

The Judicial System of Mercosur: Is there Administrative Justice?²

I - Introduction

The objective of this paper is to analyze the judicial system of Mercosur and the existence (or not) of administrative justice that is carried out within its jurisdiction. However, before talking about the judicial system of Mercosur itself, it is useful to give an overview of Mercosur and its institutions.

Mercosur, or *Mercado Común del Sur* (Common Market of the South), was created in 1991 by the Treaty of Asunción,³ signed by four South American countries: Brazil, Argentina, Uruguay and Paraguay,⁴ which are its current Member States.⁵

Taking into account these four Member States, Mercosur has continental dimensions (around 12 million km²), a considerable population of more than 200 million people, and a Gross Domestic Product (GDP) “of about 1 trillion dollars, which makes it the fourth largest regional economy in the world after NAFTA, the European Union and Japan.”^{6/7}

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² I would like to thank Professor Marcílio Toscano Franca Filho for his invaluable suggestions and comments.

³ See <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm>. (19/11/07)

⁴ Venezuela signed a protocol on July 2006 confirming the intention to become a member state of Mercosur but it will depend on the approval of the Parliaments of the four current Member States what has not happened yet. See ARTIGA, Álvaro (Coord.). *La integración regional y comercial en América del Sur. Estudios e Investigaciones n°54. Notre Europe – Etudes & Recherches*. p. 55. Available at http://www.notre-europe.eu/uploads/tx_publication/Etud54-es-Ameriquedusud_01.pdf (24/11/07)

⁵ VIGEVANI, Tullo et al. Mercosur: Democracy and Political Actor. In DOMÍNGUES, Francisco; OLIVEIRA, Marcos Guedes de (eds.). *Mercosur: Between Integration and Democracy*. Bern: Peter Lang AG, 2004. P. 103. “(...) the Ouro Preto Protocol, signed on 17 December 1994, - that formally instituted the incomplete ‘Customs Union’ thus bringing an end to the transition period for the establishment of the common market (...)”

⁶ DOMÍNGUES, Francisco; OLIVEIRA, Marcos Guedes de (eds.). *Mercosur: Between Integration and Democracy*. Bern: Peter Lang AG, 2004. p. 11.

⁷ SOUZA JUNIOR, Lauro da Gama e. *Os Princípios do UNIDROIT Relativos aos Contratos Comerciais Internacionais e sua Aplicação nos Países do MERCOSUL*. In *Revista de Direito da Associação dos Procuradores do Novo Estado do Rio de Janeiro*. Vol. XV – *Direito Internacional*. Lúmen Júris: Rio de Janeiro, 2005. p. 164. “Nesses dez anos de aniversário do Tratado de Assunção, MERCOSUL pode festejar a eliminação

According to the Ouro Preto Protocol (Article 1),⁸ which “both confirmed the bases and the philosophy of the institutional structure (set up for the transition period by the Asunción Treaty), and introduced some institutional innovation”,⁹ Mercosur is composed by the Common Market Council (CMC - *Consejo del Mercado Común*), the Common Market Group (CMG - *Grupo Mercado Común*), the Mercosur Trade Commission (MTC - *Comisión de Comercio del MERCOSUR*), the Joint Parliamentary Commission (JPC - *Comisión Parlamentaria Conjunta*), the Economic-Social Consultative Forum (ESCF - *Foro Consultivo Económico-Social*) and the Mercosur Secretariat¹⁰ (MS - *Secretaría del MERCOSUR*),¹¹ but only the three first organs have decision-making powers (Article 2 of the Ouro Preto Protocol).¹²

After the Ouro Preto Protocol, some modifications were made to the Mercosur’s institutional structure. Four new organs were created: a) The Mercosur Parliament (MP – *Parlamento del Mercosur*) by the Mercosur Parliament Constitutive Protocol (*Protocolo Constitutivo del Parlamento del Mercosur*),¹³ which was implemented on 6 December 2006 and, since then, has substituted the Joint Parliamentary Commission;¹⁴ b) the Mercosur Center of the Promotion of Rule of Law (MCPRL - *Centro Mercosur de Promoción de Estado de Derecho*) by Decision 24/04 of the Common Market Council;¹⁵ c) the Administrative-Labour Court (ALC – *Tribunal Administrativo-Laboral*) by Resolution 54/03 of the Common Market Group;¹⁶ and d) The Permanent Review Court (PRC – *Tribunal Permanente de Revisión*) by the Olivos Protocol.¹⁷

de 95% das barreiras tarifárias ao comércio intra-regional e, apesar da crise argentina, conta com o crescimento das trocas entre seus membros e associados, e o aprofundamento da integração.”

⁸ See <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm>. (19/11/07)

⁹ PENA, Celina; ROZEMBERG, Ricardo. Mercosur: A different approach to institutional development. FOCAL – Canadian Foundation for the Americas - Policy Paper. Available at <http://www.focal.ca/pdf/mercotur.pdf> (20/11/07)

¹⁰ By the Decision 30/02 of the Common Market Council, the Mercosur Secretariat was converted from an Administrative Secretariat into a Technical Secretariat with some changes in its structure. Available at http://www.mercosur.int/msweb/portal%20intermediario/es/archivos/Dec_030_002.pdf (24/11/07)

¹¹ MEDEIROS, Marcelo de Almeida. Multi Level Governance and the Problem of Balance within Mercosur. In DOMÍNGUES, Francisco; OLIVEIRA, Marcos Guedes de (eds.). Mercosur: Between Integration and Democracy. Bern: Peter Lang AG, 2004. p. 91.

