

## **“IN SEARCH OF A STRATEGY FOR THE LIBERALISATION OF TRADE IN SERVICES IN MERCOSUR”**

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### **Abstract**

With the recent entry into force of the Protocol of Montevideo on Trade in Services, MERCOSUR legislation includes three main instruments for the liberalisation of trade in services: a number of general obligations and disciplines that prescribe minimum standards of treatment for foreign services and service providers; a programme of liberalisation 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 paper argues that, though not perfect, these legal instruments could make a difference improving the current conditions for the movement of services and service providers within the bloc, without the need to introduce major institutional reforms. However, it also argues that MERCOSUR Members' lukewarm commitment to the integration process will make it difficult to achieve significant results any time soon. Whatever the case, considering the particularities of barriers to trade in services, the paper contends that the success of any strategy for the liberalisation 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 26 March 1991, Argentina, Brazil, Paraguay and Uruguay signed a treaty in Asuncion for the establishment of a common market involving the free movement of goods, services and factors of production.<sup>2</sup> The Treaty of Asuncion, as it became to be known, set a five years 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>3</sup> and a minimalist and strictly intergovernmental institutional structure.

Since the entry into force of the Treaty of Asuncion, the liberalisation of trade in goods took priority over the liberalisation of trade in services, and it is not difficult to understand why. Trade between MERCOSUR<sup>4</sup> Members was mainly based on goods, while the liberalisation of trade in services raised complex and sensitive issues, at a time when there was not sufficient expertise or political will to address them. However, a number of measures aimed at the liberalisation of trade in services have been adopted since the very beginning of the integration process, albeit without managing to achieve any significant results.

Fifteen years after the entry into force of the Treaty of Asuncion, 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>5</sup> This contrasts with recent technological developments that have dramatically reduced the transaction costs of services trade, 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 of services and service providers within the bloc is becoming more and more apparent.

In December 2005, the Protocol of Montevideo on Trade in Services – a GATS like instrument providing a regulatory framework for trade in services in MERCOSUR - finally entered into force.<sup>6</sup> The event passed unnoticed for a traditionally goods' biased scholarship<sup>7</sup> and overshadowed by an

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<sup>2</sup> See Tratado para la Constitucion de un Mercado Común entre la Republica Argentina, la Republica Federativa del Brasil, la Republica del Paraguay y la Republica Oriental del Uruguay [hereinafter Treaty of Asuncion], Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041. The Treaty of Asuncion entered into force on 29 November 1991.

<sup>3</sup> With the exception of 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.

<sup>4</sup> MERCOSUR is the Spanish acronym for the Common Market of the South.

<sup>5</sup> See, for instance, MERCOSUR Report No 10, INTAL-IADB, February 2006; Berlinsky, Julio, Negotiations on Trade in Services between MERCOSUR and the EU, Chaire MERCOSUR de Sciences Po, An 1, no 6, December 2003; de Oliveira Junior, Marcio, Uma Análise Da Liberalização do Comércio Internacional de Serviços Texto Para Discussão Nº 727, IPEA, Rio de Janeiro, June 2000; Primo Braga, C.A., and de Brum, J. (1997). Services in MERCOSUR: Much ado about Nothing?, *International Trade and MERCOSUR: Emerging Issues*. Buenos Aires: Economic Development Institute of the World Bank. Universidad Torcuato Di Tella.

<sup>6</sup> 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 CMC Dec. 13/97, 15 December 1997. The Protocol entered into force on 7 December 2005. So far the Protocol has been ratified by Argentina (Ley 25623, 17 July 2002, published by the Official Bulletin 8 August 2002), Brazil (Decreto Legislativo 335/2003, 24 July 2003 and Decreto Legislativo 926/2005, 15 September 2005) and Uruguay (Ley 17885, 20 December 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 7 December 2005. For Argentina and Uruguay only the initial list of specific commitments are binding, for Brazil, the schedule of commitments approved by the first round of negotiations are binding.

<sup>7</sup> There are very few commentaries on MERCOSUR law on services. See Félix Peña, "El Comercio de Servicios en el Mercosur," *Boletín MERCOSUR - Fundación BankBoston* 49 (1998); María Angélica Peña, "Services in MERCOSUR: The Protocol of Montevideo," *Services Trade in the Western Hemisphere*, S. Stephenson (ed.) (Brookings Institution Press, 2000); Roberto Ruíz Díaz Labrano, *Mercosur: Integración Y Derecho* (Buenos Aires: Ciudad Argentina, 1998) at 336 - 348.; Luis Alejandro Estoup, "La Liberación De La Prestación De

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 paper is to draw the attention away from the mainstream debate and focus on MERCOSUR main legal instruments for the liberalisation 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 programme of liberalisation based on rounds of negotiations of specific concessions on market access and national treatment. In addition, Member States may adopt secondary legislation for the regulation of specific service sectors. This paper examines each of these legal instruments and puts forward some considerations on the impact they may have on the liberalisation of trade in services in MERCOSUR. First, the meaning of trade barriers and trade liberalisation is analysed considering the particularities of barriers to trade in services.

## **I.1 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, like 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 rather the mere expression of different policy choices, values and standards of living.

Not only governments, but also private actors can 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 labelled 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 paper, “trade barriers” refers to governmental measures<sup>8</sup> and practices<sup>9</sup> that restrict foreign goods’ or services’ access to domestic markets or impair the competitive relationship

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Servicios en el Mercosur," *Derecho Mercantil Contemporáneo* (Buenos Aires: La Ley, 2001).; Gabriel Gari, "Free Circulation of Services in Mercosur: A Pending Task," *Law and Business Review of the Americas* (Summer, 2004).

<sup>8</sup> 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.

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>10</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>11</sup>, there are significant differences between barriers to trade in services and barriers to trade in goods.<sup>12</sup>

First, contrary to tariffs and quotas, which are clearly identifiable, explicitly protectionist and whose trade restrictive effect is easily 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 it is difficult to measure their trade restrictive effect.

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, the 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.

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<sup>9</sup> Governmental practices refer to the way domestic regulations are applied and enforced by the competent authorities.

<sup>10</sup> There are many official reports, produced on a regular basis, which provide a useful insight on the variety of governmental measures and practices with trade restrictive effects. See, for instance, the trade policy review reports produced on a country by country basis by the WTO at [www.wto.org](http://www.wto.org). Large trading nations also conduct regular investigations on trade barriers maintained by their trading partners. For US reports see National Trade Estimate Report on Foreign Trade Barriers (2005) produced by the US trade representative at [www.ustrade.gov](http://www.ustrade.gov). For the EU see the European Community Report on United States Barriers to Trade and Investment 2005, produced by the European Commission at <http://trade-info.cec.eu.int/doclib/docs/2006>

<sup>11</sup> For an excellent account of the particularities of transactions on services as compared to transactions on goods see Hill, T P, "On Goods and Services", *The Review of Income and Wealth*. 23: 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 for instance, Bhagwati, J., Splintering and Disembodiment of Services and Developing Nations, *The World Economy*. 7: 133 – 143 (1984); Linders, G. (2001). Theory, Methodology and Descriptive Statistics on Services and Services Trade. The Hague: Netherlands Bureau for Economic Policy Analysis; McCulloch, R. (1987). International Competition in Services, *Working Paper No 2204*. New York: NBER; Sapir, A., and Winter, C. (1994). Services Trade. In D. Greenaway, and A.L. Winters (Eds.), *Surveys in International Trade*. Oxford: Blackwell Publishers; Stibora, J., and de Vaal, A. (1995). *Services and Services Trade: A Theoretical Inquiry*. Rotterdam: Netherlands Economic Institute.

<sup>12</sup> For studies on barriers on trade in services see, amongst others, ECLAC, *Manual for Completing the Questionnaire on Measures Affecting Services Trade in the Hemisphere* (ECLAC: 2000); Hoekman, B and Carlos Primo Braga, *Protection and Trade in Services: A Survey* (World Bank: 1997); Hoekman, B., "Conceptual and Political Economy Issues in Liberalizing International Transactions in Services", in A. Dearnorff, and R.M. Stern (eds.), *Analytical and Negotiating Issues in the Global Trading System* (University of Michigan Press: 1994); Sampson, G.P., and Snape, R.H., "Identifying the Issues in Trade in Services", *World Economy*. 8(2): 171 – 181 (1984).

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 interests and non-trade concerns that underlies the liberalisation of merchandise trade.

The particularities of barriers to trade in services have some policy implications for the instruments and measures adopted for the liberalisation of trade in services. What works well for the liberalisation of trade in goods may not necessarily be adequate for the liberalisation of trade in services, and vice versa. Typically, the removal of border controls contributes to the liberalisation of the cross-border movement of goods but does not add much to the liberalisation of trade in services. By contrast, the opening of foreign direct investment policies and immigration policies – in particular businessmen, professionals and self-employed persons - is particularly relevant for the liberalisation of trade in services, while not vital for the liberalisation of trade in goods.

## **I.2 Trade Liberalisation**

Just like trade barriers cannot be limited to tariffs and quotas, trade liberalisation cannot be confined to the removal of clear-cut protectionist measures either. On the contrary, trade liberalisation is a complex process that requires the subtle combination of different kind of actions: removing existing barriers and preventing new ones from emerging, de-regulating domestic rules and re-regulating at the ‘supranational’<sup>13</sup> level.

Broadly speaking, trade liberalisation refers to forms of inter-state co-operation 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.

