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# Legal Instruments for the Liberalization of Trade in Services at the Sub-Regional Level: The MERCOSUR Case\*

Gabriel Gari\*\*

## Abstract

With the recent entry into force of the Protocol of Montevideo on Trade in Services, the MERCOSUR legal system includes three main instruments for the liberalization of trade in services: a number of general obligations and disciplines that prescribe minimum standards of treatment for foreign services and service providers, a Program of Liberalization based on the negotiation of specific concessions on Market Access and National Treatment and a rule-making process for the adoption of secondary legislation on specific service sectors. This article assesses the impact these instruments may have on the liberalization of trade in services and suggests ways to enhance their efficacy and to foster Members' compliance with MERCOSUR disciplines on services within the limits of MERCOSUR's strictly intergovernmental approach to integration. It is argued that there is room for improvement in this area, which could potentially facilitate the movement of services and service providers within the bloc without resorting to major institutional reforms based on a supranational model of integration. At the same time, it is argued that MERCOSUR Members' lukewarm commitment to the integration process will make it difficult to achieve significant results any

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time soon. In any event, considering the particularities of barriers to trade in services, this article contends that the success of any strategy for the liberalization of trade in services ultimately will be conditioned to the improvement of the transparency, economic efficiency, impartiality and due process of domestic regulatory practices.

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## I. Introduction

On March 26, 1991, Argentina, Brazil, Paraguay and Uruguay signed a treaty in Asunción for the establishment of a common market involving the free movement of goods, services and factors of production, named MERCOSUR.<sup>1</sup> The Treaty of Asunción, as it became to be known, set a five year period for the establishment of the common market but fell short in laying down the rules and institutions necessary to accomplish the ambitious goal in such a brief period of time. The Treaty only stipulates broadly defined commitments<sup>2</sup> and a minimalist and strictly intergovernmental institutional structure.

Since the entry into force of the Treaty of Asunción, the liberalization of trade in goods took priority over the liberalization of trade in services, and it is not difficult to understand why this occurred. MERCOSUR trade was mainly based on goods, while the liberalization of trade in services raised complex and sensitive issues, which trade negotiators were not ready to address, mainly due to lack of political will and technical expertise. Notwithstanding these initial difficulties, a number of measures aimed at the liberalization of trade in services have been adopted since the very beginning of the integration process.

Fifteen years after the entry into force of the Treaty of Asunción, the state of affairs on the free movement of services and service providers in MERCOSUR remains closer to an expression of will than to a legal and economic reality.<sup>3</sup> The fragmentation between domestic services markets contrasts with recent technological developments that have dramatically reduced the transaction costs of trade in services, creating fresh business opportunities in sectors that no long ago were regarded as non-tradable. At a time of growing importance of services for both developed and developing economies, the cost of not having an open, sound and transparent regulatory framework for the free movement

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1. See Tratado para la Constitución de un Mercado Común entre la República Argentina, la República Federativa del Brasil, la República del Paraguay y la República Oriental del Uruguay Arg.-Braz.-Para.-Uru., Mar. 26, 1991, 30 I.L.M. 1041 [hereinafter Treaty of Asunción]. The Treaty of Asunción entered into force on November 29, 1991. MERCOSUR is the Spanish acronym for the Common Market of the South.

2. Except for the Trade Liberalisation Programme included in Annex I to the Treaty, which stipulates detailed obligations for the removal of tariffs according to a gradual, lineal and automatic schedule.

3. See, e.g., Gabriel Gari, *Free Circulation of Services in Mercosur: A Pending Task*, 10 LAW & BUS. REV. AM. 545 (2004); Marcio de Oliveira Junior, *Uma Análise Da Liberalização do Comércio Internacional de Serviços no MERCOSUL, Texto Para Discussão N° 727*, (Instituto de Pesquisa Economica Aplicada, Working Paper No. 727, 2000) available at [http://www.ipea.gov.br/pub/td/td\\_2000/td0727.pdf](http://www.ipea.gov.br/pub/td/td_2000/td0727.pdf); CARLOS ALBERTO PRIMO BRAGA & JULIO DE BRUM, SERVICES IN MERCOSUR: MUCH ADO ABOUT NOTHING? (1995).

of services and service providers within the bloc cannot be overlooked.

In December 2005, the Protocol of Montevideo on Trade in Services—a GATS-like instrument<sup>4</sup>—providing a regulatory framework for trade in services in MERCOSUR, finally entered into force.<sup>5</sup> The event has been overlooked by MERCOSUR scholarship, traditionally focused on trade in goods<sup>6</sup> and overshadowed by an acrimonious debate over the current status of the integration process, which in the eyes of the smaller partners has allegedly failed to meet the expectations it once raised. The purpose of this article is to draw the attention away from the mainstream debate and focus on MERCOSUR's main legal instruments for the liberalization of trade in services.

The Protocol of Montevideo includes general obligations prescribing the minimum standards of treatment that Member States must accord to foreign services and service providers and regulatory disciplines that Member States must observe when adopting measures affecting trade in services. It also compels Member States to participate in a Program of Liberalization based on rounds of negotiations of specific commitments on Market Access and National Treatment. In addition, Member States may adopt secondary legislation for the regulation of specific service sectors. This article examines each of these legal instruments, assesses the impact they may have on the liberalization of trade in services in MERCOSUR, and puts forward some proposals to enhance their efficacy and to foster Members' compliance with MERCOSUR disciplines on services.

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4. See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125, 1168 [hereinafter GATS].

5. See Protocolo de Montevideo sobre el Comercio de Servicios del Mercosur [Protocol of Montevideo on Trade in Services in MERCOSUR] [hereinafter Protocol of Montevideo], approved by MERCOSUR Decision 13/97, (Dec. 15 1997). The Protocol entered into force on Dec. 7, 2005. So far the Protocol has been ratified by Argentina (Ley 25623, July 17, 2002, published by the Official Bulletin Aug. 8, 2002), Brazil (Decreto Legislativo 335/2003, July 24, 2003 and Decreto Legislativo 926/2005, Sept. 15, 2005) and Uruguay (Ley 17885, Dec. 20, 2004). According to Article XXVII, when three countries deposit the ratification instruments before the Paraguayan Government, the Protocol will enter into force. This occurred on Dec. 7, 2005.

6. There are very few commentaries on MERCOSUR law on services. See Felix Pena, *El Comercio de Servicios en el MERCOSUR*, BOLETIN MERCOSUR FUNDACION BANK BOSTON 49 (1998); María-Angélica Peña, *Services in MERCOSUR: The Protocol of Montevideo*, in SERVICES TRADE IN THE WESTERN HEMISPHERE 154 (Sherry M. Stephenson ed., 2000); ROBERTO RUIZ DÍAZ LABRANO, MERCOSUR: INTEGRACIÓN Y DERECHO 336-348 (1998); Luis Alejandro Estoup, *La Liberación De La Prestación De Servicios en el Mercosur*, DERECHO MERCANTIL CONTEMPORÁNEO 163 (2001).

### A. *Trade Barriers*

“Trade barriers” are usually associated with measures exclusively addressed against foreign goods, imposed at the border and deliberately adopted to protect domestic industries from foreign competition, such as tariffs or quotas. However, the scope of measures that can restrict cross-border trade is much broader than that.

Cross-border trade may be hindered by “within-the-border” barriers, namely, discriminatory measures deliberately adopted against foreign products in respect of taxation, distribution, advertising or marketing conditions, to name just a few.

Cross-border trade may also be hindered by governmental measures and practices, which, although not primarily aimed at protecting domestic industries from foreign competition, have trade-restrictive effects. The mere difference between the exporting and the importing country regulations in terms of health and safety standards, technical standards or consumer protection, places a dual regulatory burden on the exporter, which increases the transaction costs of international sales and discourages trade. This type of trade restriction is not the result of a deliberate effort to protect domestic industries, but the mere expression of different policy choices, values and standards of living.

Private actors can also hinder the free movement of goods or services across national borders. Business practices such as price-fixing, market sharing, concerted refusal to purchase, or exclusive dealing arrangements that make it difficult for new goods and services to “break into” established business channels, restrain competition and thereby restrict trade.

Furthermore, there are a number of other factors, which cannot be directly attributed to particular governmental or private conducts that have trade-restrictive effects, most notably, unstable macroeconomic conditions and, in particular, volatile exchange rates. Arguably, any factor preventing goods and services from flowing across national borders in the same way as they flow within an internal market could be labeled as a trade barrier. However, such a broad definition includes trade restrictions that would remain beyond the reach of the disciplining effect of international trade rules.

For the purpose of this article, “trade barriers” refers to governmental measures<sup>7</sup> and practices<sup>8</sup> that restrict foreign goods’ or

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7. Governmental measures include any kind of laws, regulations or administrative decisions taken by government agencies or non-governmental bodies in the exercise of powers delegated by government agencies.

8. Governmental practices refer to the way domestic regulations are applied and enforced by the competent authorities.

services' access to domestic markets or impair the competitive relationship between foreign goods or services vis à vis like domestic goods and services within the domestic market, irrespective of whether they have been adopted with a view to protect domestic industries or not.<sup>9</sup>

Trade in services, like trade in goods, can be hindered either by governmental measures and practices that restrict foreign services' or foreign service providers' access to the domestic market and by governmental measures and practices that impair the competitive relationship between foreign services vis-à-vis like domestic services within the domestic market. However, because of the particularities of trade in services,<sup>10</sup> there are significant differences between barriers to trade in services and barriers to trade in goods.<sup>11</sup>

First, contrary to tariffs and quotas, which are clearly identifiable, explicitly protectionist and whose trade-restrictive effect is easily

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9. There are many official reports, updated on a regular basis, which provide a useful insight on the variety of governmental measures and practices with trade-restrictive effects. See, e.g., WTO Trade Policy Reviews, [http://www.wto.org/english/tratop\\_e/tp\\_r\\_e/tp\\_r\\_e.htm](http://www.wto.org/english/tratop_e/tp_r_e/tp_r_e.htm) (last visited Apr. 28, 2007). Large trading nations also conduct regular investigations on trade barriers applied by their trading partners to their exports. For U.S. reports, see Office of the United States Trade Representative, *2005 National Trade Estimate Report on Foreign Trade Barriers* (Mar. 30, 2005), [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2005/2005\\_NTE\\_Report/Section\\_Index.html?ht=](http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_NTE_Report/Section_Index.html?ht=). For the E.U., see European Commission, *European Community Report on United States Barriers to Trade and Investment 2005*, <http://trade-info.cec.eu.int/doclib/docs/2006>.

10. For an excellent account of the particularities of transactions on services as compared to transactions on goods see T.P. Hill, *On Goods and Services*, 43 REV. INCOME & WEALTH 315-338 (1977). Hill's seminal work alerted the academia about the complexity underlying the nature of services, and served as a springboard for further research in this area. See, e.g., Jagdish Bhagwati, *Splintering and Disembodiment of Services and Developing Nations*, 7 WORLD ECON. 133-43 (1984); GERTJAN LINDERS, *THEORY, METHODOLOGY AND DESCRIPTIVE STATISTICS ON SERVICES AND SERVICES TRADE* (2001); R. McCULLOCH, *THE HAGUE: NETHERLANDS BUREAU FOR ECONOMIC POLICY ANALYSIS* (1987); André Sapir, & Chantal Winter, *International Competition in Services*, (Nat'l Bureau of Econ. Research, Working Paper No. 2204, 1994); *Services Trade in SURVEYS IN INTERNATIONAL TRADE* (David Greenaway & L. Alan Winters eds., 1994); JOACHIM STIBORA & ALBERT DE VAAL, *SERVICES AND SERVICES TRADE: A THEORETICAL INQUIRY* (1995).

11. For studies on barriers on trade in services see UNITED NATIONS CEPAL/ECLAC, *INTERNATIONAL TRADE AND DEVELOPMENT FINANCE DIVISION, INTERNATIONAL TRADE UNIT, MANUAL FOR COMPLETING THE QUESTIONNAIRE ON MEASURES AFFECTING SERVICES TRADE IN THE HEMISPHERE ECLAC* (2000); BERNARD HOEKMAN & CARLOS ALBERTO PRIMO BRAGA, *PROTECTION AND TRADE IN SERVICES: A SURVEY* (1997); Bernard Hoekman, *Conceptual and Political Economy Issues in Liberalizing International Transactions in SERVICES IN ANALYTICAL NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM* (Alan Deardorff & Robert M. Stern eds., 1994); Gary P. Sampson & Richard H. Snape, *Identifying the Issues in Trade in Services*, 8 WORLD ECON. 171-81 (1984).

measurable, most barriers to trade in services are embedded in domestic regulations scattered all over the regulatory system, which do not necessarily pursue an explicit protectionist purpose and whose trade-restrictive effect is difficult to measure.