¹² See BAPTISTA, Luiz Olavo. Mercosur, its institutions and juridical structure. Foreign Trade Information System. Available at http://ctrc.sice.oas.org/geograph/south/mstit2_e.pdf (20/11/07)

¹³ See http://www.parlamentodelmercotur.org/archivos/PROTOCOLO%20PARLAMENTO_ES.doc (20/11/07)

¹⁴ See <http://www.parlamentodelmercotur.org/index1.asp#> (20/11/07)

¹⁵ See <http://www.mercotur.int/msweb/portal%20intermediario/es/index.htm> (20/11/07)

¹⁶ See <http://www.mercotur.int/msweb/portal%20intermediario/ES/index.htm> (20/11/07)

¹⁷ See <http://www.mercotur.int/msweb/portal%20intermediario/ES/index.htm> (20/11/07)

As a result, the current institutional structure of the Mercosur is composed by: a) the Common Market Council; b) the Common Market Group; c) the Mercosur Trade Commission; d) the Mercosur Parliament; e) the Economic-Social Consultative Forum; f) the Mercosur Secretariat; g) the Mercosur Center of Promotion of Rule of Law; h) the Administrative Labour Court; and i) the Permanent Review Court.¹⁸

The Common Market Council is the highest organ of Mercosur with powers to represent the Mercosur in relation to other countries and international organizations.¹⁹ It has the responsibility “for the political direction of the process of integration and for adopting the decisions necessary to ensure compliance with the objectives established by the Treaty of Asunción and to attain the definitive establishment of the Common Market” (Article 3 of the Ouro Preto Protocol)²⁰ and its decisions are binding for the Member States (Article 9 of the Ouro Preto Protocol).

The Common Market Group, as claimed above, is another organ with decision-making powers. According to Article 10 of the Ouro Preto Protocol it is the executive body of Mercosur with competence, among others, to execute and fiscalise the execution of the CMC’s decisions (Article 14, III of the Protocol).²¹

The third organ in the hierarchy is the Mercosur Trade Commission, which “is in charge of assisting the Common Market Group on questions related to trade policy. Its main task is to look after trade policy within Mercosur, and between it and third countries.”^{22/23}

The Mercosur Parliament, as mentioned above, has substituted the Joint Parliamentary Commission. It has the important task of speeding up, in the respective national parliaments, the implementation of the normative acts of Mercosur (Article 12 of the Mercosur Parliament Constitutive Protocol).

¹⁸ See <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (20/11/07)

¹⁹ TEPEDINO, Gustavo. *L'impatto del Mercosul sul diritto privato brasiliano: prospettive di armonizzazione nei rapporti di consumo*. In RIZZO, Vito (ed.) *Diritto privato comunitario Vol. I: fonti, principi, obbligazioni e contratti*. Napoli: ESI, 1997. p. 139.

²⁰ FERRARI, Marta Haines (ed.). *The Mercosur Codes*. Scotland: B.I.I.C.L., 2000. p. 86.

²¹ TEPEDINO, Gustavo. *Idem*. p. 139/140.

²² MEDEIROS, Marcelo de Almeida. *Idem*. p. 92.

²³ See Article 16 of the Ouro Preto Protocol.

The Economic-Social Consultative Forum is an organ composed by representatives of the social and economic sectors of the Member States, who are distributed in many different commissions, which guarantees the requirement of participation of the civil society in the integration process²⁴ but, as its name shows, has only a consultative function (Article 29 of the Protocol).

The Mercosur Secretariat is the operational support structure of the Mercosur's organs. It is situated in the City of Montevideo, Uruguay (Article 31 of the Ouro Preto Protocol).

The Mercosur Center of the Promotion of Rule of Law was created with the aim of analyzing and strengthening the development of the States, the democratic governability and all the aspects linked to the regional integration process (Article 1 of the Decision 24/04 of the Common Market Council). To fulfill these objectives it will have to promote academic research, organize conferences, seminars, forums, and to maintain a physical and virtual library, among other tasks (Article 2 of the Decision 24/04 of the Common Market Council).

The Administrative-Labor Court is a jurisdictional instance to solve labor complaints made by the Mercosur Secretariat servants and other workers contracted by Mercosur for specific tasks in the Administrative Secretariat or in other organs of the institutional structure of Mercosur.

Finally, the Permanent Review Court is the highest instance of the dispute settlement system between Member States.

Following this brief introduction of the Mercosur's institutional structure, its judicial system will be described below.

II - The Judicial System of Mercosur

The judicial system of Mercosur is composed by two different jurisdictions: one to deal with labor cases and the other to deal with settlements between Member States. Let us start with the labor-administrative jurisdiction.