As a rule based process, trade liberalisation takes place within an international legal framework laid down by a treaty, which accords rights and imposes obligations to its parties. The degree of liberalisation 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 liberalisation, 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>14</sup>

Legal scholars adopted a similar terminology to reflect the different type of legal instruments used for advancing the trade liberalisation process. On European law, for instance, Weatherhill differentiates ‘negative harmonisation’, which he understands as the elimination of obstructive national laws through judicial rulings, from ‘positive or legislative harmonisation’, by which he refers to the introduction of community rules to govern a particular area in partial or total replacement for national rules.<sup>15</sup> Similarly, Ziller argues for the need to complement the abolishment of barriers to the movement of goods, services, labour and capital, necessary to set up the common market, with more

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<sup>13</sup> The term ‘supranational’ is hereby used in a loose sense to refer to legislative acts adopted by treaty-based decision-making bodies and does not imply the existence of a qualified majority decision-making system or the direct effect, direct applicability or primacy of the supranational norm.

<sup>14</sup> See Tinbergen, Jan, *International Economic Integration* (Elsevier:1956).

<sup>15</sup> See Weatherhill, Stephen, “Why Harmonise?” in Tridimas, T and Paolisa Nebbia (eds), *European Union Law for the 21<sup>st</sup> Century: Rethinking the New Legal Order*, Vol II (Hart:2004) at 12.

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>16</sup> The literature on WTO law also refers to negative and positive integration.<sup>17</sup>

In a similar vein, Federico Ortino distinguishes between “negative integration” and “positive integration” although with a different meaning from that attributed by the abovementioned authors. He further distinguishes between “judicial positive integration” and “legislative positive integration” or “positive integration *strictu sensu*” according to the body responsible for implementing the legal instrument in question. Ortino also differentiates between “shallow integration” and “deep integration” according to the degree of intrusiveness of each of the legal instruments employed to liberalise trade in Member States’ regulatory prerogatives to pursue legitimate public policy objectives.<sup>18</sup>

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

### **I.3 Trade Liberalisation of Services in MERCOSUR**

The core legal provision prescribing the liberalisation of trade in MERCOSUR is Article 1 of the Treaty of Asuncion, which prescribes that the common market 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>19</sup>

In addition, Annex I to the Treaty includes a Trade Liberalisation Programme that further specifies the extent and conditions for the elimination of tariffs, non tariff restrictions and other equivalent measures. Article 2 of this Annex defines broadly the meaning of “duties” and “other restrictions” to intraregional trade and Article 10 prescribes that all non-tariff restrictions shall be eliminated by 31 December 1994.

At the beginning of 1994 MERCOSUR Members realised their original target to have a common market in place by the end of that year was far too ambitious and decided to replace it by the commitment to establish a customs union by the same date. The redefinition of the integration process was formally stated on the “Consolidation of the Customs Union and Transition to a Common Market” document<sup>20</sup>, which states that the establishment of a customs union is an essential step that

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<sup>16</sup> See Ziller, Jacques, *The Challenge of Governance in Regional Integration. Key Experiences from Europe*, (European Union Institute Working Paper: 2005), at 36-37.

<sup>17</sup> See, for instance, Petersmann, E., “From ‘Negative’ to ‘Positive’ Integration in the WTO: Time for ‘Mainstreaming Human Rights’ into WTO Law?”, 37, *CMLRev* (2000) at 1363; Cottier, T. and P Mavroidis, “Regulatory Barriers and the Principle of Non-Discrimination in WTO Law: An Overview”, in T Cottier and P Mavroidis (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Organization Law* (Ann Arbor, University of Michigan Press: 2000) at 4; Bourgeois, “On the Internal Morality of WTO Law”, in A von Bogandy, P Mavroidis and Y Mény (eds), *European Integration and International Co-ordination – Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (The Hague/London/new York, Kluwer Law International: 2002) at 40.

<sup>18</sup> See Ortino, Federico, *Basic Legal Instruments for the Liberalisation of Trade in Goods*, (Hart: 2004), in particular 23 - 27.

<sup>19</sup> The original text is in Spanish and Portuguese. This translation has been made by Marta Haines Ferrari, *The Mercosur Codes* (BIICL:2000).

<sup>20</sup> See CMC Dec. 13/93, 17 January 1994 and Minutes CMC Meeting 2/93, Annex I.

must be taken *before* starting a new stage towards the formation of a common market to which no deadline is attached.

In August and December 1994, the Common Market Council (hereinafter CMC) decided to extend the deadline for the elimination of tariffs and non tariff barriers to regional products until 31 December 1999.<sup>21</sup>

Save for specific exceptions, since 1 January 2000, the application of customs duties, charges of equivalent effect and other restrictions to regional products are prohibited. This prohibition has been regarded by several ad hoc arbitration awards as a binding rule that imposes precise and self-executing obligations on Member States, rather than a merely programmatic expression of will dependent on the adoption of more specific commitments.<sup>22</sup> Furthermore, it has been held that the prohibition to adopt restrictions or measures of equivalent effect has an absolute character, namely, that they cannot be adopted “even though the measure is not aimed at discriminating a foreign product”.<sup>23</sup>

In spite of the clear obligation in force prohibiting non-tariff restrictions, intra-regional trade in goods remains severely hindered by them, an issue which highlights the difficulties faced by MERCOSUR to enforce the legal commitments undertaken by its members.

By contrast, Member States’ commitments with respect to the liberalisation of trade in services remained loosely defined until the entry into force of the Protocol of Montevideo. Apart from the reference by Article 1 of the Treaty of Asuncion to the free movement of services, there are no provisions in the Treaty or its Annexes that specify the normative implications of Article 1 for the free movement of services.

Despite not being regarded as a priority, MERCOSUR bodies began to work on the liberalisation of trade in services during the early stages of the integration process. In June 1992, the CMC approved a broad and ambitious working programme containing a variety of tasks for the establishment of a common market to be concluded by the end of 1994.<sup>24</sup> A number of those tasks were aimed at advancing the liberalisation of trade in services either by way of negotiating general obligations and disciplines or by way of harmonising legislation or adopting mutual recognition agreements for specific service sectors.

The working programme 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 (hereinafter CMG).<sup>25</sup> However, it was not until November 1997 that a framework agreement on trade in services was adopted. One reason put forward by MERCOSUR diplomats to explain the delay in

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<sup>21</sup> See CMC Dec. 5/94, 5 August 1994, CMG Res. 48/94 of 3 August 1994 and Dec. 24/94, 17 December 1994, which approved lists of items excluded from the Customs Union Area and subject to a special tariff reduction plan. For ARG and BRA the phase in period of the excluded items into the Customs Union Area subject to tariff-free treatment should have been completed by 31/12/98, for PAR and URU the completion date should have been 31/12/99 (Article 3 a Dec. 5/94).

<sup>22</sup> See arbitration award on non-tariff measures dispute, *Argentina v Brazil*, 28 April 1999, par 81 and arbitration award on excise duty on cigarettes dispute, *Paraguay v Uruguay*, 21 May 2002, pag 5.

<sup>23</sup> See arbitration award on prohibition on importation of remolded tyres, *Uruguay v Brazil*, 9 January 2002, pag. 14.

<sup>24</sup> See Dec. 1/92, 27 June 1992 establishing a working programme known as Las Lenas Programme.

<sup>25</sup> See CMG Res. 38/95, December 4, 1995 creating the Ad Hoc Group on Services and CMG Res. 31/98, July 23, 1998 creating the Group of Services.

reaching an agreement was the novelty of the issue and the lack of experience on how to deal with it.<sup>26</sup> The ratification process of the Protocol in Member States' congresses was also subject to severe delays and it was not until 7 December 2005 that the Protocol entered into force.<sup>27</sup>

The Protocol of Montevideo constitutes an integral part of the Treaty of Asuncion and is based on the General Agreement on Trade in Services (hereinafter GATS)<sup>28</sup>, one of the World Trade Organisation's agreements approved by the Uruguay round of multilateral trade negotiations. Save for few exceptions, the Protocol literally transposes into the sub-regional context the provisions of this multilateral instrument.<sup>29</sup>

The Protocol contains two main legal instruments for advancing the liberalisation of trade in services in MERCOSUR. 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 favoured 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 Programme of Liberalisation of trade in services based on the negotiation of specific commitments.

In addition to the Protocol of Montevideo, MERCOSUR legal system includes a rule-making process for the adoption of secondary legislation. So far, a number of Decisions and Resolutions dealing with the harmonisation of legislation or mutual recognition agreements applicable to specific service sectors have been enacted.

Sections II, III and IV examine in further detail each of these legal instruments and the impact they had or may have on the liberalisation of trade in services in MERCOSUR.

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<sup>26</sup> See comments made in 1996 by Mr 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* (Lapsus: 1996). at 63.

<sup>27</sup> See *supra* footnote 6.

<sup>28</sup> 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].

<sup>29</sup> The disadvantages of importing a multilateral legal instrument into a sub-regional regulatory framework are analysed in sections II and III.

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

### II.1 Introduction

Any trade agreement covering services includes general obligations prescribing the minimum standards of treatment that State Parties must accord to foreign services and service providers and regulatory disciplines that State Parties must observe when adopting measures affecting trade in services. Their number and scope of application may vary from treaty to treaty but, most trade agreements refer at least to the principle of non-discrimination.<sup>30</sup>

General obligations and disciplines are not aimed at removing specific trade restrictive measures, but rather at preventing State Parties from adopting them. They contribute to the liberalisation of trade by compelling State Parties to accord foreign service providers minimum standards of treatment and to regulate in a more ‘trade friendly’ way and, ultimately, by fostering more open, transparent and non-discriminatory national laws. They are usually treaty-based<sup>31</sup>, their scope of application is cross-sector rather than sector-specific and they tend to be drafted in general terms.