Second, trade in services frequently involves the cross-border movement of factors of production. Therefore, governmental measures and practices that directly or indirectly have a restrictive effect on the cross-border movement of persons, capital and information, including, amongst others, immigration policies, cultural policies, balance of payment policies and foreign direct investment policies have, accordingly, a restrictive effect on trade in services.

Third, service markets are more heavily regulated than merchandise markets. As a result, foreign services and foreign service providers face a higher risk than foreign goods of being subject to discriminatory measures and practices. Moreover, pervasive State intervention in service markets—not only as a regulator but also as a service provider and as a service consumer—is more likely to affect the level playing field for foreign service providers vis à vis domestic providers.

Finally, a number of domestic regulations with restrictive effects on trade in services touch upon a number of sensitive public policy issues, increasing the usual tension between free trade and non-trade concerns that underlies the liberalization of merchandise trade.

The particularities of barriers to trade in services have some policy implications for the liberalization of trade in services. First, the political will to liberalize must be particularly strong to counteract protectionist reactions against the opening of service markets to foreign competition. Second, the scope of application of trade disciplines must be particularly broad, tackling not only overt quantitative restrictions or discriminatory measures against foreign service providers, but also measures that may directly or indirectly affect trade in services, including, amongst others, measures affecting the cross border movement of persons, capital and information. Third, trade disciplines must include not only minimum standards of treatment that Member States must accord to foreign service providers (e.g., Market Access and National Treatment), but also regulatory disciplines that Member States must observe when adopting measures affecting trade in services (e.g., transparency, reasonableness, objectivity, impartiality and due process). Finally, sophisticated institutional mechanisms for the further development of trade disciplines and their enforcement must be in place.

### *B. Trade Liberalization*

Just like trade barriers cannot be limited to tariffs and quotas, trade



liberalization cannot be confined to the removal of clear-cut protectionist measures either. On the contrary, trade liberalization is a complex process that requires a subtle combination of different type of actions: removing existing barriers and preventing new ones to emerge, deregulating domestic rules and re-regulating at the “supranational”<sup>12</sup> level.

Broadly speaking, trade liberalization refers to a process of interstate cooperation laid down by an international trade agreement aimed at disciplining governmental measures and practices that restrict foreign goods’ or services’ access to domestic markets or impair the competitive relationship between foreign goods or services vis-à-vis like domestic goods and services. The liberalization process is unfolded under the umbrella of a treaty, which accords rights and imposes obligations to its parties. The degree of liberalization sought varies from treaty to treaty and so does the spectrum of governmental areas subject to international disciplines, the rules and principles Member States are subject to, and the type of institutional framework established for the implementation and, eventually, the enforcement of those rules and principles.

The economic literature on international trade usually refers to two main modalities of trade liberalization, namely, “negative integration” and “positive integration.” For Tinbergen, for example, “negative integration” means the removal of discrimination and restrictions on trade and “positive integration” means the creation of new institutions and their instruments or the modification of existing instruments, so as to enable the market of the integrated area to function effectively and to promote other broader policy objectives in the union.<sup>13</sup>

Legal scholars adopted a similar terminology to reflect the different type of legal instruments used for advancing the trade liberalization process. On European law, for instance, Weatherhill differentiates “negative harmonization,” which he understands as the elimination of obstructive national laws through judicial rulings, from “positive or legislative harmonization,” by which he refers to the introduction of community rules to govern a particular area in partial or total replacement for national rules.<sup>14</sup> Similarly, Ziller argues for the need to

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12. The term “supranational” is hereby used in a loose sense to refer to norms adopted by treaty-based decision-making bodies and does not necessarily imply the existence of a qualified majority decision-making system or the direct effect, direct applicability or primacy of the supranational norm.

13. See JAN TINBERGEN, *INTERNATIONAL ECONOMIC INTEGRATION* (1956).

14. See Stephen Weatherhill, *Why Harmonise?* in *EUROPEAN UNION LAW FOR THE 21<sup>ST</sup> CENTURY: RETHINKING THE NEW LEGAL ORDER*, VOL II 12 (Takis Tridimas & Paolisa Nebbia eds., 2004).

complement the abolishment of barriers to the movement of goods, services, labor and capital, necessary to set up the common market, with more sophisticated forms of regulation necessary to manage the market once it is set up, “both because of the recurrent temptations of governments to restore protectionism, and because market failures have to be corrected by regulatory intervention.”<sup>15</sup> The literature on WTO law also refers to negative and positive integration.<sup>16</sup>

The variety of bodies involved and legal instruments used for the liberalization of trade reveals the intricate nature of this process, quite different from the lay understanding about trade liberalization merely as a diplomatic-led process based on negotiations aimed at the removal of tariffs or the de-regulation of national markets.

### C. *Trade Liberalization of Services in MERCOSUR*

Article 1 of the Treaty of Asunción contains the core legal provision on the liberalization of intra regional trade. It provides for the establishment of a common market by December 31, 1994, which shall involve, amongst other things:

The free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures[.]<sup>17</sup>

At the beginning of 1994, MERCOSUR Members realized the original target to have a common market in place by the end of that year was far too ambitious and decided to redefine the objectives of the integration process. They agreed to establish a customs union as an essential step that should be taken *before* starting a new stage towards the formation of a common market.<sup>18</sup> As a result, MERCOSUR Members prioritized the

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15. See Jacques Ziller, *The Challenge of Governance in Regional Integration. Key Experiences from Europe* 36-37 (European Union Institute Working Paper, 2005).

16. See, e.g., Ernst Ulrsich Petersmann, *From 'Negative' to 'Positive' Integration in the WTO: Time for 'Mainstreaming Human Rights' into WTO Law?*, 37 C.M. L. REV 1363 (2000); Thomas Cottier and Petros Mavroidis, *Regulatory Barriers and the Principle of Non-Discrimination in WTO Law: An Overview*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE ORGANIZATION LAW 4 (Thomas Cottier, Petros Mavroidis and Patrick Blatter eds., 2000); Jacques H.J. Bourgeois, *On the Internal Morality of WTO Law*, in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION—STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN 40 (Armin von Bogandy, Petros Mavroidis & Yves Mény eds., 2002).

17. THE MERCOSUR CODES (Marta Haines Ferrari, trans., BIICL 2000). The original text is in Spanish and Portuguese.

18. See MERCOSUR CMC Decision 13/93, (Jan. 17, 1994) (approving the “Consolidation of the Customs Union and Transition to a Common Market” schedule).

implementation of a common external tariff and the elimination of tariffs<sup>19</sup> and non-tariff barriers to intra regional trade in goods, while leaving their commitments on the other aspects of a common market such as the coordination of macroeconomic policies and the free movement of services and factors of production loosely defined, with no implementation deadline attached to them.

Despite not being regarded as a priority, MERCOSUR bodies began to work on the liberalization of trade in services during the early stages of the integration process. In June 1992, the Common Market Council ("CMC") approved a broad and ambitious working program containing a variety of tasks for the establishment of a common market to be concluded by the end of 1994.<sup>20</sup> A number of those tasks were aimed at advancing the liberalization of trade in services either by way of negotiating general obligations and disciplines or by way of harmonizing legislation or adopting mutual recognition agreements for specific service sectors.

The working program assigned a Commission on Trade in Services created under the umbrella of sub-working group No. 10—Coordination of Macroeconomic Policies—the task of reviewing the domestic legal systems of each Member State and proposing a framework agreement for the regulation of trade in services by December 1993. Despite the efforts made, the agreement was not completed on time. The commission's mandate was renewed and its institutional status upgraded, first to an Ad Hoc Group on Services and then to a Group on Services accountable to the Common Market Group ("CMG").<sup>21</sup> However, it was not until November 1997 that a framework agreement on trade in services was adopted. Seven additional months were necessary for completing the drafting of the sectoral annexes to the Protocol and for the negotiation of State Parties' initial schedules of specific commitments.<sup>22</sup> One reason put forward by MERCOSUR diplomats to explain the delay in reaching an agreement was the novelty of the issue and the lack of experience on how to deal with it.<sup>23</sup> Because of delays on the ratification process in

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19. See MERCOSUR CMC Decision 5/94, (Aug. 5, 1994); MERCOSUR CMC Decision 24/94, (Dec. 17, 1994).

20. See MERCOSUR CMC Decision 1/92, (June 27, 1992) (establishing a working programme known as Las Lenas Programme).

21. See MERCOSUR CMG Resolution 38/95, (Dec. 4, 1995) (creating the Ad Hoc Group on Services); see MERCOSUR CMG Resolution 31/98, (July 23, 1998) (creating the Group of Services).

22. See CMC Decision 09/98, July 23, 1998

23. See comments made in 1996 by Mario Antonio Marconini, Ad Hoc Group on Services' Coordinator. Mario Antonio Marconini, *Estado Actual de Las Negociaciones en Materia de Comercio de Servicios en el Mercosur*, ACTAS CONFERENCIA ORIGEN EN EL COMERCIO DE SERVICIOS 63 (1996).

each Member State, it was not until December 7, 2005 that the Protocol finally entered into force.<sup>24</sup>

The Protocol of Montevideo constitutes an integral part of the Treaty of Asunción and is based on the GATS. Except for a few exceptions, the Protocol literally transposes into the sub-regional context the provisions of this multilateral instrument. Part II of the Protocol includes general obligations that prescribe the minimum standards of treatment that Member States must accord to foreign services and service providers (e.g., Most Favored Nation Treatment, Market Access and National Treatment) and regulatory disciplines that Member States must observe when adopting measures affecting trade in services (e.g., transparency, reasonableness, objectivity and impartiality). Part III of the Protocol sets out the conditions for a Program of Liberalization of trade in services based on the negotiation of specific commitments. In addition to the Protocol, the MERCOSUR legal system includes a rule-making process for the adoption of secondary legislation. So far, a number of Decisions and Resolutions aimed at the harmonization or mutual recognition of domestic legislation have been enacted. Sections II, III and IV of this article examine in further detail each of these legal instruments for the liberalization of trade in services.

## II. General Obligations and Disciplines on Trade in Services

### A. *The Scope of Application of the Protocol of Montevideo*

General obligations and disciplines included in trade agreements further the liberalization of trade in services by compelling Member States to accord foreign services and service providers minimum standards of treatment and to regulate in a more “trade friendly” way, fostering more open, transparent and non-discriminatory domestic laws.<sup>25</sup> MERCOSUR Members are subject to the general obligations and disciplines contained in Part II of the Protocol of Montevideo on Trade in Services, which, as it has been mentioned, largely reproduces those general obligations and disciplines included in the GATS.

In principle, the scope of application of the Protocol of Montevideo is defined broadly. Article II.1 prescribes that the Protocol applies “to measures taken by Member States which affect trade in services. . . .” In turn, Article II.2 defines “trade in services” as the supply of a service:

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24. See Protocol of Montevideo, *supra* note 6.

25. It is important to bear in mind that the obligations and disciplines may either be expressly stated by Treaty provisions or implied by them. In this sense, the adjudicatory bodies responsible for interpreting the Treaty play a critical role in shaping the normative content of those obligations and disciplines.

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;<sup>26</sup>

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

However, further provisions of the Protocol and its Annexes introduce significant limitations to this initially broad scope of application. First, the Protocol does not apply to services provided in the exercise of governmental authority.<sup>27</sup> Second, both the Annex on Air Transport Services and the Annex on Land and Waterway Transport Services exclude from the Protocol's scope of application the rights and obligations included in sector-specific agreements concluded before the Protocol was approved.<sup>28</sup> Third, the Annex on the Movement of Natural Persons introduces important caveats to the type of measures relating to this mode of supply that can be disciplined. Finally, and most importantly, the two main standards of treatment that must be accorded to foreign services and service providers—National Treatment and Market Access—are binding only in those service sectors included in Member States' schedules of specific commitments and subject to the restrictions thereby applied to each mode of supply.

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26. The inclusion of commercial presence as a modality of "trade" in services defies the ordinary meaning of "trade." While "trade" refers to arms-length transactions between buyers and sellers, the commercial presence mode of supply implies the permanent presence of the foreign service supplier in the territory of the consumers' country. For many service sectors, commercial presence is the only way to compete in foreign markets, but at the time the GATS was negotiated there was no support for the liberalization of foreign direct investment at the multilateral level. To circumvent that obstacle, GATS negotiators agreed on an extraordinary broad definition of trade in services, encompassing the supply of services through the commercial presence of foreign service providers.

27. See Protocol of Montevideo, *supra* note 6, arts. II.3(b), (c).

28. See *id.*, Air Transport Services, Annex, arts. 2-4; see *id.*, Land and Waterway Transport Services, Annex, arts. 2,3.