²⁴ TEPEDINO, Gustavo. Idem. p. 140.

1 - Administrative-Labor Court

On 5 September 1997, through the Decision 42/97 of the Common Market Group, General Rules for the Administrative Secretariat Servants were created, which Article 56 states that “All claim concerning labor issues that cannot be solved by an administrative appeal will be able to be presented to an administrative jurisdictional instance that will be created and regulated by a Resolution of the Common Market Group.”²⁵

The Administrative-Labor Court of Mercosur was created by Resolution 54/03 of the Common Market Group, with jurisdiction to hear and determine at unique instance, disputes in labor and administrative matters between Mercosur and its servants²⁶ or other workers contracted by Mercosur for specific tasks in the Mercosur Secretariat or in other organs of its institutional structure.²⁷ The Court is composed of four judges²⁸ appointed by the Common Market Group (Common Market Group Resolutions 15/04 and 35/06).²⁹

According to the statute of the Administrative-Labor Court, its competence to hear and determine these disputes will begin only after the exhaustion of the administrative sphere, which means that the servant or contracted worker will need to address the claim to his or her immediate superior in the Administrative Secretariat and also to the Director of the Administrative Secretariat or, in the case of other organs, the claim has to be submitted to the administrator responsible for the respective organ (Article 1 of the Administrative-Labor Court Statute).³⁰

When deciding the cases the Court will have to observe the rules of the Main Office Agreement of the Administrative Secretariat³¹ (Common Market Council Decision 04/96),³² the Mercosur rules applicable to Administrative Secretariat Servants and also the service

²⁵ See Article 56 of the Decision 42/97 of the Common Market Group. Available at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (24/11/07)

²⁶ Servants of the Mercosur Secretariat.

²⁷ See Article 1 of the Common Market Group Resolution 54/03 of 10 December 2003. Available at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (24/11/07)

²⁸ Its current judges are: María Cristina Boldorini (Argentina), Antonio Paulo Cachapuz de Medeiros (Brazil); Miguel Ángel Solano López (Paraguay), and María Carmen Ferreira Harreguy (Uruguay)

²⁹ Available at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (24/11/07)

³⁰ Available at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (24/11/07)

³¹ According to the Decision 30/02 of the Common Market Council, the current denomination of the Administrative Secretariat is Mercosur Secretariat.

³² Available at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (24/11/07)

instructions emitted by the Director of the Administrative Secretariat (Article 3 of the Administrative-Labor Court Statute).³³

To date, there is no available information about case laws of the Administrative-Labor Court of Mercosur.

2 - System non-labor Disputes Settlement

On 18 February 2002 the Olivos Protocol was signed by the Mercosur's Member States.³⁴ This protocol created a new system for the settlement of disputes,³⁵ substituting the former system regulated by the Brasília Protocol³⁶ and introducing some innovations.³⁷

According to the Olivos Protocol, the disputes between Member States concerning the interpretation, application or default of the Asunción Treaty, the Ouro Preto Protocol, the Protocols and Agreements celebrated in the boundary mark of the Asunción Treaty, the Common Market Council's Decisions, the Common Market Group's Resolutions and Mercosur Trade Commission's Directives must be submitted to the procedures established by the Olivos Protocol.^{38/39}

When a dispute can be submitted to other international systems of disputes settlement to which Mercosur Member States, individually, are part, the claimant will have the right to choose one or another but, after starting the procedure through one system, none of the Member States involved in the disputes will be able to go to other systems of disputes

³³ Available at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (24/11/07)

³⁴ See <http://www.mercosur.int/msweb/portal%20intermediario/pt/index.htm> (14/11/07)

³⁵ See Olivos Protocol. Available at <http://www.mercosur.int/msweb/portal%20intermediario/ES/index.htm> (24/11/07)

³⁶ The Brasília Protocol was approved in 17 December 1991. Available at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (24/11/07)

³⁷ ARAÚJO, Nadia. *O Tribunal Permanente de Revisão do MERCOSUL e as Opiniões Consultivas: análise dos laudos arbitrais, sua ligação com o common law e algumas idéias para o futuro*. In SOUZA JUNIOR, Lauro da Gama e (editor). *Revista de Direito da Associação dos Procuradores do Novo Estado do Rio de Janeiro. Vol. XV – Direito Internacional*. Lumen Juris: Rio de Janeiro, 2005. p. 111. “Entre suas inovações temos a opção de foro, intervenção do Grupo Mercado Comum, a definição do objeto da controvérsia, a criação do Tribunal Permanente de Revisão com sede em Assunção, acesso direto ao Tribunal, obrigação de cumprimento dos laudos e cláusulas programáticas.”

³⁸ See Article 1(1) of the Olivos Protocol.

³⁹ The Olivos Protocol was amended by the Modifying Protocol of the Olivos Protocol (*Protocolo Modificadorio del Protocolo de Olivos*). Available at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (23.04.08)

settlement.^{40/41} Although, this recognition of other systems by Mercosur weakens its own system, since its member states are not obliged to submit their claims to the Mercosur Disputes Settlement System.