To make an impact on the liberalisation of trade, appropriate institutions and mechanisms must support the application and enforcement of the general obligations and disciplines. Adjudicatory bodies responsible for interpreting them play a critical role. A too restrictive interpretation of their scope of application or their normative implications limits their capacity to strike down trade restrictive measures. By contrast, a too liberal interpretation may unduly constrain Member States’ domestic regulatory autonomy, undermining the democratic legitimacy of the whole integration process.<sup>32</sup>

### II.2 The Scope of Application of the Protocol of Montevideo

In Principle, the Protocol’s scope of application is defined broadly. Article II.1 prescribes that the Protocol applies “... to measures taken by Member States which affect trade in services...”. In its turn, Article II.2 defines “trade in services” broadly, including the “commercial presence of the service supplier within the territory of any other Member State” as a modality of international service transaction.<sup>33</sup> However, further provisions of the Protocol and its Annexes introduce significant limitations to this initially broad scope of application.

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<sup>30</sup> The principle of non-discrimination has been described as a constitutional principle of any trade liberalisation process. See Ortino, F. *ob cit* at 23.

<sup>31</sup> 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.

<sup>32</sup> See, for instance, the interpretation by the European Court of Justice of Article 28 of the EC Treaty prohibiting ‘measures of equivalent effect’. The case law of the Court on Article 28 played a key role in the development of the principles of proportionality and functional equivalence, which turned out to be crucial for the establishment of the internal market. It is also worth highlighting the sensitivity shown by the Court’s rulings to the political and economic context underlying the integration process, as it stems from its decision on *C-268/91 Keck and Mithouard* [1993] ECR I-6097 by opposition to its previous decision on *Case 8/74 Procureur du Roi v Dassonville* [1974] ECR 837.

<sup>33</sup> The inclusion of commercial presence as a modality of “trade in services” departs from the ordinary meaning of trade. While “trade” refers to arms-length transactions between buyers and sellers, the commercial presence mode of supply refers to foreign direct investment and 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 liberalisation of foreign direct investment. To circumvent that obstacle, GATS negotiators agreed on an

First, the Protocol does not apply to services provided in the exercise of governmental authority.<sup>34</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>35</sup>

Third, the Annex on the Movement of Natural Persons includes important caveats to the type of measures relating to this mode of supply that can be disciplined.

Fourth, 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.

It is understandable to find these limitations in the context of a painstakingly negotiated multilateral agreement like the GATS. It makes less sense, however, to keep them in the context of a regional trade agreement aimed at the establishment of a common market.<sup>36</sup>

In addition, the Protocol of Colonia on the Reciprocal Promotion and Protection of Investments in MERCOSUR<sup>37</sup> includes some sector specific exclusions including service sectors such as insurance (Argentina); health assistance, broadcasting services, telecommunication services, financial services and construction (Brazil); telecommunications, audio-visual services, postal services (Paraguay); electricity, financial brokerage services, railways, telecommunications, broadcasting, press and audio-visual media (Uruguay).<sup>38</sup> These exceptions proscribe the commercial presence of a foreign service provider in the territory of the service consumer, which is one of the main modalities of "trade" in services.

## **II.3 The General Obligations and Disciplines included in the Protocol**

### *Most Favoured Nation Treatment*

According to the most favoured nation treatment (hereinafter MFN), whatever the conditions of treatment accorded to services or service providers from a Member State, they shall be immediately and unconditionally accorded to services or service providers from any other Member State.<sup>39</sup>

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extraordinary broad definition of trade in services, which would contemplate the commercial presence of foreign service providers.

<sup>34</sup> See Article II.3(b) and (c).

<sup>35</sup> See Annex on Air Transport Services, Articles 2, 3, 4 and Annex on Land and Waterway Transport Services, Articles 2 and 3.

<sup>36</sup> There are a number of disadvantages associated to the importation of a multilateral instrument into a sub regional agreement like MERCOSUR because the WTO and MERCOSUR seek completely different objectives. While the purpose of the WTO is merely to foster the liberalisation of trade among its Members to the extent politically possible, the purpose of MERCOSUR, by contrast, is to establish a common market. In addition, it undermines the overall consistency of the MERCOSUR legal system, which also includes rules on investments, movement of persons and on various specific service sectors that overlap with the Protocol's provisions.

<sup>37</sup> See Protocolo de Colonia para la Promoción y Protección Recíproca de Inversiones en el MERCOSUR [Protocol of Colonia on the Reciprocal Promotion and Protection of Investments in MERCOSUR], approved by CMC Dec. 11/93, 17 January 17, 1994. This Protocol has not yet entered into force. So far, it has only been ratified by Argentina. Law No. 24891 of Nov. 5, 1997, published by the Official Bulletin on Dec. 9, 1997.

<sup>38</sup> *id.*, Article 1.

<sup>39</sup> Article III.

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. It should be less relevant for MERCOSUR because, according to the Treaty of Asuncion, Member States are committed to the adoption of a common trade policy in relation to third States.<sup>40</sup> However, for the time being, the common external trade policy has not yet been fully implemented<sup>41</sup> and thus the MFN standard could still have a role to perform.

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.

### *National Treatment*

The national treatment standard compels Member States to accord services and service suppliers of any other Member State treatment no less favourable than that it accords to its own like services service suppliers.<sup>42</sup> The Protocol further specifies that Member States can meet this standard by according either formally identical or formally different treatment. Finally, the provision stipulates that formally identical or formally different treatment must be considered “less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member State compared to like services or service suppliers of any other Member State”.<sup>43</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 liberalisation 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 there specified.<sup>44</sup>

### *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 circumstances there specified.<sup>45</sup>

### *Transparency*

Member States must observe certain disciplines aimed at enhancing the transparency of their regulatory activity.<sup>46</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 (hereinafter 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

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<sup>40</sup> See Article 1, Treaty of Asuncion.

<sup>41</sup> For instance, in 2004 Uruguay signed a Free Trade Agreement with Mexico, including the liberalisation of trade in services, which goes against Uruguay’s commitment to a common trade policy. The agreement was simply tolerated by the other Member States.

<sup>42</sup> Article V.1.

<sup>43</sup> Article V.4.

<sup>44</sup> Article VII.2.

<sup>45</sup> Article VII.2.

<sup>46</sup> See Article VII.

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 liberalisation of trade in services. A more transparent rule-making process provides Member States with the opportunity to scrutinise the compatibility of new regulations with treaty provisions at an early stage. It also forces domestic regulators to consider the possible costs and benefits of 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 liberalisation of trade in services, like other obligations and disciplines, will depend on the way they are implemented.

#### *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 liberalisation 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>47</sup>

Contrary to GATS, the Protocol does not limit the scope of application of these standards to sectors where specific commitments have been undertaken.

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

Many service industries operate under the close supervision of administrative agencies, which tend to have broad powers of intervention on their business. For instance, in the financial sector, the supervisory authority is entitled to suspend or withdraw an authorisation to operate; it may conduct investigations into the financial health of the company and request the adoption of contingency measures. Similarly, utilities regulators may impose requirements on prices or conditions of access to the service provided, or the competition watchdog may impose fines for anticompetitive behaviour. All these administrative decisions could potentially discriminate against foreign services and service providers. The Protocol includes some procedural standards aimed at encouraging the adoption of administrative decisions based on objective and impartial criteria, minimising 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 authorisation 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".

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<sup>47</sup> A survey among service industry operators on the most frequent barriers to trade in services 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 Feketekuty, Geza, *International Trade in Services. An Overview and Blueprint for Negotiations* (AEI: 1988) at 141.

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 steps when making such decisions which ultimately should encourage more sound and even-handed administrative practices.

#### *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>48</sup>*

GATS negotiators did not agree to apply these regulatory standards to all service sectors. However, recognising their role in preventing unnecessary barriers to trade in services, they agreed to continue negotiating the development of these standards once GATS had entered into force. 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.<sup>49</sup> So far, detailed disciplines have been developed for the accountancy sector.<sup>50</sup> However, only those countries that have made specific commitments in the accountancy sector are bound by these disciplines.<sup>51</sup>

By contrast, under the Protocol these disciplines apply to 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 in particular allows for the review of the appropriateness of the means employed to secure the quality of a service in the light of their trade restrictive costs. This 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.

## **II.4 Impact of the General Obligations and Disciplines on the Liberalisation of Trade in Services**

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

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<sup>48</sup> Article X.4.

<sup>49</sup> See GATS, Article VI.4.

<sup>50</sup> See *Disciplines on Domestic Regulation in the Accountancy Sector*, (S/WPPS/W/21) approved on Nov. 30, 1998.

<sup>51</sup> See Trade in Services Division - WTO Secretariat, *GATS: Fact and Fiction* (WTO: 2001). at 11, and Aaditya Mattoo, Sauvé, Pierre (ed.), *Domestic Regulation & Service Trade Liberalization* (World Bank and Oxford University Press: 2003). at 3.

ultimately, to encourage more transparent, objective and impartial regulations and administrative practices.

To being with, the general obligations and disciplines' capacity to liberalise trade in services is limited by their narrow scope of application. For instance, 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.<sup>52</sup> The number of service sectors covered by Member States' schedules is contingent to the results of the rounds of negotiations which are currently under way.<sup>53</sup> The annexes to the Protocol introduce further limitations, excluding from its scope of application relevant service sectors (e.g. transport and to some extent financial services) and modalities of trade (e.g. limitations on the application of the obligations and disciplines to measures related to the movement of natural persons).

Like the GATS, the Protocol's main obligations proscribe overt market access restrictions and discriminatory measures and practices. However, apart from a necessity test which only applies to technical standards, qualifications and licensing requirements, the Protocol does not provide more rigorous disciplines to deal with the dual regulatory burden problem caused by non-discriminatory regulations. Considering that service markets are heavily regulated, this is a serious handicap, in particular when the liberalisation process is aimed at reaching advanced levels of integration such as the establishment of a common market. Eventually, ad-hoc arbitration tribunals could overcome this limitation by interpreting the meaning of 'de facto' discrimination broadly.