## B. *The General Obligations and Disciplines Included in the Protocol*

### 1. Most Favored Nation Treatment

According to the most favored nation treatment (“MFN”), whatever the conditions of treatment accorded to services or service providers from a Member State, they shall be immediately and unconditionally accorded to like services or service providers from any other Member State.<sup>29</sup>

This obligation is very important in the multilateral context in order to discipline an extended practice among some trading partners to grant each other preferential treatment on service sectors such as transport or telecommunications and on the recognition of professional qualifications. For a sub-regional agreement aimed at the establishment of a common market though, the MFN standard is a necessary component of a much deeper system of integration. State Parties to the Treaty of Asunción agreed not just to eliminate discrimination between each others’ services and service suppliers but to adopt a common trade policy in relation to third States and to coordinate sectoral policies in the service sector including transport and communication.<sup>30</sup> However, for the time being, the common external trade policy and the coordination of sectoral policies have not yet been fully implemented<sup>31</sup> and thus the MFN standard still has a role to play. Unlike the GATS, the Protocol of Montevideo does not allow Member States to introduce exceptions to this standard. The MFN standard applies to any measure covered by the Protocol, whatever the service sector that may be at stake.

### 2. National Treatment

The National Treatment standard compels Member States to accord services and service suppliers of any other Member State treatment no less favorable than that it accords to its own like services and service suppliers.<sup>32</sup> The Protocol further specifies that Member States can meet this standard by according either formally identical or formally different treatment.<sup>33</sup> Finally, the provision stipulates that formally identical or formally different treatment must be considered “less favorable if it modifies the conditions of competition in favor of services or service

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29. See Protocol of Montevideo, *supra* note 6, art. III.

30. See Treaty of Asunción, *supra* note 2, art. 1.

31. For example, in 2004 MERCOSUR authorised Uruguay to sign a Free Trade Agreement with Mexico, including the liberalization of trade in services.

32. See Protocol of Montevideo, *supra* note 6, art. V.1.

33. See *id.*, art. V.3.

suppliers of the Member State compared to like services or service suppliers of any other Member State.”<sup>34</sup>

The National Treatment standard cuts deeper into Member States’ policy autonomy, disciplining its fiscal, transportation and cultural policies, to name just a few. However, its liberalization capacity is diminished by the fact that its scope of application is constrained to those service sectors included in each Member State’s schedule of specific commitments and under the circumstances specified there under.<sup>35</sup>

### 3. Market Access

The Market Access standard is designed to prevent Member States from adopting overt quantitative restrictions such as measures limiting the number or value of service transactions, the number of service suppliers or the number of natural persons that may be employed in a particular service sector.

Article IV lists six types of Market Access restrictions that are expressly forbidden. Like the National Treatment standard, these are not cross-sector prohibitions. Their scope of application is constrained to those service sectors included in each Member State’s schedule of specific commitments and under the terms, limitations and conditions specified there under.<sup>36</sup>

### 4. Transparency

Member States must observe certain disciplines aimed at enhancing the transparency of their regulatory activity.<sup>37</sup> First, they have to publish promptly national measures and international agreements that pertain to or affect trade in services. Second, they must keep the MERCOSUR Trade Commission (“MTC”) updated on regulatory changes that may affect significantly trade in services. Third, they must respond promptly to requests by any other Member State on any of its measures that may affect trade in services. Finally, each Member State may notify the MTC of any measure taken by any other Member State, which it considers, affects the operation of the Protocol.

By promoting the disclosure of information on national regulations, transparency standards could make a significant contribution towards the liberalization of trade in services. A more transparent rule-making process provides Member States with the opportunity to scrutinize the

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34. *See id.*, art. V.4.

35. *See id.*, art. VII.2.

36. *See id.*, art. VII.2.

37. *See id.*, art. VII.

compatibility of new regulations with treaty provisions at an early stage. It also forces domestic regulators to consider more carefully the possible costs and benefits of their regulatory decisions and, ultimately, it encourages better regulation and greater compliance. Transparency also facilitates foreign service providers' access to updated information about regulations currently in force. The real impact of transparency standards on the liberalization of trade in services, like other obligations and disciplines, will depend on the way they are implemented.

#### 5. Reasonable, Objective and Impartial Administration of Measures Affecting Trade in Services

Member States must administer measures of general application affecting trade in services in a reasonable, objective and impartial manner. This discipline is particularly relevant for the liberalization of trade in services, which is frequently obstructed not only by discriminatory rules but also by non-discriminatory rules applied in a discriminatory way. For instance, discriminatory delays in required government approvals, licenses and clearances; discriminatory access to data collected by the government and discriminatory enforcement of regulations against foreign service providers can result in a major obstacle to trade in services.<sup>38</sup> Contrary to GATS, the Protocol does not limit the scope of application of these standards to sectors where specific commitments have been undertaken.

#### 6. Procedural Standards for the Adoption of Administrative Decisions Affecting Trade in Services

Many service industries operate under the close and constant supervision of administrative agencies, which tend to have broad powers of intervention on their business. For instance, financial supervisory authorities must monitor the solvency of financial undertakings, and in compliance with their duties they may conduct investigations, request the adoption of contingency measures and, if necessary, they may suspend or withdraw an authorization to operate. Similarly, utilities regulators may impose on service providers requirements on prices or conditions of access to the service provided. All these administrative decisions could potentially discriminate against foreign services and service providers.

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38. A survey on the most frequent barriers to trade in services among service industry operators found that in many cases the discriminatory treatment is not written into the published laws and regulations but it is a matter of official practice, i.e., "the way things have always been done . . ." or the "general bureaucratic tendency not to approve new activities." See GEZA FEKETEKUTY, *INTERNATIONAL TRADE IN SERVICES. AN OVERVIEW AND BLUEPRINT FOR NEGOTIATIONS* 141 (1988).



The Protocol includes some procedural standards aimed at encouraging the adoption of administrative decisions based on objective and impartial criteria, minimizing the risk of discriminatory decisions. Article X.2 prescribes that Member States must grant all service providers affected by administrative decisions the right to have access to an impartial and objective procedural review of those decisions and, where necessary, to the application of appropriate remedies. Article X.3 prescribes that applications relating to licenses, registrations, certificates or other kind of authorization required for the supply of a service must be dealt with by the competent authority "within a reasonable period of time" and that the authorities must make a decision and if they consider the application to be incomplete, they must inform the applicant of the status of the application "without undue delay." The aim of the procedural standards is not to constrain administrative agencies' discretion to make decisions on the basis of merit, but to request the administrator to follow minimum procedural steps when making such decisions which ultimately should encourage more sound and even-handed administrative practices.

#### 7. Necessary Technical Standards, Qualification and Licensing Requirements

The Protocol includes an open list of more stringent disciplines aimed at preventing measures and procedures relating to technical standards, qualification requirements and licensing requirements from constituting unnecessary barriers to trade in services. These disciplines prescribe that such measures and procedures must be, *inter alia*:

- i. based on objective and transparent criteria, such as competence and ability to supply the service;
- ii. not more burdensome than necessary to ensure the quality of the service; and
- iii. in the case of licensing procedures, not in themselves a restriction on the supply of the service.<sup>39</sup>

Contrary to GATS,<sup>40</sup> under the Protocol these disciplines apply to

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39. Protocol of Montevideo, *supra* note 6, art. X.4.

40. GATS negotiators did not agree to apply these regulatory standards to all service sectors. However, recognizing their role in preventing unnecessary barriers to trade in services, they agreed to continue negotiating on the development of these standards once GATS had entered into force. Article VI.4 of the GATS entrusts the Council for Trade in Services, through the appropriate bodies it may establish, with the task to develop any discipline that could be necessary based on these regulatory standards. So far, detailed

all service sectors, regardless of Member States' specific commitments. They provide the legal basis for undertaking a much deeper review of national measures and procedures on technical standards, qualification requirements and licensing requirements. The necessity test allows for the review of the appropriateness of the means employed to secure the quality of a service in light of their trade-restrictive costs, which opens the door to go far beyond a discriminatory test and struck down measures that, despite being indistinctly applicable in character, they nonetheless create more trade restrictions than necessary to attain their regulatory goals.

C. *Impact of the General Obligations and Disciplines on the Liberalization of Trade in Services*

Since the Protocol of Montevideo has just entered into force, it is still too early to assess the impact that its general obligations and disciplines have had on the liberalization of trade in services in MERCOSUR. However, based on the analysis of the Protocol's provisions and on the institutional framework responsible for their implementation and enforcement, it is possible to anticipate some limitations that will affect the capacity of the general obligations and disciplines to liberalize trade in services and to put forward some proposals to overcome them.

To begin with, the capacity of the general obligations and disciplines to liberalize trade in services is limited by their narrow scope of application. As previously mentioned, Member States are bound to accord Market Access and National Treatment standards to foreign service providers only in those sectors included in their schedule of specific commitments and under the conditions thereby established. In addition, the Protocol's main obligations—Market Access and National Treatment—are well suited to tackle overt quantitative restrictions and discriminatory measures and practices, but are less effective to deal with more subtle trade restrictive measures such as the dual regulatory burden problem caused by non-discriminatory regulations.<sup>41</sup> Considering that service markets are heavily regulated, this is a serious handicap, in particular for a liberalization process aimed at the establishment of a common market. Eventually, ad-hoc arbitration tribunals could

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disciplines have been developed for the accountancy sector. However, only those countries that have made specific commitments in the accountancy sector are bound by these disciplines.

41. The Protocol does include a non-discriminatory standard, the necessity test, but limits its scope of application to technical standards, qualifications and licensing requirements. See Protocol of Montevideo, *supra* note 6, art. X.4.

overcome this limitation by interpreting the meaning of “de facto” discrimination broadly.

Ultimately, the impact of the Protocol’s general obligations and disciplines on the liberalization of trade in services will largely depend on the capacity of MERCOSUR institutions and mechanisms to apply them and, in particular, on the way MERCOSUR adjudicatory bodies interpret them.<sup>42</sup>

The Protocol entrusts the settlement of disputes that may arise between Member States regarding to the application, interpretation or non-fulfillment of the commitments established by the Protocol of Montevideo to the MERCOSUR dispute settlement system,<sup>43</sup> which has important limitations. Typical of a purely intergovernmental agreement, MERCOSUR lacks a supranational court and its disputes are settled by ad-hoc arbitration tribunals. Despite recent improvements, like the possibility to appeal the arbitration award before the Permanent Tribunal of Revision,<sup>44</sup> *locus standi* remains closed to Member States. Individuals affected by trade-restrictive measures must first resort to the National Section of the CMG for the initiation of consultation proceedings. If consultations fail to settle the dispute, the controversy may continue on to the arbitration stage only if a Member State adopts the individual’s complaint as its own. Thus, there is always the risk that private parties’ interests may end up diluted in broader geopolitical concerns.<sup>45</sup>

Notwithstanding its limitations, the capacity of the dispute settlement system to enforce Member States’ legal commitments, including the Protocol’s general obligations and disciplines, should not be underestimated. A recent arbitration award has confirmed the binding effect of the Protocol upon Member States.<sup>46</sup> The award holds that the

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42. Adjudicatory bodies responsible for interpreting treaty-based general obligations and disciplines play a critical role. A too restrictive interpretation of their scope of application or their normative implications may limit their capacity to strike down trade-restrictive measures. By contrast, a too liberal interpretation may unduly constrain Member States’ domestic regulatory autonomy, undermining the political legitimacy of the integration process.

43. See Protocol of Montevideo, *supra* note 6, art. XXV.

44. See The Protocol of Olivos for the Settlement of Disputes, Feb. 18, 2002, 42 I.L.M. 2 (replacing the Protocol of Brasilia for the Settlement of Disputes, Dec. 17, 1991).

45. See Thomas Andrew O’Keefe, *Dispute Resolution in MERCOSUR*, 3 J. WORLD INVESTMENT 507 (2002), available at <http://www.mercosurconsulting.net/Articles/article10.html>.

