012. By way of comparison, the dispute settlement mechanisms of the United States, Mexico and Canada Agreement (USMCA, formerly NAFTA) has been invoked 232 times.

Keeping in mind the importance that the trade bloc has had for Brazil and, especially, for its industry, the report explores the reasons behind this stalemate and propose improvements that could increase the resilience of MERCOSUR's DRS framework. This analysis becomes particularly relevant at a time where WTO dispute settlement faces important operational difficulties.

The purpose of the report is to address four main questions:

> (I) How is MERCOSUR's dispute settlement mechanism structured?
>
> (II) How does the mechanism compare to the systems adopted in other trade agreements, such as the WTO, the USMCA, and the European Union?
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> (II) Why has MERCOSUR's dispute settlement mechanism not been used in the last years?
>
> (IV) Are there any improvements that could encourage interested parties (in particular the private sector) to use the system and increase the

[1] Confederação Nacional da Indústria (CNI). MERCOSUR is important for Brazil and the industry, CNI says. Available on: <https://noticias.portaldaindustria.com.br/noticias/internacional/MERCOSUR-e-importante-para-o-brasil-e-para-a-industria-diz-cni/>. June 28, 2021.

[2] Confederação Nacional da Indústria (CNI). MERCOSUR is important for Brazil and the industry, CNI says. Available on: <https://noticias.portaldaindustria.com.br/noticias/internacional/MERCOSUR-e-importante-para-o-brasil-e-para-a-industria-diz-cni/>. June 28, 2021.

confidence of MERCOSUR member countries in the available framework?

In order to carry out the proposed research and answer such questions, the report relies on: (i) specialized literature on MERCOSUR, the WTO, the USMCA, and the EU; (ii) an analysis of selected disputes between MERCOSUR members submitted to the MERCOSUR and to the WTO; (iii) a review of technical documents issued by the Secretariat of MERCOSUR and its Permanent Court of Revision (PCR); and (iv) interviews undertaken with officials from Brazil's Ministry of Foreign Affairs (also known as *Itamaraty*) and MERCOSUR's Permanent Court of Revision.

The subsequent sections of the report are organized in four parts. The second part presents a contextual analysis of MERCOSUR and its dispute settlement system. The third part carries out an analysis of the procedural rules of MERCOSUR's DRS, comparing it to the frameworks of the WTO and of other trade bloc's (USMCA and EU). The fourth part discusses the possible causes for the low usage of the system and makes suggestions that could improve, particularly from the perspective of the industrial sector in Brazil. The fifth part briefly concludes the report.

PART 2: MERCOSUR'S DISPUTE RESOLUTION SYSTEM

Since the signing of the Treaty of Asunción in 1991, the MERCOSUR's DRS has evolved significantly. If initially the bloc's dispute resolution framework only provided for a provisional system, the bloc's legal evolution led to new protocols and the creation of the Permanent Court of Revision (PCR). The greatest milestone for the improvement of the system was the signing of the 2002 Protocol of Olivos, which significantly changed MERCOSUR's DRS structure and procedures. This section presents an overview of MERCOSUR's structure, its DRS' history, and procedures.

2.1 MERCOSUR: an overview of its history and structure

On March 26, 1991, MERCOSUR was created when the Treaty of Asunción was signed between Argentina, Brazil, Paraguay, and Uruguay. The Treaty aimed to create a regional organization that could stimulate cooperation initiatives and reduce trade barriers among the Cone Sur's countries[3], in order to promote great commercial flows within and beyond the bloc. The establishment followed the trend of the 1990s integration, seen in other regions of the world, and is often hailed as an important step towards a more resilient regional economy.

The intention to consolidate MERCOSUR as a common market is clear from the first article of the Treaty of Asunción. This integration would lead to the (I) free movement of goods, services, and productive factors between countries; (II) the elimination of customs duties and non-tariff barriers; and (III) the establishment of a common external tariff.[4] The Treaty of Asunción also stated that a Free Trade Zone had to be established until 1994. Although these provisions were not fully implemented in the following years, its goals and purpose undeniably led to greater political and commercial integration between the trade bloc's members.

Nonetheless, it was not until 1994 that MERCOSUR's institutional contours began to be defined after the signature of the Protocol of Ouro Preto.[5] The 1994 Protocol represented a landmark in MERCOSUR and in the region's integration. This agreement conferred international legal personality to the bloc and created an institutional structure with permanent bodies and specific responsibilities. Furthermore, it provided for a Common External Tariff that would uniformize duties between parties.

The Protocol of Ouro Preto represented an important step in advancing MERCOSUR's institutional framework and remains its constituting document. Following the Treaty of Asunción and the Protocol of Ouro Preto, the bloc was divided into seven bodies: the Common Market Council (CMC), the Common Market Group (GMC), the MERCOSUR Trade Commission

[3] Cone Sur (or the Southern Cone) is a geographic and cultural region composed of the southernmost areas of South America, mostly south of the Tropic of Capricorn. Traditionally, it covers Argentina, Chile, Uruguay and parts of Brazil and Paraguay. It is bounded on the west by the Pacific Ocean and on the east by the Atlantic Ocean.
[4] MERCOSUR. Treaty of Assunción. March 26, 1991.
[5] MERCOSUR. Protocol of Ouro Preto. December 17, 1994.

(CCM), the MERCOSUR Administrative Secretariat (SAM), the MERCOSUR Parliament (Parlasul), MERCOSUR Economic-Social Consultative Forum, and its 14 working groups.

The Common Market Council (CMC) is the highest body of MERCOSUR. Section I of the Protocol of Ouro Preto outlines the structure of the CMC. Its main objective is to conduct the integration process and make decisions to ensure compliance with the objectives established by the Treaty of Asunción. The CMC's decisions are made by consensus and are binding on MERCOSUR member states.

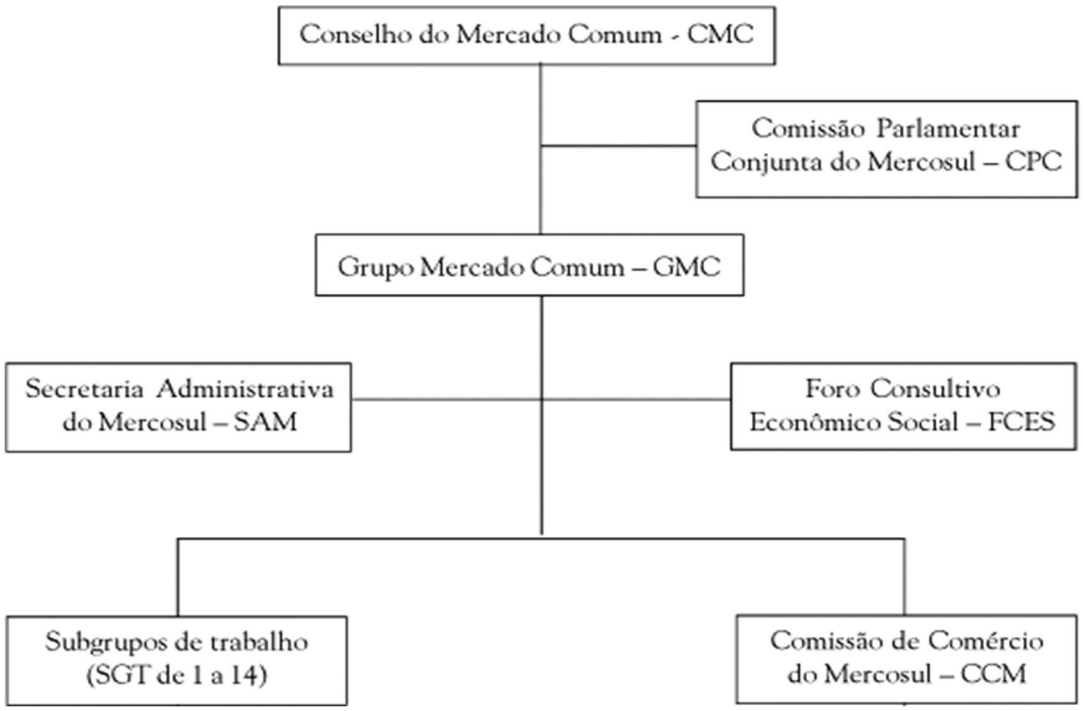
Below the CMC is the Common Market Group (GMC). Although bound by the CMC, the GMC acts as the executive body of MERCOSUR. Articles 10 to 15 of the Protocol of Ouro Preto set out the functions of the executive. The role of the GMC ranges from ensuring the application of the MERCOSUR treaties to proposing draft decisions to the CMC. Decisions from the GMC are made by resolutions, which must be approved by consensus and are mandatory for member states.

Underneath the CMC and the GMC is the MERCOSUR Trade Commission (CCM). The CCM is in charge of defining and applying the commercial policy instruments within the bloc, both concerning the free trade zone and the customs union. It is also responsible for creating technical committees that act as advisors and prepare reports on MERCOSUR's commercial matters. The CCM's meetings occur monthly and result in mandatory guidelines to be followed by States parties. The CCM can also make non-binding recommendations.

The CMC, GMC, and CCM are the decision making groups of MERCOSUR. Alongside these three bodies, MERCOSUR includes an Administrative Secretariat (SAM), Parliament (PARLASUL), Economic Social Consultative Forum, and 14 permanent working groups. The SAM is headquartered in Montevideo, Uruguay, and provides operational support to the bloc. The PARLASUL was created to represent the interests of the bloc's citizens in the integration process. The Economic-Social Consultative Forum is the body that interacts with civil society. It has an advisory role and can make recommendations to the GMC. The 14 permanent working groups meet periodically to discuss topics related to the bloc's integration process.