In the end, the impact of the Protocol's general obligations and disciplines on the liberalisation of trade in services will largely depend on the capacity of MERCOSUR institutions and mechanisms to apply them. As part of the Treaty of Asuncion, the Protocol does not provide for an independent institutional framework but relies on MERCOSUR pre-existing institutions.

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-fulfilment of the Protocol of Montevideo.<sup>54</sup>

Until now, no procedure has been established for Member States to inform the MTC about the introduction of new regulations affecting trade in services or measures adopted for the protection of essential security interests. The MTC has not received any consultations or claims relating to the application of the Protocol. It is unlikely that any of these procedures will be set up and running in the near future and no high expectations should be placed on the MTC' role as a guardian of the Protocol. The MTC meets on average once a month, has limited resources and is already overwhelmed by its functions 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.

The Protocol entrusts the settlement of disputes that may arise between Member States regarding to the application, interpretation or non-fulfilment of the commitments established by the Protocol of Montevideo to the MERCOSUR dispute settlement system<sup>55</sup>, which has important limitations. Typical of a purely intergovernmental agreement, MERCOSUR disputes are settled by ad-hoc arbitration

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<sup>52</sup> From a comparative perspective, the North American Free Trade Agreement (NAFTA) and NAFTA-type agreements follow the negative list approach, i.e. national treatment and market access standards apply to all service sectors unless they are expressly excluded in a list of exceptions.

<sup>53</sup> See Section III for a detailed analysis of the results of the round of negotiations.

<sup>54</sup> See Article XXIII.

<sup>55</sup> See Article XXV.

tribunals rather than by a supranational court. Despite recent improvements, like the possibility to appellate the arbitration award before the Permanent Tribunal of Revision<sup>56</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>57</sup> In addition, many complain that the system is subservient to political interests and deadlines are rarely respected.<sup>58</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>59</sup> The award holds that the free movement of services, particularly transport and tourism, was affected by the persistent and continuous blocking of motorways that link Uruguay and Argentina caused by environmental activists on the Argentinean bank of the River Uruguay.<sup>60</sup> Furthermore, the award prescribes that the failure of Argentinean 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>61</sup>

The award rejects the Argentinean 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>62</sup>

Previous awards relating to measures affecting the free movement of goods have also held that Article 1 of the Treaty of Asuncion 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>63</sup> So far, the evidence stemming from the arbitration awards suggests that if 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 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>64</sup>

Domestic courts can also contribute with the enforcement of the Protocol's obligations and disciplines. The Protocol has already been ratified by acts of parliament in three Member States and thus could be invoked, for instance, by a domestic service provider to challenge an administrative measure that may restrict his right to export services. There is evidence that suggests a growing involvement of domestic

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<sup>56</sup> See the Protocol of Brasilia for the Settlement of Disputes, 17 December 1991; replaced by the Protocol of Olivos for the Settlement of Disputes, 18 February 2002 42 I.L.M. 2.

<sup>57</sup> See Andrew O' Keefe, *Dispute Resolution in Mercosur*, 2002, at 18, available at [www.mercosurconsulting.net](http://www.mercosurconsulting.net)

<sup>58</sup> *id.*, at 18.

<sup>59</sup> See arbitration award on the dispute between Uruguay v Argentina on the obstruction to the free movement of goods and services caused by private parties, 6 September 2006, paragraph 105.

<sup>60</sup> *id.* paragraphs 111-114.

<sup>61</sup> *id.* Tribunal's decision, second consideration.

<sup>62</sup> *id.* paragraphs 117 and 118.

<sup>63</sup> See arbitration award on excise duty on cigarettes dispute, Paraguay v Uruguay, 21 May 2002, pag 14.

<sup>64</sup> Only eleven arbitration awards have been issued between 1995 and 2006.

courts on the enforcement of MERCOSUR law.<sup>65</sup> However, the role of domestic courts is limited by the implementation gap between the rules approved by MERCOSUR bodies and the rules finally transposed into Member States' domestic legal systems<sup>66</sup> and by the insufficient knowledge about MERCOSUR law among legal operators.<sup>67</sup>

In summary, the general obligations and disciplines included in the Protocol of Montevideo constitute a key legal instrument for the liberalisation of trade in services because trade liberalisation 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 liberalisation of trade in services in MERCOSUR will be undermined by their narrow scope of application and by the limitations of the dispute settlement system responsible for their enforcement.

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<sup>65</sup> See *First Report on the Application of MERCOSUR law by Domestic Courts* (MERCOSUR Secretariat: 2003) and *Second Report on the Application of MERCOSUR law by Domestic Courts* (MERCOSUR Secretariat: 2004).

<sup>66</sup> See *infra* footnote 116.

<sup>67</sup> See *First Report on the Application of MERCOSUR law by Domestic Courts* (MERCOSUR Secretariat: 2003) at 22.

### III. Negotiations of Specific Commitments

#### III.1 Introduction

Multilateral agreements on trade in goods and services include provisions that require State Parties to enter into rounds of negotiations directed to the progressive elimination of trade barriers based on reciprocal concessions.<sup>68</sup> By contrast, regional trade agreements usually determine from the outset the degree of integration sought - e.g. a free trade area, a customs union or a common market - and therefore do not include provisions compelling State Parties to enter into further negotiations. The Protocol of Montevideo constitutes an exception to this trend because despite being part of a regional trade agreement, it nevertheless includes a programme of liberalisation on trade in services based on the negotiations of specific commitments.

The rounds of negotiations are based on the exchange of reciprocal concessions relating to clearly identifiable and explicitly protectionist barriers whose trade restrictive effects are easily measurable, such as overt quantitative restrictions or discriminatory regulations against foreign service providers. Since these are just a small part of the wider spectrum of measures and practices that restrict foreign services' access to domestic markets, the degree of liberalisation that can be achieved by the negotiation of reciprocal concessions is limited. On the other hand, the negotiation of trade concessions gives State Parties more control over the scope and pace of the liberalisation process. Some commentators have viewed this feature as an advantage, particularly in the case of trade in services, where the political sensitivities at stake call for a gradual and carefully negotiated liberalisation process, more palatable to domestic constituencies.<sup>69</sup>

#### III.2 The Protocol's Programme of Liberalisation of Trade in Services

Following the provisions of Part IV of the GATS, Part III of the Protocol establishes a Programme of Liberalisation of trade in services based on the negotiation of specific commitments. The aim of the programme is to advance the liberalisation of trade in services through the progressive inclusion of sectors, sub-sectors, activities and modes of supply into Member States' schedules of specific commitments, until the completion of the programme within a maximum time limit of ten years since the entry into force of the Protocol.<sup>70</sup> For this purpose, the programme compels Member States to enter into rounds of negotiations of specific commitments on market access and national treatment on a yearly basis.<sup>71</sup>

The Programme follows a "positive list" approach<sup>72</sup>, according to which, each Member State sets out in its schedule of specific commitments the sectors, sub-sectors and activities in respect of which it

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<sup>68</sup> See Article XVIII bis GATT 1994 and Article XIX GATS.

<sup>69</sup> See Hoekman, B. and Michel M. Kosteci, *The Political Economy of the World Trading System*, (OUP: 2001). The authors argue that because of the particularities of the political economy of the liberalisation of trade in services, which is more resisted than the liberalisation of trade in goods, the process of liberalisation needs to be more gradual. The political feasibility of the liberalisation of trade in services depends on more gradual methods of liberalisation.

<sup>70</sup> See Article XIX.1.

<sup>71</sup> See Article XIX.1.

<sup>72</sup> The "positive list" approach differs from the "negative list" approach. In this case, all parties to an agreement undertake the obligation to grant market access and to accord national treatment to all foreign services and foreign services suppliers in all sectors *unless* otherwise specified in a list of exemptions or non-conforming measures, set out in an annex. This is the approach followed in the North American Free Trade Agreement (hereinafter NAFTA) and on NAFTA-style free trade agreements. For more details on the advantages and disadvantages of the "positive list" approach and the "negative list" approach see Sherry Stephenson and Francisco Prieto, *Evaluating Approaches to the Liberalization of Trade in Services: Insights from Regional*

shall assume market access and national treatment commitments.<sup>73</sup> The schedule also indicates the terms, limitations and conditions on market access and national treatment for each kind of mode of supply (i.e. cross-border supply, consumption abroad, commercial presence and presence of natural persons).<sup>74</sup> Member States may also include in their schedules additional commitments with respect to measures affecting trade in services other than market access or national treatment commitments.<sup>75</sup> It is for each Member State to decide which service sectors and which modes of supply he wants to liberalise and under what conditions.

The Protocol entrusts to the CMG the task of calling and supervising the rounds of negotiations of specific commitments.<sup>76</sup> The CMG has delegated this task to the Group of Services, one of its auxiliary bodies.<sup>77</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>78</sup> The CMC is the body responsible for approving the results of the negotiation rounds as well as any modification or suspension thereof.<sup>79</sup>

Like in the GATS, the Protocol's Programme of Liberalisation is subject to important caveats. First, the authorisation for differences on the level of commitments undertaken according to the particularities of the different service sectors.<sup>80</sup> Second, the express recognition of Member States' right to regulate, and to introduce new regulations within their territories with a view to meet national policy objectives.<sup>81</sup> Third, Member States' right to modify or suspend their specific commitments.<sup>82</sup>

Again, it is understandable to find this type of qualifications in the context of a multilateral agreement among countries with sharp differences in their level of development. It makes less sense, however, to keep them in the context of a regional trade agreement between few countries with similar levels of development.<sup>83</sup> For instance, it is difficult to reconcile the express recognition of Member States' right to regulate and to pursue their own national policies with MERCOSUR purpose to establish a common market involving the free movement of services and the coordination of macroeconomic and sectoral policies (including transport and communications).