46. See Laudo del Tribunal Arbitral “Ad Hoc” de MERCOSUR Constituido para Entender de la Controversia Presentada por la República Oriental del Uruguay a La República Argentina Sobre “Omisión Del Estado Argentino en Adoptar Medidas Apropriadas para Prevenir Y/O Hacer Cesar Los Impedimentos a la Libre Circulación Derivados de los Cortes en Territorio Argentino de Vías de Acceso a los Puentes Internacionales Gral. San Martín Y Gral. Artigas Que Unen La República Argentina con

free movement of services, particularly Transport and Tourism Services, were affected by the persistent and continuous blocking of motorways that link Uruguay and Argentina caused by environmental activists on the Argentine bank of the River Uruguay.<sup>47</sup> Furthermore, the award prescribes that the failure of Argentine authorities to adopt the necessary measures to prevent or at least to put an end to those blockings of motorways is not compatible with MERCOSUR Members' commitment to secure the free movement of goods and services across their territories.<sup>48</sup>

The award rejects the Argentine argument that the Protocol of Montevideo only compels Member States not to adopt *governmental measures* that affect the free movement of services. Instead, it holds that the authorities of a Member State are under the obligation to prevent or to put an end to the obstructions to the free movement of goods and services caused by private parties, even in the absence of an express rule that prescribes such conduct. The Tribunal argues that such obligation stems from the commitment on free movement undertaken by Member States, which also involves the obligation to adopt the necessary means to secure such commitment.<sup>49</sup>

Previous awards relating to measures affecting the free movement of goods have also held that Article 1 of the Treaty of Asunción prescribes a clear, defined and self-executing obligation and that custom duties, charges of equivalent effect and other restrictions on regional products are absolutely prohibited.<sup>50</sup> So far, the evidence stemming from the arbitration awards suggests that when a dispute reaches the arbitration stage, the competent tribunal will look at the claim seriously and will examine the compatibility of the challenged measure in light of a broad understanding of Member States' free trade commitments, whether expressed or implied by the applicable legislation. Therefore, in

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La República Oriental del Uruguay" [Arbitration Award on the Dispute Between Uruguay and Argentina Relating to the Omission of the Argentine Republic to Prevent the Impediment to the Free Movement of Goods and Services by Obstructing Access to International Bridges] ¶ 105, Sept. 6, 2006, *available at* [http://www.mercosur.int/msweb/portal%20intermediario/es/controversias/archivos/TPR\\_Tribunal%20AdHoc\\_Laudo%20Libre%20Circulacion\\_ES.pdf](http://www.mercosur.int/msweb/portal%20intermediario/es/controversias/archivos/TPR_Tribunal%20AdHoc_Laudo%20Libre%20Circulacion_ES.pdf).

47. *Id.* at ¶¶ 111-114.

48. *Id.* (Tribunal's decision, second consideration).

49. *Id.* ¶¶ 117, 118.

50. *See* Laudo del Tribunal Arbitral "Ad Hoc" de MERCOSUR Constituido para Decidir en la Controversia Entre La República del Paraguay a La República Oriental del Uruguay Sobre La Aplicación del "IMIESI" (Impuesto Especifico Interno) a la Comercialización de Cigarrillos [Arbitration Award on the Dispute Between Paraguay and Uruguay Relating to an Excise Duty on Cigarettes Imposed by Uruguay] 14, May 21, 2002, *available at* <http://www.mercosur.int/msweb/portal%20intermediario/es/controversias/archivos/VIII%20LAUDO.pdf>.

theory, the dispute settlement system could be an effective mechanism for the enforcement of the Protocol's general obligations and disciplines. In practice, however, only a tiny proportion of Member States' measures and practices incompatible with MERCOSUR law end up being challenged before a MERCOSUR ad-hoc Tribunal.<sup>51</sup>

The Protocol places on the MTC the overall responsibility for the application of the Protocol and assigns to this body the following functions: to receive information about measures adopted by Member States which allegedly affect the operation of the Protocol, to receive information about measures adopted by Member States for the protection of essential security interests, and to deal with consultations and claims submitted by Member States relating to the application, interpretation or non-fulfillment of the Protocol of Montevideo.<sup>52</sup>

Until now, no procedure has been established for Member States to inform the MTC about the modification or introduction of new regulations affecting trade in services or measures adopted for the protection of essential security interests and it is unlikely that this procedure will be set up in the near future. The MTC meets on average once a month, has limited resources and is already overloaded by its role assisting the CMG in the supervision of the application of the common trade policy. Nevertheless, it would be advisable for the MTC to take the first steps to comply with the Protocol's mandate by, for instance, creating a technical committee on trade in services.

In summary, the general obligations and disciplines included in the Protocol of Montevideo constitute a key legal instrument for the liberalization of trade in services since trade liberalization is a process of permanent character, which requires the constant monitoring of domestic regulatory practices to prevent the adoption of new barriers and to encourage best regulatory practices based on objective, transparent and impartial criteria. However, the capacity of the Protocol's general obligations and disciplines to contribute with the liberalization of trade in services in MERCOSUR will be constrained by their narrow scope of application and by the limitations of the dispute settlement system responsible for their enforcement.

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51. Between 1995 and 2006 only twelve arbitration awards have been issued by ad hoc Tribunals and one of them (remodelled tyres) was subject to review by the Permanent Review Tribunal.

52. See Protocol of Montevideo, *supra* note 6, art. XXIII.

### III. Negotiation of Specific Commitments

#### A. *The Protocol's Program of Liberalization of Trade in Services*

Following the provisions of Part IV of the GATS, Part III of the Protocol establishes a Program of Liberalization on Trade in Services. The Program of Liberalization is a mechanism for advancing the liberalization of trade in services through the negotiation of specific commitments on Market Access and National Treatment. It provides for a gradual or "positive list" approach to the liberalization of trade in services, by which Member States set out in national schedules of commitments the sectors, sub-sectors, modes of supply and conditions under which they wish to assume specific commitments on Market Access and National Treatment.<sup>53</sup> At the same time, the Program compels Member States to enter into successive rounds of negotiations aimed at the progressive inclusion of sectors, sub-sectors, activities and modes of supply of services in Member States' schedules, as well as the reduction or elimination of trade-restrictive measures, with a view to ensure effective Market Access.<sup>54</sup>

Upon the conclusion of each negotiation round, new concessions are recorded in each Member State's schedule of specific commitments, which by virtue of Article VII.4 must be annexed to the Protocol and shall form an integral part thereof. The Protocol stipulates that negotiation rounds must be conducted on a yearly basis and that the Program of Liberalization must be completed on a period no longer than ten years since the Protocol's entry into force.<sup>55</sup> The positive list approach enables each Member State to control, within the ten years time frame, the scope of its liberalization commitments and the pace of the liberalization process, according to the particular strengths and weaknesses of its various service sectors.

One of the main reasons that has been invoked in favor of importing a GATS's style Program of Liberalization for the opening of services markets is its gradualism. Peña, for instance, claims that the gradualism prescribed by the Program of Liberalization is in line with the principles of gradualism, flexibility and balance that have guided MERCOSUR integration process from its very beginning.<sup>56</sup> She argues that the Program of Liberalization allows for the gradual adaptation of Member States that are starting out with dissimilar conditions concerning their

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53. *Id.* art. VII.2.

54. *Id.* art. XIX.1.

55. *Id.* art. XIX.1.

56. See María-Angélica Peña, *supra* note 7, at 155.

internal regulations for the various services sectors.<sup>57</sup> Peña also asserts that the positive list approach combined with the obligation to conduct annual rounds of negotiations towards the complete liberalization of trade in services within a ten years period enables even the smallest and most vulnerable countries to establish temporary restrictions on Market Access in order to prepare their most sensitive or most de-regulated sectors for a broader market.<sup>58</sup>

Political economy reasons suggest that the opening of services markets should be gradual,<sup>59</sup> in particular for fledgling integration process conditioned by unstable macroeconomic circumstances and sharp structural and policy asymmetries among participant States. What remains questionable is whether a GATS-style Program of Liberalization based on rounds of negotiations over positive lists of specific commitments constitutes the best alternative for securing the gradualism that MERCOSUR needs for its process of liberalization of trade in services.

First, comparable integration experiences have resorted to other strategies in order to secure the gradualism of the liberalization process. For instance, during the early stages of integration of the—at that time—European Economic Community, various programs were designed and implemented for the progressive abolition of restrictions to the movement of services.<sup>60</sup> These programs were elaborated on the basis of a common understanding that the ultimate objective was the establishment of a common market. They consisted on the adoption or removal of a detailed list of measures subject to a binding timetable. Gradualism was secured by fixing the deadlines for the adoption of the liberalizing measures in accordance with their implementation costs.<sup>61</sup> Another alternative is the “negative list approach” followed by NAFTA

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57. *Id.* at 155.

58. *Id.* at 163.

59. *See, e.g.*, B. HOEKMAN AND MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM*, (2001). The authors contend that because of the sensitivity of the public policy issues at stake, the liberalization of trade in services tends to be more resisted than the liberalization of trade in goods and thus, require a gradual and carefully negotiated liberalization process, more palatable to domestic constituencies.

60. *See, e.g.*, General Programme for the Abolition of Restrictions of Freedom to Provide Services, 1962 O.J. 32, (Jan. 15, 1962); *see also* Completing the Internal Market: White Paper from the Commission to the European Council, June 28-29, 1985, COM (1982) 310 final (June 14, 1985).

61. *See* Treaty Establishing the European Community, art. 15, Feb. 7, 1992, 1992 O.J. (C 224) 1 [1992], 1 C.M.L.R. 573 [hereinafter EC Treaty]. “When drawing up its proposals with a view to achieving the objectives set out in Article 14, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain during the period of establishment of the internal market and it may propose appropriate provisions. . . .” *Id.*

and NAFTA-type agreements, whereby parties to the agreement commit themselves from the outset to grant Market Access and to accord National Treatment to all foreign services and services suppliers in all sectors *unless* otherwise specified in a closed list of exemptions or non-conforming measures, set out in an annex. In this case, what Member States may have to negotiate is the phase out of the exceptions rather than the phase in of positive commitments on Market Access and National Treatment.<sup>62</sup>

Second, apart from the difficulties faced by negotiators in measuring the value of concessions for reciprocal bargaining purposes, the logic underlying the negotiation of specific commitments tends to prioritize short-term interests and individualistic negotiation strategies over long-term interests and co-operative actions towards the formation of a common market. For instance, it happened on a number of occasions during the negotiation rounds, that some Member States offered to eliminate or reduce restrictions in certain sectors or modes of supply but, ultimately, the offers were withdrawn on the grounds that they were not matched by comparable offers from other Member States.

Like the GATS, the Program of Liberalization is subject to two important limitations. First, the need for the liberalization process to respect the right of each Member State to regulate, and to introduce new regulations within their territories with a view to meet national policy objectives relative to the service sector.<sup>63</sup> The right to regulate is defined broadly, covering, *inter alia* regulations affecting Market Access or National Treatment, although its exercise is subject to the condition not to annul or impair the obligations arising from the Protocol and from a Member State's schedule of specific commitments.<sup>64</sup>

It is understandable to find a qualification of this kind in the context of a multilateral agreement among over one hundred and forty countries characterized by sharp differences in their level of development. It seems less compelling to include such qualification in the context of a sub-regional agreement between few countries with relatively similar levels of development. In particular, it is difficult to reconcile the express recognition of Member States' right to regulate and to pursue their own national policies with MERCOSUR's purpose to establish a

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62. For further analysis on the advantages and disadvantages of the "positive list" and the "negative list" approach, see Sherry Stephenson & Francisco Prieto, *Evaluating Approaches to the Liberalization of Trade in Services: Insights from Regional Experience in the Americas* in TRADE POLICY FOR DEVELOPING COUNTRIES IN A GLOBAL ECONOMY: A HANDBOOK 1 (World Bank 2001).

63. Protocol of Montevideo, *supra* note 6, art. XIX.4. The GATS refers to the right to regulate in its preamble, not in a specific provision of the agreement.

64. *Id.* art. XIX.4.



common market involving the free movement of services and the coordination of macroeconomic and sectoral policies, including services sectoral policies like transport and communications.

The second limitation refers to the Member States' right to modify or suspend their specific commitments during the implementation of the Program of Liberalization. Article XX of the Protocol enables a Member State to take back something it has given in past negotiations, but only at a price and after due notice. The right to suspend or modify specific commitments can only be exercised in exceptional circumstances and its effects are subject to the principle of non-retroactivity in order to protect acquired rights.<sup>65</sup> In addition, the Member State wishing to suspend or modify its commitments must notify the CMG and duly justify its decision. It must also hold consultations with the Member States which are considered to be affected, with a view to reach an agreement on the specific measures to be applied and their period of application.<sup>66</sup> In practice, all Member States have already exercised their right to modify their schedules of commitments.<sup>67</sup>

The Protocol entrusts the task of calling and supervising the rounds of negotiations of specific commitments to the CMG.<sup>68</sup> The CMG has delegated this task to the Group of Services, one of its auxiliary bodies.<sup>69</sup> The CMG is also responsible for receiving notifications and the results of the consultations on the modification and/or suspension of specific commitments.<sup>70</sup> The CMC is the body responsible for approving the results of the negotiation rounds as well as any modification or suspension thereof.<sup>71</sup>

### *B. Impact of the Negotiation Rounds on the Liberalization of Trade in Services*

Negotiation rounds on specific commitments started in 1998, soon

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65. *Id.* art. XX.1.

66. *Id.* art. XX.2.