Figure 1 displays MERCOSUR's organizational structure.

Figure 1 - MERCOSUR's organogram and main bodies



Source: Queiroz (2005).[6]

2.2 The evolution of MERCOSUR's DRS

In 1991, the States parties signed the Protocol of Brasilia. This agreement provided a provisory DRS for countries to solve disputes regarding the integration process' agreements and related documents (i.e., the Treaty of Asunción, the agreements concluded within its scope, and with decisions from its decision-making bodies).[7] The Protocol is a landmark in the bloc's history and the members' relationships. It represented an unprecedented intent to proactively consider a method to resolve conflicts between parties.

The procedure was developed around a simple principle: when a dispute was identified, countries should initially seek direct negotiations to solve it. If direct negotiations were unsuccessful, the issue could be submitted to the CMC, which would be responsible for evaluating the situation, allowing both parties to state their respective positions. Whenever needed, the CMC could summon a Group of Experts for their advice on the matter. If both diplomatic and political solutions are not effective, the country involved in the dispute could communicate its intention to the SAM that would then initiate arbitral procedures. By signing the Protocol of Brasilia, countries

[6] Fábio Albergaria de Queiroz. Meio ambiente e comércio na agenda internacional: a questão ambiental nas negociações da OMC e dos blocos econômicos regionais. Ambient. soc. 8 (2), Dec. 2005. DOI: https://doi.org/10.1590/S1414-753X2005000200007.
[7] MERCOSUR. Protocol of Brasilia. December 17, 1991.

recognized the mandatory jurisdiction of eventual arbitral tribunals to hear and resolve all disputes covered by the Protocol.

The Protocol of Brasilia provided a provisional settlement of disputes between States Parties through *ad hoc* arbitral tribunals. Between its signing in 1991 and the subsequential 2002 Protocol of Olivos, 12 cases were presented to *ad hoc* arbitral tribunals[8]. Nonetheless, as the bloc's integration advanced, some debates raised questions about whether the system could be improved through a more permanent structure and legal framework. The debate pushed for a new system that, resembling the WTO's DRS, established a permanent court of appeals that would provide greater legal certainty and standardization of arbitral awards. The debates culminated in the signing of the 2002 Protocol of Olivos, which remains the primary document for MERCOSUR's dispute resolution framework.[9] The 2002 Protocol created the Permanent Court of Revision (PCR), a permanent judicial body located in Asunción, Paraguay, that seeks to ensure the correct interpretation and compliance of the bloc's rules among member countries.

The PCR is responsible for analyzing possible conflicts that arise from the region's integration process from States parties' demands. The PCR renders decisions, called "awards" or *Laudos* in Portuguese, and can be called upon by parties to issue advisory opinions on topics relevant to MERCOSUR's regional integration. Since its creation in 2002, it has rendered 6 Decisions (appeals and 1 *per saltum*) and issued 3 Advisory Opinions.[10]

The 2002 Protocol would be further developed by the CMC's Decision No. 37 (CMC/DEC. No. 37/03), which details MERCOSUR's DRS procedures; how advisory opinions are issued; the GMC intervention; the Ad Hoc tribunal and the PCR structure; and the procedure to appeal against arbitral awards.[11]

The chronological evolution of the system and its main agreement are displayed in Figure 2.

[8] See Annex I for the list of disputes until 2021.
[9] MERCOSUR. Protocol of Olivos. February 18, 2002.
[10] See Annex I for the complete list of disputes and advisory opinions.
[11] MERCOSUR. CMC/DEC. No. 37/03. Regulation of the Protocol of Olivos. December 15, 2003.

Figure 2 - The historical evolution of MERCOSUR's dispute resolution system

Source: Secretariat of the Permanent Court of Revision.[12]

2.3 How to solve a conflict within MERCOSUR: legal framework and procedure

Keeping in mind the main agreements that structured MERCOSUR as well as its decision-making bodies (CMC, GMC and CCM), this section explores the legal framework and procedural aspects regarding MERCOSUR's dispute resolution mechanism. The MERCOSUR DRS has jurisdiction to solve conflicts that arise over the interpretation, application, or non-compliance of the instruments dealing with the bloc's integration process. The common basis for disputes include (I) the rules of the Treaty of Asunción, (II) the protocols and agreements entered into within the bloc, (III) the Decisions of the Common Market Council (CMC), (IV) the Resolutions of the Common Market Group (GMC), and (V) the Guidelines of the Trade Commission of the MERCOSUR (CCM).[13]

To that end, MERCOSUR provides two procedures for solving disputes between States parties - a regular procedure as well as a special procedure. The PCR has three mechanisms for resolving disputes: issuing Decisions, Urgent Measures, and Advisory Opinions.

[12] MERCOSUR. Permanent Court of Revision Secretariat. Dispute Resolution Mechanism.
[13] MERCOSUR. Art. 1, Protocol of Olivos. February 18, 2002.

The following sections examine each of these topics.

2.3.1 MERCOSUR's DRS stages and procedures

The regular procedure for solving disputes in MERCOSUR consists of three stages as outlined by the 2002 Protocol of Olivos and the CMC/DEC. No. 37/03.[14] The stages are divided in diplomatic bilateral consultations, political mediations by the GMC, and a quasi-judicial arbitral stage.[15]

The first stage refers to intergovernmental negotiations between the parties involved in a dispute. It consists of a mandatory, pre-litigation stage, where countries are encouraged to engage in conversations. These direct negotiations are generally conducted by the respective GMC national sections (which in Brazil is under its Ministry of Foreign Relations' structure[16], also known as *Itamaraty*). However, they may encompass other political means, such as meetings at MERCOSUR decision-making bodies, inter-ministerial meetings, meetings between political representatives. To start a consultation, parties must inform MERCOSUR's GMC. The GMC will register the action and track any results. The Protocol of Olivos states that this stage can last up to 15 days from the initial communication of the plaintiff to the defendant - a period that can be extended by mutual agreement between the parties.[17]

If the conflict is not resolved in bilateral consultations, the issue may be referred to the GMC for analysis and mediation - the 2nd stage of MERCOSUR's dispute resolution mechanism. This second phase also functions as a pre-litigation stage; however, it is not mandatory, and the parties may use it or seek to initiate judicial proceedings directly.[18] In the event that the complaining party chooses to take the case to the GMC, the GMC will schedule the discussion to a future meeting. That meeting will provide an opportunity for both parties to state their positions, including, when necessary, expert advice. The Protocol of Olivos establishes that this stage can last up to 30 days from the date of the meeting at which the dispute was submitted to the body's consideration. In this time span, the GMC must try to find a consensual solution for both parties.[19]

If the GMC cannot find a consensual solution, or when a party decides to bypass the 2nd stage, any of the parties may communicate their intention to start an arbitral procedure to the GMC. At this point, parties have two paths: (I) seek an arbitral award from a panel of experts, or (II) directly seek the PCR analysis - if agreed by both parties. Having received the communication the

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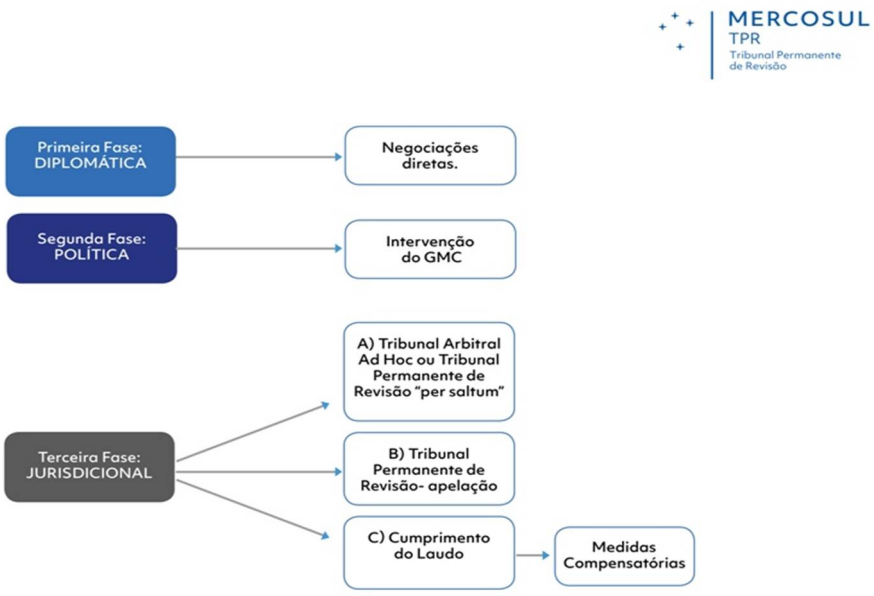
[14] MERCOSUR. Protocol of Olivos. February 18, 2002.; MERCOSUR. CMC/DEC. No. 37/03. December 15, 2003.
[15] This distinction is made by the Secretariat of the PCR. The diplomatic stage refers ro diplomatic negotiations that are seen to involve bilateral consultations; political mediations are political because there is an intervention by a third party.
[16] In Itamaraty, The bloc's dispute system is the responsibility of the Mercosur Legal, Political and Social Affairs Division (Divisão de Assuntos Jurídicos, Políticos e Sociais do MERCOSUL - DMS) and the Commercial Litigation Division (Divisão de Contenciosos Comerciais - DCCOM).
[17] MERCOSUR. Art. 14, CMC/DEC. No. 37/03. December 15, 2003; MERCOSUR. Art. 5, Protocol of Olivos. February 18, 2002.
[18] MERCOSUR. Art. 6, Protocol of Olivos. February 18, 2002; MERCOSUR. Art. 6.1, Protocol of Olivos. February 18, 2002.
[19] MERCOSUR. Art. 8, Protocol of Olivos. February 18, 2002.