The GATS' style gradual approach to the opening of services markets based on the negotiations of specific commitments, has been considered as a suitable modality for the liberalisation of services in MERCOSUR. In this vein, Peña claims that the gradualism prescribed by the Programme of Liberalisation is in line with the principles of gradualism, flexibility and balance that have guided MERCOSUR integration process from its very beginning.<sup>84</sup> She argues that the Programme of Liberalisation allows for the gradual adaptation of Member States that are starting out with dissimilar conditions concerning their internal regulations for the various services sectors.<sup>85</sup> The author also asserts that the positive list approach combined with the obligation to conduct annual rounds of negotiations toward the complete liberalisation of trade in services in ten years enables even the

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*Experience in the Americas*, in TRADE POLICY FOR DEVELOPING COUNTRIES IN A GLOBAL ECONOMY: A HANDBOOK (World Bank: 2001), at 1.

<sup>73</sup> The schedules' classification of service sectors and sub-sectors is based on the WTO classification list (Document MTN.GNS/W/120).

<sup>74</sup> See Article VII.1, Protocol of Montevideo.

<sup>75</sup> Article VI. Additional commitments can be related, for instance, to technical standards, licensing requirements or procedures.

<sup>76</sup> Article XXII (a).

<sup>77</sup> See Res. GMC N° 31/98, 23 July 1998.

<sup>78</sup> Article XXII (b).

<sup>79</sup> Article XXI.

<sup>80</sup> Article XIX.3.

<sup>81</sup> Article XIX.4. The GATS also includes this caveat, not in the body of the text but in its preamble.

<sup>82</sup> Article XX.

<sup>83</sup> See supra footnote 36.

<sup>84</sup> See, María Angélica Peña, ob cit at 155.

<sup>85</sup> id., at 155.

smallest and most vulnerable countries to establish temporary restrictions on market access in order to prepare their most sensitive or most deregulated sectors for a broader market.<sup>86</sup>

The benefits of a gradual approach to the opening of services markets for a fledgling integration process conditioned by unstable macroeconomic circumstances and sharp structural and policy asymmetries among its Member States are uncontroversial. What remains questionable is whether a programme of liberalisation based on rounds of negotiations of specific commitments constitutes a suitable method for securing the gradualism of the process.

The logic underlying the negotiation of specific commitments tends to prioritise short-term interests and individualistic negotiation strategies over long-term interests and co-operative actions. For instance, what could appear to be a bad outcome from the narrow perspective of short term national interests, it may be of great importance if looked at in the context of a process aimed at building a common market.

Other integration experiences show the existence of alternative ways to pursue the liberalisation of trade in services gradually, without resorting to the negotiation of specific commitments. For instance, the measures adopted by the then EEC Members during the early years of the European integration process. During this period, various programmes were designed and implemented for the progressive abolition of restrictions to the movement of services.<sup>87</sup> These programmes 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 liberalising measures in accordance with their implementation costs.<sup>88</sup>

### **III.3 Impact of the Negotiations on the Liberalisation of Trade in Services**

The first round of negotiations of specific commitments was launched in December 1998, eight years before the Protocol of Montevideo entered into force. Since then, six rounds of negotiations have been completed. As a progressive process, the results of the last round incorporate the results of the previous one. The results of the sixth round of negotiations have been approved by CMC Decision 01/06 in July 2006.<sup>89</sup>

To enter into force, Member States' schedules of specific commitments must be incorporated into national legal systems in accordance with the procedures provided for in each Member State.<sup>90</sup> So far, only the Member States' initial schedules of specific commitments<sup>91</sup> have entered into force and only for Argentina, Brazil and Uruguay, which have completed the incorporation process. The schedules of commitments resulting from the rounds of negotiations have been approved by the CMC but have not entered into force in any Member State. Like many other rules approved by MERCOSUR bodies but not transposed into domestic legal systems, the CMC Decisions that approved the results of the rounds

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<sup>86</sup> *id.*, at 163.

<sup>87</sup> See, for example, the General Programme for the abolition of restrictions of freedom to provide services and the General Programme for the abolition of restrictions of freedom of establishment, OJ No2 of 15 January 1962. See also the Commission White Paper for the Completion of the Internal Market COM (85) 310 Final, 14 June 1985.

<sup>88</sup> See also Article 15 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 [...]".

<sup>89</sup> See CMC Dec. 1/06, 20 July 2006.

<sup>90</sup> See Article XXVII (3), Protocol of Montevideo.

<sup>91</sup> See CMC Dec. 9/98, 23 July 1998.

of negotiations enter into a kind of "limbo" where they can remain indefinitely awaiting the completion of the transposition process.<sup>92</sup>

The overall objective of the negotiations has been to reach commitments that cover a wide range of sectors and modes of supply that go beyond those commitments undertaken by Member States' WTO schedules of specific commitments.<sup>93</sup> This is in line with multilateral disciplines on regional integration which prescribe that to be compatible with the WTO any preferential agreement liberalising trade in services must have a "substantial coverage" and must provide for the absence or elimination of "substantially all discrimination".<sup>94</sup>

The format of schedules of commitments is based on service sectors, modes of supply and market access and national treatment commitments. For each service sector or sub-sector there are eight entries: four entries for market access commitments on each mode of supply (cross-border supply, consumption abroad, commercial presence and presence of natural persons) and four for national treatment commitments on each mode of supply.

An 'UNBOUND' entry implies that no commitment of any kind has been made. By contrast, a 'NONE' entry implies that no exceptions are maintained, i.e. a bound commitment not to apply any measures that are inconsistent with market access or with national treatment standards. Eight 'NONE' entries means that in that specific service sector or sub-sector the Member State is committed not to apply any measure inconsistent with market access or national treatment standards on any of the mode of supply of services employed. Hence, that specific service sector is completely liberalised. The fewer the number of NONE entries, the lower the level of liberalization for that service sector.

Bernard Hoekman has pioneered a method for the estimation of the degree of liberalisation of trade in services based on a quantitative analysis of Member States' schedules of specific commitments.<sup>95</sup> Basically, this method consists of looking at Member States' schedules of commitments and giving a value of "1" for an entry of NONE for the same sub-sector and mode of supply scheduled for both market access and national treatment. Then, the ratio of 'NONE' entries on both market access and national treatment entries over the total number of possible market access AND national treatment entries for each service sector and sub-sector is calculated.

The most recent Member States' schedules of specific commitments have been examined according to Hoekman's method in order to assess the potential impact that the rounds of negotiations could have on the liberalisation of trade in services in MERCOSUR once they enter into force. Table 1 in Annex 1 summarises the findings.

The quantitative data gives a rough idea of the degree of liberalisation of a Member State's service sector and allows for making comparisons between Member States. However, it has some limitations that must be considered.

First, schedules of commitments include, in addition to sector specific commitments, cross-sector limitations. These limitations, which are applicable to all service sectors, introduce exceptions to sector specific commitments and thus must also be considered when assessing Member State's liberalization commitments.

Each Member States' schedule of commitments includes a horizontal limitation that affects the provision of services via the presence of natural persons. Members' commitments regarding this mode

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<sup>92</sup> See Bouzas, R., P. da Motta Veiga and R. Torrent, In *Depth analysis of MERCOSUR Integration, its Prospects and the Effects Thereof on the Market Access of EU Goods, Services and Investments*, (European Commission: 2002) at 173, available at [www.ub.es/obsglob](http://www.ub.es/obsglob).

<sup>93</sup> See CMG Res. 67/97, 13 December 1997.

<sup>94</sup> See Article V, paragraphs 1(a) and 1(b) GATS.

<sup>95</sup> See Hoekman, Bernard, "An Assessment of the General Agreement on Trade in Services," in Will Martin and L. Alan Winters (eds.), *The Uruguay Round and the Developing Economies*, (CUP:1996).

of supply are unbound in all service sectors, except for measures concerning the temporary entry and stay of senior personnel like managers, executives, or specialists. In other words, Member States reserve their right to introduce measures on the provision of services by natural persons against market access and national treatment standards.

The schedule of commitments of Brazil and Paraguay also include a horizontal limitation that affects the provision of services via the commercial presence of service providers from one Member in another Member's territory. The limitation, applicable in all service sectors, specifies that foreign service suppliers wishing to supply a service as a juridical 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.

Schedules may include 'NONE' entries with specific qualifications and exceptions or additional commitments other than market access or national treatment commitments. These commitments are not reflected by the quantitative indicator used, which is only based on 'NONE' entries alone.

Another aspect that the quantitative indicator does not reflect is the gap there may be between the schedule of commitments and the actual level of liberalisation. The schedule of commitments stipulates the Member State's binding obligation to accord foreign services and service providers a minimum standard of treatment. The actual level of treatment may be above the bound level. For instance, a Member State may decide to derogate a law imposing quantitative restrictions on the access of foreign banks to the domestic market without removing such limitation from its schedule of commitments.

Despite the limitations of the method employed, the findings provide a fairly accurate picture of Member States' level of commitments. The following paragraphs examine the results on various service sectors. The data shows important asymmetries on the levels of liberalization, not only among Members themselves, but also among service sectors within each Member's schedule of commitments.

### *Professional Services*

The quantitative analysis of Member States' schedules reveals a moderately high level of liberalisation for professional services in Argentina (63%), Brazil (52%) and Uruguay (54%), while Paraguay has not undertaken any binding commitment in this sector (0%). However, the raw quantitative data has to be qualified by the cross-sector limitations already mentioned and by specific limitations for the professional sector. 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, enrol in the relevant professional body, and establish a registered office in the country. On top of this, none of the Member States have made commitments on mode 4 (movement of natural persons) on any professional sector, which is probably the most important mode of supply of professional services. Therefore, in practical terms, there is still a long way to go for the liberalisation of professional services. In this respect, it is important to mention that thanks to the active participation of professional bodies, some measures have already been adopted for the mutual recognition of professional qualifications with a view to facilitate the provision of professional services on a temporary basis.<sup>96</sup>

In relation to specific professions, the schedules of commitments of Argentina, Brazil and Uruguay reveal that architectural and engineering services are the least restrictive, while medical related services remain closed not only for the movement of natural persons but also for cross-border trade and the commercial presence of foreign service providers.

