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Multilateral Trading System and Regional Integration

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Introduction by Stephen Powell

I want to turn to the far South of the hemisphere next with Adrián Makuc. Adrián is Director of Foreign Trade Policy in Argentina's Ministry of the Economy. He has broad responsibility, not only for the extremely active MERCOSUR agreement and all of the developments that are going through, but also for the Free Trade Area of the Americas, for the Aladi umbrella agreement, for many of the economic pacts in the region, as well as for handling WTO matters.

Adrián was one of the original participants in the Free Trade Area of the Americas talks. He headed up the working group on anti-dumping and subsidies, which laid the groundwork for the beginning of negotiations. It was a very difficult job that he accomplished extremely well. He now oversees a wide array of issues, not the least of which is the strengthening of MERCOSUR, not only from the Brazilian crisis, but also from the Asian economic crisis.

IX. MULTILATERAL TRADING SYSTEM AND REGIONAL INTEGRATION

*Adrian Makuc**

A. *Introduction*

The multilateral trade rules are the basis of the so called "multilateral trading system," and they are contained in the Agreements of the Uruguay Round. The World Trade Organization (WTO) is responsible for these Agreements and has a structure of Councils and Committees for that purpose: General Council; Council of Trade in Goods, Services, and Intellectual Property; and the respective committees of each Agreement mentioned, as well as the Committees of Trade and Development, Balance of Payments; Trade and the Environment; and Trade Policy Review Mechanism.

In this context, the treaties of regional integration that evolved between the end of the 1980's and the beginning of the 1990's created a perspective of increasing concern for the future of the multilateral trade rules for goods and services. This concern was somewhat reduced after the end of the Uruguay Round negotiations. The formation of the new rules to liberalize trade of goods and services, and the creation of the WTO, set up new

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expectations about the general benefits for developing countries — as well as for developed countries — as they became members of the new organization.

It is important to point out that until the 1980's, the most successful experience in regional integration — probably the only one — was the European process based the Treaty of Rome and aimed at the formation of a common market at first and a monetary and economic union afterwards.

During the movement that took place between 1985 and 1995, the regional trade agreements were between developing countries. The exceptions were the North American Free Trade Agreement (NAFTA), formed between a developing country and two developed countries; the agreements signed by the European Union with ACP (African/Caribbean/Pacific) countries; and agreements among North African or Mediterranean countries — agreements generally based on commercial preferences and many times unilateral, even though they sometimes include other matters.

The persistence of this movement initiated by countries that are members of the Regional Trade Agreements (RTA's) can be explained by a variety of reasons. Nevertheless, it is interesting to highlight one of them: the position of these regional trade agreements with regard to the multilateral rules. The way in which the issues have evolved is of great concern to the people who are responsible for implementing these treaties in the member countries that are also members of the WTO. This evolution at WTO level has been one of the determining factors in the promotion of further progress in the deepening of regional integration.

This means that the economic and trade policy-makers in the governments of these countries — particularly in the case of developing countries — have increasingly chosen to give priority to the advancement of regional economic integration. According to their vision of the situation, the multilateral trading system began to lose strength because it did not reach the expectations created when the Uruguay Round negotiations came to an end and the WTO was put in place based on the liberalization commitments obtained after that long negotiation.

This priority of integration, with a view to reaching the stage of free trade in goods and services in a regional context, required the member countries to confront a series of challenges in the area of trade policies and related areas, whenever it was necessary to go beyond the provisions of the current disciplines of the multilateral trade agreements. The experience in the Regional Trade Agreements obviously diverges in this regard, and, in general, is contingent on the objectives each one of them had established. There are differences in the original issues that were the basis for the negotiations carried out before arriving at the commitments, in the terms

that were agreed, upon and in the subsequent implementation and enforcement of the agreements.

To give an example, without trying to make a comparison, there is a clear difference between the contents of the NAFTA and MERCOSUR agreements, besides the obvious difference that MERCOSUR is an agreement among developing countries and NAFTA is not. The difference has to do with details — the extent and the depth of the negotiations *before* the conclusion of the treaties, which were submitted to their respective Congresses for approval.