PCR Secretariat will convene an *ad hoc* arbitration tribunal (AHAT) or start procedures at the PCR. The third phase is a quasi-judicial, adversarial, and public stage.

Once an arbitration proceeding is initiated through the first option, an AHAT is constituted from the list of arbitrators registered in the SAM. The AHAT will have the task of hearing the parties and analyzing issues of fact and law, issuing a binding award at the end of the procedure. From the AHAT award, the parties can request a Revision Appeal to the PCR, which has the role of confirming, modifying, or revoking the legal basis of the award. Much like other appellate courts, the PCR does not consider issues of fact. In such cases, the PCR will issue a final Decision that will prevail over the arbitration award.

Although the PCR's central role is to serve as an appellate court for the AHAT, the Protocol of Olivos allows the parties, by mutual agreement, to directly bring the dispute directly (*per saltum*) to the PCR analysis[20]. In this case, where the PCR operates as a forum of first instance, its Decision is unappealable and binding on the parties.[21] It is important to highlight that both the AHAT and PCR decisions are binding and mandatory. The decisions from both bodies must be enforced within thirty days after parties' notification - unless an appeal is made. Figure 3 illustrates MERCOSUR's DRS three stages.

Figure 3 - The three stages of MERCOSUR's dispute resolution system



Source: Permanent Court of Revision Secretariat.[22]

The deadlines before the PCR or an AHAT are short. The parties have 15 days to present their reasons to the AHAT/PCR, limiting their submissions to the questions of law addressed in

[20] MERCOSUR. Art. 9 e 23, Protocol of Olivos. February 18, 2002.
[21] MERCOSUR. Art. 23, Protocol of Olivos. February 18, 2002.
[22] MERCOSUR. Permanent Court of Revision Secretariat. Dispute Resolution Mechanism.

the dispute. Once the reasons have been received, the opposing party will also have a period of fifteen days to respond. Then, the AHAT/PCR has 30 days to issue a report and decide on the dispute. It is worth mentioning that the procedures before an AHAT and the PCR are confidential before any decision is made. The Decision of the PCR on any appeals will be final; however, a Clarification Appeal may be filed when the parties deem it necessary to clarify its content and form of compliance. This appeal has suspensive effects that last for up to fifteen days after the notification of the Decision.

Throughout the aforementioned procedures, the parties have the right to drop the complaint and conclude the dispute through a diplomatic or political agreement. Chart 1 displays each DRS stage and its established deadlines.

Chart 1 - Deadlines for each MERCOSUR's DRS stage

Stage	Consultations	GMC intervention	AHAT/PCR (reasons)	AHAT/PCR (responses)	AHAT/PCR (decisions)
Deadline	15 days*	30 days	15 days	15 days	15 days

* The period that can be extended by mutual agreement between the parties.

Source: Made by the authors

Failure to comply with a Decision from the PCR may result in the winning State applying for temporary (up to one year) compensatory measures that must be proportionate and preferably in the sector affected by the dispute.[23] Similar to what happens in the WTO[24], if it is understood that the measures are useless in the affected sector, additional measures may be applied in other sectors as well as the possible suspension of commercial concessions. If the defeated State considers the compensatory measures excessive, it may request the PCR analyzes them within fifteen days after they take effect.

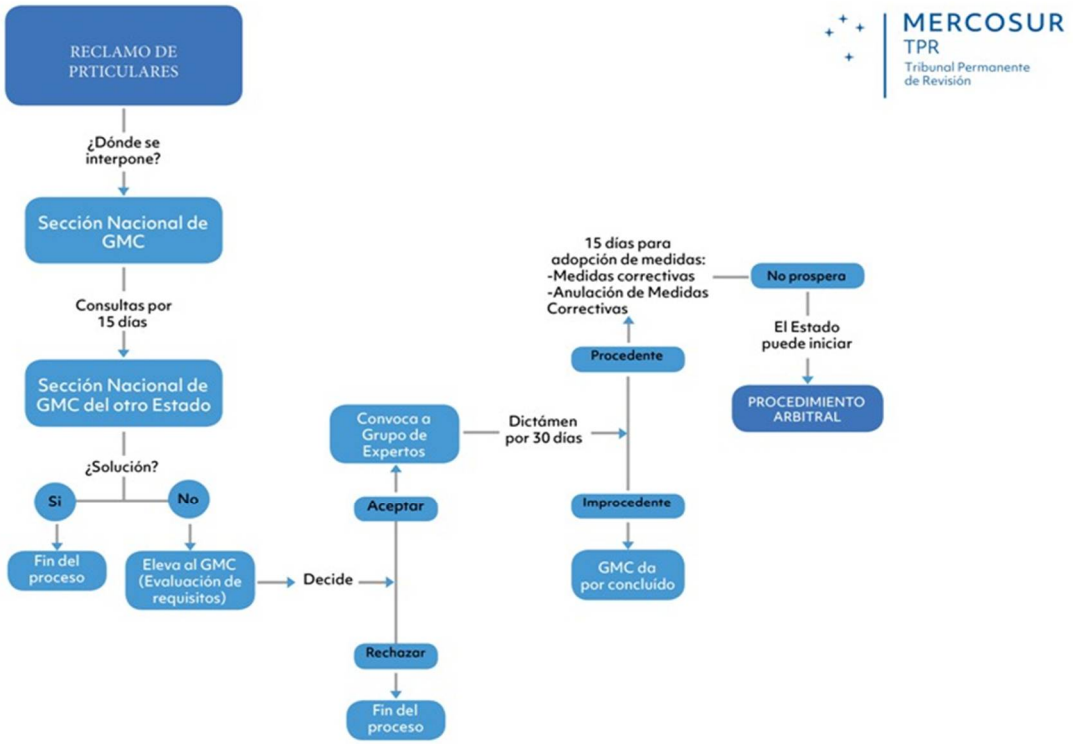
In addition to the regular procedure, defined by the Protocol of Olivos, the CMC approved a special procedure in 2005. The special procedure is focused on disputes arising from agreements rendered at the meetings of MERCOSUR's Ministers (CMC/DEC No. 26/05).[25] In such cases, the representatives of States parties shall first, in the same way as in the regular procedure, initiate direct consultations for settling any dispute. However, if they do not reach a solution and decide to submit the matter to the GMC, the state representatives that were present in the disputed meeting shall participate in the GMC analysis. The participation of the state representatives from the disputed meeting is a key difference from the regular procedure. The GMC may also form a Group of Experts that will assist in the analysis.

[23] MERCOSUR. Chapter IX, Protocol of Olivos, February 18, 2002; Chapter VIII of CMC/DEC. No. 37/03.
[24] GATT. Agreement on Safeguards. 1994.
[25] MERCOSUR. CMC/DEC No. 26/05.

If the dispute is not resolved in the previous steps, any of the concerned parties may appeal to the PCR. The GMC's Resolutions and PCR's Decisions are mandatory. If the party obligated to comply with the Decision refuses to do so, the affected party may apply Compensatory Measures in the same way as the regular procedure; however, it should first suspend rights and benefits arising from the disputed agreement. If the suspension is impracticable or ineffective, the party harmed by the non-compliance may suspend rights and benefits arising from other agreements.

It is important to highlight that MERCOSUR State-representatives are the only parties that can intervene in the DRS.[26] Individual persons or legal entities can only file a complaint within their GMC national section, which will analyze the demand and give rise, if relevant, to consultations with their GMC pair.[27] Once bilateral consultations have taken place without reaching a resolution, the responsible national bodies can take the issue to MERCOSUR's GMC for analysis. If GMC mediation is unsuccessful, any of the States parties involved may initiate an arbitration following the path previously described. The interested individual party may intervene in the arbitration proceeding; however, its interests will be represented by the national bodies in charge (the Ministry of Foreign Relations in Brazil's case). Figure 4 explains how a private party can present a claim against trade measures from another state party.

Figure 4 - The intervention of private individuals in the MERCOSUR dispute resolution system



[26] MERCOSUR. Art. 1, Protocol of Olivos. February 18, 2002.
[27] MERCOSUR. Art. 39 a 44, Protocol of Olivos. February 18, 2002.

Source: Permanent Court of Revision Secretariat.[28]

A notable feature of MERCOSUR's DRS is the inability of individuals to access the system directly. Any dispute would ought to be presented to the GMC national section, which is the Ministry of Foreign Relations in Brazil's case.[29]

2.3.2 Urgent measures and advisory opinions

In exceptional cases of urgency when there is a risk of irreparable damage, States parties may appeal directly to the PCR requesting the adoption of an Urgent Measure. CMC/DEC No. 23/04 imposes four requirements for this situation[30]:

> a) that they are perishable, seasonal goods, or that due to their nature and / or characteristics have lost their properties, utility and / or commercial value in a short period of time, if they were unjustifiably retained in the territory of the country claimed; or goods that were destined to meet demands originating in crisis situations in the importing State Party;
>
> b) that the situation is caused by actions or measures taken by a State Party, in violation or non-compliance with the MERCOSUR regulations in force;
>
> c) that the maintenance of these actions or measures may produce serious and irreparable damage;
>
> d) that the disputed actions or measures are not the subject of an ongoing dispute between the parties involved.