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<sup>96</sup> See CMC Decision 25/03, 16 December 2003 and *infra* footnote 138.

### *Communication Services*

The postal services market is virtually closed in the four countries. Brazil's schedule includes limitations on the market access column, and Argentina, Paraguay, and Uruguay have not yet undertaken binding commitments in this service sector. The provision of Audiovisual Services is very restricted as well. For instance, every country has domestic regulations on radio and television transmission services that are against their market access (state owned companies have preference over others on the assignation of frequencies) and national treatment (television and radio companies must be owned by the nationals of each country) commitments. Argentina is the only Member State that has made some concessions in this sector, namely, flexibilise – subject to negotiation – the existing limit on foreign ownership on tv and radio companies. Courier Services, by contrast, enjoy a high level of liberalization (except in mode four) in all countries but Paraguay.

The level of liberalization of telecommunication services is characterized by important asymmetries among Member States. In Argentina telecommunications services enjoy the highest level of liberalization (74%), while in the rest of the countries, the level of liberalization is significantly lower.

In Brazil, the schedules of commitments indicate a high level of liberalization, with all modes of supplied but mode four completely liberalized for all telecommunications sectors. In quantitative terms, this indicates a level of liberalization of 75%. However, the schedule 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 licence to operate from ANATEL. 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.

In Paraguay, land telephone services, telex services and telegraph services are provided by a state-owned enterprise (CONATEL) under monopoly conditions. For the provision of any other telecommunication service a licence to operate from CONATEL is necessary. Licenses are issued only to public or private limited liability companies, set up in accordance with Paraguayan legislation, with registered address in Paraguay and with at least 50% of their capital owned by Paraguayan nationals.

In Uruguay, the level of liberalization of value added services (electronic mail, electronic data interchange, etc.) is moderately high, but basic telecommunication services are provided under monopoly conditions by a state-owned enterprise (ANTEL).

### *Environmental Services*

Along with postal services, environmental services including sewage, refuse disposal, and sanitation services, are among those 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 this market under concession regimes, but competition in this sector tends to be highly restricted.

### *Financial services*

Financial markets are highly regulated. In general terms, financial undertakings cannot operate without a license and their activities are subject to close supervision by the financial authorities in accordance with a voluminous number of prudential and conduct of business regulations. While the negotiation of specific commitments may help to remove quantitative restrictions to the commercial presence of foreign service providers or overt discriminatory measures in terms of licensing or supervision, it is a method of liberalization totally ineffective to address the dual regulatory burden problem caused by the duplication of supervisory regimes. This is clearly reflected in the Member States' schedules of commitments. All of them include horizontal limitations to their financial 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' financial commitments must 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>97</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 of financial services abroad. The liberal approach on banking services has been recently constrained by the Central Bank higher controls over the outflow of capital from non-residents.

In Uruguay, the level of liberalization of financial services is moderately high, although there are some horizontal limitations in addition to those relating to prudential supervision, most notably, bank applications are subject to a quantitative limitation established by law.<sup>98</sup> 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 by the State Insurance Bank only. 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. In fact, hardly any bound commitment can be found in their schedules. 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 licence 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 fulfil specific conditions, and all members of senior level management must be permanent residents in Brazil.

Overall, Member States' schedules of specific commitments reveal with undisputable clarity that MERCOSUR is far from securing the necessary conditions for the free movement of services prescribed by Article 1 of the Treaty of Asuncion. The horizontal limitations included in any of the schedules, and the deep asymmetries in the level of liberalization according to the service sectors and modes of supply can give an idea of the scale of the job that lay ahead.

For instance, except for senior personnel, there are virtually no commitments on the movement of natural persons. The failure to remove the obstacles for this mode of supply is a serious blow for professional services and other human-intensive services, which are so important for the development of networks between individuals and small and medium enterprises from different Member States. As it has been mentioned, some legislative measures have recently been taken to facilitate the movement of persons, but there is still a long way to go.

Second, there are worrying asymmetries among Member States in their level of specific commitments. This trend undermines the objectives of the liberalization program, which aims at "promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations."<sup>99</sup> Future negotiating rounds should focus on trying to reverse this tendency. While Paraguay is the country that has the lowest level of liberalization, the major contribution must come from Brazil, because no substantive liberalization on trade-in services will be possible unless the

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<sup>97</sup> It must be specified, however, that commitments related to services auxiliary to insurance (including broking and agency services) remain unbounded.

<sup>98</sup> Every year, the number of licenses for the operation of new banks cannot be more than 10% higher than the authorisations granted during the previous year.

<sup>99</sup> Article XIX.1, Protocol of Montevideo.

largest economy in the region is fully committed to it.

Third, in sectors like transport, which are of strategic importance for production costs and for trade in goods, little or no advancement on the liberalization of trade has yet been made. Tourism and travel related services, by contrast, show a high degree of liberalization in all Member States except from Brazil, which again is a major drawback for scale reasons.

From a chronological perspective, after six rounds of negotiations, Member States have made a slow but steady progress in opening their services markets. A comparison between current schedules of commitments with Member States' initial schedules of commitments reveals that progress has been made not only in terms of the increased number of bound commitments, but also in terms of the enhanced transparency of the schedules, which now specify with more precision the measures that limit the application of market access and national treatment principles.<sup>100</sup> However, one must never forget the limitations of this instrument of liberalization, in particular, its inefficacy to deal with the dual regulatory burden problem. The persistence of cross-sector limitations over the negotiation rounds is a stark reminding of this limitation.

Finally, Member States' commitments under the Protocol of Montevideo are more significant - in quality and quantity - than those contained in their WTO schedules of specific commitments. It is uncertain, however, whether the scale of these GATS' plus commitments satisfy the multilateral standards applicable to preferential trade agreements.<sup>101</sup> In any case, Article V of the GATS gives developing countries a 'flexibility' margin to observe the referred standards and so far the WTO has been reluctant to discipline Members' regional integration strategies.<sup>102</sup>

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<sup>100</sup> For a comparative analysis of the results of the first three rounds of negotiations see Bouzas, R., P. da Motta Veiga and R. Torrent, *ob cit*, Annex II.1.

<sup>101</sup> See *supra*, footnote 94.

<sup>102</sup> See Prieto, F and Sherry Stephenson, *ob cit* at 17. The authors suggest that the implementation of GATS Article V has been affected by difficult questions of interpretation and subject to constraints on the availability of adequate data on services.

## IV. Secondary Legislation on Trade in Services

### VI. Introduction

As it has been mentioned, trade liberalisation 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’.<sup>103</sup>

The development, implementation and enforcement of a body of rules in-between domestic law and international public law raises all sort of legal problems, most notably, the legal basis and the decision-making process for the adoption of secondary legislation, the legal effect of secondary legislation on individuals and the relationship between secondary legislation and conflicting national laws. There are no codified solutions for these problems; different trade agreements provide different arrangements to address them. Despite the difficulties, secondary legislation can make a vital contribution to the liberalisation process, in particular, for tackling the dual regulatory burden that foreign goods and services are subject to by harmonising domestic regulations.

Although secondary legislation has played a prominent role through out MERCOSUR history, its effect on the liberalisation of intra-regional trade has been limited. The Treaty of Asuncion, which has been rightly described as an international agreement of instrumental character *for* the establishment of MERCOSUR, rather than its constituent treaty<sup>104</sup>, only laid down general integration objectives and broadly defined commitments. The details of the regulatory framework of the integration process were left to be developed through secondary legislation.<sup>105</sup> To this end, the Treaty established a minimalist and strictly intergovernmental institutional structure of a provisional character including bodies with decision-making power.

In December 1994, in compliance with Article 18 of the Treaty, MERCOSUR provisional institutional structure was replaced by a permanent one laid down by the Protocol of Ouro Preto. The Protocol established three intergovernmental decision-making bodies with rule-making power. The CMC, the highest body of MERCOSUR, is responsible for the political leadership of the integration process. It consists of Ministers of Foreign Affairs and Finance; it meets every six months and adopts Decisions that are binding upon Member States. It can also issue Recommendations, which are not binding. The CMG is the executive body responsible, amongst other duties, for monitoring compliance with the Treaty and for taking the necessary measures to enforce the Decisions adopted by the CMC. It consists of four members and four alternates for each country representing the Ministries of Foreign Affairs and Finance and the Central Banks. It meets as often as necessary and adopts Regulations that are binding upon Member States. Finally, the MTC is the body responsible for assisting the CMG to monitor the application of the common trade policy instruments in connection with the operation of the customs union. It consists of four members and four alternates for each Member State and is coordinated by the Ministries of Foreign Affairs. It meets at least once a month and adopts Directives, which are binding upon Member States.

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<sup>103</sup> See Olavo Baptista, Luiz, *MERCOSUR its Institutions and Juridical Structure*, at 60, available at [www.sice.oas.org](http://www.sice.oas.org).

<sup>104</sup> See Abreu Bonilla, S. *MERCOSUR e INTEGRACION*. (Fundación de Cultura Universitaria: 1991) at 47.

<sup>105</sup> See Pérez Otermin, Jorge, *El Mercado Común del Sur. Desde Asunción a Ouro Preto*, 2ed (FCU: 2000), Chapter V.

After sixteen years of existence, the CMC, CMG and, later on, the MTC have adopted a large number of Decisions, Resolutions and Directives.<sup>106</sup> This vast body of secondary rules along with the Treaty of Asuncion, its Annexes and Protocols are part of the MERCOSUR legal system. The following paragraphs examine the process for the adoption of MERCOSUR norms and the main norms relating to trade in services.