The current disputes settlement procedure of the Mercosur is composed of the following stages: a) Compulsory Preliminary Negotiation; b) Optional Conciliation; c) Compulsory Arbitration; and d) Decision Review's Instance.

a) Compulsory Preliminary Negotiation Stage

Article 4 of the Olivos Protocol states that the Member States involved in a dispute shall try to solve it through direct negotiations,⁴² informing the Mercosur Secretariat about the negotiations and their results.⁴³

b) Optional Conciliation Stage

If the negotiation phase has been unsuccessful or the dispute has been only partially solved, the litigant Member States may agree to present the conflict to the Common Market Group (Article 6(2) of the Olivos Protocol), which will analyze the arguments of both parties and will only make non-binding recommendations (Article 7 (1)(2) of the Olivos Protocol).⁴⁴

⁴⁰ PENA, Celina; ROZEMBERG, Ricardo. Mercosur: A different approach to institutional development. FOCAL – Canadian Foundation for the Americas - Policy Paper. Available at <http://www.focal.ca/pdf/mercosur.pdf> (21/11/07). “The PO contains explicit provisions regarding the need for selecting the forum before which the conflicts will be settled. The Brasilia Protocol did not account for this aspect, which, for example, has permitted that in light of the application of antidumping measures by Argentina regarding the importation of Brazilian poultry, Brazil first raise the complaint with Argentina within the scope of the Brasilia Protocol and then, not having had its expectations satisfied, it raised the issue to the World Trade Organization's (WTO) Dispute Settlement Body. With respect to this, the PO establishes that if a controversy can be submitted either to the controversy resolution system of MERCOSUR or to that of the WTO, the plaintiff state must select one of these mechanisms, permanently waiving access to the other forum.”

⁴¹ See Article 1(2) of the Olivos Protocol.

⁴² FERNÁNDEZ, Wilfrido. *El Nuevo Tribunal Arbitral del Mercosur. Anuario de Derecho Constitucional Latinoamericano* - 2006. Available at <http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/20061/pr/pr27.pdf> (24/11/07). “Vale decir, que la instancia arbitral jamás puede iniciarse sin un previo mecanismo obligatorio de negociaciones directas (...)”

⁴³ See Article 5(2) of the Olivos Protocol.

⁴⁴ According to Article 6(3) of the Olivos Protocol, another member state that is not party of the dispute can submit the controversy to the CMG after the direct negotiations but this procedure will not interrupt the arbitration phase started by one of the litigant member states.

c) Compulsory Arbitration Stage

If direct negotiation has failed, one of the litigant parties, despite of the conciliation stage through the Common Market Group, can start the arbitration phase that begins with the creation of an Ad Hoc Arbitration Court that is comprised of three arbiters. Of these three, two are selected at the request of the parties, according to national lists presented by the countries *ex ante*, while the third, who presides over the Court, is selected by common agreement (Articles 9, 10 and 11 of the Olivos Protocol).⁴⁵

The Ad Hoc Arbitration Court, at the request of one of the litigants, can provide provisional measures if there are presumptions of grave and irreparable damages for one of the parties with the maintenance of the current situation (Article 15 of the Olivos Protocol).⁴⁶

Against the decision of the Ad Hoc Arbitration Court, any of the parties can present a request for clarification of the decision (Article 28 of the Olivos Protocol) and also an appellate review for the Permanent Review Court (Article 17 (1) of the Olivos Protocol).⁴⁷

If there is no appeal against the decision, it will be definitive and will have the force of *res judicata* between the parties (Article 26(1) of the Olivos Protocol).

d) Permanent Review Court

The Permanent Review Court was officially installed on 13 August 2004, in Asunción, Paraguay,⁴⁸ and its respective judges were nominated by Decisions 26/04, 18/06, 38/07⁴⁹ and 42/07⁵⁰ of the Common Market Council.⁵¹

⁴⁵ If there is no agreement about the selection of the third arbiter, the choice will be made by the Mercosur Secretariat (Article 10(3) ii of the Olivos Protocol).

⁴⁶ Although the article deals exclusively with the Ad Hoc Arbitration Court, there are some authors that defend that the Permanent Review Court has the same powers. FERNÁNDEZ, Wilfrido. *El Nuevo Tribunal Arbitral del Mercosur. Anuario de Derecho Constitucional Latinoamericano - 2006*. Available at <http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/20061/pr/pr27.pdf> (24/11/07). p. 599/600. “(...) tanto los tribunales arbitrales ad hoc como el Tribunal Permanente de Revisión tienen potestad para declarar medidas cautelares directamente en las controversias en disputas (...)”

⁴⁷ Both the decisions of the *Ad Hoc* Arbitration Courts and of the Permanent Review Court will be based on the Asunción Treaty, the Ouro Preto Protocol, the Protocols and Agreements celebrated in the boundary mark of the Asunción Treaty, the Common Market Council's Decisions, the Common Market Group's Resolutions and Mercosur Trade Commission's Directives, and also on other principles or rules of international law applicable to the matter. There is also the possibility for the *Ad Hoc* Arbitration Courts and for the Permanent Review Court when functioning as an unique instance, to decide the controversy through equity with the consent of the parties (Article 34 (1)(2) of the Olivos Protocol).