The affected State Party may petition the PCR, which will decide as a whole body whether to grant the measure on an urgent basis, subject to due proportionality with the damage shown. The State party that feels injured by the decision, may request the PCR to reconsider the issue, which will analyze the request within 15 days from the notification. In case of non-compliance with the emergency measure dictated by the PCR, the Compensatory Measures of Chapter IX of the Protocol of Olivos would apply.

Another evolution in the MERCOSUR legal framework - which puts the PCR in line with other international courts - is the availability of Advisory Opinions under Article 3 of the Protocol of Olivos. This measure represents the progress made among member countries through CMC/DEC. No. 37/03[31].

Advisory Opinions are well-founded, non-binding, and non-mandatory pronouncements that the PCR can issue upon request. These opinions are based on questions of law regarding the interpretation and application of MERCOSUR's legal framework. Their primary objective is to standardize the application of MERCOSUR's rules in the territory of States Parties. Opinions may be requested on any legal issue included in the Treaty of Asunción, the protocols and agreements

[28] MERCOSUR. Permanent Court of Revision Secretariat. Dispute Resolution Mechanism.
[29] See supra note 6.
[30] MERCOSUR. CMC/DEC. No. 23/04.
[31] MERCOSUR. Art. 1.1, CMC/DEC. No. 37/03.

concluded within the Treaty, the Decisions of the CMC, the Resolutions of the GMC, and the Guidelines of the CCM.

All the States parties to the MERCOSUR, its decision-making bodies (CMC, GMC, and CCM), and the Superior Courts of the States Parties[32] with national jurisdiction may request consultative opinions from the PCR. There are two procedures for requesting Advisory Opinions. (1) [FIRST PROCEDURE]; and (2) [SECOND PROCEDURE].

The first provides for requests by States and MERCOSUR bodies. In the case of States Parties, the interested party submitting a draft request should take a draft to a joint meeting between representatives, which must agree on its content and present it collectively through MERCOSUR's Pro Tempore Presidency. In the case of the decision-making bodies, the request for an advisory opinion is made through a request that only needs to appear in the minutes of a respective meeting.

A second procedure foresees the request by the Superior Courts of Justice of the States parties. In these cases, the request must refer to a pending judicial process with a pertinent legal issue to the MERCOSUR's framework[33]. In such cases, the national Superior Courts are responsible for regulating the internal procedures for requesting Advisory Opinions from the PCR. In Brazil's case, the Supreme Court of Justice (STF) must approve any request. This understanding is embodied in article 7, VIII of the STF Internal Regulation[34].

Once an advisory opinion is requested, the PCR meets with all its members, who by common agreement designate an arbitrator who will act as the main rapporteur. Before analyzing the issues in detail, the PCR considers the issue's admissibility. Accepting the request, the PCR has 45 days to issue its Opinion, which must be approved by a majority of the board - dissenting votes are liable to be presented.

2.3.3 Forum selection

The disputes covered by the Protocol of Olivos can be brought to other forums at the choice of the plaintiff[35] - the main example being the WTO's DRS. If a State Party decides to take a dispute to a settlement system other than MERCOSUR, it must inform the other State of the chosen forum. The parties will then have a period of 15 days to agree on the selected forum. If an agreement is not reached, the complaining party may exercise its option, informing the respondent and the GMC of its decision.[36]

Once a dispute settlement procedure is initiated in MERCOSUR, none of the parties involved can resort to other forums on the same matter.[37] In the case of the WTO, a procedure is

[32] The Regulation for requesting Consultative Opinions is made by Organs superior bodies of each country. Argentina: Judgment No. 13/08 of the Supreme Court of Justice of the Nation; Brazil: Regimental Amendment No. 48/2012 of the Federal Supreme Court. Paraguay: Judgment No. 549 of the Supreme Court of Justice. Uruguay: Judgment No. 7604/07 of the Supreme Court of Justice. See: MERCOSUR. Opiniões Consultivas. 2021.
[33] MERCOSUR. Art. 4.1, CMC/DEC. No. 37/03. December 15, 2003.
[34] Supremo Tribunal Federal. Art. 7, VIII, Regulamento Interno. 2020.
[35] MERCOSUR. Art. 2, Protocol of Olivos. February 18, 2002.
[36] MERCOSUR. Art. 1.1, CMC/DEC. No. 37/03. December 15, 2003.
[37] This rule was challenged in the cases of Chickens and Tires, when cases were later brought to the WTO's DSS.

considered initiated when the complaining party requests the formation of a panel (special group) to analyze the issue.[38]

The rules to select a forum were not defined by the Protocol of Brasilia. It was through provisions from the Protocol of Olivos and the CMC/DEC No. 37/03 that the matter was settled. The difficulties of selecting a forum to discuss trade barriers were highlighted by two cases involving MERCOSUR countries: the 2000 Chickens case between Brazil and Argentina and the 2002 Papeleras case between Uruguay and Argentina explained below.[39]

2000-2003: Chickens' case[40]
• At issue:: Argentina accused Brazil of practicing dumping on its exports of poultry, applying an anti-dumping measure against its poultry imports from Brazil - amounting to 40% of the minimum exporting price registered.
• Brazil's representatives argued that no dumping was practiced and that Argentina's measure violated MERCOSUR's principle of free circulation of intra-bloc goods and the WTO rules on dumping.
• The case was brought to an AHAT, wherein Brazil was condemned as the arbitrators concluded that the antidumping right proposed by Argentina was valid and, therefore, would not infringe Mercosur's rule on the subject. For Brazilian parties, the decision was unfounded since there were formal issues hindering Argentinian claims.
• Dissatisfied, Brazil requested to establish a panel at the WTO to review the issue, disregarding the AHAT decision. Brazil won the case at the WTO, forcing Argentina to modify its legislation on the subject.
• The Chickens' case is seen as one of the dubious decisions made by an AHAT. It is often pointed as a case that discredited MERCOSUR's DRS, diminishing its legitimacy.

[38] MERCOSUR. Art. 1.4 CMC/DEC. No. 37/03. December 15, 2003.
[39] LUCENA, Andrea Freire. From MERCOSUR to the World Trade Organization: Brazil and the choices to resolve regional conflicts over anti-dumping law. UFG Magazine, j editionulho 2012. Year XIII No. 12. P. 182 Available in: < https://www.revistas.ufg.br/revistaufg/article/view/48429 >. Accessed: May 2, 2021.
[40] Brazil's House of Representatives. Report - Chickens. Available in: < https://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-mistas/cpcms/normativas/laudos.html/frangos>. Accessed: June 2, 2021.

2002 - 2010: Papeleras' case[41]
• At issue: Uruguay agreed to the installation of two pulp and paper factories on the banks of the Uruguay River without consulting Argentina, a neighboring country that manages issues pertaining to the river together with Uruguay.
• The population of Argentina began to criticize the project as there were issues regarding environmental preservation. Without being able to reach consensus between the countries, both countries began to block free passage between borders.
• Uruguay presented its claims against Argentina to an AHAT under MERCOSUR and Argentina sued Uruguay at the International Court of Justice (ICJ).
• The parties later reached a consensus: both understood that Uruguay should have consulted Argentina about the project; however, the increase of pollutants in the waters of the Uruguay River was not proven.
• The Papeleras' case increased the feeling that MERCOSUR's DRS was unable to solve regional issues.

The prolonged conflict and the use of external forums in both cases significantly undermined MERCOSUR's DRS credibility. In the following years, less cases were brought to arbitral tribunals and the PCR, and the system remained almost inactive. Although the forum selection issue was definitely settled under the Protocol of Olivos, governmental and nongovernmental interviewees highlighted how they remain fearful of the system's efficiency.

2.3.4 The Ad Hoc Arbitral Tribunals and the Permanent Court of Revision

The *ad hoc* arbitration tribunals (AHAT) were first previewed in the 1991 Protocol of Brasilia and were maintained by the 2002 Protocol of Olivos. They are the first instance for judicial analysis. AHATs are convened after a request from an interested party in a dispute; however, they can only be formed after the issue has been analyzed in bilateral consultations (a mandatory step to any development in the system). If the dispute is not resolved by pre-litigation procedures (intergovernmental negotiations and GMC intervention), any State Party involved in the dispute can decide to engage the SAM, which will proceed to form a AHAT. The AHAT has a period of 60 days, extendable for another 30 days, to present an arbitral award to the parties. Its awards are binding but are subject to a Revision Appeal to the PCR. As the name implies (*ad hoc*), it is a temporary tribunal created to analyze issues of fact and law.

[41] Brazil's House of Representatives. Understand the paper crisis. Available in: <https://www.camara.leg.br/noticias/82478-entenda-a-crise-das-papeleiras/>. Accessed: June 4, 2021.

AHATs are composed of three arbitrators appointed from the list of arbitrators submitted to the PCR Secretariat - each State Party must keep an updated list of twelve names with the Secretariat. Whenever a dispute arises, each State involved in the dispute proposes four candidates to join the AHAT. Of these candidates, two will be chosen (one from each party) and will join a neutral third party appointed by mutual agreement (not a national of any of the parties involved in the dispute). The third arbitrator is responsible for presiding over the AHAT.