## IV.2 MERCOSUR Legislative Process

The term 'legislative process' might be considered too presumptuous for describing its current status of development, but in fact, MERCOSUR law already includes a number of treaty provisions, CMC Decisions and CMG Regulations containing rules on how to make rules, which, taken together, stipulate the realisation of a series of diverse and autonomous acts, by different actors, aimed at the production of rules.<sup>107</sup>

Overall, the legislative process is characterised by its strong intergovernmental character, namely, decisions based on consensus, decision-making bodies formed by governmental officials only, and the indirect effect of secondary rules. In addition, there are no rules that clearly stipulate the legal basis for the adoption of secondary legislation or a specific procedure for controlling its validity.

Considering the underlying circumstances of an integration process characterised by huge structural and policy asymmetries among its Member States, the strictly intergovernmental character of MERCOSUR legislative process comes as no surprise. Despite its grandiloquent integration objectives, the intergovernmental design of MERCOSUR institutional framework accords its Members a tight control over the scope and pace of the integration process and does not require Members to forfeit any significant portion of their regulatory autonomy to supranational bodies. As it is explained below, these features limit the capacity of MERCOSUR legislative process to develop a regulatory framework suitable for the proper functioning of a common market.

Decisions, Regulations and Directives must be adopted by consensus and in the presence of all Member States.<sup>108</sup> Whatever its advantages for Member States wary of giving away too much sovereignty, from a technical perspective, the consensus rule permeates the rule-making process with an undesirable degree of rigidity. Building consensus is a lengthy and cost-intensive process, always at risk of being derailed by short-term national interests, which prevents the legislative process 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 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 specialised 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,

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<sup>106</sup> By 2004 MERCOSUR decision-making bodies had adopted 331 CMC Decisions, 1,023 CMG Resolutions and 140 MTC Directives. See Perotti, Alejandro and Deisy Ventura, *El Proceso Legislativo del Mercosur*, (Konrad Adenauer: 2004), at 23. 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.

<sup>107</sup> *id* at 17.

<sup>108</sup> Article 37, POP.

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>109</sup> - now in the process of being replaced by a fully fledged Parliament<sup>110</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>111</sup> However, so far, none of these bodies have played an active role in the rule-making process.

It is arguable whether this strictly governmental composition of decision-making bodies, led by diplomats with a minimal input from Members of Parliament and representatives from the social and economic sectors strikes the right balance between democratic legitimacy and technical legitimacy that any rule-making process should aim at if its rules are to be applied at all.

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 in its domestic legal system and inform the MERCOSUR Administrative Secretariat about the actions taken to this end.<sup>112</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>113</sup> The rule enters into force simultaneously for all Member States thirty days after the Secretariat's communication.<sup>114</sup> Before the end of the thirty days period, Member States must publish the rule in question in their respective official journals.<sup>115</sup>

The lack of direct applicability of MERCOSUR norms has become the bottle neck of the legislative process. Indeed, only a small portion of MERCOSUR prolific body of secondary rules has been duly incorporated into Member States' domestic legal systems.<sup>116</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>117</sup> As a result there is a huge implementation gap, 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.

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<sup>109</sup> Articles 22-27 POP.

<sup>110</sup> See Protocol on the creation of MERCOSUR Parliament approved by CMC Decision 23/05, 8 December 2005.

<sup>111</sup> Articles 28 – 30, POP.

<sup>112</sup> Article 38 and 40(1) POP.

<sup>113</sup> Article 40(2), POP.

<sup>114</sup> Article 40(3), POP.

<sup>115</sup> Article 40(3), POP.

<sup>116</sup> 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 Regulations that needed to be incorporated into Member States' domestic legal systems, out of which 224 (37%) 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%) were incorporated by the four Member States. These figures were presented in the Seminar "Las Normas de Derecho Originario y Derivado del MERCOSUR. Su incorporación a los Ordenes Jurídicos de los Estados Partes", Secretaría Administrativa del MERCOSUR, Montevideo, 26 and 27 September 2002.

<sup>117</sup> See da Motta Veiga, Pedro, *MERCOSUR's Institutionalization Agenda: The Challenges of a Project in Crisis*, INTAL – ITD Working Paper, July 2004 at 21

A number of measures have been adopted to streamline the incorporation process and minimise the implementation gap but the problem persists.<sup>118</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 the corresponding internal procedures necessary for the entry into force of MERCOSUR norms.

Another limitation of the MERCOSUR legislative process is the lack of treaty provisions that clearly stipulate the legal basis for the adoption of secondary legislation.<sup>119</sup> Article 1 of the Treaty of Asuncion prescribes rather vaguely that the common market shall involve, amongst other things, “The commitment by State Parties to harmonise their legislation **in pertinent areas** to strengthen the integration process” (emphasis added). The enumeration of the functions and powers of MERCOSUR decision-making bodies prescribed by the Protocol of Ouro Preto provides additional parameters that further define the scope of secondary legislation, but the Protocol does not lay down clear standards prescribing in what areas and to what extent the decision-making bodies can or cannot regulate.

Moreover, there is not a specific procedure in place for controlling the validity of the Decisions, Regulations or Directives adopted by the decision-making bodies.<sup>120</sup> This omission stands out against basic constitutional principles which prescribe that any time a decision-making body is set up and entrusted with a rule-making power, a control mechanism should also be established to make sure its powers are exercised within the limits prescribed. 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 liberalisation of trade.

Inevitably, the abovementioned limitations of the legislative process have taken its toll on the quality of the Decisions, Resolutions and Directives. One problem has been the *internal* incompatibility between MERCOSUR norms of the same level or different levels and the *external* incompatibility between MERCOSUR norms and domestic norms or between MERCOSUR norms and international public norms.<sup>121</sup> In order to minimise the internal incompatibility problem, the CMC adopted a Decision entrusting the MERCOSUR Secretariat with the function of controlling the legal consistency of draft norms with existing norms. 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.<sup>122</sup>

Another common problem has been the use of the rule-making power not to adopt normative acts *strictu sensu*, but to make ordinary administrative decisions<sup>123</sup> or political declarations with no intention to create any legal effects. Although this type of ‘norms’ usually include a provision expressly stating that they do not need to be incorporated into Member States’ domestic legal systems, their formulation under a normative form creates legal uncertainty. A case has already been made

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<sup>118</sup> See, amongst others, CMC Decisions 55/00, 15 December 2000, 07/03 18 June 2003, 22/04 8 July 2004.

<sup>119</sup> See by way of comparison, in the EU context the principles of attributed competence and subsidiarity (Article 5 EC Treaty and Protocol on the Application on the Principles of Subsidiarity and Proportionality, Treaty of Amsterdam).

<sup>120</sup> 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 Asuncion, 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.

<sup>121</sup> See Perotti, Alejandro and Deisy Ventura, *ob cit*, at 13.

<sup>122</sup> See Annex 1(d), CMC Dec. 30/2, 6 December 2002.

<sup>123</sup> See, for instance, CMC Dec. 27/05, 7 December 2005 designing the Director of MERCOSUR Secretariat.

about the need to create a typology for the different types of acts that can be adopted by the decision-making bodies.<sup>124</sup>

### IV.3 Impact of Secondary Legislation on the Liberalisation of Trade in Services

The majority of MERCOSUR secondary norms are related to the implementation of the common trade policy or to the harmonisation of technical regulations and sanitary and phytosanitary measures. There are, however, a small number of norms about services, some of which were adopted during the early stages of the integration process. Because of its modest development, it is premature to conduct an analysis of the impact of secondary legislation on the liberalisation of trade in services. However, it is worth examining how the main limitations of MERCOSUR legislative process, namely, the legal basis problem, the decision-making problem and the incorporation problem have affected the scope, purpose and quality of the norms on services and, where possible, put forward some considerations on how could they be solved.

#### *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 liberalisation of trade.

For instance, quite a few norms have been adopted on telecommunications, but they are all focused on the harmonisation of very specific technical regulations.<sup>125</sup> No matter how important the harmonisation 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. In the transport sector, out of the wide range of policies and regulations affecting the conditions of transport services in Member States, the majority of the norms adopted are focused on a particularly narrow issue, namely, the harmonisation of the conditions for the transport of hazardous substances, the control mechanisms for the observance of those conditions and the enforcement regime.<sup>126</sup> In the same way, there are norms harmonising technical regulations on the provision of very specific services like dialysis services<sup>127</sup> or cleaning and disinfection services<sup>128</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 prescribing clear parameters for the legislative action and the absence of a strategic action plan setting priorities have not contributed to prevent 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, avoiding the legislative action being conditioned by the existence of contingent political consensus or active technical bodies eager to submit regulatory proposals to the CMG.<sup>129</sup>

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<sup>124</sup> See Perotti, Alejandro and Deisy Ventura, *ob cit*, at 25.

<sup>125</sup> See, amongst others, CMG Reg. 25/94, 3 August 1994 on the interfase of PDH digital transmission or CMG Reg. 65/97, 13 December 1997 on the coordination of frequencies for mobile telephone services.

<sup>126</sup> See, for instance, CMC Dec. 8/97 and 15 December 1997, CMC Dec. 82/00, 7 December 2000.

<sup>127</sup> See CMG Regulation 42/00, 28 June 2000.

<sup>128</sup> See CMG Regulation 54/02, 28 November 2002.

<sup>129</sup> In this vein, it is worth looking at the experience of the European Union. For instance, Article 52(2) of the EC Treaty lays down some guidelines for the legislative action stipulating that priority must be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods. The European Commission has a long experience in the development of legislative actions plans.