The subject of this paper is the new issues that arise at the same time that the integration process advances, as well as the connection between the RTA's and the WTO. The issues in this context arise from the nature and characteristics of an RTA, the rights and obligations that each party accepts, and the existence of multilateral disciplines that are mandatory for both parties (if the countries are members of the WTO). One of the main issues in this discussion is the compatibility of RTA's with Article XXIV of GATT 1994 and Article V of the General Agreement on Trade in Services (GATS).

B. *MERCOSUR vs. GATT-WTO*

The four MERCOSUR countries of Argentina, Brazil, Paraguay, and Uruguay presented the Asuncion Treaty before GATT in February 1992, in accordance with the provisions of the GATT's so-called "enabling clause" approved at the end of the negotiations of the Tokyo Round — entitled "Special and Differential Treatment for Developing Countries" — which includes a direct reference to the trade zones and customs unions of developing countries.

This reference was later upheld when a working group was formed to analyze the MERCOSUR integration process — in the Trade and Development Committee first, and in the Committee of Regional Trade Agreements afterwards. In the terms of reference for the working group, there was mention of the enabling clause as well as of Article XXIV of the GATT 1994. The working group merged with the new committee created at the end of 1995, to take care of these processes in only one forum, reflecting the concerns of the WTO member countries with the proliferation of RTA's.

The analysis of the creation of free trade areas based on Article XXIV of GATT 1994 reveals the differences between the interests and objectives of the countries that are engaged in negotiating the RTA's and the terms of reference which emerge from the conditions established in Article XXIV itself. The interpretation agreed upon during the Uruguay Round, with the

idea of updating and clarifying the provisions of Article XXIV, only covered the methodology to be used when calculating tariff levels before and after the integration. This new interpretation did not make further progress due to a lack of consensus, and because the countries participating in integration processes decided to give themselves some leeway in the interpretation of the provisions contained in Article XXIV. The same thing happened to Article V of the GATS.

The differences in country interests are clear when we look into the objectives of the RTA's that have been signed and the ones that are being negotiated among groups of countries in different regions of the world, all of which are WTO members. The countries try to establish among themselves more favorable rules in some cases stricter than necessary, if compared with the provisions of multilateral trade agreements. A first level of difference comes from the coverage of the agreements that goes beyond the issues arising from goods and services trade, and engulfs issues relating to intellectual property, investments, competition policy, and government procurement — areas of coverage extensive enough that the whole body of rights and obligation can not be analyzed independently.

This broader coverage of the RTA's of the 1990's has not been matched by a parallel development of the multilateral rules in the context of the WTO. The WTO has not been able to decide how to treat the so-called "new issues" since the Ministerial Conference that took place in Singapore on December 1996.

But the other problem — the other important difference that appears among the countries that are part of these regional trade agreements and of the WTO as well — has to do with what we mentioned before with regards to the characteristics of those regional agreements and their implementation. Some RTA's come to life only after negotiations on all the issues have been completed and compromise has been reached on every one of them establishing the terms under which the member countries will relate in the immediate future. Others only address general objectives and basic or initial rights and obligations and then continue with the negotiating process. Therefore, in these RTA's the instruments needed to regulate the relations among the countries participating in the integration process and the relations of those countries with the rest of the world are not complete.

In my opinion, this situation causes major problems among the countries that are members of RTA's, and between these countries and the rest of the WTO members.

C. Main Characteristics of the MERCOSUR Integration Process

The decision to create the MERCADO COMUN DEL SUR was made by the participant countries following a movement initiated in 1986, with the signature of a new bilateral agreement between Argentina and Brazil with the same objective. Similarly, in March 1991, the Asuncion Treaty was signed and it was later registered under the ALADI (Latin American Association of Integration-Montevideo Treaty, 1980) provisions as the *Acuerdo de Alcance Parcial de Complementación Económica N° 18* (Partial Economic Cooperation Agreement).