In summary, the functions of the AHAT are:

1. Know and resolve disputes between States parties;
2. Define provisional measures in arbitration proceedings;
3. Resolve any unclear terms in an awards (*Revision Aclaratoria*);
4. Resolve disagreements about compliance with the report;
5. To issue an opinion on the compensatory measures adopted by the States Parties.

AHAT arbitrators receive fees in cases of performance in a dispute. Although not all arbitrators can be appointed on the same case, Article 19 of CMC/DEC. No. 37/03 lists the impediments for an arbitrator to be appointed:

a. To have intervened as a representative of any of the States parties to the dispute in the stages prior to the arbitration proceedings in matters or matters related to the object of the dispute;

b. To have any direct interest in the object of the dispute or its outcome;

c. To be currently representing or having represented during any period, in the last 3 years, individuals or legal entities with a direct interest in the object of the dispute or in its result;

d. Not have the necessary functional independence of the Central Public Administration or direct from the States parties to the dispute.

Above the Ad Hoc Tribunals, the Permanent Court of Revision (PCR) is the highest body for the analysis and settlement of disputes in MERCOSUR. It is a permanent court and can be called upon at any time. When analyzing an appeal, it can only issue a Decision on issues of law involved in the dispute. When triggered as a court of first instance, it can also analyze issues of fact; its decisions are mandatory for parties.

The PCR is composed of 5 arbitrators, one per each State. Arbitrators must be nationals of MERCOSUR States. In case of an even total number of arbitrators, an additional arbitrator will be appointed by consensus. Currently, the PCR has five arbitrators who are considered highly renowned jurists in MERCOSUR law. The position of arbitrator lasts two years and can be renewed for two more periods of the same length. PCR arbitrators receive fees in cases of performance in a dispute and when issuing an Advisory Opinion.

In the analysis of disputes involving two parties, the PCR must be composed of three arbitrators: a national from each party and a neutral third party who will act as chair. When the dispute involves more than two States Parties, the PCR is composed of all its arbitrators.

In addition to its judicial function, the PCR may be required to issue Advisory Opinions on the application of MERCOSUR's rules and legal framework as outlined in section 2.3.2. Advisory Opinions are an important instrument for the standardization of the law applied in the trade bloc. In summary, the functions of the PCR are:

1. Acting as a single instance, as agreed by the parties;

2. Revision of a AHAT awards requested by either party;

3. Resolve on exceptional urgency measures;

4. Resolutions on appeals to provisional measures that have been brought against a AHAT awards;

5. Resolve on unclear Decision terms (*Revision Aclaratoria*);

6. Resolves on divergence on compliance with the arbitration award, pronounced on the compensatory measures adopted and their compliance.

PART 3: COMPARING MERCOSUR'S DISPUTE RESOLUTION SYSTEM TO THE WTO'S AND OTHER TRADE BLOCS'

MERCOSUR's DRS is far from the only dispute settlement framework that exists in the international community. Other well-known systems include the World Trade Organization, the European Union, as well as the USMCA. Overall, MERCOSUR's DRS is heavily inspired by the WTO's, fostering State-parties action and intergovernmental consultations as an important means to solve eventual disputes. While the European Union system is hardly compared to MERCOSUR due to the different structure between both blocs, the USMCA's experience could offer interesting improvements to the South American bloc, especially regarding its binational panels to analyze anti-dumping measures.

3.1 MERCOSUR and the World Trade Organization

The WTO's dispute resolution mechanism is the most prolific system for solving commercial disputes between countries in the world. With more than 160 members and currently covering 98% of global trade, the WTO is the major organization for any discussion on international trade matters. The WTO's dispute resolution system is centered on its Dispute Settlement Body (DSB) - the WTO's body responsible for resolving disputes and implementing decisions. The DSB is composed of representatives from all member states. A State who feels harmed by another's trade practices can appeal to the WTO's DSR instead of directly retaliating against their peer.

The DSB can be triggered whenever a member recognizes that the action of another member nullifies or reduces the commercial gains of a previous WTO negotiation or disrespects any official WTO treaty. There are three main stages to the WTO's DRS: (I) direct consultations between parties; (II) adjudication by panels and, if applicable, by the Appellate Body; and (III) implementation and enforcement, which includes the possibility of countermeasures in the event of the losing party failing to implement the ruling.

The WTO's DRS shares many similarities with MERCOSUR's DRS. Overall, the WTO's is also centered in States' action and fosters dialogue through mandatory consultations between parties. Once a party brings a dispute to the WTO, parties have a mandatory 60 day period to negotiate before a panel request can be made. Every consultation is registered with the DSB Secretariat and made public. Although some bilateral negotiations remain undisclosed, the system promotes a healthy culture of consultations between States parties. The panel analyzes issues of fact and law - as does MERCOSUR's AHAT - and awards can be challenged and brought to the analysis of a permanent body (the PCR or the Appellate body). In general, most trade disputes are resolved at the bilateral consultation stage, as parties agree that the cost-benefit - politically and economically - is not advantageous to proceed into the other stages.

Nonetheless, the WTO system differs from MERCOSUR on three main aspects. First, the panels must be composed *ad hoc* for each individual dispute as there are no permanent panels nor

permanent panelists in the WTO.[42] Parties choose the panelists for each case based on names suggested by the DSB. Second, a panel's decision must be brought to the DSB's consideration which ought to approve or dismiss it - a difference to the role of the GMC which mediates a political solution. The DSB decides based on its experts' analysis and in a "negative" consensus procedure - i.e., a panel's decision is rejected only when all representatives vote in that way. Finally, the DSB's Appellate Body is composed of judges with great knowledge specifically on trade matters, not integration law.

The success of the WTO's DSB shows how bilateral consultations can be effective to solve disputes. Although panels are extremely important, countries can reach a consensus through a healthy culture of negotiation. The WTO experience suggests many possible avenues of reform for MERCOSUR's DRS. The NCI could propose that MERCOSUR establish panels on an *ad hoc* basis, replacing the current procedure for permanent lists. Additionally, it could establish that a panel decision must be approved by the GMC on a positive/negative consensus; thus, removing the political nature of its role. Finally, the Secretariat of MERCOSUR could publish details regarding consultations, promoting the DRS' transparency and pushing for a culture of healthier commercial consultations.

3.2 MERCOSUR and the United States-Mexico-Canada Agreement (USMCA)

The USMCA dispute resolution system incorporated the major legal characteristics of the previous DRS under the North American Free Trade Agreement (NAFTA). The current system is composed of three major avenues for solving a dispute: (I) investor-state disputes (ISDS) arbitration (USMCA Chapter 8); (II) binational panel review of national administrative agency rulings under domestic anti-dumping (USMCA Chapter 10); and (III) state-to-state disputes challenging another party's application or interpretation of the agreement (USMCA Chapter 31).[43]

In the case of USMCA Chapter 8, an investor can request an arbitral review whenever it feels prejudiced by a state policy . Although the ISDS system was confirmed under the USMCA framework, the new agreement allowed for countries to opt out of it - which Canada did completely and Mexico restricted its use[44]. That means that, from 2022, for Canadian enterprises investing in Mexico and the US, along Mexico and US-based companies investing in Canada, no ISDS enforcement protections will be applied. The ISDS system is present in many Bilateral Investment Treaties (BITs); however, Brazil has had a historical position against it.

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[42] WTO. 1994 Marrakesh Treaty, Annex 2. Art. 8.

[43] Simon Lester. Knowing your NAFTA Dispute Chapters. CATO Institute. July 26, 2017. Available at: <https://www.cato.org/blog/knowing-nafta-dispute-chapters-11-vs-19-vs-20>.

[44] A limited group of potential ISDS claims against Mexico or Mexican government entities "relating to covered government contracts" will enjoy ISDS protection. However the list is narrow: activities with respect to oil and natural gas, power generation services, supply of telecommunications and transportation services, the ownership or management of roads, railways, bridges, or canals. See: David A. Gantz. The United States-mexico-Canada Agreement: Settlement of Disputes. Rice University's Baker Institute for Public Policy. May 2, 2019. P. 50. Available at:<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3389420>.

The USMCA Chapter 10 panel is a binational option for countries to discuss the implementation of anti-dumping and subsidies/countervailing duty determinations by trade remedies authorities, such as the US Department of Commerce and the US International Trade Commission. It works as an alternative to federal court review and has been an important mechanism for USCMA parties to address national agencies for anti-dumping policies. The panel is seen as a good strategy and has been highly used in the last two decades.[45] Without Chapter 10, the legal recourse for managing these policies would be through the domestic legal system. Chapter 10 specifies that a binational panel will hear the case and act as a court arbitrating the dispute.

Chapter 31 of the USMCA is the last avenue for solving a dispute. It provides for a State-to-State (SDS) mechanism. In this case, whenever a party feels harmed by another state's interpretation of an agreement under the USMCA framework, it can request the formation of a panel of experts to solve it. The procedure is similar to that from MERCOSUR: countries initiate mandatory bilateral consultations and if the dispute is not solved then a panel of five members is established to analyze questions of fact and law. The Chapter 31 system has faced challenges as the US government has indefinitely delayed appointing individuals to the SDS roster - as it has done with the WTO's Appellate Body. Moreover, it appears that all USMCA parties appear to have generally preferred the WTO's dispute settlement process to its own for the review of trade disputes among them.[46]

The USCMA agreement provides interesting examples on how bilateral issues can be solved through different and more flexible systems. For the NCI's inquiry, MERCOSUR could consider implementing Chapter 8 (ISDS) and Chapter 10 (a binational panel system to address national anti-dumping measures without political aspects involved). However, Chapter 8 disregards the historical position against an ISDS mechanism in Brazil.