67. In 2000, Brazil notified the CMG of two new restrictions affecting its previous commitments relating to mobile services, private leased circuit services and paging. *See* Brazil's notification to the CMG on Annex VII to the minutes of the XXXXVII CMG Meeting, Buenos Aires, Apr. 4-5, 2000 [on file with author]. In 2004, Argentina (Maintenance and Repair of Vessels), Paraguay (Horizontal restrictions on Mode 3) and Uruguay (Pharmacy Services, Retailing Services) notified the CMG of new restrictions to their specific commitments approved by the IV round of negotiations. *See* Argentina's, Paraguay's and Uruguay's notification to the CMG on Annex XXXVII to the minutes of the LVI CMG Meeting, Rio de Janeiro, Nov. 25-26, 2004 [on file with author].

68. Protocol of Montevideo, *supra* note 6, art. XXII (a).

69. *See* MERCOSUR Resolution GMC 31/98, (July 23, 1998).

70. Protocol of Montevideo, *supra* note 6, art. XXII(b).

71. *Id.* art. XXI.

after the Protocol of Montevideo was approved, but long before the Protocol entered into force. Between 1998 and 2006, six negotiation rounds have been completed on a *de facto* basis. It is an accumulative process, where the results of the last round include the results of the previous one. The schedules of specific commitments resulting from the sixth negotiation round have been approved by the CMC in July 2006,<sup>72</sup> however, since they have not been incorporated into Member States' national legal systems, they are not legally binding upon them.<sup>73</sup> Member States have nevertheless pledged to make their best efforts to observe their specific commitments.<sup>74</sup>

To be compatible with the WTO, Member States' schedules of specific commitments must provide for a "substantial coverage" of sectors and modes of supply and must aim at the elimination of "substantially all discrimination."<sup>75</sup> In this vein, the Modalities for the Negotiation of Initial Specific Commitments, provide that negotiations must aim at deepening Member States' specific commitments under the WTO, and that they must have a substantial coverage of service sectors and modes of supply.<sup>76</sup>

The negotiation modalities and procedures used by Member States closely follow those used at the multilateral level. For example, negotiations are conducted by way of exchanging request and offer lists, service sectors are classified according to the WTO Secretariat's Services Sectoral Classification List,<sup>77</sup> and specific commitments are inscribed in Member States' schedules in accordance with WTO Guidelines for the Scheduling of Specific Commitments.<sup>78</sup>

Every schedule specifies the sectors and sub-sectors where

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72. See MERCOSUR CMC Decision 1/06, (July 20, 2006).

73. Article XXVII.3 of the Protocol prescribes that for their entry into force, the schedules of specific commitments resulting from the negotiation rounds must be incorporated into national legal systems in accordance with the procedures provided for in each Member State. So far, only Argentina and Uruguay have completed the incorporation process for their initial schedules of specific commitments and Brazil for the schedule of commitments approved by the first negotiation round.

74. See Minutes of the II meeting of the Group of Services, Asunción, Mar. 16-18, 1999 [on file with author].

75. See GATS, *supra* note 5, art. V, ¶¶ 1(a), 1(b).

76. MERCOSUR CMG Resolution 67/97 art. 4 (Dec. 13, 1997)

77. See GATS Secretariat, *Services Sectoral Classifications List*, MTN.GNS/W/120 (Jul. 10, 1991) [hereinafter *Sectoral Classifications List*]. For the classification of sub-sectors, Member States may rely on the United Nations Provisional Central Product Classification. United Nations Statistics Division—Classification Registry, <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1> (last visited May 7, 2007).

78. See Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS)* S/L/92 (Mar. 28, 2001).

commitments are undertaken.<sup>79</sup> For each service sector or sub-sector there are eight entries: one entry for each mode of supply (cross-border supply, consumption abroad, commercial presence and presence of natural persons) under a Market Access column and one entry for each mode of supply under a National Treatment column. Schedules also include a third column reserved for "Additional Commitments" not subject to scheduling under the Market Access or National Treatment columns, for instance, commitments relating to qualifications, standards or licensing matters.<sup>80</sup>

The level of commitment in a specific sector for each mode of supply can range from a full commitment to a commitment with limitations or no commitment at all.<sup>81</sup> A full commitment on Market Access means the Member State does not maintain for that mode of supply any of the types of measures listed in Article IV. A full commitment on National Treatment means the Member State accords to foreign services and service suppliers conditions of competition no less favorable than those accorded to its own like services and service suppliers.<sup>82</sup> Full commitments are recorded in the schedule with a "NONE" entry.

A Member State can also make commitments with limitations, inscribing in the schedule a concise description of the measure inconsistent with Articles IV or V it wishes to maintain. Finally, a Member State may opt not to make any commitment whatsoever for a specific mode of supply, i.e., to remain free to adopt measures inconsistent with Articles IV or V. The absence of commitments is recorded in the schedule with an "UNBOUND" entry. Eight "NONE" entries for a specific service sector means that trade in services is completely liberalized for all modes of supply, namely, that the Member State is legally bound not to adopt any measure inconsistent with Articles IV or V. The fewer the number of "NONE" entries, the lower the level of liberalization for that service sector.

The following paragraphs examine Member States' most recent schedules of specific commitments, using Hoekman's method to assess the potential impact they could have on the liberalization of trade in services once they enter into force.<sup>83</sup> The quantitative data gives a rough

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79. Member States' schedules follow the WTO Secretariat's Services Sectoral Classification List. *Sectoral Classifications List*, *supra* note 78.

80. Protocol of Montevideo, *supra* note 6, art. VI.

81. *Id.* art. VII.1.

82. *Id.* art. V.

83. Bernard Hoekman has pioneered a method for the estimation of the degree of liberalization of trade in services based on a quantitative analysis of Member States' schedules of specific commitments. It gives a value of "1" for an entry of "NONE" on both the Market Access and the National Treatment columns. Then, it calculates the ratio

idea of the degree of liberalization of the various service sectors and allows for making comparisons between Member States' specific commitments.<sup>84</sup> It has to be borne in mind, however, that Hoekman's method does not take into account horizontal limitations for specific modes of supply which are applicable to all service sectors.<sup>85</sup>

### 1. Professional Services

Argentina's, Brazil's and Uruguay's schedules of specific commitments reveal a moderately high level of liberalization of Professional Services, while Paraguay has not undertaken any binding commitment in this sector. Specific commitments vary according to the profession, with Architectural and Engineering Services being the most liberalized and Medical-related Services the least liberalized.

The quantitative data must be qualified by Member States' horizontal limitations on Mode 4, which is probably the most important mode of supply for Professional Services, and other horizontal limitations relating to qualification requirements, residency requirements and membership of professional bodies' requirements. For instance, both Argentina and Uruguay specify in their schedules that any person seeking to provide professional services in their country must first obtain recognition of their professional degree, enroll in the relevant professional body, and establish a registered office in the country. Therefore, in practical terms, there is still a long way to go for the liberalization of trade in Professional Services. The negotiation of specific commitments could, at best, provide for a limited degree of liberalization, but in order to ensure effective market access it is clear that the development of secondary legislation is essential. In this vein, it

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of "NONE" entries on both the Market Access and National Treatment columns over the total number of possible entries for each service sector or sub-sector. See Bernard Hoekman, *Assessing the General Agreement on Trade in Services* in THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES 327 (Will Martin and L. Alan Winters eds., 1995).

84. See Annex, *Table 1 Degree of Liberalization of Service Sectors by Member State—July 2006*.

85. For instance, each Member States' schedule of commitments include a horizontal limitation on Mode 4 (presence of natural persons supplying services), which limits all sector-specific commitments on this mode of supply to a restricted number of categories of natural persons (Intra-corporate Transferees, Business Visitors, Professionals and specialized Technicians, Representatives of Foreign Companies). Brazil's and Paraguay's schedules also include horizontal limitations on Mode 3 (commercial presence of foreign service suppliers), which specify that foreign service suppliers wishing to supply a service as a legal person in their territory must be organized as a legal entity foreseen by their domestic laws. In addition, the Brazilian schedule states that to be eligible for remittances, foreign service suppliers established in Brazilian territory must be registered with the Central Bank of Brazil.

is worth highlighting the participation of some professional bodies on the negotiation of the mutual recognition of professional qualifications with a view to facilitate the provision of professional services on a temporary basis.<sup>86</sup>

## 2. Communication Services

The postal services market is virtually closed to foreign competition in the four countries. Audiovisual Services are very restricted as well, with every country maintaining restrictions on Market Access (e.g., quotas on foreign films, preferences for state owned companies on the assignation of TV and radio frequencies) and National Treatment (e.g., national-ownership requirements for TV and radio companies, nationality requirements for film producers).

The level of liberalization of Telecommunication Services is characterized by important asymmetries among Member States, with a relatively high level of liberalization in Argentina, along with a significantly lower level of liberalization in the other three Member States.

Brazil's specific commitments provide for a high level of liberalization, with all modes of supply but Mode 4 completely liberalized for all telecom sub-sectors, however, its schedule also includes important horizontal limitations. First, the Executive Power is allowed by legislation to limit the foreign ownership of the capital of any telecom undertaking. In addition, all telecom providers need a license to operate from ANATEL<sup>87</sup> and licenses are issued only to legal persons set up according to Brazilian legislation, with registered address in Brazil and with the majority of capital or voting rights controlled by Brazilian nationals.

Similarly, the Paraguayan schedule includes a horizontal note stipulating that each telecommunication service provider in Paraguay requires a government licence granted by CONATEL<sup>88</sup> according to a transparent and non-discriminatory procedure. The licenses are granted exclusively to legal persons (corporations or Limited Liability Companies) constituted in accordance with the national law of Paraguay, with headquarters and representation in the Paraguayan territory and with at least 50 percent of their capital owned by Paraguayan nationals.

In Uruguay, the level of liberalization of Value-added Services

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86. See MERCOSUR CMC Decision 25/03, (Dec. 16, 2003); see *infra* note 130.

87. Agência Nacional de Telecomunicações (National Telecommunications Agency).

88. Comisión Nacional de Telecomunicaciones (National Telecommunications Commission), established by Ley No. 642 de Telecomunicaciones, May 25, 1995.

(electronic mail, electronic data interchange, etc.) is moderately high, but Basic Telecommunication Services are provided under monopoly conditions by a state-owned enterprise (ANTEL<sup>89</sup>).

### 3. Environmental Services

Along with Postal Services, Environmental Services including Sewage, Refuse Disposal, and Sanitation Services, are among the least liberalized. These services are usually provided by state-owned enterprises under monopoly conditions or through local government authorities. In some cases, private contractors are allowed to enter the market under concession regimes but, overall, competition in this sector tends to be highly restricted.

### 4. Financial Services

Financial markets are highly regulated in every jurisdiction. Financial undertakings cannot operate without a license and their activities are subject to a number of prudential regulations and conduct of business regulations. It is for these types of sectors where the limitations of the negotiation of specific commitments as a mechanism for the liberalization of trade in services become apparent. At best, successful negotiations may contribute to remove quantitative restrictions to the commercial presence of foreign service providers or overt discriminatory measures in terms of licensing or supervision, but it is a mechanism totally ineffective to address the dual regulatory burden problem caused by the duplication of supervisory regimes. All Member States' schedules include horizontal limitations to their Financial Services' commitments aimed at preserving their supervisory prerogative over any financial undertaking that operates in their territories. It is with these limitations in mind, that Member States' commitments in this sector should be assessed.

In Argentina, Financial Services other than Insurance enjoy the highest level of liberalization. Although Insurance Services tend to be more restricted, there are no limitations for the commercial presence of foreign insurance service providers, something that finds no parallel in any other Member State.<sup>90</sup> Regarding Banking and other Financial Services, Argentina's schedule does not include limitations either to the commercial presence of foreign service suppliers or to the consumption

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89. Administración Nacional de Telecomunicaciones (National Telecommunications Administration).

90. It must be specified, however, that commitments related to services auxiliary to insurance (including broking and agency services) remain "unbound."

of Financial Services abroad. Argentina's liberal approach on Banking Services has been recently constrained by the adoption of stricter controls over the outflow of capital.<sup>91</sup>

In Uruguay, the level of liberalization of Financial Services is moderately high, although there are some horizontal limitations such as quantitative restrictions on bank licenses.<sup>92</sup> The main Banking Services, such as the accepting of deposits and lending of all types, are almost completely liberalized, while for Investment Services some restrictions remain in place. Insurance Services can only be provided either by the State Insurance Bank, a state-owned company, or by public limited companies with nominative shares. In addition, insurance against accidents at work and professional sickness are provided only by the State Insurance Bank. Apart from these limitations, insurance markets are moderately open to the commercial presence of foreign service providers.

In Brazil and Paraguay, the level of liberalization of financial services is very low, with hardly any commitments made so far. In addition, both countries include horizontal limitations to the commercial mode of supply of financial services. In Brazil, for instance, in addition to the need to obtain a license to operate and being subject to the supervision of Brazilian financial supervisory authorities, all financial companies must be incorporated under Brazilian law in the form of a "sociedade anônima." Moreover, financial service providers other than insurance service suppliers may be required to fulfill specific conditions, and all members of senior level management must be permanent residents in Brazil.