The function of the Permanent Review Court is not only to review the Ad Hoc Courts' Decisions (Article 17 of the Olivos Protocol); it also has other three different functions as pointed out by Wilfrido Fernández.^{52/53} Therefore, besides its review instance function, the Permanent Review Court works as a unique instance of dispute settlement when the involved parties agree in this sense (Article 23 of the Olivos Protocol), as a unique instance of urgent and exceptional cases (Article 24 of the Olivos Protocol and Article 1 of the Decision 23/04 of the Common Market Council)⁵⁴ and as a consultative organ (Article 3 of the Olivos Protocol and Article 2 of the Annex of the Decision 37/03 of the Common Market Council⁵⁵).

According to Article 17(1) of the Olivos Protocol, any of the parties can present an appellate review to the Permanent Review Court against the decisions of the Ad Hoc Arbitration Courts, limited to questions of law discussed in the controversy and to juridical interpretations developed by the Ad Hoc Arbitration Court Decision (Article 17 (2) of the Olivos Protocol).⁵⁶ The decision of the Court will be definitive and will substitute the Ad Hoc Arbitration Court decision (Article 22 (1)(2) of the Olivos Protocol).⁵⁷

⁴⁸ See <http://www.mercosur.int/msweb/portal%20intermediario/pt/index.htm> (24/11/07)

⁴⁹ See http://www.mercosur.int/msweb/portal%20intermediario/Normas/normas_web/Decisiones/PT/2007/DEC_038-2007_PT_Prorr%20mando%20Quinto%20Arbitro.doc. (14.04.08)

⁵⁰ See http://www.mercosur.int/msweb/portal%20intermediario/Normas/normas_web/Decisiones/PT/2007/DEC_042-2007_PT_DesigArbitroTPR.doc. (14.05.08)

⁵¹ Its current judges are: Dr. Nicolás Eduardo Becerra (Argentina), Dr. João Grandino Rodas (Brazil), Dr. Roberto Puceiro Ripoll (Uruguay), Dr. Carlos Alberto González Garabelli (Paraguay) and Dr. José Antonio Moreno Ruffinelli (5th judge).

⁵² FERNÁNDEZ, Wilfrido. *El Nuevo Tribunal Arbitral del Mercosur. Anuario de Derecho Constitucional Latinoamericano* - 2006. Available at <http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/20061/pr/pr27.pdf> (24/11/07). p. 599 “*Son varias las funciones más trascendentales a su cargo: Primera función: Función de revisión en cuanto a cuestiones de derecho emergentes de los laudos de los tribunales arbitrales ad hoc. Consecuentemente, los eventuales laudos ex aquo et bono no son susceptibles del recurso de revisión. Segunda función: Actuación arbitral como única instancia. Se incluye esta alternativa, mediante la cual las partes en controversia, de común acuerdo, pueden prever someterse a esta instancia única arbitral, dejando de lado el tribunal ad hoc. Se recalca que esta alternativa sólo opera mediante consenso entre las partes mencionadas en la disputa. Tercera función: Actuación como única instancia cuando se inicia un procedimiento de los ahora llamados casos excepcionales de urgencia, que tienen un reglamento especial. Cuarta función: Instancia única para atender las ahora llamadas opiniones consultivas.*”

⁵³ Wilfrido Fernández is a former judge of the Permanent Review Court of Mercosur. See Decision 41/07 of the Common Market Council. Available at http://www.mercosur.int/msweb/Normas/normas_web/Decisiones/PT/2007/DEC_041-2007_PT_Aceita%C3%A7%C3%A3o.doc. (14.05.08)

⁵⁴ See <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (24/11/07)

⁵⁵ See <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (24/11/07)

⁵⁶ Although, there will not be a possibility to present an appeal against decisions of the Ad Hoc Arbitration Courts based on *ex aequo et bono* principles (Article 17(3) of the Olivos Protocol). – *Ex aequo et bono* principles means equity.

⁵⁷ Both parties can request a clarification of the decision according to Article 28(1) of the Olivos Protocol.

Despite the compulsority of the arbitration stage before the Ad Hoc Arbitration Courts, both parties, in common agreement, can present the case directly to the Permanent Review Court (Article 23(1) of the Olivos Protocol) and the Court will function as a unique instance without the possibility of appeal against its decision (Article 23(2) of the Olivos Protocol).⁵⁸

There is also another possibility for the controversy to be presented directly to the Permanent Review Court, without going to the Ad Hoc Arbitration Courts: this is the case of urgent and exceptional measures (Article 24 of the Olivos Protocol, regulated by Decision 23/04 of the Common Market Council⁵⁹), when the requirements of the Article 2 of the Decision 23/04 of the Common Market Council are verified.^{60/61} The decision of the Permanent Review Court, in any case, will have the force of *res judicata* between the litigants (Article 26(2) of the Olivos Protocol).

Definitive decisions of the Permanent Review Court (and also of the Ad Hoc Arbitration Courts, when it is the case – Article 26(1) of the Olivos Protocol) have to be adopted (or abided) by the involved Member States, without prejudice of the compensatory measures applicable to the matter (Article 27 of the Olivos Protocol).