3.3 MERCOSUR and the European Union

The European Union was created in 1992 by the Maastricht Treaty and provides its members with an unique experience of integration that goes beyond purely economic issues. EU integration includes the free transit of people, services, and foreign capital. Since every member's trade policy is conducted jointly by the EU's responsible bodies, international disputes usually treat the EU as a group and not individual members. In these situations, the EU usually pursues its claims through the WTO dispute settlement system

All States parties to the EU have given the Court of Justice of the European Union powers to resolve disputes arising from the integration process[47]. The CJEU has supranational judicial powers to resolve any disputes through judicial procedures, in addition to a voluntary system that allows consultations on the interpretation of the bloc's normative framework. Thus, the CJEU

[45] David A. Gantz, J.D. Addressing Dispute Resolution Institutions in a NAFTA. Mexico Center. P. 12 (2018).
[46] David A. Gantz. The United States-mexico-Canada Agreement: Settlement of Disputes. Rice University's Baker Institute for Public Policy. May 2, 2019. P. 6. Available at:<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3389420>.
[47] Court of Justice of the European Union. synthesis. Available in: < https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_pt>. Accessed: June 7, 2021.

resolve disputes and renders Consultative Opinions, both which are mandatory[48]. This is a key difference to MERCOSUR's non-mandatory Advisory Opinions. The CJEU also has its own budget, which allows for more effective action in cases that are brought to its discretion[49]. Financial independence gives the CJEU stronger powers to enforce its decisions.

Note, since December 2019, the 28 EU member states decided to terminate all intra-European bilateral investment treaties (BITs). This decision eliminated all possibilities for European investors to present claims directly against European states in international arbitral tribunals.[50]

Chart 2 displays a comparison between the DRS from MERCOSUR, the USCMA, and the European Union.

Chart 2 - Comparison between MERCOSUR, USMCA and European Union

	MERCOSUR	**USMCA**	**European Union**
Deciding body	Permanent Court of Review	Ad hoc basis	Court of Justice of the European Union
Standing	States	States and Individuals	States and Individuals
Dispute avenues	Consultation, mediation and arbitration	ISDS, SDS, binational panels	Voluntary and contentious jurisdiction
Advisory opinions	Non-binding advisory opinion	-	Binding advisory opinion
Budget	PCR does not have budgetary autonomy	-	CJEU has its own budget and independence

Source: Made by the authors.

[48] Eur-lex. European Union Law. Art. 267. Available in: < https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX:12016E267>. Accessed: June 7, 2021.
[49] VIEIRA, Luciane Klein. ARRUDA, Elisa. The relationship between the degree of economic integration and the dispute settlement system: a comparative study between the European Union and Mercosur. Available in: < https://www.publicacoesacademicas.uniceub.br/rdi/article/view/5160>. Accessed: June 7, 2021. P. 299.
[50] Christopher A. Casey. The End of Intra-EU Investor-State Dispute Settlement (ISDS): Implications for the United States. February 13, 2019. https://fas.org/sgp/crs/row/IN11041.pdf

3.4 Where are conflicts being solved: MERCOSUR and the USMCA

The following section analyzes empirical and statistical data regarding MERCOSUR's and the USMCA member disputes. Anecdotal evidence frequently suggests MERCOSUR disputes are being resolved at the WTO. This section explores how and where member states have been solving their disputes. It goes a step further by then comparing results between blocs and to the WTO.

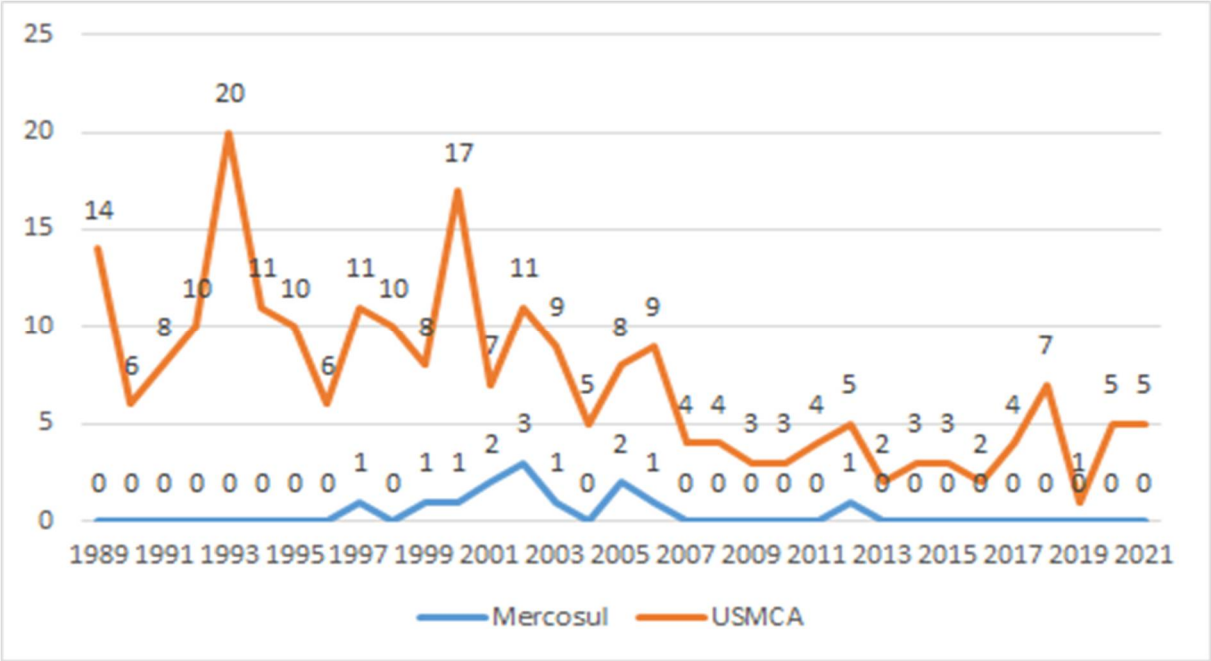
Although the comparison with the EU in terms of procedures is important to the report, the authors have not looked at EU data as it would not be useful. The level of integration is very different from the other two blocs, representing an inadequate parallel. Furthermore, the European Union litigates in the WTO as a sole entity and this prevents a statistical analysis of cases among the member countries in the organization. Therefore, the comparison will be made between MERCOSUR and USMCA.

The first point of comparison between MERCOSUR and USMCA is the total number of cases. Since the 1991 Treaty of Asunción, the South American mechanism has had ten (10) arbitral awards under Protocol of Brasilia and two arbitral awards under the Protocol of Olivos - the last one in 2006. The Permanent Court of Revision (PCR) has issued six reports between 2005 and 2012, five of them regarding revisions of other cases. Since 2012 no complaints have been presented to the PCR.[51] It is possible to consider sixteen (16) disputes solved inside the mechanism, twelve (12) regarding trade issues, one concerning political disputes and three others being advisory opinions.

The USMCA experience is very different. Since the beginning of the North American bloc, 232 cases have been presented in its mechanisms (ISDS, SDS, and binational panels)[52]. The chart below traces the volume of cases in each bloc through the years.

Chart 3 - Number of cases between MERCOSUR and NAFTA/USMCA (1989-2021)

[51] A list of these cases can be found in annex !. For further details see the PCR website.
[52] See details on https://can-mex-usa-sec.org/secretariat/report-rapport-reporte.aspx?lang=eng



Source: Made by the authors.

MERCOSUR's system has resolved less cases and most of them between the years of 1999 and 2006, facing a full paralysis after that period. NAFTA/USMCA, on the other hand, has solved a significant number of cases since its beginning and the number is well balanced throughout the years. Nevertheless, the majority of them concern investor-state disputes and the binational panel mechanism to solve anti-dumping disputes (USMCA Chapters 8 and 10). Both mechanisms are not present in MERCOSUR's DRS.

Therefore, to make a fair comparison between the blocs and the members' disputes in WTO, the next table considers only State-State disputes. In this case, three (3) disputes under Chapter 20 of NAFTA, five (5) cases under Chapter 18 of FTA[53], and two (2) cases under USCMA's chapter 31, totaling ten (10) disputes. Table 4 compares the number of cases solved within the two blocs, and the number of disputes presented in the WTO by these same countries against each other.

Table 4 - Cases between MERCOSUR and NAFTA/USMCA members within each bloc's DRS and at the WTO

Trade Bloc	No. of cases presented within the bloc's mechanism	No. of cases presented by blocs' members against each other in the WTO/DSB (trade remedies)	No. of cases presented by blocs' members against each other in the WTO/DSB (other disputes)
MERCOSUR	13	3	0

[53] These cases refer to the first FTA signed between the United States, Mexico and Canada before NAFTA.

NAFTA/ USMCA	10	20[54]	24[55]

Source: Made by the authors

In the WTO, USMCA parties have registered 44 disputes in total[56], which shows that Mexico, Canada and the USA appear to have a preference towards the WTO system to settle their internal disputes. The NAFTA/USMCA's mechanism seems to be more used for investor-state disputes and the binational panel for antidumping measures, although almost half of the disputes in the WTO of the USMCA parties refer to trade remedies.