Overall, after six rounds of negotiations, Member States have made a slow but steady progress in consolidating the status quo of their domestic legislation. The fact that, in general terms, schedules of specific commitments reflect the current status of Member States' domestic legislation constitutes an important step towards the liberalization of trade in services because of its "lock in effect" (i.e., it prevents Member States from introducing new limitations to trade in services in the future). The consolidation of the status quo also contributes to the transparency of the process by preventing gaps between bound commitments and applied commitments.<sup>93</sup>

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91. This policy shift was adopted during the aftermath of the severe financial crisis that hit Argentina in December 2001.

92. Every year, the number of licenses for the operation of new banks cannot be more than 10 percent higher than the authorisations granted during the previous year.

93. In the GATS context there is an extended negotiation practice to make commitments more restrictive than the current legislation. This practice enables Member States to preserve some manoeuvring room for future negotiations, making "new" offers

At the same time, the negotiation of specific commitments have yielded very little results beyond the consolidation of the status quo. The horizontal limitations included in any of the schedules, and the asymmetries in the level of liberalization according to the service sectors and modes of supply gives an idea of the scale of the job that may lay ahead. Even though Member States have exchanged request and offer lists for the elimination of existing restrictions on Market Access and National Treatment, they have not managed to agree on a preferential treatment for MERCOSUR services and service providers. Most requests for concessions have been denied, among other reasons, on grounds of lack of reciprocal concessions from the requesting State, the need for further consultations at domestic level, or the need to wait until the culmination of a regulatory reform process.

So far, the implementation of the Program of Liberalization has confirmed the limitations of the negotiation of specific commitments as a mechanism for the liberalization of trade in services and the need to complement it with alternative mechanisms such as the development of secondary legislation to ensure the necessary conditions for the free movement of services as prescribed by the Treaty of Asunción.

#### IV. Secondary Legislation on Trade in Services

##### A. *MERCOSUR Legislative Process*

Trade liberalization is not only about removing trade-restrictive domestic regulations or preventing new ones to emerge, but also about providing new rules necessary for the proper functioning of the integrated market. To this end, trade agreements seeking to reach advanced levels of integration usually lay down an institutional framework, which includes decision-making bodies endowed with rule-making power. The rules made by these bodies are known as “secondary legislation” or “derived law” by opposition to treaty provisions, which are referred to as “primary legislation” or “original law.” Secondary legislation can make a vital contribution to the liberalization process, in particular, by harmonizing disparate domestic regulations and thus minimizing the trade-discouraging effect caused by the dual regulatory problem. At the same time, the creation, implementation and enforcement of secondary legislation raises difficult legal issues, most notably, the identification of the legal basis for the adoption of secondary legislation, the legal effect of secondary legislation on individuals and the relationship between secondary legislation and domestic laws.

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without having to adopt fresh deregulatory measures.



The MERCOSUR legal system has an international law status, albeit with some particularities, and its institutional framework is based on an intergovernmental model, which confers its Members' strict control over the scope and pace of the integration process. MERCOSUR decision-making bodies (CMC, CMG and MTC) are formed by government officials from the executive power of each Member State and all decisions must be taken by consensus with the presence of all Member States.<sup>94</sup> So far, MERCOSUR decision-making bodies have produced a voluminous body of secondary rules including CMC Decisions, CMG Resolutions and MTC Directives.<sup>95</sup> MERCOSUR secondary legislation is not directly applicable on Member States' domestic legal systems. Member States must take the measures necessary for its incorporation into their domestic legal system and individuals cannot rely on them before national courts until they have been duly incorporated by all Member States.<sup>96</sup>

The following paragraphs examine the process for the adoption of MERCOSUR norms. Although the term "legislative process" could be regarded as rather presumptuous for describing its current status of development, in fact, MERCOSUR law already includes a number of treaty provisions, CMC Decisions and CMG Resolutions containing rules on how to make rules, which, taken together, stipulate the realization of a series of diverse and autonomous acts, by different actors, aimed at the production of rules.<sup>97</sup>

The main features of MERCOSUR legislative process are its decision-making system based on consensus, the lack of rules that clearly stipulate the legal basis for the adoption of secondary legislation and the need for all Member States to adopt the necessary measures to incorporate the rules into their domestic legal systems for their entry into force.

First, Decisions, Resolutions and Directives must be adopted by consensus and in the presence of all Member States.<sup>98</sup> Notwithstanding its advantages for Member States wary of giving away too much sovereignty, from a technical perspective, the consensus rule introduces a

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94. See Protocol of Ouro Preto, Dec. 17, 1994, Arg.-Braz.-Para.-Uru., arts. 4, 11, 16, 38, 34 I.L.M. 1244 [hereinafter POP].

95. By 2004 MERCOSUR secondary legislation included 331 CMC Decisions, 1,023 CMG Resolutions and 140 MTC Directives. See ALEJANDRO PEROTTI & DEISY VENTURA, *EL PROCESO LEGISLATIVO DEL MERCOSUR* 23 (2004). The authors state that approximately 150 norms were derogated. In addition, many of these norms have not entered into force or consist of ordinary administrative decisions or political declarations with no legal effect.

96. See POP, *supra* note 95, art. 40.

97. See *supra* ALEJANDRO PEROTTI & DEISY VENTURA, note 96 at 17.

98. See POP, *supra* note 95, art. 37.

heavy degree of rigidity into the rule-making process. Building consensus is a lengthy and cost-intensive process, always at risk of being derailed by short-term national interests, which prevents decision-making bodies from delivering on time regulatory responses to the challenges raised by an ever changing environment. While introducing a qualified majority decision-making system is simply politically unfeasible and, at least at this stage of the integration process, technically unnecessary, it does not seem unreasonable to start thinking for alternatives to the present all-encompassing consensus rule that governs the adoption of any kind of measure, from far reaching policy measures to highly technical and specific decisions, or ordinary administrative acts.

MERCOSUR decision-making bodies consist of government officials, more precisely, representatives from the executive power and within the executive branch the largest group corresponds to diplomats from Member States' Ministries of Foreign Affairs. Decision-making bodies are supported by a number of technical bodies in fulfilling their functions. The CMG has the largest number of technical bodies operating under its umbrella, including thirteen sub-working groups and various other groups and specialized meetings. Technical bodies also consist of equal number of government officials per Member State, although in this case middle rank officials from other branches of the executive, regulatory entities and other state agencies are also represented. Technical bodies do not have decision-making power, but they can, and normally do, submit proposals for the adoption of norms to the decision-making body they support.

It must be noted that MERCOSUR institutional structure is complemented by a Joint Parliamentary Commission<sup>99</sup>—now in the process of being replaced by a fully fledged Parliament<sup>100</sup>—consisting of Members of Parliament from the Member States and an Economic and Social Consultative Forum (a consultative body consisting of representatives from Member States' social and economic sectors, which can issue non-binding Recommendations to the CMG).<sup>101</sup> However, so far, none of these bodies have played an active role in the rule-making process.<sup>102</sup>

It is arguable whether this strictly governmental composition of decision-making bodies, led by diplomats with a minimal input from

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99. *Id.* at art. 22-27.

100. *See* Protocol on the Creation of MERCOSUR Parliament, approved by MERCOSUR CMC Decision 23/05, (Dec. 8, 2005).

101. *See* POP, *supra* note 95, arts. 28-30.

102. *See* Cecilia Pena and Ricardo Rozenberg, *MERCOSUR: A Different Approach to Institutional Development*, FOCAL POLICY PAPER FPP-05-06 5 (2005), [www.focal.ca/pdf/mercosur.pdf](http://www.focal.ca/pdf/mercosur.pdf) (last visited Apr. 28, 2007).

Members of Parliament and representatives from the social and economic sectors strikes the right balance between political legitimacy and technical legitimacy that any rule-making process should aim at if its rules are to be applied at all.

Second, the MERCOSUR legislative process lacks treaty provisions that clearly stipulate the legal basis for the adoption of secondary legislation.<sup>103</sup> Article 1 of the Treaty of Asunción prescribes, rather vaguely, that the common market shall involve, among other things, "The commitment by State Parties to harmonize their legislation *in pertinent areas* to strengthen the integration process."<sup>104</sup> The Protocol of Ouro Preto enumerates MERCOSUR decision-making bodies' functions and powers, but it fails to clearly specify in what areas and to what extent the decision-making bodies can or cannot regulate. Not surprisingly, secondary legislation has been developed in a rather chaotic and unfocused way, following no priority criteria and covering a wide range of topics, some of them not even remotely related to the liberalization of trade.

Moreover, there is not a specific procedure in place for controlling the validity of the Decisions, Resolutions or Directives adopted by the decision-making bodies.<sup>105</sup> This has resulted on problems of *internal* incompatibility between MERCOSUR norms of the same level or different levels and problems of *external* incompatibility between MERCOSUR norms and domestic norms or between MERCOSUR norms and other international public norms.<sup>106</sup> In addition, the lack of control over the legislative process has resulted on the adoption of acts

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103. Compare EC Treaty, *supra* note 62, art. 5, and Protocol on the Application on the Principles of Subsidiarity and Proportionality, Treaty of Amsterdam, 1997 O.J. (C 340) 1.

104. Treaty of Asunción, *supra* note 2, art. 1 (emphasis added).

105. There are, of course, general procedures established by the Protocol of Olivos for the settlement of disputes arising between Member States in relation to the interpretation, application or non-fulfilment of provisions of the Treaty of Asunción, the agreements concluded within its framework, as well as CMC Decisions, CMG Resolutions and MTC Directives. However, as they currently stand, these procedures are not suitable for controlling the exercise of MERCOSUR bodies' rule-making power because the *locus standi* before MERCOSUR ad hoc Tribunals is limited to Member States and it is unlikely that any Member State would resort to this procedure to challenge the validity of norms adopted by consensus.

106. In order to minimise the internal incompatibility problem, the CMC adopted Decision 30/02, entrusting the MERCOSUR Secretariat, amongst other things with the function of controlling the legal consistency of draft norms with existing norms. MERCOSUR CMC Decision, 30/02, (Dec. 6, 2002), Annex 2(d). However, the CMC Decision did not go as far as regarding the Secretariat's technical intervention as a compulsory stage of the legislative process, but allowed MERCOSUR bodies to adopt rules even without hearing the Secretariat's opinion. See *supra* ALEJANDRO PEROTTI & DEISY VENTURA, note 96, at 13.

other than normative acts *strictu sensu*, such as administrative decisions relating to individuals<sup>107</sup> or political declarations with no intention to create any legal effects.<sup>108</sup>

Third, Decisions, Resolutions and Directives are not directly applicable on Member States' domestic legal systems. For their entry into force the following steps must be taken. First, each Member State has to take all the necessary steps to incorporate them into its domestic legal system and inform the MERCOSUR Administrative Secretariat about the actions taken to this end.<sup>109</sup> It is for each Member State to decide what kind of steps must be taken for the incorporation, whether it is a purely administrative procedure or one that requires parliamentary ratification. Once each Member State has informed the Secretariat about the incorporation, the Secretariat will inform all Member States accordingly.<sup>110</sup> The rule enters into force simultaneously for all Member States thirty days after the Secretariat's communication.<sup>111</sup> Before the end of the thirty days period, Member States must publish the rule in question in their respective official journals.<sup>112</sup>

The lack of direct applicability of MERCOSUR norms has become the bottle neck of the legislative process, creating a serious compliance problem. Indeed, only a small proportion of MERCOSUR secondary rules have been duly incorporated into Member States' domestic legal systems.<sup>113</sup> As it has been rightly pointed out, the lack of direct applicability makes the effectiveness of decisions taken by MERCOSUR political bodies dependent on domestic mechanisms and interests, which often use this circumstance as an informal means of vetoing or blocking their entry into force.<sup>114</sup> As a result, there is a huge implementation gap,

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107. See, e.g., MERCOSUR CMC Decision 27/05, (Dec. 7, 2005) (designating the Director of MERCOSUR Secretariat).

108. A case has already been made about the need to create a typology for the different types of acts that can be adopted by the decision-making bodies. See *supra* ALEJANDRO PEROTTI & DEISY VENTURA, note 96 at 25.

109. See POP, *supra* note 95, arts. 38, 40(1).

110. *Id.* at art. 40(2).

111. *Id.* at art. 40(3).

112. *Id.* at art. 40(3).