If the Member State benefited from the Court decision considers the fulfillment of that decision by the other party to be insufficient, it will be authorized to apply compensatory measures (Article 31 of the Olivos Protocol) and also to present this problem to the respective Court (Article 30 of the Olivos Protocol). In the case of application of compensatory

⁵⁸ But with the same possibility to request a clarification of the decision (Article 28(1) of the Olivos Protocol).

⁵⁹ See <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (24/11/07)

⁶⁰ Decision 23/04 of the Common Market Council, Article 2 – Each Member State can present a case before the Permanent Review Court under the procedure established by this Decision when the following requirements are accomplished:

a.- it involves perishable or seasonal goods, or that by their nature and specific characteristics they lose their properties, utility and/or commercial value in a short period of time if they were unjustified retained in the territory of the respondent State; or goods that were destined to take care of demands originated in situations of crisis in the importer Member State;

b.- the situation has its origin in actions or measures adopted by one Member State, in violation or default of the force Mercosur rules;

c.- the maintenance of these actions or measures can produce grave and irreparable damages;

d.- the questioned actions or measures are not the object of a current controversy started between the parties to the suit. (the original version is in Spanish – translated by the author)

⁶¹ FERNÁNDEZ, Wilfrido. Idem. p. 600.

measures, the other party will be able to contest those measures before the Court that pronounced the decision (Article 32 (1)(2) of the Olivos Protocol).⁶²

Finally, there is also the possibility of asking the Permanent Review Court consultative opinions about the interpretation of Mercosur Law. This can be done by the Member States, Mercosur Executive Bodies (Common Market Council, Common Market Group and Mercosur Trade Commission), and by the Member States' Superior Courts with national jurisdiction (Article 3 of the Olivos Protocol and Article 2 of the Annex of the Decision 37/03 of the Common Market Council).⁶³ However, these consultative opinions do not have compulsory or vinculative effects.⁶⁴

e) Initiative of individuals and legal persons

According to Article 39 of the Olivos Protocol, the settlement disputes system can also be started on the initiative of an individual or a legal person, as a consequence of a sanction or application, by any of the Member States, of legal or administrative measures with restrictive, discriminatory, or unfair competition effects, in violation of the Treaty of Asunción, the Ouro Preto Protocol, the Protocols and Agreements celebrated in the boundary mark of the Asunción Treaty, the Common Market Council's Decisions, the Common Market Group's Resolutions or Mercosur Trade Commission's Directives.⁶⁵

The claim must be submitted to the National Section of the Common Market Group in the Member State where the claimants live or have their main office (Article 40 (1) of the Olivos Protocol). The claim will be analyzed by the National Section that, if the claim is

⁶² About the application of compensatory measures see Decision 01/2007 of the Permanent Review Court (Controversy between Uruguay and Argentina about compensatory measures in the Recapped Tires Case – Decision 01/2005 of the Permanent Review Court). Available at <http://www.mercosur.int/msweb/portal%20intermediario/ES/documentos/TPR%20Laudo%2001%20-%2007.pdf> (25/11/07)

⁶³ Wilfrido Fernández argues that the inferior Courts, through the National Superior Courts, can ask consultative opinions to the Permanent Review Court. In FERNÁNDEZ, Wilfrido. *El Nuevo Tribunal Arbitral del Mercosur. Anuario de Derecho Constitucional Latinoamericano* - 2006. Available at <http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/20061/pr/pr27.pdf> (24/11/07). p. 607. The Permanent Review Court of Mercosur has the same opinion, as we can see from the Consultative Opinion 01/2007, which is the unique consultative opinion expressed by the Court until this moment. Available at http://www.mercosur.int/msweb/portal%20intermediario/pt/conteudo/PrimeraConsultiva_PT.pdf (26/11/07)

⁶⁴ See Article 11 of the Annex of the Decision 37/03 of the Common Market Council.

⁶⁵ About the procedure started by individuals or legal persons (during the Brasília Protocol operation), see VENTURA, Deisy. *Les asymmetries entre le Mercosur et l'Union européenne – Les enjeux d'une association interrégionale*. L'Harmattan: Paris, 2003. p. 190/197.

admitted, will submit a query to the National Section of the Member State where the violation is taking place with the aim of finding an immediate solution to the problem (Article 41(1) of the Olivos Protocol). Following this, if there is no solution, the National Section will submit the claim to the Common Market Group (Article 41(2) of the Olivos Protocol).

The Common Market Group will appraise whether it accomplishes the requirements of the Article 40(2) of the Olivos Protocol. If the answer is negative, the Common Market Group will reject the claim (Article 42(1) of the Olivos Protocol); if it is affirmative, the Common Market Group will call a group of specialists that will present a legal opinion about the matter (Article 42 (2)(3) of the Olivos Protocol).

In the case that the specialists present an unanimous opinion about the granting of the claim formulated against one of the Member States, any other Member State will be able to request the adoption of corrective measures or the repeal of the contested measures. If the request is not accepted within fifteen days, the applicant Member State will have the right to start the arbitral procedure regulated by the Olivos Protocol (Article 44(1)(i) of the Olivos Protocol).