However, when analyzing the cases in which Argentina, Brazil, Paraguay, and Uruguay faced each other in the World Trade Organization, there are only three cases between MERCOSUR members - and these only concern Argentina and Brazil. The three cases were: DS355 Brazil - Anti-Dumping Measures on Imports of Certain Resins from Argentina; DS241 Argentina - Definitive Anti-Dumping Duties on Chickens from Brazil; DS190 Argentina - Application of transitional safeguard measures to certain imports of cotton fabrics and their blends from Brazil[57], all concerning trade remedies.

The data refutes the commonly held belief that the MERCOSUR disputes are being resolved at the WTO. Instead, it is more accurate to claim that South American countries are seeking political venues to solve their disputes. Since in MERCOSUR any trade dispute is seen to create political conflicts, countries have preferred to not discuss trade practices, reducing the effectiveness of the bloc's integration process. Any unfounded trade practices ought to be discussed between States parties in order to increase the economic integration between countries.

[54] DS49, DS101, DS132, DS203,DS221, DS234, DS247, DS264, DS277, DS281, DS282, DS295, DS310, DS325, DS338, DS344, DS534, DS535, DS550, DS551

[55] DS31, DS103, , DS144, DS167, DS170, DS180, DS194,DS204, DS236, DS257, DS276, DS280, DS308, DS311, DS357, DS381, DS384, DS386, DS505, DS520, DS531, DS533, DS557, DS560

[56] Available on WTO's page: https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

[57] Available on WTO's page: https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

PART 4: DIAGNOSIS AND PROPOSALS

This section seeks to answer how to improve MERCOSUR's DRS in order to make it more relevant. Overall, the research showed that MERCOSUR's disputes are not brought neither to the bloc's DRS nor to the WTO's. MERCOSUR members have fostered diplomatic solutions over judicial ones since the establishment of the trade bloc.

As reported by interviewees, there is a diplomatic consensus between States parties in order to avoid proceeding with trade disputes in international venues. However, MERCOSUR's diplomatic channels have not been used to solve disputes. Another reason pointed out by research seems to be the perceived asymmetry between States parties, especially regarding Brazil's economic might. Government officials mentioned that Brazil has a different goal regarding MERCOSUR than Argentina, Paraguay, and Uruguay, political influence in South America. Thus, engaging in disputes could highlight disparities and trade contradictions between nations, potentially escalating bilateral tensions. This generates a feedback loop that jeopardizes the DRS: the system is not accessed, therefore, it does not build case law. This was pointed out as a source of uncertainty for parties that could prevent countries from presenting new claims.

As shown by research, claims are rarely brought to the attention of the bloc's DRS. The report's results show two main reasons that explain why the DRS has been seldom used by parties: a culture of solving disputes through political means and a DRS with a few ineffective procedural guidelines.[58] Although the largest identified issue relates to the institutional culture, there are some reforms that could improve the DRS procedure. It is important to highlight that no major flaw in the system was detected, but the proposals for reform could increase the system's efficiency as well as renew its relevance in South America.

This report uncovers two cultural and eight procedural proposals for reforms that could remove barriers and facilitate access, improve disclosure and therefore confidence, and enrich the quality of the decisions. All these actions could consolidate MERCOSUR's mechanism as a technical body capable of settling complex disputes between the States parties. It is important to highlight, though, that they are based on an ideal scenario and the feasibility and political barriers that could hinder the implementation of these reforms were ignored.

The next section presents suggestions focused on mitigating the cultural issues surrounding MERCOSUR's DRS and improving its procedure.

4.1 Proposals Regarding MERCOSUR's DRS Culture and Procedure

The diplomatic guideline and political interests are a grey area and hard to circumvent, since they depend on a multitude of factors. Nonetheless, it is possible to propose a few actions

[58] In addition to documentary and bibliographic research, this report refers to information gathered during interviews with officials from Brazil's Ministry of Foreign Affairs and MERCOSUR Secretariat, that have provided important insights for the group's analysis. Nevertheless, these interviews will not be referred formally, because of non-disclosure terms established with the interviewees.

that could improve the relationship between the private sector and the government institutions responsible for deciding to present a claim.

It is possible to also take some actions to improve recognition of the system and to try to revive it before thinking of more structural changes. Structural changes take time to be implemented. Ergo, this report proposes immediate actions at the outset and then makes suggestions for structural reform.

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4.1.1 Implement a program similar to 'Sem Barreiras'

A first proposal would be to create internal mechanisms in Brazil to foster the dialogue between the private sector and the Ministry of Foreign Affairs, which is responsible for presenting claims to MERCOSUR's DRS. A possible inspiration could be the 'Sem Barreiras' (*No Barriers*) initiative.

'Sem Barreiras' is an electronic system for monitoring trade barriers, created as a channel for dialogue with the Federal Government, to deal with external measures that hinder the access of Brazilian exports to international markets.[59] The system makes it possible to monitor, in a transparent way, the actions taken by the Government to eliminate these measures or reduce their effects.

A similar system could be installed so the national industry can monitor the diplomatic negotiations about a specific complaint on trade barriers or other disputes against MERCOSUR`s parties. The same 'Sem Barreiras' system could be expanded by creating a specific channel on MERCOSUR with the Ministry of Foreign Affairs. This action would improve intergovernmental negotiations. The system could register any claims presented to Itamaraty and disclose it to the public. The increased transparency would encourage the government to engage in MERCOSUR's DRS if intergovernmental negotiations are ineffective. This would increase the Ministry of Foreign Affairs` accountability and prevent claims from private actors being forgotten or neglected because of political diplomatic guidelines.

4.1.2 Create multiple channels of dialogue with stakeholders

Another important topic raised during conversations was that, once there is a political guideline to use the mechanism as little as possible, the mechanism becomes underfunded and is not a priority for government investments. This limits the possibility of enhancing the system and making it more institutionally structured.

One important possible reason for the limited use of MERCOSUR`s DRS is the lack of confidence and knowledge on the system. This year, MERCOSUR's 31st anniversary, the PCR Secretariat prepared public events about the bloc's actions, possibilities and importance for the region. They held discussions on the system's credibility in the academic field. However, it is crucial to reach other stakeholders. It is very important to increase the dialogue about MERCOSUR's mechanism through multiple channels. Increasing awareness would make more

[59] https://sembarreiras.gov.br/painel

stakeholders aware of the system's relevance, which would hopefully lead to an increase in use. Potential channels include events, seminars, training programs, between States parties, the judiciary and the private sector.

Another important action is to increase the awareness of the national judiciary about the possibility of using advisory opinions, which, although not binding, could have a strong moral effect on national judges and political bodies.

4.1.3 Select Ad Hoc Arbitrators for each case

To address the lack of confidence in the system, one important modification that would directly impact on the quality of the awards is to change the way the list of Ad Hoc Arbitrators is selected. Some of the old decisions in MERCOSUR`s system were questioned by stakeholders since the arbitrators were not experts on the technical issues involved.

This proposal focuses on leveraging the expertise of available arbitrators rather than the restrictive permanent list. This way, expert arbitrators can be selected specifically for each matter. Such an approach can prevent controversial and poor decisions.

4.1.4 Propose Brazilian arbitrators in consultation with the private sector

One first step towards enlarging the relevance of the system, that relates to the proposal of organizing multi stakeholder events, is to inform the private sector about the importance of MERCOSUR and its system, and how they can seize the system. Nevertheless, this has to be accompanied by a more relevant participation of the private actors in the process.

Building on the previous proposal about expert arbitrators, this proposal hopes to actively engage the private sector in the MERCOSUR DRS. The Brazilian government should consult with the private sector when developing the list of proposed arbitrators. Such an approach would leverage the private sector's knowledge, help the government improve the DRS, and hopefully instill a greater confidence in MERCOSUR's system.

4.1.5 Reform deadlines within the procedure

As presented in section 2, each phase of MERCOSUR's DRS has a specific deadline. The diplomatic phase, which involves State-to-State negotiations is currently 15 days and the political phase, involving the GMC consultation is set for 30 days. Research showed that these deadlines are too short, because diplomatic negotiations could take a lot of time. These short periods can discourage countries to present official claims, and to instead pursue informal intergovernmental negotiations that don't necessarily have a fix deadline.

A worthwhile reform, inspired by the WTO's DRS, is to expand the deadline for the first phase of the MERCOSUR process to 60 days, with flexibility. However, the claim must be registered and tracked from the moment negotiations start. This longer deadline gives States more time to resolve the matter amicably. Registering and tracking the dispute forces States to keep

others informed of the negotiations and explain why disputes are not continuing through the system.

This reform would make it more attractive to State-parties and to the private sector to engage in negotiations inside the system. As for the political phase, the timeline could be enlarged to 90 days, with a debarment clause well established so this period doesn't last for a long time.

4.1.6 Improve disclosure and tracking of claims inside the mechanism

Currently, a claim is only disclosed as it enters the GMC phase – the second phase of MERCOSUR's DRS, the political phase. Nevertheless, it is important to guarantee transparency in the first phase of the process as highlighted in the previous proposal. That way, the private sector and other interested stakeholders can keep track of the on-going negotiations and pressure on the government to advance the dispute.

A simple solution exists: improve the information available on the website. Adding a system that allows a claim to be tracked from the moment it enters the system allows all interested parties to follow the case. This reform complements the previous suggestions that focused on transparency in the intergovernmental negotiations (before a claim is presented to the system) and reforming deadlines.