113. Between 1991 and September 2002, the CMC adopted 149 Decisions that needed to be incorporated into Member States' domestic legal systems, out of which 44 (30%) were incorporated by the four Member States. During the same period, the CMG adopted 604 Resolutions that needed to be incorporated into Member States' domestic legal systems, out of which 224 (37 percent) were incorporated by the four Member States. Between 1994 and September 2002 the MTC adopted 90 Directives that needed to be incorporated into Member State's domestic legal systems, out of which 45 (50 percent) were incorporated by the four Member States. Secretaria Administrativa del MERCOSUR, *Las Normas de Derecho Originario y Derivado del MERCOSUR. Su incorporación a los Ordenes Jurídicos de los Estados Partes* (Sept. 26-27, 2002).

114. See Pedro da Motta Veiga, *MERCOSUR's Institutionalization Agenda: The*

with a vast number of approved rules not incorporated into Member States' domestic legal systems causing legal uncertainty and undermining the credibility of the whole integration process.

To make matters more difficult, since private individuals cannot rely on unincorporated secondary rules before national courts, the only enforcement mechanism available to compel Member States to incorporate MERCOSUR rules is the State to State dispute settlement system based on ad-hoc arbitral procedures, which is not backed by effective remedies.

A number of measures have been adopted to streamline the incorporation process and minimize the implementation gap but the problem persists.<sup>115</sup> Proposals for introducing a directly applicable system for MERCOSUR norms that do not require parliamentary ratification are currently being negotiated but, so far, no formal decision has been adopted. It is also expected that, once it is set up, the MERCOSUR Parliament could play a more active role in speeding up internal procedures for the entry into force of MERCOSUR norms that require parliamentary approval.

#### *B. Impact of Secondary Legislation on the Liberalization of Trade in Services*

This section examines how the main limitations of the MERCOSUR legislative process, namely, the legal basis problem, the decision-making problem and the compliance-enforcement problem have affected the scope, purpose and quality of secondary legislation on services and, where possible, puts forward some considerations on how could they be solved.

##### 1. The Legal Basis Problem

MERCOSUR decision-making bodies have adopted secondary rules in relation to education, energy, financial services, health, postal services, professional services, telecommunications, tourism and transport. Most rules are related to service sectors with comparatively low trade relevance like education, health or postal services, or to trade-relevant sectors but addressing very narrow and technical issues rather than focusing on aspects of wider impact for the liberalization of trade.

For instance, although quite a few norms have been adopted on

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*Challenges of a Project in Crisis* 21 (INTAL—ITD Working Paper, July 2004).

115. See, e.g., MERCOSUR CMC Decision 55/00, (Dec. 15, 2000); MERCOSUR CMC Decision 07/03 (June 18, 2003); MERCOSUR CMC Decision 22/04, (July 8, 2004).

telecommunications, most of them are focused on the harmonization of very specific technical regulations.<sup>116</sup> No matter how important the harmonization of these technical issues may be, its impact on the opening of telecom markets will be limited unless more fundamental regulatory restrictions on the commercial presence of foreign telecom providers or on the use of cross-border telecom services are sorted out. Similarly, in the transport sector, out of the wide range of policies and regulations affecting the conditions for transport services in Member States, legislative action has been focused on particularly narrow issues such as the harmonization of the conditions for the transport of hazardous substances.<sup>117</sup> In the same way, there are norms harmonizing technical regulations on the provision of very specific services like dialysis services<sup>118</sup> or cleaning, disinfecting and pest control services.<sup>119</sup>

The service sectors regulated and the content of the rules confirm the rather unfocused and eventful development of MERCOSUR secondary legislation. The lack of treaty provisions clearly prescribing the regulatory competence of MERCOSUR decision-making bodies and the absence of a strategic legislative action plan may have influenced on this outcome. An amendment of the Protocol of Ouro Preto, spelling out more clearly in what areas to what extent and for what purposes can rule-making bodies adopt norms, could help to harness the development of secondary legislation in a more efficient way.<sup>120</sup>

The lack of a clear legislative strategy is also revealed by the varied purposes underlying secondary rules on services. There are norms directly aimed at eliminating trade barriers and promoting conditions of fair competition standing along with norms pursuing non-trade objectives. Typical examples of secondary rules used as an instrument for the liberalization of trade include the CMC Decision on the harmonization of the conditions of access for branches of insurance undertakings,<sup>121</sup> or the CMG Resolution on the harmonization of the requirements for the authorization of road transport undertakings.<sup>122</sup> The

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116. *See, e.g.*, MERCOSUR CMG Resolution 25/94, (Aug. 3, 1994) (on the interface of PDH digital transmission); MERCOSUR CMG Resolution 65/97, (Dec. 13, 1997) (on the coordination of frequencies for mobile telephone services).

117. *See, e.g.*, MERCOSUR CMC Decision 8/97, (Dec. 15, 1997); and MERCOSUR CMC Decision 82/00, (Dec. 7, 2000).

118. *See* MERCOSUR CMG Resolution 42/00, (June 28, 2000).

119. *See* MERCOSUR CMG Resolution 54/02, (Nov. 28, 2002).

120. In this vein, again, it is worth looking at the European Union experience. For instance, Article 52(2) of the EC Treaty lays down some guidelines for legislative action stipulating that priority must be given to those services which directly affect production costs or the liberalization of which helps to promote trade in goods. The European Commission has a rich experience in drafting and implementing legislative actions plans.

121. *See* MERCOSUR CMC Decision 9/99, (Dec. 7, 1999).

122. *See* MERCOSUR CMG Resolution 58/94, (Apr. 11, 1994).

purpose of these norms is to facilitate cross-border trade by seeking to establish a level playing field and avoiding the duplication of red tape.

By contrast, there is no shortage of examples of norms adopted for non-trade purposes. The coordination of security and educational policies, the protection of human rights, and cooperation agreements on judicial affairs are just a few examples of areas not even remotely related to the liberalization of trade where MERCOSUR decision-making bodies have been actively legislating on.<sup>123</sup>

In principle, there is nothing wrong with furthering cooperation in non-trade areas through secondary legislation. One could also make a case for the need to regulate on the protection of non-market interests even at the expense of trade liberalization. But if this is the case, a reformulation of the objectives of the Treaty of Asunción and the Protocol of Ouro Preto and the role those instruments assign to the market in the integration process would be necessary. Again, clear treaty standards on what to regulate and for what purposes can contribute to clarify the purposes of secondary legislation and its link with the overall objectives of the integration process.

Most of the norms include an extremely succinct preamble, which makes it more difficult to ascertain their purpose. In order to enhance the transparency of the legislative practice it could be useful to request the rule-making bodies to lay down more detailed preambles. Although there is no specific procedure for the control of the validity of the norms, a requirement for more specific recitals referring to the purposes of a norm and its connection with the overall purposes of the Treaty of Asunción, will help to identify the underlying values that are shaping the integration process and the place that free trade occupies among them.

Another characteristic of MERCOSUR norms on services is that they do not follow a single regulatory pattern. Some of them establish memorandums of understandings<sup>124</sup> or exchange of information and cooperation agreements,<sup>125</sup> others provide for the minimum harmonization of domestic regulations,<sup>126</sup> while a few of them provide

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123. See, e.g., MERCOSUR CMC Decision 40/00, (Dec. 15, 2000) (Cooperation Agreement between Member States' Central Banks on the Exchange of Information for the Prevention and Combat of Money Laundering); MERCOSUR CMC Decision 13/98, (Dec. 10, 1998) (approving a tri-annual plan and targets for the educational sector).

124. See MERCOSUR CMC Decision 57/93, (Sept. 24, 1993) (Guidelines on Energy policies in MERCOSUR); MERCOSUR CMC Decision 10/98, (July 24, 1998) (Memorandum of Understanding on Electric exchanges and Electric integration in MERCOSUR); MERCOSUR CMC Decision 10/99, (Dec. 7, 1999) (Memorandum of understanding relating to gas exchanges and gas integration in MERCOSUR).

125. See MERCOSUR CMC Decision 8/99, (Dec. 7, 1999) (Cooperation Agreement between Supervisory Authorities of Insurance Companies).

126. See MERCOSUR CMG Resolution 8/93, (Jan. 17, 1994) (establishing minimum common regulations for capital markets).

for an exhaustive harmonization of domestic regulations.<sup>127</sup> Each type of norm impacts on the autonomy of domestic regulators in a different way. While memorandums of understanding or cooperation agreements simply encourage Member States to cooperate or exchange information on specific issues, rules prescribing a detailed harmonization of domestic regulations, involve a significant transfer of regulatory competence from domestic regulatory agencies to MERCOSUR rule-making bodies on the subject-matter regulated.

To some extent, the wide range of regulatory strategies followed by MERCOSUR secondary legislation could be explained by differences in the degree of disparity between domestic regulations or by particular political economy factors underlying each service sector. It is not clear, however, whether specific regulatory strategies are chosen according to a particular rationale or they are just chosen randomly, without following any particular logic. In any event, neither the Treaty of Asunción nor the Protocol of Ouro Preto provides any guidance on the division of competence between MERCOSUR rule-making bodies and domestic regulatory agencies. Since the decision on the extent to which MERCOSUR rule-making bodies should interfere with the competence of domestic regulatory agencies is a fine one, with technical and political implications for the integration process,<sup>128</sup> it is vital to develop clear parameters in this area.

## 2. The Decision-Making Problem

As mentioned, any rule-making process must strike a balance between political legitimacy and technical legitimacy. This balance is particularly relevant for services, where the regulator normally faces politically sensitive issues or highly technical regulatory challenges. A legislative process led by diplomats, with little input from consultative bodies representing the social and economic sectors and based on an all-encompassing consensus rule leaves the regulator little maneuvering room to find out the way to strike the balance between political legitimacy and technical legitimacy. Nevertheless, MERCOSUR rule-making bodies have tried some mechanisms to overcome these

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127. See MERCOSUR CMG Resolution 38/04, (Nov. 26, 2004) (laying down quality standards for the delivery of letters of up to 20 grams within specified areas).

128. For instance, a maximum harmonisation approach could provide an interesting avenue to address the dual regulatory burden problem (i.e., trade barriers caused by an overlap of domestic regulations), but, at the same time, it involves high transaction costs, it can stifle regulatory competition and the fact that the rule-making process is led by diplomats may also undermine the political legitimacy of the integration process, without mentioning the compliance-enforcement difficulties faced by MERCOSUR secondary legislation.



limitations.

First, MERCOSUR rule-making bodies have tried to overcome these limitations by contracting out part of the decision-making process to private actors. This mechanism has been tried by involving professional associations in the development and implementation of secondary rules applicable to Professional Services. CMC Decision 25/03<sup>129</sup> lays down some guidelines for the adoption of framework agreements for the mutual recognition of professional bodies and contains disciplines on the issuing of licenses for the provision of temporary professional services. The objective is to harmonize the regulatory requirements for the provision of professional services in order to facilitate the movement of professionals across Member States on a temporary basis. The norm involves the professional associations in the development of the guidelines and disciplines, and in their implementation by entrusting them the issuing of temporary licenses and the supervision of the temporary provision of professional services.

Second, MERCOSUR rule-making bodies have tried to overcome these limitations by relying on international standards. This mechanism has been tried for the adoption of prudential regulations in the banking and securities sector.<sup>130</sup> In this case, instead of producing the regulations themselves, MERCOSUR rule-making bodies rely on the standards developed by specialized international organizations like the Basle Committee on Banking Supervision. The advantage of this mechanism is the adoption of state-of-the-art financial regulations produced by highly specialized bodies, but at the same time, an excessive reliance on "soft law" mostly shaped in light of the interests and needs of mature financial markets may not necessarily match the technical needs of developing financial markets and could undermine the political legitimacy of the rule-making process.

Third, MERCOSUR rule-making bodies have tried to overcome these limitations by delegating part of the decision-making process to technical bodies. A growing number of sub-working groups, specialized

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129. This norm acknowledges and takes on board the work carried out by the MERCOSUR Commission for the Integration of Surveying, Agronomy, Architecture, Geology and Engineering (in Spanish, Comisión para la Integración de Ingeniería, Agrimensura, Agronomía, Arquitectura, Geología e Ingeniería para el MERCOSUR-CIAM), a regional body set up by national professional associations, which has been working on the mutual recognition of professional qualifications. MERCOSUR CMC Decision 25/03, (Dec. 16, 2003).

130. See MERCOSUR CMC Decision 10/93, (Jan. 17, 1994) (adopting the Basle Rules and Principles on Banking Regulation and Supervision); MERCOSUR CMG Resolution 1/96, (Apr. 19, 1996) (adopting the International Financial Standards on debtor classification and credit risks); MERCOSUR CMG Resolution 20/01, (June 13, 2001) (adopting the Basle Rules on Transparency of Information of Financial Services).

meetings and technical committees, provide technical support to the CMG. A number of those technical bodies have competence on various service sectors or on issues with direct relevance for trade in services, for example, the Group on Services, sub-working groups on communications, financial issues, transport, energy, health, investments, e-commerce, and specialized meeting on tourism and on audiovisual and cinematographic activities. Most of the secondary rules on services have been originated by proposals put forward before the competent decision-making body by these technical bodies.