On the other hand, if the specialists do not present an unanimous opinion or hold that the claim is unfounded, the Common Market Group will finish the procedure (Article 44(1)(ii)(iii) of the Olivos Protocol). However, the Member State that presented the case to the Common Market Group will then be able to start the arbitral procedure regulated by the Olivos Protocol (Article 44(2) of the Olivos Protocol).

III - Conclusions – Is there administrative justice in the judicial system of Mercosur?

Before drawing any conclusions as to whether there is or there is not administrative justice in the judicial system of Mercosur, it is important to clarify what we understand by ‘administrative justice’.

For the purposes of this paper, ‘administrative justice’ is considered the jurisdiction with competence to hear and determine disputes between individuals and legal persons and the Public Administration concerning the interpretation and nullification of administrative acts, *ultra vires*, and also the reinstatement of the legality when a individual’s or legal

person's rights are violated by the behaviors of the Public Administration.⁶⁶ Administrative acts and behaviors to be submitted to the jurisdiction of administrative justice must be regulated by rules and principles of public law.⁶⁷ This means that administrative justice will not have the jurisdiction to judge a case where the public administration functions as a private actor.⁶⁸

After having defined the scope of 'administrative justice', it is possible to analyze whether there is or there is not any administrative justice in the Mercosur judicial system. Let us start with the Administrative Labor Court.

As stated above (item II.1), the Administrative Labor Court has jurisdiction to hear and determine at unique instance disputes, in labor and administrative matters, between Mercosur and its servants or other workers contracted by Mercosur for specific tasks in the Mercosur Secretariat or in other organs of its institutional structure.

There is consensus that "employment by a public authority did not *per se* 'inject' a public law element; nor did the seniority of the employee; nor did the fact that the employer was required to contract with its employees on special terms."⁶⁹ However, most scholars would agree that the relationship is regulated by public law, and, as a consequence, under the jurisdiction of the administrative justice "if there were statutory underpinning of the employment such as statutory restrictions on dismissal, which would support a claim of *ultra vires*, or a statutory duty to incorporate certain conditions in the terms of employment which could be enforced by mandamus."⁷⁰

⁶⁶ CARVALHO FILHO, José dos Santos. *Manual de Direito Administrativo*. 11.ed. Rio de Janeiro: Lumen Juris, 2004. p. 840. In the same sense see: CRAIG, P. P. *Administrative Law*. 5.ed. London: Sweet & Maxwell, 2003. p. 755-788 and CANE, Peter. *An Introduction to Administrative Law*. 3.ed. Clarendon Press: Oxford, 1997. p. 8.

⁶⁷ CANE, Peter. *An Introduction to Administrative Law*. 3.ed. Clarendon Press: Oxford, 1997. p. 13. "(...) to say that a decision or action is subject to judicial review is to say that it can be challenged on the basis of the rules and principles of public law which define the grounds of judicial review."

⁶⁸ STRAUSS, Peter L. *Administrative Justice in the United States*. 2.ed. Carolina Academic Press: North Carolina, 2002. p. 184/185. The author quotes the example of the state enterprises.

⁶⁹ CRAIG, P.P. *Administrative Law*. 5.ed. London: Sweet & Maxwell, 2003. p. 818/819. In the same sense, see: WADE, H.W.R; FORSYTH, C.F. *Administrative Law*. 8.ed. Oxford University Press: New York, 2000. p. 659 and STRAUSS, Peter L. *Administrative Justice in the United States*. 2.ed. Carolina Academic Press: North Carolina, 2002. p. 135/136.

⁷⁰ WADE, H.W.R; FORSYTH, C.F. *Administrative Law*. 8.ed. Oxford University Press: New York, 2000. p. 659.

This is the case of Mercosur servants, who are regulated by a special statute, the General Rules for the Administrative Secretariat Servants (Decision 42/97 of the Common Market Group), and, in this sense, it is possible to conclude that there is administrative justice under the jurisdiction of the Mercosur Administrative Labor Court.

On the other hand, concerning the Mercosur Disputes Settlement System, the answer seems not to be easy. As discussed above (item II. 2. e), the procedure of the settlement of disputes system can be started by an individual or legal person, who can present a claim against any of the Member States, as a consequence of the sanction or application, by any of the Member States, of legal or administrative measures with restrictive, discriminatory, or unfair competition effects, in violation of the Treaty of Asunción, the Ouro Preto Protocol, the Protocols and Agreements celebrated in the boundary mark of the Asunción Treaty, the Common Market Council's Decisions, the Common Market Group's Resolutions and Mercosur Trade Commission's Directives. At first sight it could fit within the definition of administrative justice.

Although, there are some details that go into another direction. The first point that has to be discussed is the fact that the claim has to be presented to the National Section of the Common Market Group in the Member State where the claimants live or have their main office, which is a body of the Member State, and that National Section will decide about the admission of the claim. Having that in mind, it is possible to conclude that the individuals or legal persons will be able to present a claim only against the others Member States and not against the Member State where they live or have their main office, since this Member State will not submit a claim against itself.