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 liberalisation of trade include the CMC Decision on the harmonisation of the conditions of access for branches of insurance undertakings<sup>130</sup>, or the CMG Resolution on the harmonisation of the requirements for the authorisation of road transport undertakings.<sup>131</sup> The 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 are norms adopted, for instance, for the prevention of criminal activities like the cooperation agreement between Member States' central banks on the exchange of information for the prevention and combat of money laundering<sup>132</sup>, or educational norms aimed at the development of a common educational policy rather than at the liberalisation of educational services.<sup>133</sup> In fact, there is no shortage for examples of norms intended 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 liberalisation of trade where MERCOSUR decision-making bodies have been actively legislating on.

A comparison between the principles and objectives of the Treaty of Asuncion and of the Protocol of Montevideo, with the topics and purposes sought by many secondary norms, illustrates the extent to which a legal instrument originally conceived for the liberalisation of trade can end up being used for completely different purposes. Again, clear treaty standards on what to regulate and for what purposes can contribute to avoid this outcome and to minimise the risk of creating rules for the protection of non-market interests at the expense of trade liberalisation.

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 to be more specific in terms of the purposes of the norm and to clearly specify the primary legislation on the basis of which the norm is adopted, will help to clarify which are the 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>134</sup> or exchange of information and cooperation agreements<sup>135</sup>, others provide for the minimum harmonisation of domestic regulations<sup>136</sup>, while a few of them provide for an exhaustive harmonisation of domestic regulations<sup>137</sup>. Each type of norm impacts on the autonomy of domestic regulators in a different way. While memorandum of understandings or cooperation agreements simply encourage Member States to co-operate or exchange information on specific issues, rules prescribing a detailed harmonisation of domestic regulations,

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<sup>130</sup> See CMC Dec. 9/99, 7 December 1999.

<sup>131</sup> See CMG Res. 58/94, 11 April 1994.

<sup>132</sup> See CMC Dec. 40/00, 15 December 2000.

<sup>133</sup> See, for instance, CMC Dec. 13/98, 10 December 1998 approving a tri-annual plan and targets for the education sector.

<sup>134</sup> See CMC Dec. 57/93, 24 September 1993, Guidelines on Energy policies in MERCOSUR; CMC Dec. 10/98, 24 July 1998, Memorandum of Understanding on Electric exchanges and Electric integration in MERCOSUR, and CMC Dec. 10/99, 7 December 1999 Memorandum of understanding relating to gas exchanges and gas integration in MERCOSUR.

<sup>135</sup> See CMC Dec. 8/99, 7 December 1999, Cooperation Agreement between Supervisory Authorities of Insurance Companies.

<sup>136</sup> See CMG Res. 8/93, 17 January 1994 establishing minimum common regulations for capital markets.

<sup>137</sup> See CMG Res. 38/04, 26 November 2004, laying down quality standards for the delivery of letters of up to 20 grams within specified areas.

involve a significant transfer of regulatory competence from domestic regulatory agencies to MERCOSUR rule-making bodies on the subject-matter regulated.

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. Soft regulatory approaches like memorandums of understandings or norms providing for very basic levels of harmonisation can only deal in a very limited way with the dual regulatory burden problem, i.e. trade barriers resulting from the overlap of domestic regulations. A maximum harmonisation approach, by contrast, involves high transaction costs and it can stifle regulatory competition. When the rule-making process is led by diplomats, the maximum harmonisation approach may also undermine the democratic legitimacy of the integration process. Neither the Treaty of Asuncion nor the Protocol of Ouro Preto prescribe any standards on the division of competence between MERCOSUR rule-making bodies and domestic regulatory agencies. So far, MERCOSUR rule-making bodies have been striking this delicate balance on a case by case basis, without following any particular regulatory strategy.

### *The decision-making problem*

As it has been mentioned, any rule-making process must strike a balance between democratic legitimacy and technical legitimacy. This balance is particularly relevant for services, where the regulator normally has to address politically sensitive issues or faces highly technical regulatory challenges. Rules that do not reflect in some way the views of affected stakeholders or which fail to provide an accurate solution to the complexities of services markets are doomed to be ignored.

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 manoeuvring room to find out the way to strike the balance between democratic legitimacy and technical legitimacy. Nevertheless, MERCOSUR rule-making bodies have tried some mechanisms to overcome these limitations.

First, 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 this sector. CMC Decision 25/03<sup>138</sup> lays down some guidelines for the adoption of framework agreements for the mutual recognition of professional bodies and disciplines on the issuing of licences for the provision of temporary professional services. The objective is to harmonise 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, by relying on international standard setters. This mechanism has been tried in the financial services sector for the adoption of prudential regulations in the banking and securities sector.<sup>139</sup> In this case, instead of producing the regulations themselves, MERCOSUR rule-making bodies rely on the standards developed by specialised international organisations like the Basle Committee on Banking

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<sup>138</sup> Adopted on 16/12/03, this norm acknowledges and takes on board the work carried out by the Commission for the MERCOSUR Integration of Surveying, Agronomy, Architecture, Geology (in Spanish Comision para la Integracion de Ingenieria, Agrimensura, Agronomia, Arquitectura, Geologia e Ingenieria para el MERCOSUR – CIAM), a regional group of national professional associations, which was spontaneously created at the beginning of the integration process and since then has been working towards the harmonisation of domestic regulations on their professions.

<sup>139</sup> See CMC Dec. 10/93 of 17/01/94 adopting the Basle Rules and Principles on Banking Regulation and Supervision; CMG Res. 1/96 of 19/04/96 adopting the International Financial Standards on debtor classification and credit risks and CMG Res. 20/01 of 13/06/01 adopting the Basle Rules on Transparency of Information of Financial Services.

Supervision. The advantage of this mechanism is the adoption of state-of-the-art financial regulations produced by highly specialised bodies, but at the same time, too much reliance on ‘soft law’ mostly shaped in light of the interests and needs of mature financial markets could undermine the democratic legitimacy of the rule-making process.

Third, by delegating part of the decision-making process to technical bodies. A growing number of sub-working groups, forums, specialised meetings and the like, provide technical support to MERCOSUR rule-making bodies. 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 specialised meeting on tourism and on audiovisual and cinematographic activities. Most of the secondary rules on services are originated by proposals put forward before the competent decision-making body by any of 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, there is still plenty of room for improvement regarding the way in which the technical supporting structure operates, for instance, by making the co-ordination of work between the different technical bodies more effective and avoiding overlapping mandates.

#### *The incorporation problem*

As it has been mentioned, this is the main limitation of secondary legislation as an instrument for the liberalisation of trade. Like any other secondary rules, MERCOSUR norms on services are not directly applicable and most of them have not entered into force because Member States’ have failed to incorporate them into their domestic legal systems.<sup>140</sup>

In summary, secondary legislation is a vital instrument for the liberalisation of trade and in particular for the liberalisation of trade in services.<sup>141</sup> So far, the body of MERCOSUR secondary legislation on services remains small, but the norms already adopted have shown how the deficiencies of MERCOSUR legislative process can limit their impact on the liberalisation of trade in services. The analysis has mentioned 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. Finally, Member States’ commitment to incorporate MERCOSUR rules into their domestic legal systems is vital to avoid the uncertainty and lack of credibility caused by the implementation gap.

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<sup>140</sup> See *supra* footnote 116.

<sup>141</sup> 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 liberalisation 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 Ehlermann, Calus-Dieter and Campogrande, Gianluigi (eds), “Rules on Services in the EEC: A Model for Negotiating World-Wide Rules?” in *The New GATT Round of Multilateral Trade Negotiations. Legal and Economic Problems*, 2<sup>nd</sup> ed (Kluwer Law and Taxation Publishers: 1987) at 490.

## Concluding Remarks

The process of liberalisation of trade in services in MERCOSUR must be understood in a context characterised 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 a strong political support for the integration process.

Over the years, MERCOSUR has slowly begun to acknowledge the growing importance of services and the need to incorporate the service sector into the integration process by adopting measures aimed at its liberalisation. Currently, MERCOSUR legislation includes three main instruments for advancing the liberalisation 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 programme of liberalisation 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. The main challenge ahead, however, is for Member States to reinforce their feeble political commitment with the integration process, which is reflected, amongst other things, in their preference for diplomatic channels instead of the dispute settlement mechanism for solving their disputes and the worrying implementation gap between the rules approved by MERCOSUR bodies and those finally transposed into Member States' domestic legal systems.

From a legal perspective, it has been argued that there is room to improve the efficacy of the main legal instruments for the liberalisation of trade in services, without the need to embark into major institutional reforms that would move MERCOSUR away from its strongly intergovernmental character.

The disciplining effect of the Protocol's general obligations and disciplines could be enhanced 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 to be observed by Member States when adopting regulations affecting trade in services that go beyond the non-discrimination paradigm and provide a legal basis to examine the proportionality of the means used for attaining the objectives sought.

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.

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. In addition, the work of the technical bodies should be streamlined and the participation of the consultative bodies in the rule-making process should be enhanced.

In the medium and long term, it is essential to create a cadre of legal operators trained in MERCOSUR law. To this end, it will be necessary to bring the debate about MERCOSUR law out of closed academic circles and promote wide reaching training programmes on MERCOSUR law. In addition, every effort should be made to disseminate information about MERCOSUR and its potential implications for the business community and the every day life of individuals. In the end, an integration process cannot succeed unless it is propelled by a demand for more and better integration rooted in the heart of the civil society.

Finally, it has to be borne in mind that success always starts at home, in particular when it comes to the liberalisation 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 practices.

## Annex I

### VI Round of Negotiations on Services – July 2006

#### Percentage (\*) of trade liberalization according to MERCOSUR Member's Schedules of Specific Commitments

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

(\*) Ratio of "NONE" entries on both the market access AND national treatment column over the total number of possible market access AND national treatment entries. The number of possible market access AND national treatment entries for each service sector is estimated by multiplying the number of sub sectors by four. The information contained in this Table must be complemented with cross-sector limitations included in the schedule's horizontal commitments section.