The objectives of the Asuncion Treaty were the creation of a common market, with free circulation of goods, services, capital, and people; convergence of macroeconomic policy; elimination of trade barriers; and harmonization of rules and procedures.

The phases for the achievement of the common market were set to start with a period in which the import duties on goods as well as non-tariff barriers applicable to trade member countries would be eliminated. During this period called "Program for trade liberalization," the parties were to eliminate tariffs in a lineal, automatic, and progressive way, with few exceptions. Also, until December 31, 1994, it was agreed that Safeguard measures could be applied to take care of production sectors experiencing problems resulting from this process.

After that, as from January 1, 1995, the customs union became effective, on the basis of a Common External Tariff and a set of instruments of common trade policy towards third countries.

Even though this objective was met, the common external tariff (AEC) will only enter into full effect on January 1, 2006. Until January 1, 2001, member countries agreed on the possibility of maintaining a limited number of tariff lines (Argentina, Brazil, and Uruguay 300; Paraguay 399) as exceptions to the AEC. At the end of 1994, due to problems in reaching an agreement in the automobile and sugar industries, it was decided that these sectors would become a part of the Customs Union on January 1, 2000, and January 1, 2001, respectively. By then, both sectors should have common regimes establishing the rights and obligations of the MERCOSUR countries.

Beginning January 1, 1995, the instruments of common trade policy that had been defined were the minimum necessary to fulfill the goal of free intra-zone circulation of goods (with the exception of a few products that were subject to import duties until the end of 1998 in the case of Argentina and Brazil, and the end of 1999 in the case of Uruguay and Paraguay). The basic common regimes corresponded to the rules of origin requirements

that allow parties to enjoy the benefits of not having to pay duties to import, the corresponding certifications, and customs procedures. Additionally, a Commission of Commerce of MERCOSUR was created in order to follow up on trade issues, propose common trade policy mechanisms to the GMC (Common Market Group — the executive body of MERCOSUR), and monitor the Agreement's implementation.

A problem originates in the parallel (simultaneous) existence of trade rules at national levels as well as in MERCOSUR. In some cases, it has been clearly accepted that each individual country will continue to apply its own national legislation, because there are no common trade rules or regulations about the same issues at the MERCOSUR level. In other cases, there appears to be a dual set of rules on the same issues.

Hence, I will briefly present two cases through which we can see the problems originating in the existence of dual sets of applicable rules, or the lack of clarity in the distinction between MERCOSUR rules and national trade legislation establishing rules based on WTO multilateral agreements that have legal status in MERCOSUR member countries.

The first case deals with the textile Safeguard measure adopted by Argentina with respect to imports of Brazilian origin based on Article 6 of the Agreement on Textiles and Clothing of WTO (ATC). During the conflict, the arguments developed by both parties can be summarized as follows. First, Brazil considers that from the provision of Article 5 of Annex IV of the Asuncion Treaty, which provides that "under no circumstances will the application of safeguard measures [exceptions made for specific products in trade among member countries] be extended beyond December 31, 1994," it follows that on January 1, 1995, the possibility of using intra-zone Safeguard measures is clearly not permitted.

Brazil also argues that after the end of the Special Regime (allowance to apply tariffs to a very limited number of products progressively phasing out in four years for Argentina and five years for Uruguay and Paraguay), free trade is a principle requiring general compliance within MERCOSUR and does not allow for any Safeguard measure.

The common regulation on Safeguards applicable to imports from third countries, approved by Ministerial Decision N° 17/96 and used by Argentina as the legal basis of its measure, is not applicable. The provision of Article 81 reads: "In the cases of agricultural products and textiles, the provisions of the WTO Agreements on Agriculture and on Textiles and Clothing will be applied." But this common regime applies only to imports from third countries and, therefore, this Article cannot be used to support any Safeguard measure on intra-MERCOSUR trade.