Besides, the decision to present the claim to the Common Market Group or to start the arbitral procedure is taken by the National Section of the Member State that receives the claim and not by the individual or legal person. So, there is no jurisdiction with competence to hear and determine disputes between individuals and legal persons and the Public Administration concerning the interpretation and nullification of administrative acts, *ultra vires*, and also the reinstatement of the legality when a individual's or legal person's rights are violated by the behaviors of the Public Administration, since the litigant will be the Member State that received the claim from the individual or legal person and not the individuals or

legal persons themselves, which means that there is no administrative justice under the Mercosur Disputes Settlement System.

For all the reasons stated above, we can conclude therefore that there is administrative justice in the Labor jurisdiction of the Mercosur judicial system but not in the non-labor one.

References:

ARAUJO, Nadia de. Direito Internacional Privado – Teoria e Prática Brasileira. 3.ed. Renovar: Rio de Janeiro, 2006.

ARTIGA, Álvaro (Coord.). La integracion regional y comercial en America del Sur. Estudios e Investigaciones n° 54. Notre Europe – Etudes & Recherches. Available at http://www.notre-europe.eu/uploads/tx_publication/Etud54-es-Ameriquedusud_01.pdf

BAPTISTA, Luiz Olavo. Mercosur, its institutions and juridical structure. Foreign Trade Information System. Available at http://ctrc.sice.oas.org/geograph/south/mstit2_e.pdf

CANE, Peter. An Introduction to Administrative Law. 3.ed. Claredon Press: Oxford, 1997.

CARVALHO FILHO, José dos Santos. Manual de Direito Administrativo. 11.ed. Rio de Janeiro: Lumen Juris, 2004.

CRAIG, P. P. Administrative Law. 5.ed. London: Sweet & Maxwell, 2003.

DOMÍNGUES, Francisco; OLIVEIRA, Marcos Guedes de (eds.). Mercosur: Between Integration and Democracy. Bern: Peter Lang AG, 2004.

EKMERDJIAN, Miguel Ángel. Introducción al derecho comunitario latinoamericano – con especial referencia al Mercosur. Depalma: Buenos Aires, 1994.

FERRARI, Marta Haines. The Mercosur Codes (ed.). Scotland: B.I.I.C.L., 2000.

FLOGAÏTIS, Spyridon. Administrative Law et Droit Administratif. L.G.D.J: Paris, 1986.

KONRAD – ADENAUER – STIFTUNG E. V.; SECRETARÍA DEL MERCOSUR (eds.).
Primer informe sobre la aplicación del derecho del MERCOSUR por los tribunales nacionales. Uruguay, 2003.

MEDEIROS, Marcelo de Almeida. Multi Level Governance and the Problem of Balance within Mercosur. In DOMÍNGUES, Francisco; OLIVEIRA, Marcos Guedes de (eds.). Mercosur: Between Integration and Democracy. Bern: Peter Lang AG, 2004.

MATIASKE, Wenzel et al. The European Union as a Model for the Development of Mercosur? Transnational Orders between Economic Efficiency and Political Legitimacy. Vol. 4. Rainer Hampp Verlag: Mering, 2007.

PENA, Celina; ROZEMBERG, Ricardo. Mercosur: A different approach to institutional development. FOCAL – Canadian Foundation for the Americas - Policy Paper. Available at <http://www.focal.ca/pdf/mercosur.pdf>

SOUZA JUNIOR, Lauro da Gama e. Os Princípios do UNIDROIT Relativos aos Contratos Comerciais Internacionais e sua Aplicação nos Países do MERCOSUL. In Revista de Direito da Associação dos Procuradores do Novo Estado do Rio de Janeiro. Vol. XV – Direito Internacional. Lumen Juris: Rio de Janeiro, 2005.

SOUZA JUNIOR, Lauro da Gama e (ed.). Revista de Direito da Associação dos Procuradores do Novo Estado do Rio de Janeiro. Vol. XV – Direito Internacional. Lumen Juris: Rio de Janeiro, 2005.

STRAUSS, Peter L. Administrative Justice in the United States. 2.ed. Carolina Academic Press: North Carolina, 2002.

TEPEDINO, Gustavo. L'impatto del Mercosul sul diritto privato brasiliano: prospettive di armonizzazione nei rapporti di consumo. In RIZZO, Vito (ed.) Diritto privato comunitario – fonti, principi, obbligazioni e contratti. ESI: Napoli, 1997.

TEPEDINO, Gustavo (ed.). Temas de Direito Civil. 2.ed. Renovar: Rio de Janeiro, 2001.

VENTURA, Deisy. Les asymmetries entre le Mercosur et l'Union européenne – Les enjeux d'une association interrégionale. L'Harmattan: Paris, 2003.

VIGEVANI, Tullo et al. Mercosur: Democracy and Political Actor. In DOMÍNGUES, Francisco; OLIVEIRA, Marcos Guedes de (eds.). Mercosur: Between Integration and Democracy. Bern: Peter Lang AG, 2004.

WADE, H.W.R; FORSYTH, C.F. Administrative Law. 8.ed. Oxford University Press: New York, 2000.