4.1.7 Reform the Advisory Opinion's procedure

A very interesting tool of MERCOSUR's system, that was described in section 2, are the Advisory Opinions. Although not binding, this kind of pronunciation from the PCR helps the mechanism to consolidate case law, and can have a persuasive effect on States and national judges. Nevertheless, this tool is seldom used[60]

To access this tool, it is important that the claimant of a legal action in the countries demand for an advisory opinion, which means they have to know and understand this type of opinion is available. Also, the national judge must have the knowledge about this procedure and the importance of the content of the opinion. However, this possibility presents some bureaucratic obstacles that should be removed to enable a wider use of the system. Right now, the Permanent Court of Revision is only able to issue an advisory opinion regarding on-going cases in the national judiciary. For that, a claim has to be presented first. Sometimes, it is not practical for the parties to present an official demand, even if they would like to receive an advisory opinion.

One fundamental way to improve the MERCOSUR system is by expanding the possibility of the Permanent Court of Revision to issue advisory opinions beyond on-going cases. Enabling a greater availability of advisory opinions allows the system to consolidate a larger body of case law and interested parties can have an expert's analysis without having to necessarily access the

[60] See Annex 1.

judiciary. Furthermore, once enlarged ~~t~~, it is possible to advocate for making these advisory opinions binding, as in the EU system.

4.1.8 Remove the necessity of STF`s authorization for advisory opinions

Another obstacle that interferes with the process of issuing advisory opinions is the need for authorization by the Brazilian Supreme Court (STF). This makes the process much more slow and can discourage parties or the judge to use this tool.

Therefore one option would be to allow for regional tribunals to directly demand for the advisory opinions, removing the necessity of the STF's pronunciation and regardless if the claimant asked for it or not. This would also help to enlarge the body of case law of the MERCOSUR's mechanism and to renew the system again.

4.1.9 Create a new instrument for private parties to access the mechanism

Currently, the only way private parties can access the mechanism to present their claims is through the representation by national sections, in the case of Brazil, the Ministry of Foreign Affairs. This hinders any "direct access" and leads to the same problems regarding political and diplomatic guidelines.

A far easier method would be to create a new instrument of Private Claim so private parties can present their demands directly to GMC. This would remove the need of private actors to be represented by national sections inside the mechanism and could help to circumvent the political interests around submitting a case.

4.1.10 Create a binational panel to analyze antidumping national decisions

Analyzing the data collected, it was possible to observe that the majority of the decisions issued by the USMCA's dispute settlement system are the ones from the binational panels regarding trade remedies. Since this is one of the major problems for the MERCOSUR's countries as well, as we can perceive from the cases in the bloc and in the WTO, the South American DRS could benefit from a similar instrument.

This last proposal is to amend the MERCOSUR's agreements in order to create a procedure similar to Chapter 19 of NAFTA, or Chapter 10 of USMCA, the binational panel to analyze the national decisions regarding anti-dumping. This could enable the MERCOSUR's system to act more effectively inside State-parties and to enhance its reliability. More importantly, it would make the bloc's system more relevant and more useful to Brazilian's industry.

Finally, it is possible to consider that MERCOSUR member states can retaliate against trade barriers applied by another member in the event that the settlement is not pursued through institutional means.

PART 5. CONCLUSION

The importance of MERCOSUR for the national industry is unquestionable. However, there are some obstacles that hinder the good use of its institutionality and the mechanisms the bloc offers, especially the dispute settlement system. Based on the premise of the low or no use of this system in recent years, the TradeLab Clinic developed research under the methodology of bibliography review, quantitative and qualitative document analysis and interviews.

The results showed important structural differences between the main regional blocs, namely MERCOSUR, USMCA and EU. The numbers also point to an important difference in the use of dispute settlement mechanisms by the MERCOSUR and USMCA (formerly NAFTA) and WTO.

After confirming the premise, it was possible to diagnose that the low utilization of the South American bloc's system is multifactorial, having cultural and procedural reasons. Using the other blocks as inspiration, the research led to ten concrete proposals so the beneficiary can develop an internal strategy closely to the government Ministries and other important players focusing on enlarging the usage of MERCOSUR's system and having their demands satisfied.

These proposals are divided into those aimed at solving more cultural and/or political problems, and others aimed at improving the mechanism, procedure and structure. Although some suggestions may appear too ambitious at first, the report allowed itself to propose structural and deep reforms that could become a real asset to the system and national industry.

It is essential to understand the system's importance and the possible improvements that could help it achieve greater effectiveness. The hope is that these suggestions, if/when implemented, would help enlarge MERCOSUR's case law and, thus, generate new confidence in its mechanisms, recovering its relevance and utility for national sectors.

ANNEX I - Cases submitted to the MERCOSUR dispute resolution system

Award	Court	Year	Protocol
Award 01 for the dispute over the communications No. 37, of December 17, 1997 and No. 7, of February 20, 1998 of the Department of Foreign Trade Operations (DECEX) of the Secretariat of Foreign Trade (SECEX): application of restrictive measures to reciprocal trade;	Ad Hoc Tribunal	1997	Protocol of Brasilia
Award 02 to decide on the **Argentine Republic's** complaint to the **Federative Republic of Brazil**, on subsidies for the production and export of pork;	Ad Hoc Tribunal	1999	Protocol of Brasilia
Award 03 to decide on the application of safeguard measures on textile products (RES. 861/99) of the Ministry of Economy and Works and Public Services;	Ad Hoc Tribunal	2000	Protocol of Brasilia
Award 04 to decide on the dispute between the **Federative Republic of Brazil and the Argentine Republic** on the application of anti-dumping measures against the export of whole chickens from Brazil	Ad Hoc Tribunal	2001	Protocol of Brasilia
Award 05 to decide on the dispute presented by the **Eastern Republic of Uruguay to the Argentine Republic** regarding restrictions on access to the Argentine market for bicycles of Uruguayan origin;	Ad Hoc Tribunal	2001	Protocol of Brasilia
Award 06 to decide on the dispute presented by the **Eastern Republic of Uruguay to the Federative Republic of Brazil** regarding the			

import ban on remodeled tires (remolded) coming from Uruguay;	Ad Hoc Tribunal	2002	Protocol of Brasilia
Award 07 to decide on the dispute presented by the **Argentine Republic to the Federative Republic of Brazil** about obstacles to the entry of Argentine phytosanitary products in the Brazilian market.	Ad Hoc Tribunal	2002	Protocol of Brasilia
Award 08 to decide in the dispute between the **Republic of Paraguay and the Eastern Republic of Uruguay** on the application of "IMESI" (Internal Specific Tax) to the sale of cigarettes;	Ad Hoc Tribunal	2002	Protocol of Brasilia
Award 09 to decide in the dispute between the **Argentine Republic and the Eastern Republic of Uruguay** about the incompatibility of the regime for stimulating the industrialization of wool, granted by Uruguay established by Law No.. 13,695 / 68 and complementary decrees with MERCOSUR regulations that regulate the application and use of incentives in intra-zone trade;	Ad Hoc Tribunal	2003	Protocol of Brasilia
Award 10 to decide on the dispute between the **Eastern Republic of Uruguay and the Federative Republic of Brazil** on discriminatory and restrictive measures to trade in tobacco and tobacco products.	Ad Hoc Tribunal	2005	Protocol of Brasilia
Award to decide on the dispute presented by the Oriental Republic of **Uruguay** to the **Argentine Republic** on "Omission of the Argentine State in Adopting Appropriate Measures to Prevent and/or Stop the Impediments Imposed on Free Circulation for the Barriers in Argentine Territory of Access Roads…";	Ad Hoc Tribunal	2006	Protocol of Olivos

Award to decide on the dispute presented by the Oriental Republic of **Uruguay** to the **Argentine** Republic on "Prohibition on the Importation of Refurbished Tires";	Ad Hoc Tribunal	2005	Protocol of Olivos
Report Nº 01/2012: "Procedimento Excepcional de Urgência solicitado pela República do Paraguai em relação à sua participação nos Órgãos do Mercado Comum do Sul (MERCOSUR) e à incorporação da Venezuela como Membro Pleno".	Permanent Court of Revision	2012	Protocol of Olivos
Opinião Consultiva Nº 01/2007: "Norte S.A. Imp. Exp. c/ Laboratórios Northia Sociedade Anônima, Comercial, Industrial, Financeira, Imobiliária e Agropecuária s/ Indenização de Danos e Prejuízos e Lucro Cessante", petição encaminhada pela Corte Suprema de Justiça da República do Paraguai, a respeito dos autos do processo do Juizado de Primeira Instância no Cível e Comercial da Primeira Vara da jurisdição de Assunção.	Permanent Court of Revision	2007	Protocol of Olivos
Opinião Consultiva Nº 01/2008: "Sucessão Carlos Schnek e outros com o Ministério de Economia e Finanças e outros. Cobrança de pesos", petição encaminhada pela Suprema Corte de Justiça da República Oriental do Uruguai a respeito dos autos do processo do Juizado de Direito no Cível da 1ª vara IUE 2-32247/07.	Permanent Court of Revision	2008	Protocol of Olivos
Opinião Consultiva Nº 01/2009: "Frigorífico Centenário S.A. c/ Ministério de Economia e Finanças e outros. Cobrança de pesos. IUE: 2-43923/2007". Petição encaminhada pela Suprema Corte de Justiça da República Oriental do Uruguai a respeito dos autos do processo do Juizado de Primeira Instância da 2ª Vara Cível.	Permanent Court of Revision	2009	Protocol of Olivos

Source: Made by the authors