Furthermore, Brazil argues that in December 1994, the ATC had been signed (at the end of the Uruguay Round-April 1994), and that the

MERCOSUR member states had not reached any agreement to use the ATC to regulate intra-MERCOSUR trade in textile products. On the other hand, it adds that the MERCOSUR regulation mentioned by Argentina is only applicable to extra-MERCOSUR trade.

Argentina argues there is clearly a loophole in MERCOSUR with respect to the possibility of applying Safeguard measures. Because Article 5 of Annex IV of the Asuncion Treaty does not prohibit the use of measures after December 31, 1994. It only prevents the application of those Safeguard measures that were regulated by Annex IV. In other words the preferential safeguards are valid only for the transition period. The argument points out that according to Article 3 of the Asuncion Treaty, Annex IV had limited validity only until December 31, 1994, and after that date there is no obligation to comply with when considering cases of possible quantitative restrictions. As there is a loophole in MERCOSUR regulations, each country is free to apply national trade rules.

Argentina has pointed out the distinctive nature of the ATC transitional safeguards (Article 6 ATC) and the Safeguards of Article XIX of GATT 1994. It noted international acknowledgment of the specificity and sensitivity of the textile industry — that the industry has been given special treatment in all multilateral and regional agreements. It adds that this reality has also been reflected in MERCOSUR, and that is why all the countries involved considered convenient the establishment of Technical Committee N° 10, Textile Sector, in order to analyze its rules and regulations.

Finally, Argentina rejects the argument of Brazil that the textile sector is completely integrated into the Customs Union, because there are still non-tariff barriers to intra-zone trade, and because many difficulties have been encountered in trying to reach any agreement about common policy for the textile industry in MERCOSUR.

The second case relates to Footwear imports into Argentina. Argentina applied a Safeguard measure based on the WTO Safeguards Agreement to imports of Footwear from third countries. The E.U. challenged this measure in WTO under the DSU provisions. The Panel and Appellate Body reports concluded that it was not possible to exclude MERCOSUR member countries from the measure if "all imports" were used to determine the existence or not of "serious injury" and causation. It added that if a MERCOSUR common regulation on Safeguard exists and provides for an exemption for MERCOSUR members, the "injury" analysis cannot be made on the basis of "all imports" but only on "imports from non MERCOSUR members."

The existence of a MERCOSUR common regulation on Safeguards is not enough if the status of MERCOSUR under the GATT 1994 Article XXIV provisions is unclear. In any case, if the common regulation is

applied, the injury determination should be based upon the same imports to which an eventual measure would be applied.

In sum, these two cases show the kinds of problems arising from the lack of clarity in some provisions of RTA's that are not consistently established vis-à-vis the corresponding rules, disciplines, or obligations existing at the multilateral level (WTO).

X. THE PHARMACEUTICAL INDUSTRY'S INTERSECTION WITH BUSINESS AND GOVERNMENT

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Introduction by Stephen Powell

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SHANNON HERZFELD

The Americas are very important to the U.S., and to our companies, especially the pharmaceutical companies of America. These companies are the makers of pills, of capsules, of injectables — those liquids that unfortunately come into you sometimes through intravenous needles. But we are really not in the pill business at all; we are really in the idea business.

To give you some context about our industry (which is important because really the trade rules are about people like us), for every 15,000 compounds or molecules looked at in one of our labs, three become medicines approved for human use, and one turns a profit. This process takes twelve to fifteen years.

Let me restate these odds in a different way. Imagine if, as you embarked on your career, you were handed a hundred textbooks. Each textbook had 150 pages in it, and you were told that you could become a lawyer if you passed the bar exam. Imagine that the bar exam consisted of one question, and the subject of that question was located on three pages buried in those 100 textbooks. Imagine that the answer consisted of one line on one single page. Now I ask you, how many of you would have chosen to roll the dice, and chosen to become lawyers with such harsh odds? And how many of you would have said, no, thanks, I will stay at my

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