Technical bodies on specific service sectors could certainly make a valuable input providing the specific knowledge necessary for regulating complex issues. However, the growing number, great diversification and, sometimes, overlapping mandate of these technical bodies, makes it difficult to coordinate their actions with a view to formulate a coherent liberalization policy for the various service sectors at issue.<sup>131</sup> Some measures have been adopted to address this problem,<sup>132</sup> but there is still plenty of room for improving the way the technical supporting structure operates, for instance, by making the coordination of work between the different technical bodies more effective and avoiding overlapping mandates.

### 3. The Compliance-Enforcement Problem

The compliance-enforcement problem is one of the main limitations faced by secondary legislation as an instrument for the liberalization of trade. Like any other secondary rules, MERCOSUR norms on services do not enter into force until all Member States have incorporated them into their legal systems and in many cases Member States' have failed to incorporate them, blocking de facto, the impact of regional policy making.<sup>133</sup>

One way to narrow the implementation gap of secondary rules could be to undertake major institutional reforms aimed at transforming MERCOSUR legal system into a community legal system, whereby individuals could rely on MERCOSUR secondary legislation before national courts against the Member State which has failed to incorporate the secondary rule at stake.<sup>134</sup> The involvement of domestic courts on

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131. See Cecilia Pena & Ricardo Rozenberg, *supra* note 103, at 5.

132. See MERCOSUR CMG Resolution 5/01, (Apr. 26, 2001) (instructing the sub-working groups on Communications, Financial Services, Transport, Energy and Mining, Health and the Specialized Meeting on Tourism to identify and eliminate restrictive measures to trade in services).

133. See *supra* note 114.

134. A number of commentators have argued in favour of the "supranationalisation" of the MERCOSUR institutional structure and the "communitisation" of MERCOSUR

the enforcement of secondary rules is an attractive path, which enables natural and legal persons to push the integration process forward. However, there are serious obstacles in the way of deep institutional reforms towards a community legal system.<sup>135</sup> MERCOSUR has been conceived as an intergovernmental model of integration based on international law, allowing the Executive Power in each Member State to hold tight control over the scope and pace of the integration process in order to prevent any deviation from Member States' national interests, and there is no sign that Member States would be ready to move away from this scheme.

There are, however, alternative ways to increase compliance with MERCOSUR secondary legislation within the limits of an intergovernmental model operating under international law. As a general principle, one of the best ways to ensure compliance is by producing good quality rules. Rules that are technically flawed or which fail to reflect a certain degree of consensus amongst those who attempt to regulate face serious implementation difficulties.

In the first place, emphasis should be placed on improving the rule-making process to ensure it produces good quality rules. MERCOSUR decision-making bodies have tried a range of regulatory strategies, from maximum harmonization of domestic regulations to less interventionist strategies such as minimum harmonization or mere memorandums of understandings. Reliance on international standards and mechanisms for contracting out part of the decision-making process to non-governmental bodies have also been tried. Despite the varieties of strategies tried, the formula to strike the right balance between political legitimacy and technical legitimacy is yet to be found. MERCOSUR decision-making bodies must continue working on improving the quality of the rules they adopt, finding the adequate regulatory strategy for each particular challenge they face. In this vein, the European Union has amassed a rich and varied regulatory practice that could be considered for inspiration and not for mechanical importation.<sup>136</sup>

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legal system. See, e.g., ELIZABETH ACCIOLY, MERCOSUR Y UNIÓN EUROPEA. ESTRUCTURA JURÍDICO INSTITUCIONAL, (2ed. 1998); Heber Arbuét Vignali, *Reflexiones políticas, jurídicas y epistemológicas sobre el MERCOSUR*, in ECONOMÍA GLOBALIZADA Y MERCOSUR, (Adda Lattuca & Miguel Ciuro Caldani, ed. 1998); MIGUEL ANGEL EKMEKDJIAN, INTRODUCCIÓN AL DERECHO COMUNITARIO LATINOAMERICANO CON ESPECIAL REFERENCIA AL MERCOSUR, (1994); Pablo Labandera Ipata, *Aspectos jurídico-institucionales que operan como freno para la integración*, in 2 REVISTA DE DERECHO DEL MERCOSUR 63-78 (1998).

135. There is no political will among Member States to move into a supranational system, not to mention the scale of domestic reforms that would be necessary to adopt to support an effective community legal system, including constitutional amendments.

136. European regulatory strategies include, amongst others, the Multi-level Governance System for the European Securities Markets. See ALEXANDRE LAMFALUSSY,

The enforcement stage should also be approached with an open mind. So far, Member States have prioritized diplomatic negotiations over rule-based enforcement mechanisms, limiting the use of the arbitral dispute settlement system as an absolute last resort. However, there are other formal and informal mechanisms for the enforcement of secondary legislation that could be worth considering. First, the MTC should be furnished with adequate resources to start performing the supervisory functions assigned by the Protocol.<sup>137</sup> A procedure to notify the adoption of new regulations affecting trade in services should be established and the MTC should create a technical committee on trade in services to comply with the mandate entrusted by the Protocol. The MERCOSUR Secretariat could support the MTC to discharge its new functions by, for instance, providing logistical support to compile and distribute information about new regulations affecting trade in services.

Another possibility could be to implement a mechanism for monitoring compliance using “name and shame” techniques such as scoring boards illustrating Member States’ records on the incorporation of MERCOSUR rules.<sup>138</sup> In the same vein, MERCOSUR decision-making bodies could delegate monitoring tasks to the Secretariat, which could produce technical reports relating to Member States’ compliance with MERCOSUR rules. Overall, a high degree of transparency is vital. Open access to timed and accurate information about Member States’ compliance with MERCOSUR disciplines can trigger informal enforcement actions which can be as effective as the formal ones.

In summary, secondary legislation is a vital instrument for the liberalization of trade and in particular for the liberalization of trade in services.<sup>139</sup> However, the deficiencies of MERCOSUR’s legislative

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ET AL., FINAL REPORT OF THE COMMITTEE OF WISE MEN ON THE REGULATION OF EUROPEAN SECURITIES MARKETS, BRUSSELS (Feb. 15, 2001), [http://ec.europa.eu/internal\\_market/securities/docs/lamfalussy/wisemen/final-report-wise-men\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf). The Open Method of Coordination used in a host of policy areas, such as research/innovation, information society, enterprise promotion, structural economic reform, and education and training. See Susana Borrás & Kerstin Jacobson, *The Open Method of Coordination and New Governance Patterns in the EU*, 11 J. EUROPEAN PUB. POL’Y 185-208 (2004).

137. See Protocol of Montevideo, *supra* note 6, art. XXIII.

138. This technique is widely used by the Commission of the European Communities to reflect EU Member States’ performance in the transposition of Directives.

139. Secondary legislation provides a flexible mechanism for adapting the regulatory framework for trade in services to the permanent changes and innovations the service sector is subject. As Ehlermann and Campogrande put it with respect to the EC’s services liberalization process: “It would have been inconceivable, even in a relatively homogeneous group such as the Six, to construct from the outset a complete Community system for trade in services, even if intended to be implemented in stages as was the liberalization of trade in goods.” See Calus-Dieter Ehlermann & Gianluigi Campogrande, *Rules on Services in the EEC: A Model for Negotiating World-Wide Rules?* in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS. LEGAL AND

process have limited MERCOSUR decision-making bodies' capacity to deliver timely and sound regulations to govern the integration of services markets. As mentioned, there are some lines of action that could be followed for improving the quality of MERCOSUR legislative process without the need to undertake major institutional reforms, in particular, the development of clear guidelines on what to regulate, to what extent and for what purpose.

## V. Concluding Remarks

The process of liberalization of trade in services in MERCOSUR must be understood in a context characterized by the increasing tradability and growing importance of services for modern economies, the complex nature of barriers to trade in services and the absence of strong political support for the integration process.

The growing importance of services and the need to incorporate the service sector into the integration process has prompted the adoption of a number of measures. Currently, the MERCOSUR legal system includes three main instruments for advancing the liberalization of trade in services, namely, a number of general obligations and disciplines that prescribe minimum standards of treatment for foreign service and service providers; a Program of Liberalization based on the negotiation of specific concessions on Market Access and National Treatment and a rule-making process for the adoption of secondary legislation on specific service sectors.

Although not perfect, these legal instruments could play a significant role in tackling governmental measures and practices that restrict foreign services' access to domestic markets or impair the competitive relationship between foreign services vis à vis like domestic services within the domestic market. It has been argued that there is room for improving the efficacy of these instruments, without the need to embark into major institutional reforms that would move MERCOSUR away from its strictly intergovernmental character.

The disciplining effect of the Protocol's general obligations and disciplines could be enhanced at least in two ways. First, by widening the scope of application of the Market Access and National Treatment standards through more ambitious rounds of negotiations. Second, by adopting more rigorous disciplines beyond the non-discriminatory standard that would provide a legal basis for a deeper securitization of domestic regulations affecting trade in services, in particular, an assessment of the proportionality of the means used for attaining the

objectives sought.

The legislative practice on services could be streamlined by the introduction of clear standards on what to regulate, to what extent and for what purposes and by adopting a carefully prepared legislative action plan setting priorities for MERCOSUR rule-making bodies. The input from technical bodies should be streamlined and the participation of the consultative bodies in the rule-making process should be enhanced with a view to produce technically sound rules backed by a broad political consensus.

The enforcement of MERCOSUR disciplines should rely less on diplomatic negotiations and more on rule-based procedures. In this vein, efforts should be directed at enhancing the arbitral dispute settlement system, but not be limited to it. The adoption of other enforcement mechanisms should be explored, including the strengthening of the supervisory role of the MTC and the adoption of mechanisms for monitoring compliance based on “name and shame” techniques. More generally, the standard of transparency on how MERCOSUR rules are created and to what extent Member States observe them should be increased sharply.

In the medium and long term, it is essential to enhance the training of legal operators (regulators, lawyers, judges) in MERCOSUR law.

Finally, it has to be borne in mind that success always starts at home, in particular when it comes to the liberalization of trade in services. Considering the particularities of barriers to trade in services, the first and most important step for the successful integration of service markets is for each Member State to ensure that domestic rules are applied in a transparent and impartial manner and that foreign service providers have access to a due process for challenging protectionist governmental measures and practices.

## Annex

Table 1

**Degree of Liberalization of Service Sectors by Member State(\*)**  
**July 2006**

	Argentina	Brazil	Paraguay	Uruguay
<b>Business Services</b>				
Professional Services	63%	52%	0%	54%
Computer and related services	75%	75%	75%	75%
Research and development services	50%	42%	0%	50%
Real Estate services	25%	75%	25%	75%
Rental/Leasing services without operators	44%	50%	38%	50%
Other Business Services	55%	54%	14%	48%
<b>Communication Services</b>				
Postal Services	0%	0%	0%	0%
Courier Services	75%	75%	0%	50%
Telecommunications	74%	75%	36%	30%
Audiovisual Services	25%	0%	0%	11%
<b>Constructing and Related Engineering Services</b>	50%	50%	25%	50%
<b>Distribution Services</b>	75%	50%	38%	50%
<b>Educational Services</b>	21%	75%	35%	25%
<b>Environmental Services</b>	19%	13%	0%	10%
<b>Financial Services</b>				
Insurance	24%	20%	7%	41%
Banking and other Financial Services	53%	26%	0%	43%
<b>Health Related and Social Services</b>	50%	25%	25%	25%

	<b>Argentina</b>	<b>Brazil</b>	<b>Paraguay</b>	<b>Uruguay</b>
<b>Tourism and Travel Related Services</b>	<b>75%</b>	<b>25%</b>	<b>69%</b>	<b>75%</b>
<b>Recreational, Cultural, &amp; Sporting Services</b>	<b>62%</b>	<b>15%</b>	<b>31%</b>	<b>15%</b>
<b>Transport Services</b>				
Maritime Transport Services	<b>32%</b>	<b>29%</b>	<b>8%</b>	<b>25%</b>
Internal Waterways Transport Services	<b>38%</b>	<b>30%</b>	<b>4%</b>	<b>18%</b>
Air Transport Services	<b>28%</b>	<b>10%</b>	<b>0%</b>	<b>0%</b>
Rail Transport Services	<b>30%</b>	<b>55%</b>	<b>0%</b>	<b>15%</b>
Road Transport Services	<b>31%</b>	<b>55%</b>	<b>17%</b>	<b>0%</b>

(\*) The degree of liberalization indicates the ratio of "NONE" entries on both the Market Access and the National Treatment columns over the total number of possible entries on Market Access and National Treatment for each service sector or sub-sector. The information contained in this Table is based on Member States' schedules of specific commitments approved by the VI Round of Negotiations, completed in July 2006.



